

Lessons to Be Learnt from the Experience of Young Competition Agencies

An update to the 2006 report

2019

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International Competition Network
Vice-Chair for Young Agencies and Regional Diversity

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I. Introduction

The challenges faced by young competition authorities in their first years of enforcement have been widely studied and observed – through various studies or through their own experience – by different competition authorities and international organizations such as the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) or the International Competition Network (ICN).

The ICN is an international organization comprised by 139 competition authorities from 126 jurisdictions around the world, whose purpose is to provide a forum for competition authorities around the world to discuss best practices in competition policy and enforcement. In accordance with its Operational Framework,¹ a Chair and up to two Vice-Chairs are designated by the Steering Group, each in charge of a specific function.

As of 2018, Mr. Toh Han Li, Chief Executive of the Competition and Consumer Commission of Singapore is the ICN Vice-Chair of Communications, in charge of developing and implementing strategies to disseminate messages and work products of the ICN. In a similar fashion, Ms. Alejandra Palacios Prieto, Chairwoman of the Mexican Federal Economic Competition Commission acts as the ICN Vice-Chair for Young Agencies and Regional Diversity, entrusted with analyzing the challenges that young authorities face and designing actions that help them to get involved and adopt practices and experiences that the ICN disseminates.

This report is an effort to update the findings of the ICN Report published in 2006 entitled *Lessons to be Learnt from Experiences of Young Competition Agencies*,² as well as to shed some light on the main challenges that authorities face in their first years of competition enforcement and advocacy. By categorizing them, we expect to observe trends on the actions that young authorities carry out to face these challenges, which hopefully can be replicated in other jurisdictions.

Through this report, we present – in no particular order – the most prevalent challenges identified by the emerging agencies. Each challenge is displayed while sharing specific experiences of the individual jurisdictions. After identifying challenges, the various measures adopted by the responding agencies are shown. The report then attempts to raise the usefulness of various approaches to the handling of these challenges and the success of these actions.

¹ ICN, *Operational Framework*, 2012. Available at <https://goo.gl/4aVKdG>.

² ICN, *Lessons to be Learnt from Experiences of Young Competition Agencies*, 2006. Available at: <https://goo.gl/M5pcx8>.

a) Background

Following the ICN Annual Conference held in 2005 in Bonn Germany, members of the former Working Group on Competition Policy Implementation agreed that a comprehensive analysis of the challenges faced by young competition agencies would be useful to identify and coordinate solutions to such challenges. The project *Lessons to be Learnt from Experiences of Young Competition Agencies* was then conceived. Among others, it was recognized that:

- > The challenges faced by the young agencies can be relatively similar in nature and identified by assessing the experiences of a sizeable number of similarly-developed agencies.
- > Approaches used to address the problems facing the young agencies are best-identified through the actual experiences of agencies which have already undergone or are undergoing similar challenges, and which can describe the measures that they have successfully implemented to address them.
- > In several cases, miscalculations were being conducted that can be avoided by having access to practical strategies that have proven successful, and with the knowledge of the relevant jurisdictions which have shared their challenges, and with whom they might be able to communicate in arriving at their solutions.
- > In addition, there were several jurisdictions which had 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 various and complex challenges facing young competition agencies need to be more accessible to them.

Since the appointment of Ms. Palacios as Vice-Chair in 2016, some of the strategies implemented included the organization of special sessions focused on the experiences of the youth agencies at the Annual Conferences of Porto in 2017 and in Delhi in 2018. During these sessions, common solution alternatives to the challenges faced by young authorities were discussed.

Following up on the discussions held during the aforementioned sessions, the need to update the 2006 findings became evident. Hence, Ms. Alejandra Palacios proposed the project before the ICN Steering Group, which was approved as one of the objectives for the 2018-2019 period.

b) Methodology

Replicating the methodology carried out in 2006 by a group of experts and competition authorities,³ COFECE undertook the task of identifying the competition authorities with less than 15 years of existence / promulgation of their competition law, and / or that have undergone significant changes in their competition regulatory framework in the same period.

Once the target population had been identified, a questionnaire was designed to follow the structure of the findings of the 2006 report. The questionnaire was sufficiently open so that young authorities could capture the details of both the challenges they face and the actions that they carry out in order to address them. The questionnaire was disseminated through the ICN Secretariat email account, and the follow-up was conducted through COFECE's international email account.

COFECE preferred that competition agencies prepared the responses internally and submit them by email, rather than organizing in-depth oral interviews which might become an unnecessary burden for the responding agency in terms of time and personnel. The period to send written responses was over one-month long. However, the deadline for those authorities who requested it was extended.

The questionnaire guides the competition authorities to classify their responses based on the categories found in the 2006 report and provides additional space to capture other challenges that cannot naturally fit in any given category. In the same way, the questionnaire showed – for each category – samples of the findings of the former report, so that the authorities knew the type of responses that were expected from them.

The survey was then disseminated through the ICN Secretariat email account (ICN.Secretariat@cb-bc.gc.ca), and the follow-up was carried out through COFECE's international email account (international@cofece.mx). It was sent both to the identified young competition authorities and to those the authorities that participated in the 2006 exercise, with the aim of observing possible improvements regarding the status of the previously-identified challenges, as well as potential persistence regarding the challenges faced.

³ The 2006 endeavor was coordinated by the Barbados Fair Trading Commission. ICN Members who assisted and provided information and suggestions included Mr. Russell Damtoft of the United States Federal Trade Commission, and Ms. Cynthia Lagdameo of the United States Department of Justice. The academic advisors who prepared the initial draft report were Dr. Taimoon Stewart from the University of West Indies, St. Augustine, Dr. Michael Nicholson from the IRIS University of Maryland and Professor Andrew Gavil from the Howard University in Washington D.C.

The present report catalogues the survey results and hence follows the structure of the 2006 effort. Neither the challenges described, nor the measures adopted to address them, are given any value judgment. They are simply presented and contrasted – when possible – with the international experience in order to assess their success. As described above, the immediate objective of the report is to describe the results of the survey and update the findings of the 2006 experience, expecting it to become a tool for the design of comprehensive and *ad hoc* strategies moving forward.

Compared to the 2006 report, where 20 responses were received, on this occasion 27 different jurisdictions answered the submitted questionnaire: Albania, Argentina, Barbados, Belgium, Brazil, Bulgaria, Colombia, Croatia, Curaçao, India, Indonesia, Kenya, Latvia, Pakistan, Panama, Slovenia, South Africa, Spain, Turkey, Ukraine and Uruguay. In addition, responses were received from jurisdictions from Northern-Africa (1), East-Europe (3), Latin-America (1) and Central-Europe (1), who requested their agency name not to be revealed in the present report.

The responses were grouped according to:

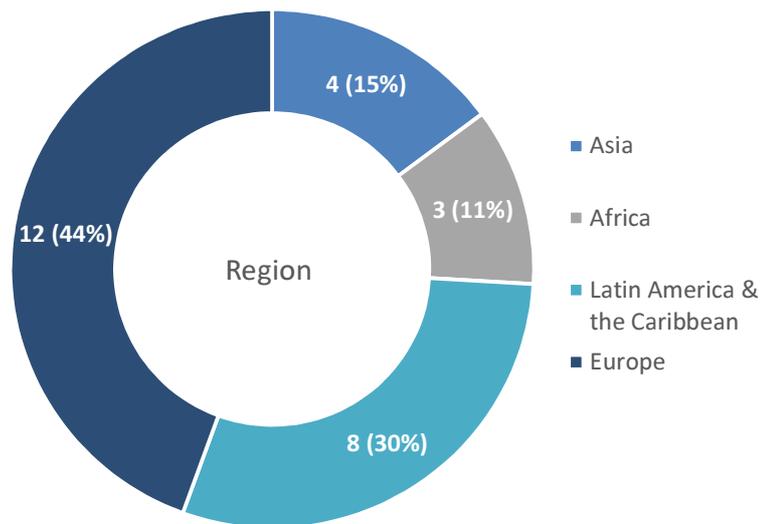
- > The type of challenges that young agencies describe, and;
- > The measures these agencies have applied in order to address said challenges.

II. Findings

Being consistent with the 2006 Report, the questionnaire distributed to the young competition authorities was organized into five categories, corresponding to the main challenges identified at that time: legislative, policy-related, resources-related, staff experience, judiciary-related and competition culture. The findings of this report are shown through these categories.

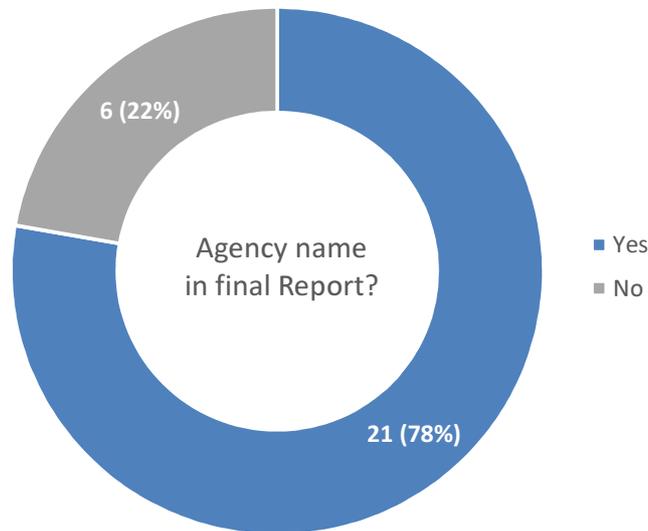
In addition, this report includes an additional section that focuses on the progress made by the competition authorities that responded to the 2006 exercise, where the trends are grouped into the same five categories. For both cases, a subtitle for general comments is included in order to capture the relevant findings that, due to their nature, cannot be grouped in any of the five aforementioned categories.

Figure 1: Respondent Authorities by Region



As shown in Figure 1, of the total responses received, the majority were from the European region (44%), followed by Latin America and the Caribbean (30%). The rest of the responses (26%) correspond to competition authorities from Africa and Asia.

Figure 2: Preference of the agencies to show their name in the report



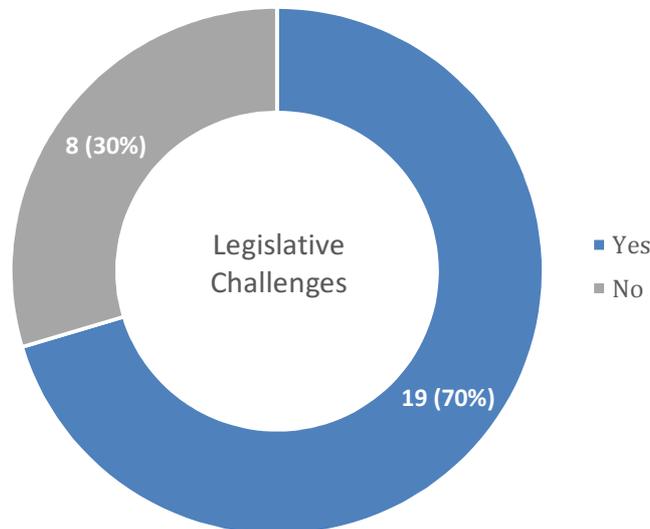
In order for some young authorities to feel more comfortable and openly-speak about the challenges they face when enforcing competition, all agencies were given the option of not showing the name of their agency, but only the region of their jurisdiction in the present report. As shown in Figure 2, 22% of the responding agencies chose not to reveal their name.

a) Legislative Challenges

Various reviews of legislative provisions across the international landscape suggest that jurisdictions that create new government entities, in this case, competition authorities, are inspired by international experiences to design their own institutional framework. While it may be beneficial for young jurisdictions, since they replicate successful experiences, - if not carefully implemented – this practice may result in the incompatibility of the design inspired abroad, with regulation and practices within the jurisdiction. This is one of the ways in which legislative challenges may arise, but it is not the only one.

As identified in the 2006 report, competition policy often requires nuanced approaches in its application. Cases regularly involve sophisticated analysis frameworks of market efficiency and consumer welfare. There is rarely a "one-size-fits-all" policy that applies to competition policy within a single jurisdiction, and this difficulty expands considerably when comparing legal statutes across jurisdictions.

Figure 3: Responding authorities facing legislative challenges



As shown in Figure 3, one commonly-faced challenge regarding inadequacy of legislation is the extent to which the current legislation does not allow some agencies to adequately address some forms of anticompetitive conducts which negatively-affect competition in their domestic markets and abroad. 70% of responding authorities reported to be experiencing challenges of this nature.

Challenges and measures adopted to address them

- ▶ The Albanian Competition Authority (ACA) stated that Law no. 9121/2003 “On competition Protection” is now consistent with the European Legislation, article 101 & 102 of Treaty of the Functioning of the European Union. However, it had to be amended due to the emergent realities and cases analyzed during its implementation for dominance abuse, merger assessment and collusive agreements. Specifically, said regulations has been amended two times in 2006 through laws no. 9499 and 9584, and again in 2010 through the law no.10317.
- ▶ The Albanian ACA will continue review its Law no. 9121/2003, according to the issues raised during its implementation for abuses of dominant position, mergers assessment, and prohibited agreements cases. The objective is to recommend the Legislative Body to update the Law in order for it to reflect current implementation needs for the different areas of competition enforcement and advocacy.
- ▶ The Barbados Fair Trading Commission asserted that there are no fines imposed by the Commission and in some instances, the Commission can only determine that an

anticompetitive action should be discontinued. Where the anticompetitive act is discontinued, there is no penalty. It is only when there is a failure to follow the directive of the Commission that the Commission can institute proceedings in the courts. Any sums collected through the imposition of fines go to the consolidated fund of the government and do not accrue directly to the Commission. The lack of fines reduces the deterrent effect of the Commission.

With respect to mergers, the current legislation does not appear to make allowance for both merger review stages it stipulates, and therefore adds to legal uncertainty and places significant pressure on businesses as well as the limited staff resources who may be called upon to engage in a full merger review irrespective of the presence of competitive concerns. In addition, the commission is mandated to consider a percentage threshold for mergers. Lacking said threshold presents challenges and some uncertainty for businesses and the authority.

- ▶ The Barbados FTC have produced several recommendations for the amendment of the legislation in order to address some of the challenges and other recommendations are forthcoming to address fines and mergers.
- ▶ For the Superintendence of Industry and Commerce of Colombia (SIC), one of the legislative challenges they face as an authority is the maximum amount of fines that can be imposed. Currently, fines imposed by the SIC can be, at maximum, of around 26 million dollars. This can represent a small amount for big companies who have a significant revenue and get involved in hardcore cartels. Also, as of today in Colombian legislation, no regulation prohibits contractors who have committed infractions to the competition regime to participate in public tenders again.
- ▶ In order to address their legislative challenges, the Colombian SIC has drafted and presented a bill to the Colombian Congress to increase the fines that the Authority could impose and secondly, to impose suspensions or disqualifications to contractors who have committed infractions in the competition regime, specifically for public tenders.
- ▶ The Fair-Trade Authority of Curaçao (FTAC) reported that The Curaçao national competition ordinance is inspired by European and Dutch competition regimes, with some adaptations to adjust the rules to local circumstances. Overall, the legislation allows for effective enforcement. The legislation contains provisions on the independence of the Fair-Trade Authority Curaçao and provides the FTAC with investigative powers such as to request information and to perform inspections. The FTAC can also levy fines for the infringement of the cartel prohibition,

the prohibition of abuse of dominance and procedural infringements such as lack of cooperation.

A potential legislative challenge is that, at this stage, the FTAC does not have the power to prohibit mergers and acquisitions. Mergers and acquisitions that reach certain turnover or market share thresholds do only need to be notified to the FTAC. The reason behind this is to focus the efforts of the FTAC in its first years on cartel and abuse of dominance enforcement. After five years, the ordinance will be evaluated for the need to add a merger enforcement provisions. Adding merger enforcement to the FTAC's tasks could increase effective enforcement of competition rules in the future.

In addition, the FTAC faces legislative challenges in relation to other existing regulations. For example, many products and services in Curaçao are strictly regulated, with maximum or fixed prices, prohibition of imports or high import tariffs and license systems. Such sector regulation can be at odds with the purpose of the competition ordinance and may limit the scope of the enforcement by the FTAC.

- ▶ With regard to merger control, the Fair-Trade Authority of Curaçao stated that the current national competition ordinance does provide for a mandatory notification of mergers, acquisitions and joint ventures reaching certain turnover or market share thresholds. This information helps the FTAC in the context of the enforcement of the abuse of dominance prohibition. In 2022, the Curaçao government will evaluate, based on the experiences of the FTAC, whether it would be desirable to add merger control to the FTAC's tasks.

With regard to the sector regulations, the FTAC advocates for the liberalization of markets whenever possible. The FTAC intends to regularly advice the government on how current rules can be updated or abolished. This formal task is mentioned in the national competition ordinance which gives the FTAC certain investigative powers.

The FTAC chooses a market-by-market approach. Every market is different, and not every market is ready for complete liberalization. For example, the FTAC recently published an advisory report on the asphalt market. The FTAC advises not to withdraw the existing price-cap for asphalt for the upcoming years, but instead modernize the method of price regulation.

- ▶ The Commission for The Supervision of Business Competition of Indonesia (KPPU) mentioned that there are several legislative challenges that Indonesia faced in the implementation of its competition law, namely:

- > the absence of search and seizure authority,
- > the absence of a leniency program,
- > the absence of extraterritorial jurisdiction;
- > the post-merger notification system.

Challenges which are related to the enforcement of competition law have created difficulties in investigation process, especially in the gathering of evidences. It is also difficult for the Indonesian agency to handle a case when the companies are not residing in Indonesia or having a subsidiary in Indonesia, while its violation has substantial impact in Indonesia's market. Whereas without these challenges, the agency could have sanctioned more violations with stronger evidence.

Separately, the post-merger notification system also created difficulties in the past, where the agency found it is impossible to undo a merger or acquisition transaction after it has been completed.

- ▶ In tackling the aforementioned challenges, the Commission for the Supervision of Business Competition of Indonesia has made an initiative and signed a cooperation framework with the National Police. This cooperation was made to gain the National Police's assistance in summoning the parties to the interview and in the field investigation process. Currently, this cooperation is also included to be formalized in the amendment of Indonesian competition law, together with the inclusion of search and seizure authority, leniency program, and extraterritorial jurisdiction.

As for addressing the challenge related to merger review, the government has issued a Government Regulation on Voluntary Pre-Merger Notification in the year of 2010. Thus, from that year onwards, the merger review system in Indonesia has voluntary pre-merger notification and mandatory post-merger notification.

- ▶ The Competition Authority of Kenya stated that some of the professional services in Kenya have set minimum and maximum pricing, making them anticompetitive. The current legislation allows for this and it therefore impedes the Authority's ability to regulate this sector. The Authority, with the support from the Parliament, is in the process of reviewing the law governing professional bodies to ensure that they don't impede competition, and that the services are affordable and accessible to as many citizens as possible. The current legislation proved to be inadequate to deal with market challenges that have arisen in the retail sector such as abuse of buyer power by supermarket players.

- ▶ The Competition Authority of Kenya has engaged in collaborations locally and across borders, (signed Memoranda of Understanding) with sector regulators with the main objective of easing the exchange of information that will enable the Authority to undertake its enforcement mandate, as well as play an effective advocacy role. For instance, a MoU has been signed with the Central Bank of Kenya to enable the two regulators enforce competition and consumer laws. The MoU with the Competition Commission of the Common Market for Eastern and Southern Africa (COMESA) enables the Authority to enforce competition laws touching Kenya and other COMESA member states with ease.

Furthermore, the Kenyan Authority has incorporated a new department known as Buyer Power to focus on the conduct and structure of the retail sector that has seen many anti-competitive practices in Kenya in the recent past. This was made possible by the increased mandate of the Authority through a law amendment.

- ▶ For several years, the Competition Council of Latvia mention that one of their priorities has been fighting against public administrative bodies that harm competition by commencing or extending unjustified commercial activities in the markets, thus, violating the principle of competition neutrality. The Competition Law grants the Competition Council the right only to consult public administrative bodies and to issue an opinion which is neither binding, nor disciplinary. Therefore, in many situations opinions issued by the authority are ignored, making it difficult to level the playing field.

Another challenge to the regulatory framework for competition in Latvia is a merger control. In cases when the target company is small (with a small turnover) and the transaction does not fall under the merger regulation, there is no need for merger clearance by the competition authority. Such mergers may greatly hinder competition as they can result in a significant market share in a small local market. They also highlighted the lack of power to prevent activities of big retail chains opening or building new retail shops, squeezing out small, independent retailers.

- ▶ In Latvia, amendments to the Competition Law were drafted to provide the authority with the right to negotiate with state and municipalities concerning the negative impact on competition caused by their unjustified activities in markets. The draft was approved by the government in June 2018 and has yet to be approved by the Parliament as of the drafting of this document.

In order to improve control over mergers, amendments to the Competition Law were adopted, which inter alia stipulate that the Competition Council within 12 months after the merger may request the company to submit a merger notification if the total market share of the companies in the relevant market exceeds 40% and there is a reasonable suspicion that the merger may result in or strengthen a dominant position or significantly reduce competition in a relevant market. Regarding the activities of big retail chains, they are currently studying international experience in order to adopt suitable measures.

- ▶ The Competition Commission of Pakistan asserted that the legal challenges began soon after the promulgation of a new competition regulatory ordinance (CO) in 2007. An ordinance usually lapses by four months after its enactment unless ratified by the Parliament before the expiry of this period. However, in November 2007, one month after the promulgation of CO 2007, the President declared an emergency in Pakistan and issued an executive order, which 'saved' some ordinances from lapsing—the CO 2007 was one of these.

Instead of lapsing after four months of its promulgation, CO 2007 survived until July 2009 when the Supreme Court of Pakistan in *Sindh High Court Bar Association v. The Federation of Pakistan* declared the President's emergency order of 2007 to be void. In this order, the Supreme Court allowed four months to the government to place all saved ordinances before the Parliament for ratification. However, rather than comply with this order, the government promulgated the Competition Ordinance 2009 in November 2009 when the four months were due to expire.

When this ordinance lapsed in March 2010 the government promulgated yet another ordinance, the Competition Ordinance, 2010. Finally, in October 2010, the Parliament enacted the Competition Act, 2010. In the Act, 43 made the provision for the establishment of a Competition Appellate Tribunal. The legal challenges continued. Those companies aggrieved by proceedings pending before CCP continued to file review petitions before the high courts. These petitions can be classified in two categories. The first group comprises petitions filed in the period when CO 2007 was in force and the second group comprises petitions filed in the period after CO 2007 had lapsed and includes petitions filed after the enactment of Competition Act, 2010.

Some of the grounds raised in petitions filed when CO 2007 was in force were that:

- > CCP had not issued the show cause notice in accordance with CO 2007;
- > certain sections of CO 2007, and, therefore, CCP's actions in exercise of these sections, were ultra vires the Constitution and contrary to the fundamental rights stipulated in it;

- > the President had promulgated the CO 2007 without legal authority because the subject of competition was not within the legislative competence of the Parliament or the President; and
- > CO 2007 did not confer jurisdiction upon CCP to exercise its powers against the petitioners.

The courts accepted most of these petitions without investigating the specific grounds raised in them and issued interim orders restraining CCP from proceeding against the petitioners. The merits of the cases were not considered in these orders.

A ground repeatedly raised in petitions from the second group, especially whilst the 2009 and 2010 Ordinances were in force, was that CCP did not have the power to issue show cause notices until the Parliament had ratified the Ordinance then in force. In case of at least one petition the court granted an injunction on this ground and this injunction became the precedent for subsequent petitions to obtain similar injunctions.

For the first three years of its operation in Pakistan, the only right available to persons aggrieved by CCP's final orders was to appeal directly to the Supreme Court. A major amendment to the law was the establishment of a Competition Appellate Tribunal to reduce the petitions and appeals filed in the four High Courts of Pakistan. But after 2010, the delay in establishing the tribunal meant that aggrieved persons had little choice but to invoke the constitutional jurisdiction of the High Courts to seek redress for their grievances.

Several petitions against CCP's final orders raised procedural and substantive grounds similar to those that had been raised in petitions filed against CCP's interim orders. These included grounds that CCP was not properly constituted; it lacked the requisite quorum at the time of passing the final order to pass the order; the order was not in accordance with the version of the competition law then in force in the country; that CCP had passed the order with mala fide intent and by exercising powers beyond its jurisdiction; competition law could not retrospectively apply to agreements entered into before its coming into force; and that certain actions of CCP were tantamount to judicial review of subordinate legislation and, therefore, not in accordance with the law.

Some petitions urged questions of law as well as of fact in their grounds, including that CCP's order was contrary to government policy and, therefore, exposed the petitioner to possible adverse governmental action, and that CCP had not fully appreciated the facts of the matter in arriving at its final order. In a majority of cases, the court simply admitted the petitions and granted a restraining order to the petitioners. Nearly all these petitions are still pending; the

interim injunctions granted by the courts against CCP have been allowed to continue from one date of hearing to the next. Thus, as in the case of petitions filed against interim orders, the Pakistani courts have not decided any petition filed against final orders on its merits.

- ▶ For the Competition Commission of Pakistan, the transition from the Competition Ordinances of 2009 & 2010 to the Competition Act, 2010, saw the formation of a specialized tribunal to hear appeals against the Commission's orders. This was an attempt to streamline the judicial review process for businesses. The appellate tribunal became fully operational in April 2015 and has been hearing cases. A positive development has been the Supreme Court of Pakistan sending many cases pending with it to the tribunal for their review.

The matter pertaining to the constitutionality of the Competition Act, 2010 is pending in the Lahore High Court. In this period, the Commission has considered the possibility of holding an interactive dialogue with the judiciary, supported by the intervention of international experts. This proposal is still under internal review and may be taken up with the new government that is expected to assume office in mid-August 2018.

- ▶ The Authority of Consumer Protection and Competition Defense of Panama (ACODECO) reported that the institutional and legal status is a major challenge for the agency because when the judiciary finally dictate their sentence, since several years have elapsed since the beginning of the investigations, it has been the case that companies have disappeared from the market.
- ▶ Panama's ACODECO has worked on various proposals to modify the law so that the agency can decide when there are absolute monopolistic practices and so that not every case is subject to long judicial review by default. Specifically, ACODECO has a proposal to modify the law to require compulsory notification for those companies that collectively or individually have obtained, during the previous fiscal year to the merger, a gross income over fifty million balboas. The rest of the companies do not have the obligation to notify a merger, if the company resulting from the merger is not in a monopolistic position in a given market. (Article 23).
- ▶ The Slovenian Competition Protection Agency is still facing problems that hamper the effective functioning of the Agency specifically, because of a "duality" in the procedure. According to Prevention of the Restriction of Competition Act (hereinafter: ZPOmK-1) the Agency is still obliged to run two separate procedures in all antitrust cases.

An administrative procedure is conducted according to ZPOmK-1, where the infringements are assessed on their merits. This is almost entirely-consistent with the one enclosed in EU Regulation 1/2003. Administrative decisions conducted by the Agency can be challenged by the parties before the Administrative Court of the Republic of Slovenia. Then, the parties involved have a right to file a revision before the Supreme Court of the Republic of Slovenia against these rulings.

Investigations of minor offenses are conducted according to the Minor Offenses Act (ZP-1). Antitrust and merger infringements are defined as minor offenses in the ZPOmK-1, through Articles 73 and 74. The minor-offenses procedure is usually conducted after the administrative procedure, in which the infringement has been already established. In ZP-1, the same fast-track procedure is prescribed for finding an infringement of antitrust merger rules and imposing fines for these infringements as for the conduct of other minor offenses (for example traffic offenses like speeding).

In ZP-1, the Agency must determine the responsible person's undertaking of an infringement of the antitrust and merger rules and - if appropriate- impose a fine. The Agency then informs offenders of minor offenses of antitrust and merger control rules of the allegations against them in writing, notifies them of the privilege against self-incrimination and subsequently the offenders have five days to provide an answer. Decisions of the Agency in minor offense proceedings can be challenged with a request for judicial protection before the County Court in Ljubljana. The County Court's judgements can be appealed before the High Court in Ljubljana. The main problems with the "duality" are:

- > the duration of separated procedures, both in which the Agency deals with the same questions. Even though the ruling over infringements are final in ZPOmK-1, under ZP-1, the Court re-evaluates the infringement using penal standards although recognizing that it is still an offense;
 - > separate court procedures are carried out, in which different judgements can be reached due to, although same merits of the case are assessed, different courts decide on the matter using different standards (criminal/penal criteria are different/stricter than in civil/administrative procedures).
- ▶ Currently, the Slovenian Competition Protection Agency is in the process of drafting the pertinent amendments to the ZPOmK-1 Law, which would merge the abovementioned two procedures into one. The proposed amendments would apply only to legal persons (responsible for the undertakings and individual entrepreneur would still be fined in a separate

minor offense procedure). The amendments are expected to be adopted in the upcoming months.

▷ The Competition Commission of South Africa stated that since the promulgation of the Competition Act, there have been several legislative challenges. They can be defined as the public-interest challenge; the cartel detection challenge; the cartel enforcement challenge; and the market failure challenge:

- > The public-interest challenge. Was faced when the competition law was discussed (before was enacted). The competition law, which borrowed heavily from the European and American laws, was not sensitive to the development needs of South Africa. For this reason, the law makers included public interest considerations as a justifiable reason for approving or prohibiting a merger, despite its competition effects.

These public interest considerations are defined in the law. From inception of the authority, no merger has been approved or prohibited solely on the basis of public interest considerations, but there have been many conditional approvals based on these considerations, the most common of which is potential job losses. Typically, a public interest condition, which is often employment-related, will state that the merging firms may not retrench employees for a stated period after the merger.

The second solution drafted into the law to cater for our unique domestic needs was the exemption provisions. In terms of these provisions, firms that wish to engage in anti-competitive conduct - for reasons that are listed in the Act - may apply to the Commission to be exempted from the application of competition law.

- > The cartel detection challenge. South Africa's Competition Act has comprehensive provisions which define and prohibit cartel conduct. However, it became apparent, soon after the competition agencies were established, that cartels were difficult to detect even though the law prohibited them. For this reason, the Commission introduced its Corporate Leniency Policy (CLP) which was designed to encourage cartel members to 'come clean' about cartel conduct in return for immunity from prosecution. This policy has been a major reason for the Commission's success in detecting cartels over the last twenty years.

The existence of the policy was challenged in the courts however, as it was not expressly-authorized in the legislation. Although this challenge was not successful, the Competition Act has since been amended to expressly authorize the CLP.

- > The cartel enforcement challenge. In South Africa, the competition agencies only have civil, not criminal jurisdiction. The latter is the domain of the South African Police Service (SAPS) and the National Prosecuting Authority (NPA). While this was not a concern at the inception of the Competition Act and the competition agencies, it became a concern after conclusion of the 2006 bread price fixing investigation. The bread cartel led to such widespread condemnation throughout South Africa that the public called for criminal sanctions to be brought against executives found to be engaged in cartel conduct. These calls were amplified after the 2013 construction cartel came to light. Soon after, the law makers introduced criminal sanctions against individuals convicted of engaging in cartel conduct, comprising a financial penalty and/or jail time.

This change in the law posed a significant threat to the viability of the CLP as the Commission was unable to guarantee immunity for an individual under the criminal dispensation. The criminal law has since been promulgated and is now in effect however the Commission and NPA are still negotiating the terms of a memorandum of understanding between the two institutions which will provide a level of certainty about how criminal matters will proceed.

- > The market failure challenge. The Competition Act was drafted with comprehensive provisions against restrictive horizontal practices, restrictive vertical practices and abuse of dominance. However, these provisions targeted identified firms for specific conducts they were engaged in. Moreover, the remedies that emerged from investigations into the above conducts were targeted at the respondents in those investigations. This became a challenge in instances where market failures were clearly present in a market but could not be attributed to the behavior of any one firm in that industry. The Competition Act did not sufficiently provide for such circumstances.

One of the earliest examples of this was in South Africa's banking industry. The industry displayed signs of high concentration, exclusionary conduct and a lack of innovation. However, the failures appeared to result from past legislation and a historic market structure rather than the conduct of market incumbents. Therefore, the Commission initiated a market inquiry into banking.

Without the backing of express legislation, the banking inquiry faced some legitimacy concerns, both in its process and its outcomes - though it was successfully concluded.

Accordingly, the legislation was amended to provide specifically for market inquiries. Following this amendment, the Commission has gone on to initiate more market inquiries.

- ▶ In cases where historical laws contravened the Competition Act or at least encouraged firms to contravene the Competition Act, the South African Competition Commission has engaged in advocacy to promote a change in policies or legislation.
- ▶ Although the Spanish National Commission of Markets and Competition (CNMC) considers that Spanish Competition Law is adequate to face most competition challenges and comparable to the most advanced in Europe, competition enforcement needs a continuous adaptation and there is room for improvement in competition legislation at least in the following areas:
 - > Reviewing provisions regarding fine calculation would be convenient for two reasons: First, to allow CNMC to employ similar methods of fine calculation as those employed by the European Commissions. This would result in a more homogeneous completion of enforcement, considering that both the CNMC and the EC can handle cases affecting the Spanish and EU markets. Second, and more important, to ensure that fines are effectively deterrent. In some cases, the limits imposed by Spanish legislation (as interpreted in recent case law) may hinder the deterrent effect of fines.
 - > Allowing for the application of next generation antitrust tools, such as settlements. These kinds of tools may make antitrust enforcement more effective, as well as help to save public and private resources currently devoted to litigation.
 - > Setting priorities: more flexibility for the CNMC to focus on the more relevant cases. CNMC can act both by its own initiative and in response to complaints. In the case of complaints, there is an obligation to act and little margin of maneuver to rapidly close a case, even when the use of public resources is not clearly justified. A bigger margin of maneuver, to focus on the most relevant cases, could be highly beneficial for an effective competition law enforcement.
- ▶ As a consultative body, the Spanish CNMC must issue a report on any Government's proposal affecting, inter alia, competition regulation. Moreover, CNMC has wide advocacy powers that can be used to address shortcomings in both competition or sectoral legislation to ensure a more effective competition enforcement:

- > CNMC may conduct sectoral or market reports or research works on competition, publish them and include, if necessary, recommendations to the Parliament or the Government to improve legislation.
- > As a preventive tool, CNMC acts as a consultative body for the Parliament, the Government, Ministries, Autonomous Communities (Regional Governments) and other public bodies and may issue reports on new legislative or regulatory proposals to ensure the application of pro competition and sound regulation criteria.
- > According to Competition Law, CNMC may challenge in Courts regulations or administrative acts that damage competition and are not adequately justified or proportionate to the public interest they pursue.
- > According to Single Market Guarantee Law (Ley 20/2013) CNMC may challenge in Courts regulations, dispositions, or administrative acts that are contrary to Single Market Guarantee Law provisions. Both by its own initiative or in response to economic operators' complaints.

Furthermore, CNMC has deployed a pro-active communication policy to make its advocacy powers more effective. The aim of this communication policy is to spread a culture of competition among private economic operators, public authorities, and the general public.

- ▷ Decisions of the Antimonopoly Committee of Ukraine (AMCU) are subject to a de facto double judicial review: first in process of the decision being challenged by the respondent seeking its annulment; and later when the AMCU seeks to enforce the decision and collect a fine and a penalty for a failure to pay. Due to the double court proceeding, the overall time from adopting a decision to its enforcement may be as long as 2-3 years (and even longer in some cases).

Large portions of fines imposed by the AMCU's decisions in competition infringement cases are not actually paid, due to broad opportunities offered by the laws enabling violators to avoid the payment of AMCU fines through liquidation, re-registration or changing the name of the charged and fined economic entity, transfer of assets and business to another legal entity.

- ▷ The Ukraine Committee has prepared and submitted to the Parliament the draft law which would amend the Law of Ukraine "On Protection of Economic Competition" to the effect of rendering the decisions of the Committee (once not challenged or if challenge is dismissed by courts) to be an executory document sufficient to initiate the enforcement procedure without additional involvement of courts.

Furthermore, the Committee is drafting amendments to competition law which will allow liability of parental companies for infringements by subsidiaries which were involved in competition-related infringements. Additionally, rules on improvement of joint and separate liability of the undertakings comprising a single economic entity

- ▶ One of the main legislative challenges faced by the Commission for Promotion and Defense of Competition of Uruguay is the merger control. Uruguayan legislation provides for a merger control regime establishing the obligation to notify operations that meet certain thresholds before they are conducted. But it is only a duty of notification. The Competition Authority cannot prohibit a concentration or impose remedies on concentrations. Another key challenge is the law provision for analyzing all potential cases of anticompetitive cases using the “rule of reason”. Even the hardcore cartels should be studied applying the “rule of reason”.
- ▶ The Competition Authority of Uruguay has proposed an amendment to include the provisions for the authorization of mergers in the competition law and to prohibit the hardcore cartels *per se*.
- ▶ A jurisdiction in North Africa mentioned that at the end of 2014, an analysis of its regulatory framework was carried out with the help of international entities, concluded that about 40% of their provisions on the matter had to be amended including, among others:
 - > Implement provisions guaranteeing freedom of trade and industry. Enforcing principles of non-discrimination between companies for aid of the State, strengthening the regulation of the market by the State and consumers rights.
 - > Specify the legal status, role and tasks of the Competition Authority. To determine the place of this body in the institutional building and to clarify its relations with the other institutions, taking into account the transversal and universal nature of its missions.
 - > Strengthened the competition authority in its role of sole authority of competition and provide it with budgetary and technical independence.
 - > Submitting State and corporate assistance to companies to the Competition Authorities’ opinion as they may have an impact on competition.
 - > To implement a Clemency program, which has proved its worth in the countries that have applied it.
 - > Empower the authority to be able to conduct unannounced inspections, searches and seizure of documents.

- > Provide for the imposition of pecuniary or penal sanctions against the authors of obstructions to investigations and instructions conducted by the Competition Authority in the framework of its missions.
- ▶ The responding North-African jurisdiction continues to operate according to the texts in force. However, it has proposed amendments to the law and introduced them in late 2016. The competition authority is waiting for action to be undertaken by the other public authorities and legislative bodies in order to update the legal framework.
- ▶ For an Eastern-Europe Competition Authority, the biggest challenge is the procedural laws that have to be used when the competition law infringement is found. Currently, they have three different procedures in place – administrative, misdemeanor and criminal procedure. All anticompetitive agreements are investigated under criminal law and abuse of dominant position is investigated under misdemeanor procedure. It is possible to use administrative procedure to investigate both mentioned infringements, but it is not possible to fine undertakings under administrative law. Therefore, it is possible that two procedures have to be used, which is not very effective.

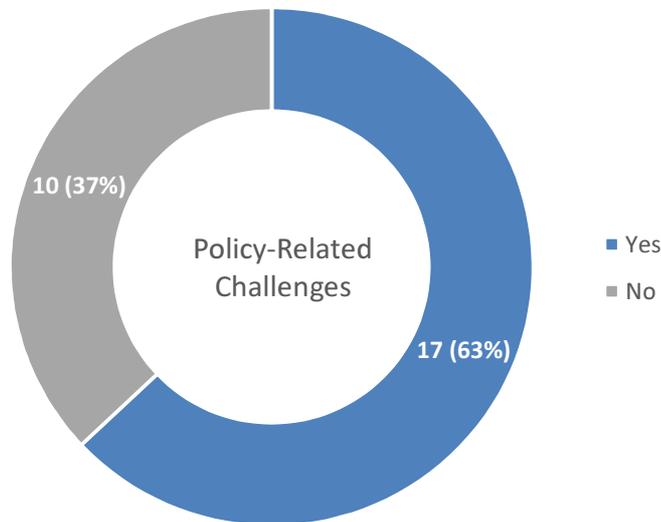
In addition, criminal and misdemeanor procedures have not proven to be the best procedures to handle competition law infringements due to the economic nature of the competition law. Furthermore, the burden of proof to start a criminal proceeding is higher, therefore there are few criminal proceedings in their jurisdiction.

- ▶ In order to improve the current situation, the Eastern-Europe Competition Authority will try to effectively-communicate their concerns to the relevant ministry, in order to proceed with the proposed amendments to the regulations in force.

b) Policy-Related Challenges

One commonly-reported difficulty for young agencies is the lack of cooperation and coordination of policy and efforts with particular government and 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.

Figure 4: Responding authorities experiencing policy-related challenges



As shown in Figure 4, 63% of the responding authorities expressed experiencing challenges related to the application of certain policies within the government that hinder the correct enforcement of competition policy.

Challenges and measures adopted to address them

- ▶ The Argentine Competition authority expressed that in recent years it has been referred to in several occasions as a source of consultations in the formulation and/or implementation of other public policies and regulations. Continuing in this path of mutual collaboration is one of the main challenges faced by Argentine jurisdiction. The development, professionalization and continuous training of the Advocacy Unit of the CNDC is essential to achieve this goal.
- ▶ In order to address the expressed challenges, the Argentine CNDC has intervened by means of consultation in the formulation and/or implementation of other public policies and regulations in several occasions, namely:
 - > Interconnection regulation: In 2017 the Ministry of Communications issued a project to establish an updated regulation for interconnection and access, which was opened to consultations. The project had references to some issues related to competition enforcement, such as essential facilities, market definition and market power. To avoid misusing those concepts, the Advocacy Unit of the CNDC prepared a document explaining

- competition jurisprudence on the matter and the extent to which they should be applied to the Information and Communication Technologies.
- > Trade barriers: In several instances the CNDC recommended that trade barriers be reduced, in particular when the domestic market is highly concentrated. Similarly, the CNDC was consulted regarding the potential effect of an antidumping measure in a highly concentrated domestic market (load cells for weighing scales).
 - ▶ For the Colombian Competition Authority, one of policy related challenges is the little regard of certain regulators of the competition regime. Especially regarding advocacy, there are several entities of the government that are unaware of the legal process and do not supply it, when it is mandatory to do so.
 - ▶ The Colombian SIC over the past few years has invested many efforts in spreading and promoting the function of advocacy and has also held workshops with different regulators to achieve a relationship of harmony with them.
 - ▶ In Indonesia, there are still many policies and regulations that not aligned with competition policy. Often times, the cases that being handled were also resulted from anticompetitive policy and regulation, especially for cases in certain strategic sector.
 - ▶ In tackling the mentioned challenges, the Indonesian KPPU intensified its coordination with Ministry and Sector Regulator by joining sectoral task force that was formed by government and by conducting Coordination Meetings and Focus Group Discussions on specific topics. KPPU also established its own Competition Checklist by adopting the OECD Competition Toolkit, and currently the checklist has been adopted in 12 regional governments in Indonesia.
 - ▶ The Kenyan Competition Authority is mandated to give advisories to sector regulators. However, the law is silent on whether the advisories should be binding or non-binding on the sector regulators. This is especially prevalent where sector regulation contains competition regulation provisions, thus concurrent with the competition law provisions.
 - ▶ The Kenyan Competition Authority is mandated to liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare. Thus, the Authority has signed Memoranda of Understanding with sector regulators. The Authority has a robust advocacy program that allows for active participation in the activities of sector regulators that have concurrent jurisdiction with the Authority. This has been through the formation of joint committees in the MoUs to address competition and consumer protection matters.

- ▶ The Ukrainian AMCU has stated that there is often a lack of understanding between them and other governmental bodies, which can negatively-affect AMCU's ability to effectively protect and promote economic competition, carry out competition enforcement, competition-related investigations and market studies.
- ▶ For the moment, legal and organizational cooperation between the Ukrainian AMCU and law enforcement bodies in investigation of antitrust cases calls for improvement. But the AMCU's efforts to solve this problem have already brought prominent results. The AMCU has reached an agreement on cooperation with the State Service of Ukraine for Food Safety and Consumer Protection, the National Securities and Stock Market Commission of Ukraine, the State Fiscal Service of Ukraine and with a number of law enforcement bodies, *inter alia*, with the anti-corruption ones.

For example, through information collected by detectives of the National Anti-Corruption Bureau of Ukraine in course of criminal investigation, the AMCU revealed bid rigging in public procurement procedure initiated by Ukrposhta, a postal service government company. Information provided by the law enforcement bodies to the Committee is extremely helpful for the AMCU since it has rather limited methods of collecting evidence. On the other hand, AMCU also shares information with law enforcement bodies when prima facie instances of criminal actions are revealed.

- ▶ For a Latin-American Competition Authority, one of the policy challenges confronting the competition authority has to do with administered prices, such is the case of the occasional price controls established by other government bodies, within the Consumer Protection framework. It should be noted that, the aforementioned regulations allow to fix prices of essential facilities under certain conditions in the face of market failures, but in practice these provisions have not been respected, generating uncertainty and damages in the market.

Another challenge related to these policies is manifested in the duplication of functions with regulators of some of the regulated sectors. In some cases, their legal bodies contain provisions on competition, which has led to situations of legal uncertainty in the markets involved, such as the case of the telecommunications sector. In addition, the Government through its different agencies intervenes in the market of public services, through the authorization of tariffs.

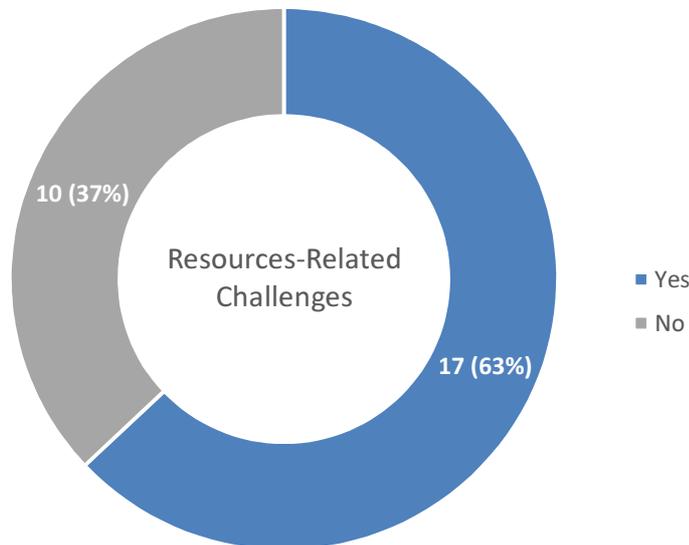
- ▶ In order to apply the competition policy and face the mentioned challenges, a Latin-American Competition Authority has promoted a series of actions fundamentally within the framework of the promotion, highlighting among others the following:
- > Subscription of inter-institutional cooperation agreements in several institutions, including the regulated sectors;
 - > Establishment of public policy recommendations, through sectoral studies carried out, which are aimed at correcting market failures (within which they can be applied to regulated sectors) and that, by adopting them, contribute to achieving better stadia of competence; and,
 - > Issuance of opinions on issues related to the identified challenges, before requests emanated mainly from private companies and the government sector.

On the other hand, it is noteworthy that the authority has taken actions in the context of the defense of competition to hear cases on practices prohibited to free competition in markets where there has been government participation as a guarantee in the determination of prices; such is the case of cement and sugar, among others.

c) Resources-Related Challenges

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 on its limited funds. However, the limitations imposed by budgets for new agencies – often located in countries with relatively strained public resources – are a constant complaint. This section highlights the impact that budgetary problems to young competition agencies for conducting their mandate.

Figure 5: Responding authorities facing resources-related challenges



As displayed in Figure 4, 63% of the responding authorities mentioned that they experience some type of challenge related to the resources they have available to carry out their mandate.

Challenges and measures adopted to address them

- ▶ The Argentine CNDC is a technical body acting under the purview of the Secretary of Commerce of the Ministry of Production. Its President is designated directly by the Executive Power and its functions are delegated by the Secretary of Commerce. It also has a limited budget without influence on its formulation. Thus, Argentina’s major current resource-related challenge is the appointment of the recently-created competition authority, created by the new competition law. The new authority will be granted sufficient powers to adopt its own decisions, control its own budget, and function without interference from political authorities.
- ▶ The new Argentine Competition Act 27,442 surpasses this historical constrains by creating an independent authority, with fully budgetary autonomy. Also, and in line with best international practices in competition matters, the new Law also allows the competition authority to set up a filing fee which once implemented will be destined to bear ANC’s ordinary expenses.
- ▶ The Barbados Competition Authority stated that, while monitoring markets and researching certain industries is a mandate of the Commission, the lack of financial resources presents a challenge to access the necessary data to inform such research. Access to various software that would allow the more efficient use of the resources available is hindered by a lack of financial resources. This can be attributed to a tradition of safeguarding information and

becomes manifest in agencies seldom collaborating, thereby resulting in a duplication of effort or operational redundancies in many instances.

- ▶ The Barbados Fair Trade Commission has utilized free software such as “R” and has been careful to seek funding for equipment and software from various international funding agencies.
- ▶ The Curaçao FTAC has limited resources due to budget constraints of the government. This affects mostly the amount of personnel that is employed by the FTAC. It also means that the case handlers of the FTAC have to spend part of their time on non-core tasks such as updating the FTAC-website or helping with financial management. Complete outsourcing of certain activities is not always possible.
- ▶ The Curaçao FTAC addresses their budgetary constraints by prioritization. Limited resources mean that the FTAC needs to prioritize tip-offs and complaints based on its enforcement criteria. For the year 2018, the FTAC prioritized two sectors with respect to competition enforcement, financial services and construction. Another consequence of the limited resources is the FTAC must conduct market research in specific cases itself, instead of relying on external research firms or consultants.
- ▶ For the Latvian Competition Authority, the most problematic issue concerns salaries. The level of salaries and the scope of activities of the staff the Competition Council is not competitive, and it raises challenges to both hold and attract professionals. The level for salaries is not competitive among even other market regulatory state institutions, and experts and managers of the Competition Council can find more attractive positions in other state authorities.
- ▶ By 2018, the salary for employees of the Competition Council of Latvia was determined uniformly with other public-sector institutions. This provision was established within normative enactments of Latvia. Nevertheless, in 2017, the Competition Council was allowed, within existing funding (without increasing the budget), to freely determine the salaries of employees. The new salary system was applied starting June 2018 and is a small step towards better-motivate employees.
- ▶ The Uruguayan Competition Authority also faces a budgetary constraint. This constraint limits the Commission’s competition advocacy activities. In general, the Commission has been in reactive rather than proactive mode in its advocacy activities. Another resource-related limitation is that it does not develop proactive or planned communication activities. In

addition, the Commission does not evaluate or quantify the potential or actual benefits of its actions.

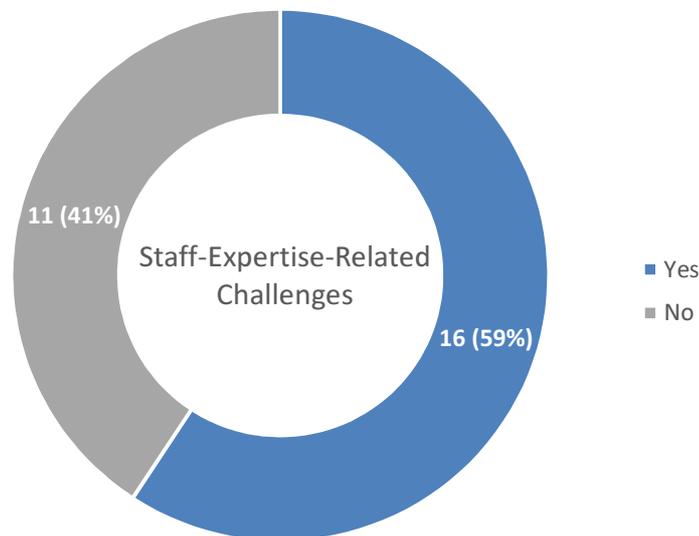
- ▶ For the time being, the Uruguayan Commission has prioritized the investigation of anticompetitive practices denounced at the office, instead of advocacy and other actions.
- ▶ For a North-African Competition Authority, its budget is entered in the indicative of the Ministry of Commerce, which calls into question its autonomy. The allocated budget does not allow to launch sectoral studies essential to identify and control the degree of competitiveness of the market. It also does not allow to resort to the external expertise (national or international) in case of need so that all the works can be carried out only by the internal human resources of the Competition Authority, which does not necessarily have all the professional skills required.
- ▶ A North-African Competition Authority faces this type of challenge by matching the budgetary resources it has with the actions it plans. This does not allow it to have visibility in the medium or long term and therefore constitutes a handicap. In addition, the competition authority did not fail to apply for support of International Organizations to register two important operations:
 - > A sectoral study on the competitiveness of the drug market (operation at the end of implementation).
 - > Elaboration and implementation of competition compliance program (beginning work in late 2018).

It is also planned to use the program to register soon (in late 2018) a sectoral study on the competitiveness of the maritime sector market in the jurisdiction.

d) Staff Expertise-Related Challenges

As discovered in the 2006 report, competition authorities tend to spend more time identifying the challenge of limited experienced professionals than others. There were several reasons reported as to why is that young authorities were often faced with this complication. Certain jurisdictions stated that the cause of this challenge is an overall shortage of available qualified personnel in competition law and policy.

Figure 6: Responding authorities facing staff-expertise-related challenges



As shown in Figure 6, 59% of the responding agencies mentioned experiencing some type of challenge related to a lack of specialized personnel. Some 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. Finally, agencies have indicated they simply do not have enough officers assigned to manage the assigned tasks.

Challenges and measures adopted to address them

- ▶ For the Argentine Competition Authority, the main challenges that will have to be faced by the newly-created authority will involve providing proper training for the Leniency program and the ex-ante merger control regime. This challenge stems from the fact that these are the two of the most important innovations introduced by the new Law.
- ▶ During the last 2 years, the Argentine CNDC's staff received several trainings on best antitrust practices from other antitrust agencies, scholars and international bodies, such as, the US Federal Trade Commission, the US Department of Justice, the Inter-American Development Bank, the World Bank, the Organization for Economic Cooperation and Development (OECD), the Latin American School of Competition (headed by the CNMC, Spain's antitrust agency), the Mexican COFECE and INDECOPI-UNCTAD/COMPAL School.
- ▶ Within the Barbados Competition Authority, there are only four technical persons in the competition division, including the Director, who handle all competition matters. In this

regard, the turnover of staff has a significant impact on how the legislation is enforced. Access to training and consistent exposure to the varying aspects of competition is hence, a major challenge.

- ▶ The Barbados Fair Trade Commission has maintained its linkage with the ICN and finds the teleconferences and webinars quite useful. It has recently been able to justify the use of financial resources for attendance to workshops. In addition, there is the link with more developed agencies and there has been some collaboration with them to ensure staff attachments or access to input from these entities.
- ▶ For the Competition Commission of India, Enforcement of the Competition Act requires officers proficient in Competition Law to carry out complex investigations of competition cases and effective enforcement. It is expected that officers having prior knowledge in field of Competition Law and Economics would join CCI. Since competition law in India is at nascent and developing phase, very limited formal courses are available in field of Competition law and Economics. Therefore, most of new officers join CCI without prior formal degree in Competition Law.
- ▶ To combat this challenge, the Competition Commission of India (CCI) has been regularly conducting training programs & workshops for newly inducted officers and also arranging various capacity building programs for senior officers of the Commission. These programs are conducted by international staff/experts from overseas multilateral agencies and competition authorities, as well as domestic experts and organizations specialized in the field of Competition law and economics. CCI holds in-house training and peer to peer sessions to ensure interdivision sharing of knowledge and information.

In last nine years of enforcement, the officers of CCI have now gained substantial experience/knowledge owing to the aforesaid capacity building initiatives as well as handling of the cases at the Commission, hence the knowledge gap is largely filled.

- ▶ The Pakistan Competition Authority stated that for public sector organizations, talent is becoming a critical issue, and perhaps more so for those agencies that have a specialized focus and require a particular skillset. Pakistan's competition agency comes under this definition as the ability to investigate and adjudicate are skills that are not common in general public service. It also faces challenges pertaining to smaller budgets, increasing demand for quality services, and the ability to retain skills and knowledge for organizational continuity have been key challenges.

- ▶ The Pakistan Commission has used all possible options available. These include specific training programs usually under technical assistance, given its limited budget. These events have been helpful in introducing new concepts and thinking within the Commission. However, the sporadic nature of these training events has not resulted in plugging in capacity shortfalls the Commission faces. Gaps in key areas remain, most notably economic analysis and market research. The Commission will also have to face new and emerging challenges most notably relating to big data and technology, for which a different set of skills will be necessary.
- ▶ A Latin-American Competition Authority stated that in order to carry out the functions performed by the Commission, as regards investigations *ex-officio* or by complaint, some limitations are detected related to the lack of expertise in the personnel, requiring training in terms of: computer forensics, which added to the lack of the required equipment, does not allow to develop an effective investigation process; and development of surprise inspections or without prior notice, given the lack of knowledge and / or experience of technical personnel in this area.

In terms of merger assessment, it is necessary that technical personnel be trained in analysis tools in the processes of verification of concentrations, namely: measurements of market power, through concentration indexes other than the Herfindahl–Hirschman Index and their subsequent effects in the market where the merger occurs; efficiency analysis; structural remedies; among others.

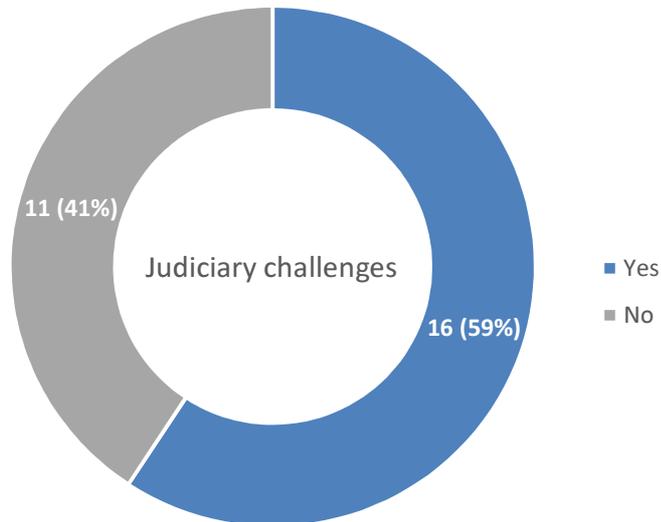
- ▶ The responding Latin-American Competition Authority uses actions that allow it to undertake competition enforcement, including: inter-agency consultations on specific issues; research and / or consultations on the web of specialized sites (OECD, UNCTAD, ICN, among others); training of technical personnel from competition agencies through seminars given by institutions such as the US Federal Trade Commission (FTC) and Department of Justice (DOJ), on-site internships at the FTC or another competition agency where it is possible for it to be done; and other training abroad on competition issues.

e) Judiciary Challenges

A judiciary familiar with competition law and its economic aspects is an important element of a country's competition policy system. In some 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.

Figure 7: Responding competition authorities facing judiciary challenges



As shown in Figure 7, 59% of the responding authorities mentioned experiencing challenges with their respective judicial bodies. 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.

Challenges and measures adopted to address them

- ▶ The Argentine New Competition Law (LDC), among the many other reforms mentioned above, creates new specialized courts of appeals to review the decisions of the new competition authority regarding all competition matters. This court shall act under the scope of the Federal Courts of Appeals in Civil and Commercial Matters and entails a major improvement.
- ▶ The New Argentine Competition Law, among the many other reforms mentioned above, creates a new and specialized courts of appeals to review the Authorities' decisions regarding all competition matters. This court shall act under the scope of the Federal Courts of Appeals in Civil and Commercial Matters and entails a major improvement over the previous regime.
- ▶ The Brazilian jurisdiction does not count with a specialized branch within the judiciary to deal exclusively with competition matters.

- ▶ The Judiciary Branch of Brazil has already recognized the need for Federal competition specialized Courts. The subject is currently under discussion regarding its implementation. Additionally, the Judiciary has also been investing in providing its members with specific training on competition matters.
- ▶ The Colombian Competition Authority specifically addressed the lack of specialized judges who understand and deliver well executed work regarding competition decisions. They recognized that there is a lack of special training in the Colombian judiciary system.
- ▶ The Colombian SIC over the past few years has invested many efforts in competition advocacy efforts. In addition, it has held workshops with different judiciary actors to explain in detail the Colombian competition regime and its implications for the national economy and overall wellbeing.
- ▶ The Spanish CNMC stated that the court in charge of reviewing CNMC's decisions is the National Court for Administrative Litigations. This court is specialized in the application of Administrative legal provisions, which are horizontal in nature, and not only specialized in the application of competition law. There is a similar issue for the second instance revision, of the CNMC's decisions, before the Supreme Court.

It also faces issues when requesting a court warrant for an inspection when it considers that there may be the risk that the company denies the entry. In these cases, it asks for a precautionary Court warrant for a dawn raid. Those warrants are supplied by Regional Courts, which do not have much practice on competition Law enforcement.

- ▶ Regarding the review proceedings of the Spanish CNMC's decisions, legislation does not provide for a specific mechanism of collaboration between CNMC and the courts, apart from the obligation of sending of the administrative file to the courts, and the performance of the CNMC defense by the State Bar.

In private enforcement, the Spanish Competition Law provides that the competition authority can collaborate as *amicus curiae* in civil court. Similarly, the procedural law allows the competition authority, at the request of the court handling the case, to refer documentation in its possession, which may be useful in the case.

In order to promote a better and common understanding of competition principles, both by judges and by CNMC's professionals, there is a MoU signed between the CNMC and the

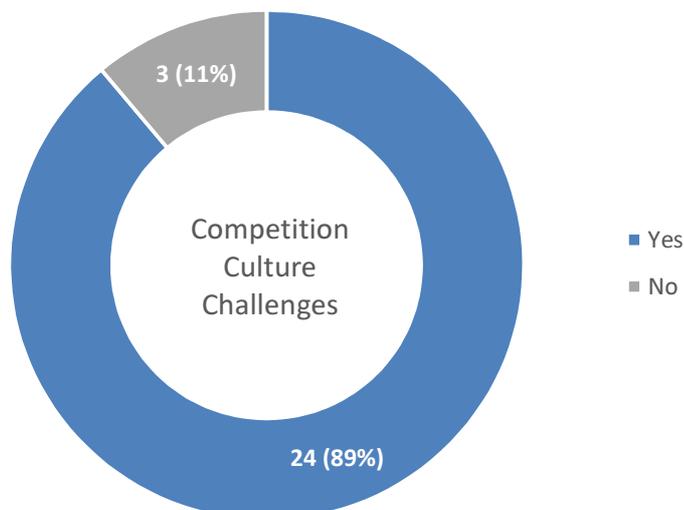
Judiciary Power General Council. This MoU foresees collaboration in activities such as exchange of sharable information, best practices and methodologies, joint academic research, case law analysis, conferences, etc.

- ▶ An Eastern-European Competition Authority stated that in their jurisdiction, judges usually have no extensive experience in resolution disputes within the sphere of antimonopoly legislation. This can often pose problems for competition enforcement.
- ▶ An Eastern-European Competition Authority engages in advocacy actions, such as national and international conferences in order to familiarize the public and the judiciary with the approaches of competitive practices. They also organize in-house seminars and training events for State-Bodies, courts, the academia and the general public.

f) Competition Culture Challenges

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, the academia 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.

Figure 8: Respondent authorities facing competition culture challenges



This is the most prevalent challenge among the competition authorities that responded to the survey. As shown in Figure 8, a clear majority of competition authorities (89%) expressed that they often experience some form competition-culture-related challenges within their respective jurisdictions.

Competition authorities rely on a continuous supply of evidential and supporting information to analyze and make informed decisions regarding the effect of certain business practices into domestic markets. A knowledgeable and aware community will more-often-than-not provide such widespread cooperation. Concerns regarding the lack of such culture are mentioned by virtually all young agencies.

Challenges and measures adopted to address them

- ▶ For the Competition Authority of Albania (ACA), competition awareness is one of the main topics that ACA frequently targets in order to increase such awareness among business community, academia, legal studios, NGO-s and consumers.
- ▶ The Albanian Competition Authority annually organizes roundtables/workshops/conferences in different cities of Albania, publishes brochures in order to increase competition culture and promote competition advocacy. In addition, this year (2018) is focused in increasing the active role through Public Relations by the usage of multiple press releases on its official website and other social media.
- ▶ Since the beginning of the current administration in Argentina, competition was included as one of the eight most important pillars of the National Productive Plan, and as one of the 100 political priorities for the upcoming years. The objective was to establish competition as a public policy priority and as the primary way of interaction between companies and consumers. In 2016, the competition authority created the National Direction of Competition Advocacy. For the first time after almost a century of competition enforcement in Argentina, the antitrust authority has a special task force to provide specific studies and perform advocacy.
- ▶ The main step of the Advocacy Direction was to commit several market studies to the diagnosis of competition conditions in different markets, such as aluminum, steel and petrochemicals, bovine meat, dairy products, laundry detergent, edible oil, credit cards, mobile telecommunications and inter-city passenger land transport. The objective of said studies was

to define the priorities for the upcoming months, identifying those markets with weak competition conditions and in need for certain adjustments and, if needed, issuing pro-competitive recommendations.

Hereunder are some of the lectures and seminars delivered by the Argentine Authority in the past few years, and destined to developing a greater awareness to the importance of competition law and policy:

- > Lecture on Competition, taught in the Universidad Nacional del Sur, in the National Chamber of Commerce, Universidad Nacional de Cuyo, Universidad Católica de Córdoba and in the National Chamber of Medical Specialties.
 - > Compliance and Competition, taught in the Universidad Católica Argentina.
 - > Workshop on competition on public procurement, La Rioja.
 - > Lecture and training for journalists, May 2018.
- ▷ The Barbados Competition Authority stated that there seems to be a general lack of knowledge in this regard. Many businesses appear to be unaware of the benefits of competition. This appears to be entrenched in the wider community. The Commission undertakes advocacy in the business community and seeks to impress on policy makers the benefits of competition.
- ▷ The Barbados Fair Trade Commission has an annual two-day competition workshop catered to businesses, academics, and university students. The content is introductory but is supported by illustrations of real cases presented by Staff of the Commission and a presenter generally from the US Federal Trade Commission. In March 2018, the Commission completed its ninth year of the workshop. In addition, the Commission submits 10 articles yearly to a business-style newspaper. The Commission has in the past three years utilized social media to engage with the community.
- ▷ The competition rules of Curaçao came into force as recent as September 2017. Naturally, not all business and consumers are already aware of the new rules. The Curaçao FTAC measured the awareness among business about the new rules in November 2017, two months after the entry into force of the ordinance. At that stage 20% of all the existing companies in Curaçao (big and small) knew about the FTAC and 25% about the competition rules. The FTAC will repeat this survey regularly, in order to monitor our progress of creating awareness of the new rules.

Curaçao does not have a developed competition culture yet. Competition is not natural for many companies and government agencies. Also, people sometimes have a different interpretation of the concept 'fair competition'. Therefore, the FTAC needs to invest heavily in advocacy efforts to promote awareness and the benefits of competition.

- ▶ The Curaçao FTAC published a website in three languages with elaborate information about its activities, publications and the benefits of competition law. The website is managed by one of the case-handlers, so it can be updated quickly. Furthermore, last year the FTAC invested heavily in informing consumers and businesses about the new competition rules of Curaçao. They submitted a letter to around 1.800 big and medium-sized firms and gave presentations to the major associations of firms in the country.

The Curaçao FTAC also has a Facebook page with two messages per week with information and news. The FTAC is in the process of organizing workshops about bid rigging for government officials involved in tenders and participated in a seminar on enforcement. The FTAC regularly publishes press statements about its activities. Finally, the FTAC draws inspiration from the recent publications of the ICN on explaining the benefits of competition.

- ▶ Competition Law and Policy is still a little-known field in Kenya to the extent that no Tertiary education institution is offering this as a training subject. In addition to this, there is very limited literature on Competition Law and Policy. The Kenyan Authority is carrying out advocacy efforts to promote Competition among various stakeholders, for instance the County Governments, Lawyers and the Judiciary as well as among news reporters to equip them with sufficient content on Competition.

The Authority participated at most consumer events as this offers an opportunity to create awareness on the mandate. In addition to this, advertising is being done on mainstream and social media to enhance knowledge on the institution.

- ▶ In the short term, the Kenyan Competition Authority holds annual capacity-building sessions on Competition and Consumer practices and Law in partnership with the University of Nairobi. The aim is to enhance its research capacity in competition and consumer protection. Furthermore, the Authority is in the process of revamping the website to offer as much information as possible on its mandate. In the Medium term, the Authority is envisioning introducing Competition Law and Policy in the curriculum to ensure that there are trained resources to work in the sector.

- ▶ In Panama universities, no academic courses in competition law are supplied. Hence, it is important to promote competition in the universities. In addition, the companies do not know the leniency programs and corporate program tools to fight anticompetitive practices.
- ▶ The Panama ACODECO promotes competition in media. They also often discuss the leniency program in some universities and law firms.
- ▶ The Uruguayan Competition Authority recognized that there is a palpable lack of competition culture in the country.
- ▶ The Uruguayan Competition Authority undertakes periodic efforts to disseminate the importance of competition through the organization of seminars, workshops and spreading the relevant cases through press releases and their website.
- ▶ A Latin-American Competition Authority stated that overall, in their jurisdiction there is no culture of business rivalry, on the contrary, there is a protectionist culture between businessmen and from the Government towards entrepreneurs. Therefore, there is a permanent challenge to deal with a paternalistic culture and with regulatory governments.

Price regulation is the preferred tool to find solutions to the supply and demand dynamics of the different goods or services consumed in the country. Furthermore, different sectors of entrepreneurs have preferred an economic regulation on the goods and services offered in the market and negotiate such economic regulation with the Government, over the competitive dynamics.

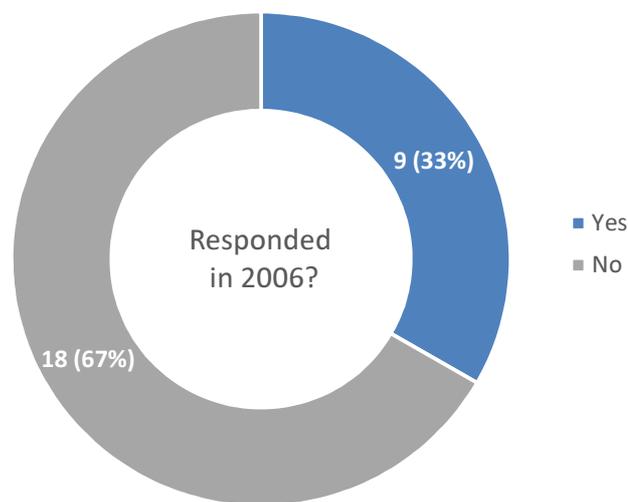
In addition to the above, there is also little knowledge of the subject and its benefits on the part of consumers, who are an important force for disciplining and encouraging companies to immerse themselves in a competitive dynamic.

- ▶ The Latin-American Competition Authority, every year since 2007, organizes the *Week for Competition*. Its aim is to develop a series of conferences and promotional activities aimed at generating a culture of competition in their jurisdiction. The sessions are chaired by the Plenary of the institution and the highest authorities of the Powers of the State and in them, there are exhibitions and debates where recognized experts valued by their personal and professional training, analyze in a critical and objective way the efficiency of markets in various sectors.

III. 2006-2019 Contrast

The main finding is that the main groups of challenges identified in the 2006 exercise are consistent with the findings of this report for young agencies, as described throughout the report. However, although the most experienced agencies that responded in 2006 show signs of progress in most areas, some challenges still persist.

Figure 9: Agencies that responded the 2006 questionnaire



As shown in Figure 9, of the 27 responses obtained, 9 of them (33%) participated in the 2006 exercise. The answers that these jurisdictions provided, and that are related to the progress these they had regarding the challenges identified at that time, are shown in this section.

Legislative Challenges

Although most of the legislative problems identified in 2006 have been addressed, particular issues persist in some jurisdictions.

The Commission on Protection of Competition of Bulgaria (CPC) stated that a new Law on Protection of Competition (LPC) was enacted in 2008. It introduced the missing investigative and decision-making powers of the CPC. In addition, the new law introduced turnover-based sanctions with maximum amount of 10% of the total turnover in the preceding financial year. Before that, the sanctions were determined as a lump sum with maximum amount of 300 000 BGN (around

150 000 EUR) and 500 000 BGN (around 250 000 EUR) for repeated infringement which could not ensure deterrent effect.

One of the current legislative challenges is related with the fact that the CPC cannot refuse to investigate a case on the grounds of priority setting. The CPC is legally bound to investigate and issue a decision on each case that has been submitted by an applicant. The other legislative challenge is the lack of power to inspect non-business premises.

However, the CPC shared that the mentioned challenges concerning the priority setting and the inspection of non-business premises are expected to be overcome with the implementation of the future Directive of the EU Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive).

A Central-Europe Competition Authority responded the survey having indicated that it currently does not experience any of the aforementioned challenges, and that it considers that it should no longer be classified as a young agency.

Policy-Related Challenges

Based on responses from responding authorities, policy-related challenges appear to have been substantially overcome.

Although the Croatian Competition Authority seems to have solved most of the challenges it faced in 2006, it mentioned that there are still areas for improvement regarding the implementation of its Leniency Program.

The South African Competition Authority stated that since 2006, there have been jurisdictional challenges posed by the Commission's overarching mandate against the sector specific mandates of various industry regulators. Some examples are in health care and communications. However, in each case the Commission has concluded a memorandum of understanding (MOU) with the sector specific regulator which sets out the manner in which competition matters will be handled between the two institutions.

Resources-related Challenges

In this area there are mixed results. Some authorities declared having overcome their budget problems. However, this type of restrictions persists in some competition authorities.

In 2006 the Bulgarian CPC replied that the budget of the authority is inadequate, which leads to turnover of staff. After that the budget was increased which led to more competitive salaries and as a result the turnover of staff decreased. Currently the budget of the CPC needs to be updated so that the CPC can organize more conferences, publish more brochures and carry out more activities aiming to raise the awareness of competition rules.

Panama ACODECO stated that their budget has been reduce by the National Assembly, which affects the agency. ACODECO highlighted that they have presented to the National Assembly the needs of the agency to fight monopolistic practices, and therefore, the need for adequate resources.

Staff-Expertise-Related Challenges

Most of the authorities that responded both in 2006 and in this report mentioned that the experience of their personnel is no longer one of the main challenges for their jurisdictions.

For example, the South African Competition Authority expressed that personnel experience was a larger challenge in the earliest years of the competition dispensation than it is today. In the years following the establishment of the competition authority, they sought the advice and guidance of trainers from the United States and Europe. The trainers visited regularly, sometimes for months at a time, and assisted in the evaluation of complex cases. However, this concern was common to the agencies regulating competition as well as the firms being regulated therefore, in a sense, the whole competition dispensation developed together.

Since its inception, the South African Commission has developed several practices in order to enhance the skills of the staff joining the Commission or practicing competition for the first time. These include:

- > participating in the working groups of the ICN, the OECD, BRICS, UNCTAD, SADC and the ACF;
- > participating in staff exchanges with other competition agencies;
- > attending both local and international training courses;
- > developing training courses with local tertiary institutions;
- > establishing a graduate trainee program; and

- > arranging networking and development opportunities for competition practitioners within South Africa.

Judiciary Challenges

This area seems to be one of the least recurring challenges for the competition authorities that participated in both exercises: 2006 and 2019. Only one competition authority reported that this problem continues to be recurrent.

For the Barbados Fair Trade Commission, this remains an issue of the utmost importance, due to past experiences. The Commission has collaborated with several funding institutions who have recognized the deficit and has sought to address this issue. Training was provided for some justices. The Commission has also raised concern at a policy level and has been assured that such training will be a feature for some justices.

Competition Culture Challenges

Although substantial improvements can be found among the respondents to the 2006 survey, the dissemination of the competition culture seems to be one of the main challenges going forward for both the young and more-experienced authorities.

The Croatian Competition Authority stated that the following challenges persist:

- > further building credible enforcement record primarily in combating hard core restrictions of national and EU competition law (such as cartels), and
- > raising competition culture among different market players

Even though the competition culture challenges that Turkish Competition Authority faces remain consistent, due to the efforts that TCA has made during the last 10 years as part of its competition advocacy programs and the improvement of the economy as a whole, the magnitude of these challenges has been greatly reduced.

For example other government agencies have taken steps to ensure that their practices do not distort competition, business community has started to employ more personnel with a deeper understanding of the Competition Law and competition, the society has started to learn how important the agency and competition for their lives is and the informal economy has no longer been a challenge as the government have taken steps to reduce its volume. Therefore, they stated

that even though there are still some competition culture challenges that the agency faces, these challenges have been diminished to an acceptable level.

In an Eastern-Europe Competition Authority mentioned here, only 16 persons working antitrust topics in the Authority and therefore it is difficult to develop sustainable awareness program. In their experience the best results have been achieved by press releases after an infringement decision.

IV. Conclusions

As stated throughout the report, this document aims to be a useful tool to categorize and identify the main challenges that competition authorities face in their first years of competition enforcement, as well as the various concrete actions they take to overcome them.

A next step for young agencies may be to take the most successful actions shared through this document and, being aware of the staff and budgetary constraints, try to replicate them within their jurisdictions. The ICN can serve as a point of contact to share experiences in this regard.

For both the more experienced authorities and international organizations, this report provides a brief compilation of actions and programs that young authorities regard as important and useful. This can be a first step in replicating these successful efforts –or more comprehensive ones– within other jurisdictions that require that type of assistance.

Legislative Challenges

Over time, more experienced agencies have been able to advocate for amendments for their respective legislations in order to adequately-address the more common *modus operandi* of the anticompetitive observed behavior in their jurisdictions. As part of their learning curve, younger agencies therefore must continue to review their individual legislations with each new experience to promote that such legislations are effective and that they address the practicalities and peculiarities of their domestic business practices and industry circumstances.

Most agencies responding to the survey indicated that they were seeking to or had over time advocated for their legislative bodies to incorporate certain amendments into their legislation. In practice, it can be observed that all agencies have struggled at some point with inadequacies in their respective regulatory frameworks, and this challenge is kind of challenge is largely solvable through effective advocacy actions.

Policy-Related Challenges

Consistent with the 2006 findings, the most difficult aspect of this challenge is addressing those circumstances where other legislation that was enacted prior to the introduction of the Competition Law and policies already sanctioned or condoned practices inconsistent with the

principles of competition, and also created conflict regarding 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 jurisdictions have been able to achieve some success in said circumstances through advocacy in the form of dialogue. The efforts of certain jurisdictions are especially-noteworthy in their MOU policy which they have developed with specific regulators.

Resources-Related Challenges

Few of the reporting agencies appeared to be completely-satisfied with the amount of capital resources it was afforded. Some agencies have objectively-determined that their resources relative to their peers or regarding their country's overall budget is quite limited. The lack of support has meant generally that 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 allocating them while retaining an image of independence and transparency.

Some agencies appear to have achieved a somewhat limited degree of success through the 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 can lobby their finance ministries for additional resources, but mostly, they must be prudent financial managers whilst finding innovative methods to manage their allocations and apply for international assistance in order to achieve closer-to-optimal results.

Staff-Expertise-Related Challenges

The challenge of limited highly skilled human resources is quite common and most problematic across agencies, notwithstanding the geographic location. It has therefore been one of the areas to which agencies have conducted vast efforts to foster incentive structures capable of attracting and retaining qualified personnel.

Due to some factors, such as high turnover, scarcity of overall competition expertise and the dynamics of recruiting and retraining personnel, the staff must continually be exposed to *ad hoc* capacity-building efforts. Technical assistance programs have generally had their most

comprehensive effect on solving this challenge of training professionals of young authorities. Most agencies indicated that they have at some time used the expertise of foreign competition authorities such as the US Department of Justice, the US Federal Trade Commission or the Mexican Federal Economic Competition Commission. Other agencies have also heavily-relied on the support of international organizations, such as the OECD, UNCTAD, the European Union, and the International Competition Network.

Judiciary Challenges

As recognized in the 2006 report, since the judiciary plays a crucial role in competition matters in all jurisdictions, counting with a judiciary that understands concepts and goals of competition policy is an important asset. The training of the judiciary represents a significant challenge for young agencies. This is an opportunity area for competition authorities and international organizations to conduct advocacy and joint-training initiatives, observing the competences and faculties of each of the actors involved.

Several jurisdictions have indicated that in their attempt to foster a competition culture within their judiciary, authorities often expose court members to *ad hoc* workshops and seminars provided by leading academics and professionals, in order to keep staff members and competition appeal court justices aware of competition law developments and its impact in their jurisdiction.

Competition Culture Challenges

The vast majority of responding young agencies experience competition-culture challenges of varying degrees. The depth of the challenge differs depending on the level of development of the agency and the historical background from which it has emerged.

Several agencies have developed comprehensive and systematic programs for public awareness. Other jurisdictions have set in place specific programs which could be compared and shared whenever appropriate with their counterparts. It is important to note that all successful programs have sought to embrace the media and academia in a quite substantial manner.

V. Acknowledgements

The foremost gratitude is directed towards the different colleagues of the competition authorities who contributed their time and effort to the preparation of this report. Without your valuable contributions this exercise would not have been possible.⁴ Special gratitude also deserves the ICN Chair, and President of the Bundeskartellamt, Mr. Andreas Mundt for trusting in the completion of the document, and the ICN Secretariat from the Canada Competition Bureau, Mr. Nigel Caesar for greatly-assisting in the logistics and monitoring of the document.

The project was coordinated by the Mexican Federal Economic Competition Commission (COFECE), particularly, by the ICN Vice-Chair for Younger Agencies and Regional Diversity and COFECE Chairwoman, Ms. Alejandra Palacios, under the supervision of Chief of Staff, Mr. David Lamb, with the direction of Ms. Carolina Garayzar, Deputy Director-General for International Affairs and drafted by Mr. Omar Quiroga, Deputy Director for International Analysis.

⁴ The complete list of jurisdictions that participated in this project can be found in Annex a) List of responding authorities.

VI. Annexes

a) List of respondent authorities

No.	Response Date	Jurisdiction
1	July 2018	Belgium
2	July 2018	Turkey
3	July 2018	Panama
4	July 2018	Kenya
5	July 2018	Uruguay
6	July 2018	Argentina
7	July 2018	Bulgaria
8	July 2018	Latin-American Competition Authority
9	July 2018	Albania
10	July 2018	Curaçao
11	August 2018	Croatia
12	August 2018	Eastern-European Competition Authority
13	August 2018	Barbados
14	August 2018	North-African Competition Authority
15	August 2018	Indonesia
16	August 2018	Colombia
17	August 2018	Brazil
18	August 2018	Central-Europe Competition Authority
19	August 2018	Ukraine
20	August 2018	Latvia
21	August 2018	India
22	August 2018	Eastern-European Competition Authority
23	August 2018	Pakistan
24	August 2018	Eastern-European Competition Authority
25	August 2018	South Africa
26	September 2018	Slovenia
27	September 2018	Spain

b) Survey Circulated

ICN Vice-Chair for Younger Agencies and Regional Diversity, Report Update, *Lessons to Be Learnt from the Experiences of Young Competition Agencies*

Background

According to the ICN Operational Framework, the ICN can have up to two Vice Chairs. In June 2016, Ms. Alejandra Palacios, Chairwoman of the Mexican Federal Economic Competition Commission (COFECE), was appointed to undertake the role, replacing Vinicius Marques, President of the Brazilian Administrative Council for Economic Defense.

In 2018, Mr. Toh Han Li, Chief Executive of the Competition and Consumer Commission of Singapore was appointed as ICN Vice-Chair for Communication, in replacement of Mr. Chris Fonteijn, who was Chairman of the Netherlands Authority for Consumers and Markets.

Together, both Vice Chairs have undertaken actions on essential topics to the ICN. Alejandra Palacios has focused on fostering younger agencies engagement and regional diversity, while Toh Han Li has focused on finalizing the development the new ICN website and various communication channels, such as social media and others.

Recognizing the variety and depth of the challenges faced by young competition agencies as they seek to enforce competition law, and considering the need to discuss and address these challenges, in 2006, the former ICN Competition Policy Implementation Working Group launched a Survey and conducted a report entitled *Lessons to Be Learnt from the Experiences of Young Competition Agencies*.⁵ The survey was launched to 47 different jurisdictions, obtaining 20 answers.

The present survey is an effort to update the report, with the aim of deepening the 12-year-old findings and discovering if the challenges faced by younger agencies persist, or whether progress can be found, as well as to identify new challenges considering the nuances of the digital economy, new technologies and the dynamic environment in which competition agencies are now developing in. Results of this survey aim to provide insights to young agencies on how other jurisdictions address similar situations.

⁵ The complete report and its findings are available through the following link:
<http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf>

General Information⁶

Country name:

Region:

- Asia
- Africa
- North America
- Latin America
- Europe
- Oceania

Agency Name:

Year of enactment of competition enforcement legislation (number):

Year of creation of the competition authority (number):

Official responsible for responding the survey (Name and Position)

Email of the official responsible for responding the survey

Do you wish the name of your agency to be showed in the final report?

- Yes, we wish the name, region and findings to be displayed in the report
- No, we wish only for the findings and the region to be displayed in the report

⁶ Information collected will be used only for statistical purposes and for drafting the final report, personal data will not be published. Competition agencies have the ability to remain anonymous if they so wish, by checking the corresponding box.

Survey

The 2006 Report identifies the most common challenges faced by the emerging agencies who responded to the survey. Each of these challenges is summarized below along with examples of both the challenges and measures adopted by the responding authorities to address the particular obstacle.⁷

In your response, please describe whether and how your agency has experienced similar or different challenges, and how your agency has overcome them. Please note that there is no limit for your answers for this survey; on the contrary, the more detailed, the more helpful the answers will be to better-understand the roots and nuances of the mentioned situations in your jurisdiction, hence, the findings on the report will be more detailed and useful to other jurisdictions' authorities.

⁷ Examples shown in this survey are representative of the type of responses that were gathered for the 2006 Report. If you wish to know the specific answers, please refer to the original document, available at:
<http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf>

1. Legislative challenges

Summary

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 behavior.

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.

Challenges identified in the 2006 Report

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.

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.

Are there any legislative challenges in your jurisdiction? (namely implementation of laws/acts/regulations that limit/hinder agency activities or powers, mandatory periods, agency independence or investigative powers).

- Yes
- No

If yes, please describe in detail the legislative challenges that your jurisdiction faces (How these challenges impact the agency performance, how the agency could enhance its works without these barriers).

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), or the inability to effectively enforce certain provisions, (e.g. lacked authority to undertake investigations on the agency's 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.

How your agency overcomes this type of challenges? (What kind of actions or internal policies are carried out in your jurisdiction for, despite these legislative challenges, undertake competition enforcement in your jurisdiction).

2. Policy-related challenges

Summary

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.

Challenges identified in the 2006 Report

Incoherent Policies Between Competition Authorities, Regulatory Regimes and Other Government Agencies

The issue of incoherent policies refers 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 regarding 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.

Are there any policy-related challenges in your jurisdiction? (namely policies and actions that must be carried out and that hinder the performance of the competition agency, coordination with other government entities and legislative bodies).

- Yes
- No

If yes, please describe in detail the policy-related challenges that your jurisdiction faces (how these challenges impact the agency performance, how the agency could enhance its works without these barriers).



Measures adopted to treat the challenge of Incoherent Policies

The measures taken to address this challenge have focused 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.

How your agency overcomes this type of challenges? (What kind of actions or internal policies are carried out in your jurisdiction for, despite these policy-related challenges, undertake competition enforcement in your jurisdiction. Are advocacy actions carried out?).

3. Resources-related challenges

Summary

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.

Challenges identified in the 2006 Report

Limited Capital Resources

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.

Are there any resources-related challenges in your jurisdiction? (namely material, financial or budgetary constraints that hinder the competition agency performance to investigate possible competition offenses).

- Yes
- No

If yes, please describe in detail the resources-related challenges that your jurisdiction faces (What are the main competition enforcement activities that are limited by lack of budget, what actions would be carried out if these barriers were not a challenge).

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 reorganizing 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.

How your agency overcomes this type of challenges? (What kind of actions or internal policies are carried out in your jurisdiction for, despite these resources-related challenges, undertake competition enforcement in your jurisdiction).

4. Personnel-experience challenges

Summary

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.

Challenges identified in the 2006 Report

Limited Experienced Human Resource Capacity

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.

Are there any personnel-experience challenges in your jurisdiction? (namely staff undertrained in cartel enforcement and/or merger review, what are the main competition topics in which there are opportunity areas in your staff?).

- Yes
- No

If yes, please describe in detail the resources-related challenges that your jurisdiction faces (What are the main competition enforcement activities that are limited by lack of training, what kind of training would help solve this challenge? Translation of key documents, Workshops, Webinars?).

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 programs, or job attachments for their staff. Technical Assistance has also been a key means of addressing this challenge.

How your agency overcomes this type of challenges? (What kind of actions or internal policies are carried out in your jurisdiction for, despite these training-related challenges, undertake competition enforcement in your jurisdiction).

5. Judiciary challenges

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.

Challenges identified in the 2006 Report

Untrained Judiciary

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.

Are there any judiciary challenges in your jurisdiction? (Judicial bodies that are not trained or does not know in depth the importance and nuances of competition enforcement).

- Yes
- No

If yes, please describe in detail the judiciary challenges for lack of training that your jurisdiction faces (What are the main competition enforcement activities that are limited by lack of training of the judiciary bodies, what kind of training would help solve these challenges? Does your agency undertake advocacy/training actions?).

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 focused and organized programs to improve the skills of their local judiciary.

How your agency overcomes this type of challenges? (What kind of actions or internal policies are carried out in your jurisdiction for, despite these training-related challenges of the judicial branch, undertake competition enforcement in your jurisdiction).

6. Competition culture challenges

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.

Challenges identified in the 2006 Report

Lack of Competition Culture

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.

Are there any competition culture challenges in your jurisdiction? (Is there a lack of knowledge regarding the benefits of competition among the general public, academia and businesses in your jurisdiction?).

- Yes
- No

If yes, please describe in detail. (What is your perception on the knowledge of the general public, academia and business regarding the benefits of competition in your jurisdiction? Does the competition agency carry out advocacy efforts to promote awareness? What kind of actions are planned to be carried out in the short and medium terms?).

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.

Several agencies have developed quite elaborate and systematic programs for public awareness. The European agencies have reported the best structured programs, 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 programs which could be compared and shared where appropriate with their counterparts. It is important to note that the all successful programs have sought to embrace the media quite substantially.

How your agency overcomes this type of challenges? (What kind of actions or policies are carried out in your jurisdiction for, despite these competition culture challenges, undertake competition enforcement in your jurisdiction).

7. General Comments

Please share with us any additional comments regarding your experiences and / or the purpose of this document: what other types of challenges can be found in your jurisdiction? What kind of findings do you believe it would be useful / fruitful to present through the final report?

Please submit your responses and / or queries regarding the project no later than July 13th, 2018, to cgarayzar@cofece.mx and a.oquiroya@cofece.mx from COFECE's International Affairs Unit.

Thank you!