

## SLIDE 1

WILLIAM E. KOVACIC: In this segment, I'm going to give you the second of a series of presentations that the ICN has developed to provide a basic introduction to competition law. In the first segment, we examined the origins and purposes of competition laws around the globe.

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KOVACIC: And in this second segment, we're going to be examining some of the basic characteristics of competition policy systems. And in doing so, we're going to emphasize some of the critical institutional features and choices that competition systems make in the determination of how to go about enforcing and applying the law.

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KOVACIC: Some general themes about how competition systems are designed stand out. First is there's a great deal of diversity across the span of the 110 jurisdictions that have competition laws today. It wouldn't be surprisingly that with so many countries, as in any other area of the law, that we would see considerable variation in the way in which governance arrangements are structured, the assignment of responsibilities and the organization of individual competition systems.

But despite this extraordinary array of competition systems and the diversity that characterizes them as a group, there's still some important unifying elements and those are the ones that we'll be focusing on most today.

In many instances, competition policy systems are determined according to the basic framework of law that individual jurisdictions have and the leading framework in the world today is what is often called civil law systems, which rely, for the most part, on administrative elaboration and policy and the application and interpretation of competition policy through an administrative body.

By contrast, common law systems tend to rely more upon the adjudication of individual cases, the prosecution of cases in the courts and the development of policy and doctrine through a long-standing process of judicial interpretation, supplemented by agency elaboration.

Now, we're seeing, in many areas of the law, that these two systems of law, in many ways, are coming together. We can point to a number of respects in which they have shared attributes and that the development of competition law, in particular, now features, in many jurisdictions, an amalgam of approaches that appeared, at one time, only in civil law countries or only in common law jurisdictions. But to the extent that we were trying to identify an important source of most competition policy frameworks today, we would be able to say that they arise from institutions that are most familiar in civil law systems.

But, again, to emphasize, there are many emerging hybrids that take older systems of competition law and adapt them to distinctive national circumstances. And because we are

seeing a universal process of sharing experience, testing individual approaches, we're now seeing jurisdictions, on their own, begin to adopt and incorporate superior techniques, better practices from other authorities and build them into their own systems.

One characteristic that I'll add that characterizes experience and is very important for the development of new systems is that the good systems, over time, engage in a continuing process of reform and adaptation. There was a view, perhaps 25 years ago, as the newest wave of new systems was being -- was coming into being, that a country would have one opportunity to pack everything into the suitcase for the journey to a competition law. There would be one window through which it had to jump and accomplish everything.

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KOVACIC: But we're seeing in the experience of so many countries, be it South Korea, be it Japan, be it Brazil, Mexico, Hungary, South Africa, India, Pakistan, any number of other jurisdictions, what we're seeing is that law reform, the continuing adaptation of existing systems is the way in which many countries have proceeded. So, I think it is less important to ask where exactly did a system begin than to ask how is it improving over time. And a universal characteristic of better practice is continuous improvement in the institutional framework.

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KOVACIC: Let's start with what kinds of substantive commands appear in the typical competition law. Again, we see variation across a number of jurisdictions, but most competition laws focus on a fairly well defined set of substantive commands. They tend to prohibit certain agreements among direct rivals, agreements that we call horizontal restraints. And the focus of many of these horizontal restraint prohibitions are what we call cartels. And by that, I mean instances in which firms have agreed to do little other than restrict how much they produce as a way of raising price.

Let's consider the experience of some of our colleagues.

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THULA KAIRA: In about -- at the beginning of the 20th -- 21st Century, the commission did identify a cartel in the day-old chicks market. And this day-old chicks market cartel had actually concentrated power into the dominant firm and two other smaller firms who actually failed to grow in the industry. So, as a result of that cartel, Zambia's prices of day-old chicks was actually three times higher than the regional average. So, when the commission discovered that cartel and, of course, subsequently declared it null and void in view of the competition law and it ceased to exist, there was entry into that industry.

And within a period of about three years, three companies entered the industry and the prices suddenly began to go down. And as we speak now, the prices are relatively competitive in the market compared to the regional average which was about three times more at the time.

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**KOVACIC:** A second form of prohibition involves relationships between producers and distributors and retailers or between producers and firms that supply them with inputs needed to provide goods or services. These are often called vertical agreements. They involve practices such as setting a minimum resale price at which retailers can sell the goods they have obtained from a manufacturer. They involve exclusive dealing arrangements by which a firm will agree only to deal with a single supplier or with a single manufacturer.

In other instances, firms might agree to bundle together certain products and services in what are called tying arrangements where, for example, they buy one product on the condition that they will purchase another from the same source.

In addition to agreements, both between rivals and between vertically related firms, a third important area of substantive prohibition involves the conduct of dominant enterprises, what in the European Union framework is called abuse of dominance, what in the United States is called monopolization.

There's general agreement among most competition policy systems that one does not simply sanction the fact of being a large firm, that dominance by itself is not the offense. In other words, it's not enough for a firm simply to be big, a firm must also be bad. But it is the definition of what constitutes improper conduct, bad conduct, that is the focus for a very careful debate and discussion which we will see in later segments of these presentations for the ICN.

In addition to controls on the behavior of dominant firms, we come to a fourth key area of substantive prohibition and that deals with mergers, combinations, consolidations of previously distinct enterprises into new unified firms. Some of these involve combinations of direct competitors, those we call horizontal mergers. Some involve combinations of say producers and downstream firms, retailers, those we call vertical mergers. Some involve combinations of firms that do not have any relationship in the sense that they produce the same goods or that they're vertically related. These we sometimes call conglomerate acquisitions.

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**HALIL BAHA KARABUDAK:** Well, an important case for the Turkish competition authorities law enforcement and education purposes was the privatization of Turk Telecom in 2005. This was a vertically integrated former state monopoly which was going to be on sale with the privatization administration expecting as much revenue as they would obtain from this sale with its vertical components intact.

However, the Turkish Competition Commission come up with its measures and acquisitions rules and asked the authorities to divest the Turkish Telecom's cable TV operations in sale. Also, they asked the internet service provider for the Turkish Telecom to be reestablished as a separate legal entity so it can be held under a certain (inaudible) and also the dominant GSM operator in Turkey was forbidden in taking part in this tender because of convergence problems

that could occur after such a tender took place and this was (inaudible) for the benefit of the Turkish consumers.

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KOVACIC: These four categories of substantive prohibition, agreements among rivals, vertical agreements, abuse of dominance and mergers constitute the quartet of activities that are the core of most competition laws.

In addition to these, I would add that a number of jurisdictions, especially those who are members of the European Union, but others that aspire to EU membership also have controls on what are called state aids. These are limitations on the ability of political entities, especially political subdivisions of larger economic unions, to give subsidies to domestic firms with the concern here being that those subsidies will distort competition between the recipients of subsidies and firms that do not receive subsidies within the larger jurisdiction.

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CARLES ESTEVA-MOSSO: One important goal of our state aid control regime is to ensure that companies are not kept artificially in markets via state subsidies that are just there to keep them afloat. If member states provide this type of operating aid and maintain companies that, otherwise, would exit the market, this will create a measured distortion of competition and affect seriously the incentives of other possible participants in the market. It will affect the incentive of competitors to expand and it could also affect the interest of new entrants, maybe with innovative products, to enter into the competitive process.

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KOVACIC: And even within each of the categories I mentioned, we do see variations. For example, with respect to abuse of dominance, we see considerable differences across jurisdiction concerning which specific forms of behavior are denominated as being inappropriate. For example, a number of jurisdictions prohibit dominant firms from charging excessive prices. Other jurisdictions have no such limitation and tell dominant firms that they can charge whatever they wish, certainly as a general rule.

So that even within these classification schemes, we have a number of instances in which variations occur from jurisdiction to jurisdiction. These variations often are deeply rooted in the considerations that we mentioned in the first part of these series of presentations, and that is, competition law arises in unique national circumstances and the decision to adopt a competition law invariably reflects the history of the country, its political economy, social circumstances and the configuration and operation of its own economy.

But what has been striking, despite this variation, in the work that's carried out through groups such as the ICN, is a growing development of agreement about what the core of activity of competition policy should be. For example, there is broad agreement today that an indispensable element of effective policy-making is the prohibition of cartels. This is hardly to say that cartels

are the only appropriate focus of competition policy development. But we see from jurisdiction to jurisdiction a growing recognition that anti-cartel prohibitions deserve a place in virtually all competition laws.

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KOVACIC: With this substantive set of commands as a backdrop, let's consider the major institutional choices that competition policy systems face in deciding how to organize the operation of a competition system. And I'm going to focus on eight major institutional choices.

To summarize them quickly, which substantive functions should the competition system perform? Second, what connection should the public competition agency have to the political process? Third, what's the appropriate form of governance within the competition agency? Fourth, who should decide to prosecute cases? Fifth, which instrumentality determines whether or not defendants are culpable or not? Sixth, what is the role of the courts inside the competition system? Seventh, what is the relationship of competition law to other forms of economic policy-making and other policy-making bodies at home and abroad? And last, what package of sanctions are brought to bear upon individual violators of the competition system?

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KOVACIC: Let's look at each of these in a bit of detail. First, what are the appropriate functions, substantive functions for a competition agency? Well, one approach to answer this question is to say it is only competition, that the only thing that the competition agency should be concerned with is competition policies. A number of the 110 jurisdictions with competition laws take this approach; that is, the only duties assigned to the competition agency are the implementation of the substantive commands that I described a moment before.

But what is striking to see in looking at the array of competition agencies around the world is that over half of the 110 do something else. Some of them also enforce consumer protection laws; for example, prohibitions against unfair or deceptive advertising in countries such as Panama and Australia. Some competition agencies have a specific remit to address the operation of the public procurement system. This, for example, is a responsibility of the Federal Anti-Monopoly Service in Russia. And some competition agencies have broad authority to deal with intellectual property related matters, for example, INDECOPI, the body that contains the competition authority in Peru also has important intellectual property related responsibilities.

And a basic question that multifunction competition agencies face is how to define the relationship across these different substantive policy commands and how to realize conceptual synergies that might be achieved by linking these different substantive functions under the umbrella of a single agency.

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JOHN FINGLETON: A central aspect of joining consumer and competition policy is that each makes the other stronger. Competition policy decisions, really good competition policy

decisions are not always popular. They may be good for long-term consumer welfare, but in the short term, they may not be popular with individual consumers.

When an agency works closely with or does consumer policy, it's overseen on the side of consumers. So, it makes competition policy decisions that look -- that may not be immediately popular, but are good for welfare and for productivity growth. It makes them stick with consumers.

Conversely, consumer policy can become quite legalistic. Consumer policy interventions can actually harm markets in some occasions. So, having consumer and competition policy together often means that we can bring more economics into consumer policy and think about the effects of consumer behavior on efficiency in the market. And that type of joining up of the economics of consumer law and competition law, I think, is really important.

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KOVACIC: A second basic question is to ask, with respect to the competition policy function alone, that is focusing only on the competition law function, is what specific activities or policy instruments should the competition agency use to carry out competition policy goals? And the modern trend is for competition agencies to try to achieve competition policy objectives through a variety of policy instruments.

Probably the first and most important of these is law enforcement. To bring cases that apply prohibitions against certain forms of behavior.

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FREDERIC JENNY: What is also very useful is for competition authorities to find the right cases, the cases where it will show that competition incurs a huge cost on the common people, on consumers. So, you have -- for example, you have a cartel on bread or pita, depending on which country you're talking about. Everybody understands this. And then everybody understands that the important aspect of the competition law is really the protection of consumers.

But I think that when you start with a law which is a bit ambiguous, selection of cases, selection of good cases that everybody can understand, is the best thing that you can do to try to slowly, but surely, change the perception of the usefulness of the competition law and move both the public, but also the policymakers, towards a more economic approach to competition.

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KOVACIC: I'll offer a generalization that we see looking across the experience of competition agencies, is that even though this is not the only policy instrument, it is probably the most important for gaining credibility.

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ALBERTO HEIMLER: We had many cases related to incumbent formerly legal monopolies trying to block access to their perfected market by new competitors. In particular, this was the case in air transport, airport companies that would block access to competitors operating in services that airports was providing. I remember a case with respect to catering services where the airport company in Rome was involved in catering services, providing catering services to air transport companies, and they were trying to block entry into the airport facilities of a competing enterprise, and successfully we opened up this market.

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KOVACIC: To look at it another way, if a jurisdiction does not develop the ability to apply and does not actually apply its law enforcement powers, it is difficult for the competition agency to be seen as a credible force.

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CELINA ESCOLAN: Another recommendation is to start the enforcement of the law in a strong manner, starting with emblematic cases that may have the ability to bring immediate benefits to producers and consumers. Regarding producers, this way they will see that business benefits are not reduced in the entire chain of production. These cases may be linked to sensitive issues such as the food market, as was the case of wheat flour in El Salvador where after a reform to the competition law it was possible to prepare records, to obtain evidence of how two entrepreneurs had shared the market and so stifled competition.

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KOVACIC: If we were to look at the competition law as being, in effect, a shopping mall, most shopping malls have an anchor tenant, a principal store, often a large department store that is the main tenant, and it is the tenant around which other shops, boutiques are built. If you don't have a good law enforcement program, it is hard to build the competition mall of competition policy.

In addition to that law enforcement tenant, there are other important functions. One is to serve as an advocate for pro-competition policies within the government and outside the government, because competition law invariably coexists with other public policies. Many of these other public policies disfavor pro-competition approaches. And a competition agency can work very hard to enforce the law against private behavior or public behavior. But if it turns out that the legislature or other ministries can adopt legislation or secondary legislation that displaces competition, then the work of the competition agency is significantly diminished.

So, some of the most important work that competition agencies do is to act as advocates for the development of pro-competition policies, to discourage legislatures from adopting measures that severely restrict the operation of competition as a force for improved economic performance, and to discourage other government bodies from adopting policies, guidelines, supplementary legislation that diminishes the role of competition.

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HEBA SHAHEIN: After a year of the establishment of the competition authority, so precisely in 2006, we managed to initiate a study in cement sector and that was because the prices were extremely high and we discovered that there is a cartel between 20 producers. And in less than two years, the case was submitted to the court and it was sanctioned, which gave us actually two main things. One, we had the capability within the public and, two, it help us in front of the parliament to have a reform for our law in 2008.

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KOVACIC: A third crucial role for the competition agency, in addition to law enforcement and policy advocacy, is that of education. The competition agency has a crucial role to play in educating business enterprises about what is expected of them and, more generally, to educating the public as a whole about the value of competition law. Every day of the week, the competition agency has to ask itself, how are we effectively popularizing the law? What are we doing to reach individual citizens and larger constituencies about the importance and value of competition law so that our work is understood and that the public can give us ideas, the business decision-makers can give us ideas about how better to perform our policy-making work?

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EDUARDO PEREZ MOTTA: So when you start -- I mean, when you start after so many years of history in your country, and when the history is not in favor of market efficiency, it takes time. It is difficult. Because it is difficult to make people accept. It is difficult to transmit, to translate to the general public the importance of market efficiency. And how they benefit from decisions that come from efficient markets through competition.

So, first of all, the challenge of promoting the culture of competition in your society is a different task, especially for an agency that is starting.

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KOVACIC: A fourth function under the umbrella of competition law is research, where the competition agency uses some of its own resources or engages in partnerships with universities, think-tanks and other bodies outside of its own walls to perform research that identifies competition problems in the economy and identifies ways to achieve effective solutions and to measure the effects of its own competition policies.

And the last tool is reporting and publicity. To issue reports that document the results of its research, to issue guidelines that assist business decision-makers in amending their behavior to comply with the law, and to issue studies and statements by which the larger society understands the rationale for and contributions of competition law. In short, the competition agency that is effective today and will be effective tomorrow uses this entire constellation of policy-making instruments to come up with the best solution to competition problems.

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KOVACIC: In addition to deciding what functions in substance the agency should perform, a crucial question is where should the agency be located in the organization chart of government, and more specifically, what should be its connection to the political process?

It's a common view, and I think widely accepted among competition agencies that some degree of independence is important.

What do I mean by independence? I mean insulation from political decision-makers, legislatures, heads of state, heads of ministries when the decision to prosecute cases or resolve cases is taken. In other words, we don't want the competition official to answer the phone call that says you will not bring this case or you shall bring this case against the disfavored firm and to have the agency's decisions guided by that form of political intervention. In other words, the core to be protected for most agencies is its decision to prosecute to cases and its decision to resolve cases.

In many instances, that independence is achieved by creating a separate administrative body that is not part of an existing ministry. That is perhaps the model followed by more than half of the 110 competition agencies in existence today. But many agencies are located within ministries. The location within a ministry does not inevitably mean that the agency's decisions will be guided by or controlled by its ministerial overseers. It is possible, through a process of building customs, habits, ways of doing work, for an agency to build insularity from that kind of direct political intervention.

But the dominant model in the world today is to seek to achieve independence by creating a separate administrative body that is not directly linked to the legislature or to an individual ministry, although other approaches to achieving independence are possible.

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ALBERTO HEIMLER: I think the most important aspect -- the most important element for creating a powerful and important institution in the country is to establish it in a way that it has the institutional capacity similar to one of the most prestigious institutions of the country and usually that institution is the Central Bank. So, the more similar in terms of capacity of its employees, in terms of its independence, in terms of its professionalism to the Central Bank, the anti-trust authority is, the better.

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KOVACIC: The actual degree of independence is a function of several subsidiary questions. First, how are the leaders of the agency appointed? Who selects them? The head of state? Is the approval of the legislature necessary? How do those leaders -- how is the tenure of those leaders defined? Can they be removed at the will of the head of state or do they have fixed terms which enable them to stay in office and to be removed only for a very good reason?

Third, how does the agency fund its operations? Must it go to the legislature every year? Does it have an additional source of funding that insulates it from the need to appeal to the legislature on a regular basis for funds?

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CELINA ESCOLAN: An important issue is the definition of the budget within the competition law, since it is necessary to have an adequate budget to ensure competitive salaries for the staff – technical staff– that should be carefully selected and must be carefully trained. Here, we invested many resources of the government and it would be very sad to easily lose this staff. Favorably, the Superintendence of Competition was engaged in a strong battle with the Ministry of Finance to ensure that these staff salaries were similar to those of the private sector. That is why the staff rotation is very low. In addition, contracts were signed on a permanent basis.

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\KOVACIC: Fourth, how easily can the legislature amend the law? If it becomes very upset with the competition agency, how easy is it for the national legislature simply to change the law and perhaps diminish the role of the competition agency?

And last, a last question is to emphasize that the degree of independence is a function of all these considerations and that no agency is completely independent from the political process, nor would we want an agency to be completely independent from the political process. We want the agency to be able to engage in discussions with political decision-makers in its role as an advocate.

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KOVACIC: As one academic acquaintance has pointed out to me, he's used the example of a solar system. The earth is close enough to the sun that it does not freeze, but it is far enough away that it does not burn to a crisp, and that is probably the way it should be for a competition agency as well, far enough away from the sun of the political process that it is not burned up in the demands for specific forms of action or inaction. But it is close enough to the political process that it is not frozen out of key decisions about economic organization and policy-making.

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KOVACIC: Another important question of organization is the form of governance and there are two basic models the competition agencies tend to use. One is to have a unitary hierarchy in which you have a single head of the agency who takes decisions on behalf of the agency. The alternative is to have a board or a college which makes decisions on behalf of the agency in a collegial process. A hybrid of this is to have a hierarchy in which you have a single executive, but the agency relies on advice from a board outside of the agency about how to conduct its affairs. And, often, the views of this board are not compulsory. They do not bind the agency, but they do provide advice, a hybrid between the unitary hierarchy and the board or college.

Whatever governance structure is chosen, from what background do the leaders come? Over half of the competition agencies in the world today are headed by economists. Economists provide the typical form of chairmanship. It's not a preponderance, but most are economists. The second leading group are lawyers. And in other instances, competition agencies bring in business leaders, consumer advocates, academics who don't have either law or economics training but are skilled at political science, business administration. The internal organization is the last key concern for governance and competition agencies have tried just about every approach conceivable to organize their operations internally.

Some organize those operations by function, for example, by cartel enforcement, by merger enforcement. Others do it by sector, energy policy, food. Some do both. With respect to economists, some place economists into fungible case handling teams. But a growing trend around the world today is to have a separate team of economists, a unit of economists who report directly to the head of the agency.

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KOVACIC: Another key question of organization is to determine who decides to prosecute. Sometimes that is the administrative agency itself operating through the board or a single agency head. For criminal enforcement, however, that authority invariably resides in the hands of a public prosecutor. Sometimes that role is unified with the competition agency, as it is in the United States with the Department of Justice, which has an antitrust unit, that is the Antitrust Division, but the Department of Justice is also the criminal prosecutor at the national level.

Over 20 jurisdictions today have some significant level of nominal criminal sanctions. Although the actual application of those sanctions takes place in a relatively small number of jurisdictions, such as the United States, Canada, the United Kingdom and Ireland.

And a last question is whether to have private rights of action; that is, should the power to prosecute be dedicated to private decision-makers who act, in effect, as delegated public prosecutors. This can be a cure against default or capture by the public agency. It can be a way of increasing enforcement. And over 40 of the 110 competition systems today have some form of private rights of action.

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KOVACIC: Another key question is who determines culpability. Should all cases be tried, in the first instance, before the courts? A number of jurisdictions do things that way. But a number of other uses the administrative decision-making process through which the administrative agency that decides to prosecute also decides what sanctions are appropriate and determines liability or guilt, subject to review by Courts of Appeal that sit above them.

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KOVACIC: Another key question just suggested is the role of judiciary. Again, in many countries, the judiciary serves as the forum in which cases are decided in the first instance. In

cases that rely heavily on administrative decision-making and action where the administrative body is responsible for taking decisions to prosecute, but also deciding whether there has been an infringement and imposing sanctions, the judiciary plays an important role by overseeing the decisions of those expert administrative bodies.

A related question is whether, in formulating the role of the judiciary, to rely on generalist courts or to create special tribunals. Many jurisdictions have decided to establish specialist courts, either stand alone specialist bodies, South Africa is an example, the United Kingdom is an example, or to create special chambers of expertise within the existing framework of the national courts. The dominant model is to rely on generalist courts, but there's a tremendous amount of experimentation taking place around the world today.

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KOVACIC: A further question of institutional design is to define the relationship of the competition agency to other public bodies. It is common, for example, for political subdivisions within the jurisdiction to have authority to apply the competition law. For example, the member states of the European Union or individual regions within a specific state, such as the government of Spain and the dedication of competition policy-making to regions within the government of Spain itself.

In addition to this, there are often other regulatory authorities at the national level that make policy decisions that affect competition deeply. These include sectoral bodies responsible for telecommunications or energy law. And a key question is, what relationship do they have to the competition agency? Sometimes, by law, they and the competition agency have shared authority. Sometimes the law gives the sectoral regulator a dominant role subject to the advice and guidance of the competition authority. Sometimes it is the competition agency that has the lead role and it is responsible for accepting advice and guidance from the sectoral regulator.

In many instances, the relationship between the sectoral regulator and the competition agency is governed by formal agreements, memoranda of understanding by which the competition agency and the sectoral regulator organize their relationship.

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KOVACIC: The last key question that I want to emphasize is the issue of sanctions. A crucial question in deciding whether to comply with the law is the question of how will I be punished if I violate the law? A law with nominally powerful substantive commands and weak sanctions will not engender compliance by affected firms. The array of sanctions available to competition agencies is considerable and there is great variation in the way that competition systems decide to punish wrongdoers.

The most powerful step, perhaps, is to impose the sanction of prison for individuals who have violated the law. This is a very big step for a competition system because it affects the identity of the prosecutor; that is, it will have to be a public prosecutor responsible to the ministry of justice. It also increases, at least implicitly or explicitly, the standard of evidence that the

competition law must satisfy. And the notion here is that the more powerful the sanctions, the greater the assurance that a legal system will want that the sanctions are appropriately brought to bear on truly culpable individuals.

In addition to imprisonment, sometimes criminal fines are imposed. For example, in Egypt, which denominates competition offenses as crimes, the punishment imposed is a criminal fine, not prison sentences. Many jurisdictions have some form of civil damages that the competition agency can impose, quite often a percentage of total turnover of the firm deemed to have violated the law. It is also common for competition agencies to obtain injunctions to forbid the continuation of bad conduct, sometimes to impose structural remedies such as divestiture to cure competition violations or a host of hybrid measures that have characteristics both of controls on conduct, but also structural features. Compulsory licensing of intellectual property would be one such example.

And it is common for sanctions to be imposed both through the order of a judicial tribunal or an administrative body, but also by settlement through which a competition agency will resolve claims by agreement with the defendant, through which the defendant agrees to submit itself to certain force of sanctions in return for a compromise of the claims that have been made.

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KOVACIC: I want to emphasize the interdependence among these elements; that is, there is a strong interdependence among the remedies to be imposed, the liability standards to be established and the proof that is required to set infringements. Once again, consider the example of the use of criminal sanctions to punish behaviors such as cartels. The criminal sanction of imprisonment is quite powerful, but to impose that sanction, most legal systems will demand a high degree of assurance that the violation has been proven, what in many systems is called proof beyond a reasonable doubt. Thus, the more powerful the remedial scheme, usually the greater the demands that proof be robust.

But it is true, as well, for the use of civil sanctions, such as civil damages or powerful civil remedies such as divestiture, where, in effect, as a matter of a formal legal standard or an implicit process of decision-making, judicial tribunals will tend to want greater assurance that the claims are well founded, that the infringement is clearly established and that the remedy to be imposed is truly proportionate to the harm that's been found.

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KOVACIC: A final element that I'll identify about the operation of a competition system is information gathering, and the basic point here is that competition agencies need access to business records to operate effectively, to prove the fact of an infringement, to define the boundaries of a relevant market, to identify the appropriate design of remedies. A competition agency cannot function well unless it has compulsory access to business records. This can be achieved through the presentation of compulsory information demands, sometimes called subpoenas or civil investigative demands.

Sometimes this access is imposed by giving the competition agency the ability to conduct searches of business premises, called in the European Union and in other jurisdictions, dawn raids, where the agency arrives with a document that permits it to gain access to the premises of the business and to inspect its records.

Another key information gathering technique in modern practice is what's called leniency or amnesty and this essentially gives culpable firms a major dispensation from penalties in return for its willingness to voluntarily come forward and provide information of wrongdoing. This has been a crucial mechanism for the discovery and prosecution of cartel arrangements around the world today, and it is now uncommon for a major and successful competition authority not to have an effective leniency protection.

An important corollary to these information gathering techniques is the imposition of strong penalties for destroying evidence that is relevant to and responsive to a government inquiry; that is, most jurisdictions severely sanction business firms, which, upon receiving a demand for information, destroy relevant records.

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KOVACIC: In all of these activities, in deciding the appropriate form of governance, organization, operations, management, institutional design, there is a growing role for cross-border cooperation. This takes the form of bilateral agreements that link two jurisdictions together, regional arrangements such as ASEAN, COMESA, CARICOM arrangement in the Caribbean that link together different countries in a specific region in cooperative efforts, sometimes including law enforcement.

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KOVACIC: And the last is participation in larger multinational arrangements, including UNCTAD, OECD and its competition committee and its Global Forum on Competition, and the International Competition Network. These forums are becoming increasingly important mechanisms for sharing superior techniques, identifying promising approaches to organization and to develop cooperative relationships that facilitate enforcement.

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THULA KAIRA: . . . . thank God for various procedural documents that have been produced already by institutions such as the International Competition Network, and those have been very, very useful for us to really -- instead of hiring a consultant to do certain things, market definition process and an economic analysis, evidence collection, we do find that the International Competition Network and the materials that are on the website have really come in very handy for us . . . .

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KOVACIC: And the common cycle I think that characterizes successful agencies has three parts to it. All agencies, in many ways, are engaged in policy experimentation because none of us have absolutely precise and certain knowledge about what the best set of institutional arrangements is before we embark on the process of establishing a competition law.

So, one way to look at the formation of a competition system is a form of experimentation. But once we have experimented with techniques, the necessary second step is to do what scientists do with experiments and that's evaluate the outcomes. Is the existing framework as good as it could be? Have we learned something from our efforts to apply the law and to use other policy tools? Do we see gaps in information gathering powers or sanctions that ought to be cured? And have we learned something by reference to the experience of other jurisdictions so that we can benchmark ourselves with their experience in operations to identify techniques for improving our own?

And then the third element of that common cycle, life cycle is adjustment. You can liken a competition system to a computer system, which requires upgrades in perhaps the operating system and software to achieve good results. And just as the state of the art for computer software and information systems changes over time, at a rapid stage, so, too, must we be attuned to making upgrades and adaptations to our own systems. It's less important where you begin than how hard you work to achieve improvements.

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KOVACIC: And as one academic colleague likes to put it, it's what you learn after you know it all that really counts, and that's certainly true in competition policy. The attitude that drives agencies, much like private firms, to achieve greatness and sustain greatness is a habit and a custom of continuous improvement.

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KOVACIC: And I'll finish by identifying challenges that agencies face in operations in applying this framework. What does an agency have to do to succeed?

Seven points. First, to establish its credibility and a presence, which is a combination of law enforcement, publicity, advocacy, good research and publicity; second, the key to success is obtaining and sustaining good leaders and professional staff. No agency is any better than the quality of its people at the top and throughout the institution, down to the most junior case handler.

Third, to establishing clearly with the larger society and political institutions appropriate expectations, well defined goals about what it means to do and what it can accomplish; fourth, to obtain autonomy in the decision to prosecute, in the sense of independence that I mentioned before; fifth, to engage in a continuing conversation with the courts to gain understanding for the competition law, what it requires and why its implementation is an important element of national policy.

Next, to build effective links with other institutions at home and abroad, sectoral regulators, political subdivisions with competition remits, but also internationally; and last, to create business and social awareness about what the competition law must do.

These are critical elements of building a new institution, but for older institutions, these tasks don't stop because it is the continuing development and implementation of policy and the refinement and improvement of techniques that characterizes a good and successful competition policy institution.