



FORUMS

Global Forum on Competition 2004

Introduction

This publication includes the documentation presented at the fourth Global Forum on Competition held in Paris in February 2004.

Overview

The programme of the Forum included four main sessions on various countries' experiences with country reviews and the relevance of such experience for developing countries, challenges/obstacles faced by competition authorities in achieving greater economic development through the promotion of competition, a peer review of Russia's competition law and policy, and how enforcement efforts against anti-competitive conduct have contributed to economic development.

Related Topics

Peer Review of Chinese Taipei (2006)

Peer Review of Turkey (2005)

Peer Review of Russia (2004)

Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004)

Peer Review of South Africa (2003)

OECD GLOBAL FORUM ON COMPETITION

— 12-13 February 2004 —

PROGRAMME

SESSION I. REGULATORY REFORM: STOCK-TAKING OF EXPERIENCE WITH REVIEWS OF COMPETITION LAW AND POLICY IN OECD COUNTRIES – AND THE RELEVANCE OF SUCH EXPERIENCE FOR DEVELOPING COUNTRIES

Stock-taking of Experience with Reviews of Competition Law and Policy 
-- Suggested Issues and Questions for Discussion – (Note by the OECD Secretariat)

The General Strategy of a Competition Regulator – An Introductory Framework (Contribution by Mr. Allan Fels, Australia)

SESSION II. CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Background note by the OECD Secretariat 

Postscript note by the OECD Secretariat 

Country contributions:

Albania
Algeria 
Brazil (CADE)
Cameroon 
China
Indonesia
Jamaica
Japan
Kenya

Mexico
Pakistan
Poland
Romania
Russian Federation
South Africa
Tanzania
Thailand
Tunisia 
United States

Other contributions:

Mr. Khelifa Tounekti (Tunisia) 
WAEMU

SESSION III . PEER REVIEW OF RUSSIA'S COMPETITION LAW AND POLICY

Competition law and Policy in Russia (Note by the OECD Secretariat)

SESSION IV. HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Background Note by the OECD Secretariat 

Postscript Note by the OECD Secretariat 

Contribution by Mr. Claes Norgren (Lead Discussant, Sweden)

Country Contributions:

Bulgaria
Jamaica
Japan
Lithuania
Pakistan
Poland
Romania

Russian Federation
South Africa
Sweden
Chinese Taipei
Thailand
Ukraine 
United State

Unclassified

CCNM/GF/COMP/A(2004)1/REV1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Jan-2004

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

**CCNM/GF/COMP/A(2004)1/REV1
Unclassified**

OECD Global Forum on Competition

PROVISIONAL FORUM AGENDA

**To be held at the Château de la Muette, 2 rue André-Pascal, Paris 16th
on 12 and 13 February 2004, starting at 9:30 am**

JT00157485

**Document complet disponible sur OLIS dans son format d'origine
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English - Or. English

GLOBAL FORUM ON COMPETITION

12 and 13 February 2004

THURSDAY 12 FEBRUARY

9:30-10:10 OPENING REMARKS

Richard **HECKLINGER**
OECD Deputy Secretary General

INTRODUCTORY COMMENTS

Frédéric **JENNY**
Chairman
Competition Committee
(France)

10:10-10:30 KEYNOTE SPEECH

Richard **MANNING**
Chairman
Development Assistance Committee
(United Kingdom)

10:30-1:00

SESSION I

**REGULATORY REFORM: STOCK-TAKING
OF EXPERIENCE WITH REVIEWS OF COMPETITION
LAW AND POLICY IN OECD COUNTRIES – AND THE RELEVANCE
OF SUCH EXPERIENCE FOR DEVELOPING COUNTRIES**
(open to all)

Chair: Frédéric **JENNY**
Chairman
Competition Committee
(France)

10:30-10:45 PRESENTATION BY THE SECRETARIAT

Issues Paper

CCNM/GF/COMP(2004)1

10:45-12:45 GENERAL DISCUSSION

**12:45-1:00 THE GENERAL STRATEGY OF A COMPETITION
REGULATOR – AN INTRODUCTORY FRAMEWORK**

Allan **FELS**
Dean
The Australian and New Zealand School of Government
(ANZSOG)

1:00-2:30

OECD BUFFET LUNCH (CHÂTEAU, ROOM GEORGE MARSHALL)

2:30-6:00

**SESSION II CHALLENGES/OBSTACLES FACED BY COMPETITION
AUTHORITIES IN ACHIEVING GREATER ECONOMIC
DEVELOPMENT THROUGH THE PROMOTION
OF COMPETITION**

(open to all)

Chair: Zoltan **NAGY**
President
Competition Authority
(Hungary)

2:30-2:40 PRESENTATION BY THE SECRETARIAT

Background Note CCNM/GF/COMP(2003)6
Postscript Note CCNM/GF/COMP(2004)3

2:40-3:00 Lead Discussants

Bill **KOVACIC**
General Counsel
Federal Trade Commission
(United States)

Khelifa **TOUNEKTI**
Director General
Competition, Trade and Economic Investigations
Trade Ministry
(Tunisia)

3:00-5:00 BREAKOUT SESSIONS (3 Sub-Groups)

5:00-5:15

COFFEE BREAK

5:15-5:30 REPORTS BY CHAIRS OF SUB-GROUPS

Zoltan **NAGY**
Chairman
Competition Authority
(Hungary)

Peter **MUCHOKI NJOROGE**
Commissioner
Monopolies and Price Commission
(Kenya)

Sally **SOUTHEY**
Assistant Commissioner of Competition
Competition Bureau
(Canada)

5:30-6:00 GENERAL DISCUSSION

Written Contributions

Albania	CCNM/GF/COMP/WD(2004)20
Algeria (*)	CCNM/GF/COMP/WD(2004)21
Brazil (CADE)	CCNM/GF/COMP/WD(2004)4
Cameroon (*)	CCNM/GF/COMP/WD(2004)5
China	CCNM/GF/COMP/WD(2004)16
Indonesia	CCNM/GF/COMP/WD(2004)22
Jamaica	CCNM/GF/COMP/WD(2004)9
Japan	CCNM/GF/COMP/WD(2004)23
Kenya	CCNM/GF/COMP/WD(2004)8
Mexico	CCNM/GF/COMP/WD(2004)24
Pakistan	CCNM/GF/COMP/WD(2004)17
Romania	CCNM/GF/COMP/WD(2004)6
Russian Federation	CCNM/GF/COMP/WD(2004)2
South Africa	CCNM/GF/COMP/WD(2004)10
Tanzania	CCNM/GF/COMP/WD(2004)12
Tunisia (*)	CCNM/GF/COMP/WD(2004)15

(*) Available in English and French.

FRIDAY 13 FEBRUARY

10:00-1:00

**SESSION III PEER REVIEW OF RUSSIA'S COMPETITION
LAW AND POLICY**

(open only to economy representatives
and intergovernmental organisations)

Chair: Frédéric JENNY
Chairman
Competition Committee
(France)

Lead Reviewers:

- European Commission
- Brazil

For discussion:

Competition Law and Policy in Russia

Note by the Secretariat

CCNM/GF/COMP(2004)2

1:00-2:30

OECD BUFFET LUNCH (CHÂTEAU, ROOM GEORGE MARSHALL)

2:30-5:00

**SESSION IV HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE
CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

(open to all)

Chair: George LIPIMILE
Executive Director
Competition Commission
(Zambia)

2:30-2:40 PRESENTATION BY THE SECRETARIAT

Background Note
Postscript Note

CCNM/GF/COMP(2003)7
CCNM/GF/COMP(2004)4

2:40-3:00 Lead Discussants:

Mr. Claes **NORGREN**
Director-General
Competition Authority
(Sweden)

Mr. Wen-Yeu **WANG**
Commissioner
Fair Trade Commission
(Chinese Taipei)

3:00-5:00 GENERAL DISCUSSION

Written Contributions

Jamaica	CCNM/GF/COMP/WD(2004)19
Japan	CCNM/GF/COMP/WD(2004)13
Lithuania	CCNM/GF/COMP/WD(2004)1
Pakistan	CCNM/GF/COMP/WD(2004)18
Poland	CCNM/GF/COMP/WD(2004)25
Romania	CCNM/GF/COMP/WD(2004)7
Russian Federation	CCNM/GF/COMP/WD(2004)3
South Africa	CCNM/GF/COMP/WD(2004)11
Sweden	CCNM/GF/COMP/WD(2004)28
Chinese Taipei	CCNM/GF/COMP/WD(2004)26
Thailand	CCNM/GF/COMP/WD(2004)27
Ukraine*	CCNM/GF/COMP/WD(2004)14

5:00-6:00

SESSION V

EVALUATION, FUTURE WORK AND CLOSING REMARKS

(open only to economy representatives
and intergovernmental organisations)

Chair: Frédéric **JENNY**
Chairman
Competition Committee
(France)

5:10-5:55 Evaluation and Future Work

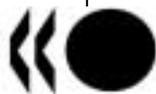
5:55-6:00 Closing Remarks

Eric **BURGEAT**
Director
Centre for Co-operation with non members

(*) Available in English and French.

Non classifié

CCNM/GF/COMP/A(2004)1/REV1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Feb-2004

Français - Or. Anglais

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

**CCNM/GF/COMP/A(2004)1/REV1
Non classifié**

Forum mondial de l'OCDE sur la concurrence

ORDRE DU JOUR PROVISOIRE

**qui se tiendra au Château de la Muette, 2 rue André Pascal, Paris 16ème
les 12 et 13 février 2004, commençant à 9 h 30**

JT00157881

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

Français - Or. Anglais

FORUM MONDIAL DE L'OCDE SUR LA CONCURRENCE

12 et 13 février 2004

JEUDI 12 FEVRIER

09 h 30 - 10 h 10 ALLOCUTION D'OUVERTURE

Richard **HECKLINGER**
Secrétaire-général adjoint
OCDE

INTRODUCTION

Frédéric **JENNY**
Président
Comité de la concurrence
(France)

10 h 10 - 10 h 30 EXPOSE LIMINAIRE

Richard **MANNING**
Président
Comité de l'Aide au Développement
(Royaume-Uni)

10 h 30 - 13 h 00

**SESSION I LA REFORME REGLEMENTAIRE – LES CHAPITRES SUR LA
CONCURRENCE : BILAN DES EXPERIENCES NATIONALES
– ET LA PERTINENCE D'UNE TELLE EXPERIENCE POUR LES
PAYS EN DEVELOPPEMENT (Session ouverte à tous)**

Président : Frédéric **JENNY**
Président
Comité de la Concurrence
(France)

10 h 30 - 10 h 45 PRESENTATION PAR LE SECRETARIAT

Note de discussion CCNM/GF/COMP(2004)1

10 h 45 - 12 h 45 DISCUSSION GENERALE

12 h 45 – 13 h00 **LA STRATEGIE GENERALE D'UNE AUTORITE
REGLEMENTAIRE DE LA CONCURRENCE – UN CADRE
INTRODUCTIF**

Allan **FELS**
Doyen
Ecole des Pouvoirs Publics d'Australie et de Nouvelle Zélande
(ANZSOG)

13 h 00 - 14 h 30 DEJEUNER-BUFFET OFFERT PAR L'OCDE (CHÂTEAU, SALLE GEORGE MARSHALL)

14 h 30 - 18 h 00

SESSION II **LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

(Session ouverte à tous)

Président : Zoltan **NAGY**
Président
Autorité de la Concurrence
(Hongrie)

14 h 30 - 14 h 40 **PRESENTATION PAR LE SECRETARIAT**

Note de référence CCNM/GF/COMP(2003)6
Note complémentaire CCNM/GF/COMP(2004)3

14 h 40 - 15 h 00 **Principaux intervenants**

Bill **KOVACIC**
Conseiller général
Commission Fédérale du Commerce
(Etats-Unis)

Khelifa **TOUNEKTI**
Directeur général
Concurrence, Commerce Intérieur et Enquêtes Economiques
Ministère du Commerce
(Tunisie)

15 h 00 - 17 h 00 **REUNIONS DES SOUS-GROUPES (3 sous-groupes)**

17 :00 – 17 :15 PAUSE-CAFÉ

17 h 15 – 17 h 30 RAPPORTS PAR LES PRESIDENTS DES SOUS-GROUPES

Zoltan **NAGY**
Président
Autorité de la Concurrence
(Hongrie)

Peter **MUCHOKI NJOROGÉ**
Commissaire
Commission des monopoles et des prix
(Kenya)

Sally **SOUTHEY**
Commissaire adjoint à la concurrence
Bureau de la concurrence
(Canada)

17 h 30 - 18 h 00 DISCUSSION GENERALE

Contributions écrites

Afrique du Sud	CCNM/GF/COMP/WD(2004)10
Albanie	CCNM/GF/COMP/WD(2004)20
Algérie *	CCNM/GF/COMP/WD(2004)21
Brésil (CADE)	CCNM/GF/COMP/WD(2004)4
Cameroun	CCNM/GF/COMP/WD(2004)5
Chine	CCNM/GF/COMP/WD(2004)16
Indonésie	CCNM/GF/COMP/WD(2004)22
Jamaïque	CCNM/GF/COMP/WD(2004)9
Japan	CCNM/GF/COMP/WD(2004)23
Kenya	CCNM/GF/COMP/WD(2004)8
Mexico	CCNM/GF/COMP/WD(2004)24
Pakistan	CCNM/GF/COMP/WD(2004)17
Roumanie	CCNM/GF/COMP/WD(2004)6
Russie	CCNM/GF/COMP/WD(2004)2
Tanzanie	CCNM/GF/COMP/WD(2004)12
Tunisie	CCNM/GF/COMP/WD(2004)15

(*) Disponible en anglais et en français

VENDREDI 13 FEVRIER

10 h 00 – 13 h 00

**SESSION III EXAMEN PAR LES PAIRS DU DROIT ET DE LA POLITIQUE
DE LA CONCURRENCE DE LA RUSSIE**

(session ouverte uniquement aux pays représentés
et aux organisations intergouvernementales)

Président : Frédéric **JENNY**
Président
Comité de la Concurrence
(France)

Principaux examinateurs :

- Commission européenne
- Brésil

Pour discussion

Droit et politique de la concurrence en Russie

Note par le Secrétariat

CCNM/GF/COMP(2004)2

13 h 00 - 14 h 30

DEJEUNER-BUFFET OFFERT PAR L'OCDE (CHÂTEAU, SALLE GEORGE MARSHALL)

14 h 30 – 17 h 00

**SESSION IV COMMENT LE PROGRES ECONOMIQUE S'EST ACCELERE
EN AGISSANT CONTRE LES COMPORTEMENTS PRIVES
ANTICONCURRENTIELS (Session ouverte à tous)**

Président: George **LIPIMILE**
Directeur Exécutif
Commission de la Concurrence
(Zambie)

14 h 30 - 14 h 40 **PRESENTATION PAR LE SECRETARIAT**

Note de référence
Note complémentaire

CCNM/GF/COMP(2003)7
CCNM/GF/COMP(2004)4

14 h 40 - 15 h 00 Principaux intervenants

Mr. Claes **NORGREN**
Directeur général
Autorité de la concurrence
(Suède)

M. Wen-Yeu **WANG**
Commissaire
Fair Trade Commission
(Taipei chinois)

15 h 00 - 17 h 00 DISCUSSION GENERALE

Contributions écrites

Afrique du Sud	CCNM/GF/COMP/WD(2004)11
Taipei chinois	CCNM/GF/COMP/WD(2004)26
Jamaïque	CCNM/GF/COMP/WD(2004)19
Japan	CCNM/GF/COMP/WD(2004)13
Lithuanie	CCNM/GF/COMP/WD(2004)1
Pakistan	CCNM/GF/COMP/WD(2004)18
Pologne	CCNM/GF/COMP/WD(2004)25
Roumanie	CCNM/GF/COMP/WD(2004)7
Russie	CCNM/GF/COMP/WD(2004)3
Suède	CCNM/GF/COMP/WD(2004)28
Thaïlande	CCNM/GF/COMP/WD(2004)27
Ukraine ^(*)	CCNM/GF/COMP/WD(2004)14

17 h 00 - 18 h 00

SESSION V EVALUATION, TRAVAUX FUTURS ET ALLOCUTION DE CLÔTURE
(session ouverte uniquement aux pays représentés et aux organisations
intergouvernementales)

Président : Frédéric JENNY
Président
Comité de la Concurrence
(France)

17 h 10 – 17 h 55 Evaluation et travaux futurs

17 h 55 – 18 h 00 Allocution de clôture

Eric **BURGEAT**
Directeur
Centre pour la Coopération avec les pays non-Membres

^(*) Disponible en anglais et en français.

Non classifié

CCNM/GF/COMP(2004)1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

17-Feb-2004

Français - Or. Anglais

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

CCNM/GF/COMP(2004)1
Non classifié

Forum mondial de l'OCDE sur la concurrence

**REFORME DE LA RÉGLEMENTATION : BILAN DES EXAMENS DU DROIT
ET DE LA POLITIQUE DE LA CONCURRENCE DANS LES PAYS DE L'OCDE,
ET INTÉRÊT DE CETTE EXPÉRIENCE POUR LES PAYS EN DÉVELOPPEMENT**

Note du Secrétariat

La présente note du Secrétariat est soumise POUR EXAMEN dans le cadre de la Session I du Forum mondial sur la concurrence qui se tiendra les 12 et 13 février 2004.

JT00158422
ta21579

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Français - Or. Anglais

BILAN DES EXAMENS DU DROIT ET DE LA POLITIQUE DE LA CONCURRENCE

-- Propositions de questions à examiner --

1. Introduction

1. Les politiques de la concurrence et les institutions chargées de ce volet de l'action publique de plus de vingt pays¹ font depuis 1998 l'objet d'examens mutuels approfondis. La plupart de ces examens ont été menés en liaison avec le programme horizontal de l'OCDE consacré à la réforme de la réglementation. Ce projet fournit aujourd'hui l'occasion d'examiner les leçons qui ont pu être tirées de ce processus. On trouvera en annexe à la présente note une synthèse des principales conclusions de ces examens, établie à partir d'un document en cours de rédaction à l'intention du Groupe spécial de l'OCDE sur la politique de la réglementation, qui s'appête à réexaminer les recommandations générales sur la réforme et la politique de la réglementation formulées dans le *Rapport sur la réforme de la réglementation* publié en 1997 par l'OCDE². Ce rapport de 1997 a servi de cadre aux examens du Comité de la concurrence.

2. Ces examens ont été menés selon plusieurs axes. Outre qu'ils se sont penchés sur le droit de la concurrence des pays concernés et sur les institutions chargées de son application, les examinateurs se sont attachés aux fondements de la politique et des institutions de la concurrence en les resituant dans le contexte des traditions commerciales, économiques, politiques et juridiques de ces pays. Ils ont également analysé la relation entre les institutions chargées de la réglementation et la concurrence, ainsi que les mesures de sensibilisation au bien-fondé de la politique de la concurrence. D'un côté, l'interaction entre politique de la concurrence et réglementation est affaire de procédure et de technique, mais de l'autre, elle suppose d'apprécier l'importance de la concurrence et des marchés dans la politique économique par rapport à d'autres objectifs et à d'autres domaines de l'action publique. Les dispositions de fond du droit de la concurrence et les procédures retenues pour sa mise en œuvre ont soulevé un intérêt considérable au cours des examens mutuels ; toutefois, formuler des recommandations à ce niveau de détail est impossible en pratique dans le contexte de la réforme de la réglementation, et en conséquence, le document de référence s'est moins attaché à ces questions. De toute façon, les différences de droit et de procédures apparaissent finalement moins importantes que les différences de cultures économiques et politiques lorsqu'il s'agit d'expliquer les variations observées dans l'efficacité de la mise en œuvre.

3. En dépit de ces différences, les examens ont mis en lumière de vastes zones de similitudes. D'une manière générale, le droit matériel prévoit des règles similaires pour des comportements identiques, et les institutions chargées de faire appliquer la législation ont généralement des formes comparables. D'une manière surprenante, l'étude a montré que la portée de la politique de la concurrence était également similaire, dans la mesure où dans la majorité des cas, ce sont les mêmes secteurs d'activité qui, dans tous les pays examinés, font l'objet d'exemptions ou d'un traitement spécial ou bien qui suscitent les mêmes problèmes en matière d'application et de défense de la loi. Ces similarités tiennent d'une part à la similitude des contextes juridiques et du développement économique dans les pays Membres examinés, mais même dans les pays qui diffèrent plus de ce point de vue des pays Membres de l'OCDE que les pays Membres ne diffèrent entre eux, la plupart des conclusions tirées de ces examens reste tout de même utiles et instructives.

4. En particulier, la plupart des pays examinés ont été le théâtre de toute une série de programmes ambitieux de réforme administrative, économique ou politique. A chaque fois, des programmes de réforme complets fondés sur la concurrence ont eu pour objectif de stimuler le développement et d'améliorer la performance économique. Plusieurs des pays examinés ont connu des bouleversements majeurs, passant d'un régime de planification centralisée à une économie de marché. Il pourrait être intéressant pour d'autres pays amenés à relever des défis de la même ampleur de savoir comment la politique de la concurrence a pu contribuer à des changements de cette ampleur.

2. Propositions de questions à examiner

5. Les recommandations de 1997 et les explications qui les accompagnent supposent que la politique de la concurrence bénéficie d'une position privilégiée dans le domaine de la réglementation. Les questions ci-dessous étudient ce que cela pourrait signifier. Cela signifie-t-il que l'on doit partir du postulat selon lequel des solutions orientées sur le marché sont les mieux à même de résoudre les problèmes ? Quelle devrait être la force de ce postulat ? Est-il réaliste d'exiger que d'autres politiques ne puissent être mises en œuvre que par des moyens qui n'exercent sur la concurrence que la distorsion minimale nécessaire pour y parvenir ? Si la réponse est négative, quelle marge de distorsion devrait-on autoriser ? Et qui devrait en décider ?

2.1 *Champ d'application de la politique de la concurrence : exclusions, exemptions et traitement spécial*

6. La mise en œuvre d'une réforme fondée sur la concurrence repose sur le postulat selon lequel la concurrence est un principe général d'organisation de l'économie. Il s'ensuit que la première recommandation de réforme concernant le droit de la concurrence est qu'elle devrait s'appliquer de la manière la plus large possible : "Comblent les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces." Ceci ne signifie pas que seule la concurrence compte, mais qu'il conviendra de justifier toutes les situations dans lesquelles un monopole ou une entente serait toléré. La réglementation peut parfois encourager, voir imposer, un comportement ou des conditions qui constitueraient autrement une violation du droit de la concurrence. Par exemple, la réglementation peut autoriser une coordination au niveau des prix, empêcher la publicité ou tout autre moyen utilisé par la concurrence, ou imposer une division territoriale du marché. Le principal motif de préoccupation reste la législation, ou toute autre mesure officielle de portée générale accordant un traitement spécial. Cela étant, les affirmations selon lesquelles le droit et la politique de la concurrence doivent être mis en balance face à d'autres législations et politiques peuvent être formulées dans d'autres contextes, y compris dans celui de l'application du droit de la concurrence lui-même.

- La portée et la nature des exclusions et des régimes spéciaux sont d'une manière générale comparables, c'est-à-dire qu'on les retrouve pour l'essentiel dans les mêmes secteurs et pour les mêmes types de comportement dans la plupart des pays examinés. Parmi les exemples communs, on peut citer l'agriculture et les coopératives, les services de l'emploi, les droits de propriété intellectuelle et droits d'exécution d'œuvres, les secteurs des infrastructures, les médias et les organismes de réglementation des services professionnels. Que conclure de ces similarités ? Quelles sont celles qui démontrent qu'à chaque fois que des problèmes identiques de lutte contre les mesures anti-concurrentielles ont été relevés, ils appellent des réformes partout ? Qu'implique le fait que des objectifs et valeurs semblables soient considérés partout comme plus importants dans ces secteurs ?
- L'instauration de règles *de minimis*, qui ont pour effet d'exempter des entreprises ou des transactions de taille modeste, peut constituer un moyen utile et transparent d'économiser

les ressources affectées à l'application de la législation, mais il est possible d'y adjoindre des définitions et des limites ayant pour effet de protéger certains intérêts privilégiés. La possibilité d'accorder un traitement spécial remet-elle en cause le principe selon lequel le droit de la concurrence s'applique à tous ? Ou bien le fait d'exempter les plus modestes garantit-il au public que la loi s'attachera en priorité aux abus exercés par les entreprises les plus puissantes ?

- Dans presque tous les pays, il est de règle d'exempter tout comportement autorisé ou imposé par une autre loi ou un autre règlement. Seuls quelques pays donnent la priorité à la politique de la concurrence. Faudrait-il établir une règle générale claire privilégiant la politique de la concurrence en cas de conflits en différentes législations ou réglementations ?
- Quelle est la procédure qui permet d'envisager d'exempter une entreprise d'une disposition du droit de la concurrence en se fondant sur d'autres considérations d'action publique ? La meilleure solution consiste-t-elle à confier ce soin aux institutions chargées de faire appliquer le droit de la concurrence, selon les procédures qui leur sont propres, ou bien cette mission devrait-elle être dévolue à une instance extérieure, selon des modalités différentes ?
- Certaines exclusions, notamment celles qui ont pour effet d'inverser certains efforts particuliers de mise en œuvre de la législation, apparaissent comme des opérations spéciales destinées à des secteurs politiquement puissants. Comment la politique de la concurrence peut-elle devenir un principe général et à vocation horizontale si sa portée est fonction d'un certain degré d'interférence politique ?
- Lorsque des intérêts gouvernementaux ou des actions publiques sont en jeu, il est courant que l'application de la politique de la concurrence pose des problèmes. Des activités menées par les pouvoirs publics peuvent donner lieu à des plaintes de la part d'usagers pour cause de monopole, ou de la part de fournisseurs du secteur privé pour concurrence déloyale. Il peut arriver que des fonctionnaires locaux encouragent des comportements non concurrentiels chez des acteurs du secteur privé ou refusent d'accorder des licences, ce qui revient à faire obstacle à l'entrée sur le marché. Comment le droit de la concurrence peut-il contribuer à réduire les failles observées dans le champ de la politique de la concurrence qui résultent du comportement des pouvoirs publics sur le marché ? Quelles leçons peut-on tirer de l'application d'interdictions juridiques à des actions officielles ou à des entités de la sphère publique ? Quelle part doit être faite aux mesures visant à convaincre du bien-fondé de la politique de la concurrence et à la réforme structurelle ?

2.2 Réglementation et déréglementation sectorielle

7. Certains traitements spéciaux ou programmes réglementaires connexes peuvent bien sûr être parfaitement compatibles avec une politique de la concurrence de large portée. Ils peuvent quelquefois constituer un moyen plus efficace d'appliquer des principes de concurrence généraux, en les adaptant à des schémas factuels récurrents. En particulier, dans les cas où le monopole a paru inévitable, la réglementation constitue quelquefois une tentative de contrôler directement le pouvoir de marché, en fixant les prix et en contrôlant les entrées et l'accès au marché. La nécessité de réforme se fait sentir lorsque l'évolution de la technologie ou des modifications intervenant au sein d'autres institutions amène à reconsidérer le postulat de départ, selon lequel la politique de la concurrence ou les institutions chargées de sa mise en œuvre ne seraient pas à même de discipliner le pouvoir de marché. Les auteurs de la réglementation peuvent s'efforcer d'empêcher les ententes ou les abus dans un secteur d'activité, exactement de la même façon que le ferait la politique de la concurrence. Il peut cependant arriver que

différentes instances de réglementation appliquent des normes différentes, et des politiques qui paraissent semblables peuvent aboutir à des résultats distincts.

- Quelles sont les considérations qui entrent en ligne de compte dans les relations entre les institutions en ce qui concerne la mise en œuvre du droit de la concurrence et la réglementation par la politique de la concurrence ? Est-il possible à une autorité réglementaire spécifique à un secteur donné d'appliquer des lois sur la concurrence faites sur mesure pour ce secteur ? Ou bien, si les fonctions sont distinctes, vaut-il mieux que des institutions sectorielles appliquent le même droit positif et les mêmes analyses de fond ?
- Dans quel cas vaut-il mieux regrouper en une seule instance les institutions administratives qui appliquent les lois affectant la concurrence, y compris la réglementation économique des monopoles naturels ? Une telle mesure peut permettre d'économiser des ressources spécialisées, en particulier dans les petits pays. Cela étant, les fonctions de surveillance sectorielle diffèrent de celles de la mise en œuvre a posteriori et nécessitent quelquefois des règles et des procédures différentes.
- Lorsque l'intervention réglementaire est fondée sur un pouvoir de marché dans un secteur réglementé, l'autorité de la concurrence est quelquefois chargée de définir le marché et de déterminer si une entreprise donnée y dispose d'un pouvoir. Est-il suffisant d'obliger les autorités chargées de la réglementation sectorielle à consulter les spécialistes de la concurrence avant de prendre leurs décisions ? L'autorité de la concurrence devrait-elle avoir un contrôle juridique sur ces décisions, ou bien faudrait-il favoriser la cohérence en les soumettant à une instance d'appel commune ?
- Dans les secteurs d'infrastructures, promouvoir l'investissement et le développement peut constituer une préoccupation de poids, en plus de la défense de la concurrence et de l'efficacité. Ces considérations ne sont pas forcément incompatibles, mais les priorités, leur hiérarchisation et les réformes doivent tenir compte des capacités institutionnelles. Quel rôle une instance chargée de la concurrence devrait-il jouer dans l'examen de ces questions ainsi que dans la conception et la mise en œuvre des réformes et de la privatisation des infrastructures ?

2.3 Action publique et mesures de sensibilisation au bien-fondé des principes de la concurrence

8. Les problèmes de concurrence posés par la réglementation commencent souvent là où le pouvoir de mise en œuvre s'arrête. Dans la quasi-totalité des pays examinés, les organismes chargés de la politique de la concurrence s'efforcent de convaincre du bien-fondé d'une réforme des réglementations contraires à la concurrence. Cette fonction est particulièrement importante dans les pays où les institutions chargées d'instaurer un marché concurrentiel sont mal connues. Dans ces situations, l'œuvre de sensibilisation consiste à éduquer le public et les autres parties du gouvernement, et à donner un avis sur les mesures publiques et décisions officielles ayant un impact sur la concurrence. Mais la sensibilisation n'est pas toujours le fait de l'instance chargée de la mise en œuvre. Lorsqu'il existe un bureau ministériel distinct de l'autorité de mise en œuvre, c'est généralement le ministère qui participe au débat sur l'action publique mené au sein du gouvernement.

- A quel moment une autorité de mise en œuvre dispose-t-elle du statut et du pouvoir lui permettant de donner un avis sur des mesures qui sortent du champ de ses compétences en matière de mise en œuvre de la législation ? Faut-il y être autorisé par la loi pour se lancer dans des opérations de sensibilisation ?

- La contribution au débat public d'une instance de la concurrence indépendante est-elle plus crédible, du fait de son autorité et de son savoir-faire ? Ou bien le fait même de participer au débat compromet-il l'indépendance requise pour une mise en œuvre efficace ?
- Pour les autorités de la concurrence relativement jeunes ou encore peu solidement établies, les actions de sensibilisation sont-elles un bon moyen pour attirer l'attention du public sur l'importance de la concurrence ? Ou importe-t-il davantage de prendre des mesures pour faire appliquer la loi ?
- Quelles sont les ressources nécessaires pour mener à bien une action de sensibilisation efficace ? Quel rôle devrait être dévolu au personnel et aux fonctionnaires des autorités concernées et aux consultants et conseillers spécialisés extérieurs ?
- La procédure d'analyse des conséquences de la réglementation est liée aux travaux de sensibilisation et de définition de l'action publique menés à bien par les responsables de la concurrence. S'il existe une procédure systématique permettant d'évaluer et de corriger les réglementations existantes ou d'améliorer la qualité des réglementations en devenir, comment prend-elle la concurrence en compte ? Quel est le rôle des responsables de la politique de la concurrence dans ces processus ? Comment l'analyse des conséquences de la réglementation peut-elle être menée en appliquant le principe des « moyens les moins anti-concurrentiels » ?

2.4 *Institutions et mise en œuvre de la politique de la concurrence*

9. La recommandation d'une mise en œuvre énergique de la législation destinée à lutter contre les collusions, abus de position dominante et fusions anti-concurrentielles suppose l'existence d'institutions de mise en œuvre dynamiques et efficaces. A cet égard, la stature, la crédibilité de l'instance de mise en œuvre, et son indépendance vis-à-vis de toute influence politique, sont des considérations importantes, particulièrement si les décisions doivent être fondées sur les conséquences en termes de concurrence plutôt que mises en balance avec d'autres actions publiques. La politique de la concurrence est menacée par la recherche de rentes : plus grands sont les avantages potentiels que l'on pourrait retirer d'un monopole, plus fortes seront les motivations pour chercher à influencer les responsables de l'action publique en vue d'obtenir ou de sauvegarder ces avantages. Ainsi, il est souvent particulièrement important qu'un organisme chargé d'empêcher les monopoles soit préservé de toute influence dictée par la recherche de rente.

- Dans quasiment tous les pays, des efforts sont déployés pour mettre les applications de la politique de la concurrence à l'abri des pressions politiques, qu'elles émanent du pouvoir législatif ou du gouvernement. En revanche, il arrive que le schéma institutionnel fasse entrer en ligne de compte un point de vue non spécialisé et potentiellement politique dans la procédure de nomination ou dans la structure des institutions chargées de prendre les décisions. Quelle est l'efficacité des mesures couramment utilisées telles que la séparation administrative entre les ministères ou le gouvernement, l'établissement de budgets distincts, l'instauration de mandats à durée déterminée et la protection des mandats ? Quelles leçons peut-on tirer des expériences consistant à confier un pouvoir de décision à des organes qui comptent en leur sein des représentants de groupes d'intérêts ?
- L'obstacle le plus couramment rencontré à une mise en œuvre efficace et vigoureuse est la réticence des tribunaux à imposer des sanctions assez lourdes pour dissuader tout comportement anti-concurrentiel. On a certes vu se dégager une tendance assez nette en faveur de sanctions financières plus lourdes à l'encontre des ententes injustifiables, mais il

reste encore beaucoup à faire. Quelles mesures faudrait-il prendre pour former et persuader les juges et les responsables de l'action publique de l'importance qu'il y a à protéger la concurrence en prévenant et, si nécessaire, en punissant tout comportement susceptible d'y faire obstacle ? Dans quelle mesure d'autres réparations telles que des dommages et intérêts ou actions privées peuvent-elles compléter efficacement la mise en œuvre de la législation par les pouvoirs publics ?

2.5 *Liens avec d'autres politiques visant à favoriser le libre jeu du marché*

10. Parmi les domaines relevant de l'action publique qui sont fréquemment liés à la politique et aux institutions de la concurrence et qui ont en conséquence été souvent évoqués au cours d'un grand nombre d'examen, on peut citer la protection des consommateurs, la concurrence déloyale, les marchés publics, les subventions et aides de l'État, et le commerce international. La plupart, mais non la totalité, des objectifs et conséquences de ces politiques sont généralement considérés comme complémentaires de ceux de la politique de la concurrence, ou pour le moins compatibles avec eux.

- Quels sont les avantages et, à l'inverse, les inconvénients des pratiques consistant à combiner ces fonctions complémentaires avec la mise en œuvre de la politique et du droit de la concurrence, en particulier lorsque les ressources et les savoir-faire sont limités ?

2.6 *Le rôle de la politique de la concurrence dans une réforme à grande échelle*

11. La portée de la réforme sera différente en fonction de la diversité des contextes. Dans certains cas, il peut être nécessaire d'établir en premier lieu des institutions, et non de se contenter de réformer celles qui ne fonctionnent pas comme on l'espérait. Ou bien la réforme peut porter sur la structure de détention, la gouvernance, l'intervention ou la protection plutôt que sur les méthodes permettant de concevoir et d'appliquer la réglementation. Les examens ont montré que les efforts de réforme qui ont été couronnés de succès sont ceux qui comprenaient de solides éléments de politique de la concurrence. Un premier examen avait permis d'entrevoir les raisons qui expliquent le lien entre une réforme fondée sur la concurrence et une amélioration économique à long terme : « une saine concurrence habitue l'économie à s'adapter. » Cette observation a été faite par un représentant officiel d'un pays Membre qui a mené à bien, dans les années 90, un vaste programme de réforme à long terme fondé sur les principes de la concurrence et qui a mis en place pour la première fois de son histoire un système crédible de mise en œuvre du droit de la concurrence.

- La question de savoir sur la culture de la concurrence est assez forte pour servir de fondement à une réforme durable a été posée à plusieurs reprises pendant les examens. Quelles sont les conditions permettant de convaincre les responsables de l'action publique et le public lui-même des liens existant entre concurrence, réforme et développement ?
- Lorsque l'engagement envers la concurrence est peu ferme ou n'a pas encore été mis à l'épreuve, quel est le meilleur moyen de susciter une adhésion et un soutien de grande ampleur ? Est-il prudent, ou nécessaire, de confier à d'autres organismes ou ministères la charge et la mission de protéger et de promouvoir la concurrence ? D'un côté, il existe un risque d'incohérence, et de détournement par des groupes d'intérêt ; de l'autre, le fait de répandre la culture de la concurrence permet de combattre la notion selon laquelle la concurrence serait juste une spécialité technique plutôt qu'un principe fondamental.

NOTES

¹ Les pays examinés dans le cadre du programme de l'OCDE sur la réforme de la réglementation sont : l'Allemagne, le Canada, la Corée, le Danemark, l'Espagne, les Etats-Unis, la Finlande, la France, la Grèce, la Hongrie, l'Irlande, l'Italie, le Japon, le Mexique, la Norvège, les Pays-Bas, la Pologne, la République tchèque, le Royaume-Uni et la Turquie. La plupart des rapports peuvent être consultés sur l'Internet à l'adresse www.oecd.org/comp . L'Afrique du sud et le Chili ont également fait l'objet d'un examen dans le cadre du programme de coopération avec les non-membres. Les rapports sont également disponibles à l'adresse www.oecd.org/comp .

² Le Rapport de 1997 sur la réforme de la réglementation est disponible sur le site www.oecd.org

ANNEXE

1. Le programme horizontal de l'OCDE sur la réforme de la réglementation a conduit le Comité de la Concurrence à procéder à des examens par les pairs approfondis des politiques et institutions de la concurrence de 20 Pays membres. Le Groupe spécial sur la politique de la réglementation (GSPR) a demandé aux Comités de faire le bilan des enseignements tirés de ce processus d'examen, en vue d'un rapport qui doit être présenté au Conseil en 2005.

2. Les recommandations du *Rapport de l'OCDE de 1997 sur la Réforme de la Réglementation* servent de cadre à cette vue d'ensemble. Les thèmes majeurs qui émergent des recommandations générales du *Rapport de 1997* sont respectivement le processus réglementaire, les réformes sectorielles, la mise en œuvre et la sensibilisation à l'impératif de la concurrence. Les 20 examens par pays ont analysé l'historique et le contexte de la politique de la concurrence, les normes de base, les structures institutionnelles et les pouvoirs de mise en œuvre, les exclusions et les problèmes sectoriels spéciaux ; ils ont également analysé les études nationales de la politique de la concurrence, et la question de la sensibilisation à l'impératif de la concurrence. Ces études nationales ont été réalisées selon un format standard, qui a été partiellement motivé par un ensemble de questions analytiques sous-jacentes au projet de 1998 visant à développer des indicateurs sur la qualité de la réglementation.

3. Cette étude se concentre sur les questions touchant le plus étroitement à la réglementation et au processus réglementaire. Elle parvient à la conclusion que les politiques de la concurrence sont plus fortes et plus cohérentes, et que les politiques réglementaires reconnaissent plus clairement la valeur de la concurrence sur le marché, lorsque ces deux politiques se sont mutuellement soutenues pour motiver la réforme, et lorsqu'un système indépendant de mise en œuvre défend les principes de la concurrence contre toute intervention opportuniste. Les recommandations de base du *Rapport de 1997* sont toujours valables, mais les espoirs formulés quant à leur mise en œuvre doivent être réalistes. Bien que la valeur de la concurrence soit largement reconnue, seul un petit nombre de pays s'accordent à reconnaître que les autres politiques doivent être promues par les moyens les moins anticoncurrentiels.

4. Les rapports soumis au Comité de la concurrence examinent les lois substantielles, le processus de mise en œuvre et les formes institutionnelles avec un degré de détail tel qu'ils ne pourront pas être directement exploités dans les travaux du GSPR concernant ces recommandations. En raison des variantes institutionnelles observées parmi les Pays membres, il est difficile de formuler des prescriptions générales qui seraient utiles dans ce contexte. Le niveau d'efficacité du système d'application de la loi sur la concurrence est largement similaire dans les Pays membres. Dans un petit nombre de pays, le système semble particulièrement efficace, tandis qu'il est particulièrement inefficace dans quelques autres pays, mais ces différences d'efficacité résultent probablement plus de différences de culture économique et politique que de différences de formes ou pratiques institutionnelles.

Les recommandations du rapport de 1997

5. La politique de la concurrence occupe une place prépondérante dans les sept recommandations de base du *Rapport de l'OCDE sur la réforme de la réglementation de 1997*. Elles exhortent à des programmes formels de réforme, à un réexamen systématique des réglementations, à la transparence et à une application non discriminatoire, à une application efficace de la politique de la concurrence, à un renforcement de l'efficacité de la politique de la concurrence et de son application, à la réforme des réglementations économiques anticoncurrentielles, à une réduction des obstacles réglementaires aux échanges et à l'investissement, et appellent à soutenir la réforme dans ses liens avec d'autres

objectifs politiques. Cinq des recommandations de 1997 traitent totalement ou partiellement de la politique de la concurrence ou de sa mise en oeuvre.¹ Considérées dans leur ensemble, les recommandations de 1997 et leurs explications justificatives impliquent que la politique de la concurrence devrait jouir d'un statut privilégié dans le domaine de la réglementation, en combinant deux éléments : une forte présomption en faveur de toutes solutions aptes à résoudre les problèmes d'une manière promouvant un marché concurrentiel, d'une part, et le principe que les autres politiques doivent être poursuivies exclusivement par des moyens ne faussant la concurrence que dans une mesure faible et strictement nécessaire à leur mise en oeuvre.

Principales recommandations du Rapport de 1997

1. Adopter, au niveau politique, de vastes programmes de réforme de la réglementation comportant des objectifs clairs et prévoyant des cadres précis pour leur mise en oeuvre.
2. Réexaminer systématiquement les réglementations pour vérifier si elles répondent toujours avec efficience et efficacité aux objectifs qui leur sont assignés.
3. Veiller à ce que les réglementations et les processus réglementaires soient transparents, non discriminatoires et appliqués avec efficience.
4. Réexaminer, et renforcer le cas échéant, le champ d'application et l'efficacité de la politique de la concurrence et les moyens de faire respecter les obligations qui en découlent.
5. Réformer les réglementations économiques dans tous les secteurs afin de stimuler la concurrence, et les éliminer sauf celles qui s'avèrent être le meilleur moyen de répondre aux intérêts généraux de la collectivité.
6. Supprimer les obstacles réglementaires inutiles aux échanges et à l'investissement en améliorant l'application des accords internationaux et en renforçant les principes internationaux.
7. Recenser les liens importants avec d'autres objectifs de l'action gouvernementale et élaborer des politiques qui permettent de réaliser ces objectifs en favorisant la réforme.

Source: Rapport de l'OCDE sur la Réforme de la Réglementation, 1997.

6. Les recommandations sur la qualité de la réglementation et le processus réglementaire reconnaissent qu'il est prioritaire de soutenir la concurrence sur le marché. Selon les critères posés par la première recommandation, une réglementation de qualité devrait notamment engendrer le moins possible de coûts et de distorsions sur le marché, et être compatible autant que possible avec les principes visant à faciliter la concurrence, les échanges et l'investissement.² Bien entendu, la qualité de la réglementation dépendra beaucoup de la mesure dans laquelle cela est "possible". Le Rapport appelle les gouvernements à mettre en place des dispositifs de réforme qui adopteront et appliqueront le principe exprès selon lequel la réglementation ne doit pas affecter la concurrence, les échanges et l'investissement plus que cela n'est nécessaire pour réaliser d'autres objectifs légitimes. La seconde recommandation, relative au réexamen systématique, renforce l'importance spéciale accordée à la concurrence et aux échanges,³ en notant que le réexamen de réglementations qui restreignent la concurrence et les échanges serait "en particulier" susceptible de produire les avantages les plus importants et les plus visibles.

7. Une recommandation traite exclusivement du champ d'application du droit de la concurrence et des pouvoirs et performances des autorités chargées de la concurrence :

- (4.) Réexaminer, et renforcer le cas échéant, le champ d'application et l'efficacité de la politique de la concurrence et les moyens de faire respecter les obligations qui en découlent :

- Comblent les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces.
- Faire respecter énergiquement le droit de la concurrence en cas de comportement de collusion, d'abus de position dominante ou de fusions anticoncurrentielles susceptibles de compromettre la réussite de la réforme.
- Doter les autorités responsables de la concurrence des pouvoirs et des moyens nécessaires pour convaincre du bien-fondé de la réforme.

Le premier point revêt une importance particulière dans le contexte réglementaire. Il réaffirme la pétition de principe selon laquelle la politique de la concurrence revêt une certaine priorité par rapport à d'autres politiques. Examiner les secteurs et pratiques qui sont exemptés de l'application du droit de la concurrence implique de se demander pourquoi la politique devrait tolérer ou préférer une situation de monopole ou de collusion. Un régime spécial sous forme d'exemptions limitées ou de structures spéciales d'application de la loi peut répondre à d'autres politiques ou d'autres forces politiques. Existe-t-il des méthodes institutionnelles pour appliquer un régime spécial dans un secteur qui parvient mieux que d'autres à l'équilibre souhaité ? En général, quelle est la nature de l'exemption pour une conduite qui est autorisée ou exigée par une autre loi ou réglementation ? Pratiquement toutes les juridictions se sont dotées d'une telle règle, mais seul un petit nombre de ces règles accordent la priorité à la politique de la concurrence. Quel est le processus suivi pour envisager des dérogations à certaines règles du droit de la concurrence, sur la base d'autres considérations politiques ? Ce processus est-il confié aux mêmes institutions que celles qui appliquent le droit de la concurrence ou à des institutions ou personnes extérieures, et est-ce le même processus que celui qui intervient pour l'application du droit de la concurrence ?

8. Le second point pourrait couvrir pratiquement l'intégralité du droit de la concurrence et de ses moyens de mise en oeuvre. La recommandation se concentre sur la manière dont la protection du droit de la concurrence remplace la protection de la réglementation. Bien que les rapports par pays aient essayé de mettre en lumière le lien entre le droit de la concurrence et la réglementation, le Comité s'est souvent intéressé à des aspects plus larges de la question lors de l'examen de ces rapports. L'appel à une application vigoureuse et effective du droit de la concurrence implique la nécessité d'institutions vigoureuses et effectives chargées de cette application. Le Comité s'est fortement intéressé à la structure et aux ressources institutionnelles, ainsi qu'aux pouvoirs et procédés d'application de la loi. La stature et la crédibilité de l'autorité de la concurrence, et son indépendance par rapport à toutes considérations politiques, sont autant de critères déterminants de l'équilibre entre la politique de la concurrence et d'autres politiques. Le troisième point souligne la nécessité de convaincre du bien-fondé de la réforme, car la compétence de l'autorité de la concurrence s'arrête souvent là où commencent les problèmes nés de la réglementation. Les questions pertinentes incluent le statut et la réputation de l'autorité, et son pouvoir de donner des avis sur des politiques sortant du cadre de sa sphère d'application de la loi, les ressources qui sont consacrées à cette fonction, son expérience et son palmarès d'efficacité. Ce troisième point est lié à deux autres recommandations, concernant la déréglementation et le lien avec d'autres politiques.

9. La recommandation séparée à propos du processus de déréglementation économique a également directement trait à la politique de la concurrence.⁴ Les implications de cette recommandation font l'objet de l'inventaire des chapitres sectoriels au sein du Groupe de travail n° 2. La recommandation finale concerne les liens avec d'autres objectifs et politiques, mais elle continue néanmoins d'impliquer une priorité pour la concurrence, notamment dans ses deux premiers sous paragraphes.⁵ Parmi les politiques fréquemment liées à la politique et aux institutions de la concurrence, et qui ont donc été évoquées dans un grand nombre des rapports nationaux, on citera la protection des consommateurs, la concurrence déloyale, les marchés publics, les subventions et aides publiques, et les échanges internationaux. La plupart des objectifs et effets

de ces politiques, sinon tous, sont habituellement considérés comme complémentaires à ceux de la politique de la concurrence, ou compatibles avec eux.

La politique de la concurrence dans les programmes de réforme

10. Les recommandations sur le processus réglementaire sont un indice de la culture de la concurrence. Chacun des rapports d'examen de la politique de la concurrence a commencé par examiner comment la politique de la concurrence trouve ses fondations dans les traditions commerciales, économiques, politiques et juridiques du pays. En évaluant comment le système politique comprend et apprécie les principes de la concurrence, les rapports ont posé la question de savoir comment ces principes avaient motivé le processus de réforme de la réglementation.

11. Pratiquement tous les pays Membres se sont actuellement dotés d'un programme formel de réforme de leur réglementation. Les occasions, motivations et justifications de ces programmes de réforme sont variables. Le stimulus immédiat d'un programme de réforme peut être une crise fiscale ou financière, une stagnation ou récession prolongée, ou un défi majeur, tels l'ouverture à l'économie de marché ou un changement de régime. La réforme peut être promue pour accroître l'efficacité, la productivité et la croissance, ou pour simplifier l'administration et réduire les charges administratives et la paperasserie. Ces objectifs ne sont ni exhaustifs ni mutuellement exclusifs, bien entendu. Par ailleurs, les programmes visant à lutter contre les lourdeurs administratives peuvent également inclure des considérations de performance économique. Tous les efforts approfondis de réforme sont susceptibles d'inclure des éléments promouvant une politique de la concurrence vigoureuse. Les exemples les plus éclatants sont les projets à grande échelle visant à remanier un système économique centralisé, parfois associés au remplacement d'un système politique non démocratique. La politique et les institutions de la concurrence ont parfois occupé une place centrale dans ces expériences de réforme totale.

12. Le lien entre la politique de la concurrence et la réforme est apparue longtemps avant le mouvement de déréglementation qui a commencé à la fin des années 1970. Les autorités américaines de la concurrence sont le produit des réformes "progressistes" du début du 20^{ème} siècle. La loi allemande sur la concurrence et le *Bundeskartellamt* ont été les pièces maîtresses des réformes qui ont vu le jour après la II^{ème} Guerre Mondiale et ont créé l'économie sociale de marché (et sa Réglementation sur les Ententes a été un élément clé du programme de réforme visant à juguler l'inflation galopante en 1923). Dans les deux pays, le large soutien politique et public dont bénéficie la concurrence affecte les perspectives de réforme et la forme que prend habituellement la réforme. Comme le fait observer l'étude consacrée aux Etats-Unis, du fait de l'acceptation culturelle d'une norme de concurrence dans la "constitution" économique américaine, des réformes mettant la concurrence en vedette peuvent être justifiées comme un retour aux racines politiques et économiques. La conception allemande de la politique de la concurrence explique également son itinéraire de réforme, car la réputation du *Bundeskartellamt* a encouragé les dirigeants politiques à s'appuyer sur la loi sur la concurrence, là où la plupart des autres pays se sont appuyés sur une intervention réglementaire sectorielle. La Hongrie fournit un exemple plus récent de situation dans laquelle la politique de la concurrence a été le moteur de la réforme économique. En 1984 et de nouveau en 1990, une loi générale sur la concurrence a été le premier produit d'une vague d'efforts de réforme, impliquant la reconnaissance du caractère fondamental de la concurrence. Lorsque le gouvernement librement élu a adopté la loi sur la concurrence en novembre 1990, le Premier Ministre a qualifié cette loi de « constitution » de la vie économique. Aux Pays-Bas, la loi d'ensemble sur la concurrence, entrée en vigueur en 1998, a été élaborée (bien qu'elle n'en forme pas officiellement partie) dans le cadre du vaste programme de réforme MDW fondé sur la concurrence, initialement lancé en 1994 et poursuivi après les élections de 1998. Plusieurs rapports ont attiré l'attention sur le modèle de la vaste réforme fondée sur la concurrence en cours en Australie.

Examen de la politique de la concurrence en Australie

En Australie, l'État fédéral et les États ont procédé à un examen approfondi de la réglementation afin d'en supprimer les effets anticoncurrentiels injustifiés. Cet examen est d'une portée et d'une ambition sans précédents dans les pays de l'OCDE. En 1993, le rapport sur la politique nationale de la concurrence a conclu que l'Australie était confrontée à des défis majeurs pour réformer son économie afin d'accroître le niveau de vie national et a recommandé de procéder à une réforme de la réglementation restreignant indûment la concurrence.¹

La législation sur la concurrence ne pouvant à elle seule éliminer les entraves réglementaires à la concurrence, car beaucoup d'entre elles découlaient d'autres lois, il était nécessaire de mettre en place un nouveau mécanisme impliquant :

Que les pouvoirs publics admettent le principe selon lequel il faut clairement démontrer que toute entrave à la concurrence est dans l'intérêt général.

Que les réglementations nouvelles fassent l'objet d'examen plus fréquents et que les restrictions importantes à la concurrence soient levées au bout d'une période déterminée, à moins d'être prorogées après avoir été soigneusement analysées dans le cadre d'un processus d'examen public.

Que les réglementations en vigueur imposant une restriction importante à la concurrence soient soumises à un examen systématique afin de déterminer si elles sont conformes au premier principe, et soient levées au bout de cinq ans, à moins d'être prorogées après avoir été soigneusement analysées dans le cadre d'un nouveau processus d'examen.

Dans la mesure du possible, que les examens des réglementations se situent dans une perspective économique.

En avril 1995, le Conseil des gouvernements australiens a signé le Competition Principles Agreement (accord sur les principes de protection de la concurrence), qui consacre ces recommandations, et un calendrier d'examen a été arrêté en 1996. Une partie substantielle du processus est actuellement achevée. Les grandes entreprises nationalisées devront désormais appliquer des principes de neutralité concurrentielle, ce qui signifie une compétition plus loyale avec le secteur privé. La plupart des 1.700 textes législatifs identifiés comme contenant des restrictions ont été examinés. Cette politique semble avoir également créé une culture de justifications rigoureuses pour les nouvelles réglementations concernant les entreprises.²

Une profonde réforme du marché du travail, des marchés financiers, de la politique fiscale et de la politique de la concurrence a renforcé les performances économiques de l'Australie. L'impact limité de la crise financière asiatique de 1997 sur l'Australie a démontré que son économie devenait plus résistante. Les études économiques que l'OCDE a consacrées à l'Australie établissent une corrélation entre le programme de réforme structurelle et la croissance de la production, des revenus, de l'emploi et de la productivité. La plus récente notait que les réformes structurelles des vingt dernières années ont été les principaux facteurs de la croissance de la productivité, et constatait que le programme avait amélioré la croissance de la productivité multifactorielle d'environ 1 point de pourcentage. Le PIB de l'Australie est actuellement d'environ 2½ pour cent supérieur à ce qu'il aurait été autrement, et les revenus annuels des ménages australiens ont augmenté d'environ A\$7 000, grâce aux réformes.³

1. Hilmer, F., Raynor, M. and Taperell, G. (The Independent Committee of Inquiry) (1993), *National Competition Policy*, Australian Government Publishing Service, Canberra.
2. OECD (2001) Étude économique de l'Australie.
3. OECD (2003) Étude économique de l'Australie.

13. Plusieurs examens ont évoqué la question de savoir si la culture de la concurrence est assez forte pour servir de fondement à une réforme durable. Par exemple, le rapport sur le Mexique observe que ses réformes ont été le produit des travaux d'experts du gouvernement, et que la loi et la politique de la concurrence manquent d'une base claire de soutien de la part du grand public, que les partisans de la politique de la concurrence ne sont pas bien identifiés, et qu'il y a eu peu d'efforts visibles pour motiver ces partisans jusqu'à présent. Le rapport sur le Japon observe que les appels à une application plus rigoureuse de la législation sur les ententes sont habituellement venus des associations de travailleurs et de consommateurs, qui sont souvent assez soupçonneux à propos d'autres aspects de la réforme. Ainsi, il n'est pas certain que les intérêts qui soutiennent la réforme apprécient l'importance que la concurrence doit jouer dans ce processus. Dans certains pays, notamment la Corée et la République tchèque, le problème clé de la réforme économique a été de corriger de graves faiblesses des finances et de la gouvernance d'entreprise. La motivation philosophique et politique de la politique de la concurrence soutient pleinement ces réformes financières et du droit des sociétés, mais les outils de la mise en œuvre du droit de la concurrence peuvent ne pas être les plus appropriés pour accomplir les tâches nécessaires. Néanmoins, si la réforme économique inclut ces changements structurels, les institutions de la politique de la concurrence peuvent jouer un rôle prééminent. La FTC de Corée a fait de la réglementation du *chaebol* une haute priorité, appliquant des lois spéciales à cet effet. Le programme de réforme d'ensemble entrepris au Mexique au début des années 1990 a assigné un rôle essentiel à la CFC, pour parvenir à des jugements analytiquement cohérents sur l'existence d'une puissance de marché, dans les opérations de privatisation.

14. La recommandation relative à l'examen systématique et à l'analyse d'impact de la réglementation (AIR) est liée aux travaux politiques et de sensibilisation du public des autorités de la concurrence. Elle traite également, d'une manière opérationnelle, de la priorité de la concurrence par rapport à d'autres objectifs politiques. S'il existe un processus systématique d'évaluation et de correction des « stocks » de textes réglementaires, ou d'amélioration de la qualité des flux réglementaires, comment tient-il compte de la concurrence ? Par ailleurs, comment le principe des « moyens les moins anticoncurrentiels » est-il appliqué dans les AIR ? Quel a été le rôle des autorités de la concurrence dans ces processus ?

15. Certains processus d'examen des projets de lois et réglementations sont pratiquement universels. Si les fonctions de fixation de la politique de la concurrence et de mise en œuvre de celle-ci sont confiées à des autorités séparées, l'autorité chargée de la politique sera plus susceptible d'être responsable d'examiner les projets afin de déterminer s'ils peuvent affecter la concurrence, alors que l'autorité chargée de la mise en œuvre pourra ne s'intéresser qu'aux projets qui affectent directement la manière dont la loi sur la concurrence est appliquée. L'autorité chargée de la mise en œuvre pourrait s'occuper du « stock » de réglementations, ainsi que du flux de nouvelles réglementations, mais d'une manière non systématique. En d'autres termes, elle pourra recevoir et instruire des plaintes à propos des restrictions à la concurrence qui résultent de la structure réglementaire existante et prôner la réforme de ces réglementations incriminées.

16. Certaines autorités ont joué des rôles particulièrement cruciaux dans la réforme des processus d'examen des réglementations en vigueur et des projets de réglementation. Le président de la Fair Trade Commission de Corée était le président du Comité de la Réforme de la Réglementation Économique de Corée à la fin des années 1990 et en est toujours membre, et d'autres dirigeants de la KFTC siègent dans ses sous-comités de travail. Pour le Mexique, le rapport recommande que la CFC prenne une position similaire au Conseil de Déréglementation Économique du Mexique. Pour l'Italie, le rapport a établi un lien entre le rôle de l'autorité et l'AIR, en recommandant que les impacts sur la concurrence deviennent un critère exprès de l'AIR, et que l'Autorité participe systématiquement au processus de l'AIR. À la date de publication du rapport, ces recommandations avaient déjà été mises en œuvre, de telle sorte qu'un représentant de l'Autorité a participé à l'*Observatorio* sur la simplification des règles et procédures, et que le guide sur l'AIR a consacré le critère de la concurrence sur le marché pour évaluer les nouvelles réglementations. Les autorités de la concurrence participent habituellement aux programmes de restructuration économique, mais il est moins habituel pour elles d'être activement impliquées dans le

processus formel d'examen et d'évaluation de la réglementation ou d'en être responsable, que ce soit pour élaborer des normes ou réaliser des évaluations effectives. Le point de savoir si elles doivent participer à ce processus dépend de leur structure institutionnelle. En Italie, où le rapport recommandait une participation formelle, il n'existe aucune autorité chargée de la politique de la concurrence qui soit chargée de cette fonction au sein d'un ministère.

17. Les recommandations relatives au processus réglementaire préconisent vigoureusement d'inclure la concurrence dans l'AIR. Cela n'imposerait pas à l'autorité chargée de la politique de la concurrence ou à celle chargée de sa mise en œuvre de revoir et d'avaliser chaque proposition. En revanche, un processus d'AIR bien conçu devrait inclure des critères afin d'identifier celles de ces propositions qui peuvent avoir des effets significatifs sur la concurrence, pour les transmettre à des experts de la politique de la concurrence qui pourraient ensuite en faire une étude plus approfondie. Le processus devrait décrire explicitement le rôle et le pouvoir de l'autorité chargée de la politique de la concurrence ou de celle chargée de sa mise en œuvre. Au minimum, si l'étude conclut que la proposition ou la réglementation entraînerait effectivement des restrictions significatives à la concurrence, l'auteur du projet ou le gouvernement devrait être tenu de répondre à cette conclusion, soit pour corriger la réglementation proposée afin d'éliminer ces effets, soit pour expliquer, publiquement, pourquoi elle est exigée dans l'intérêt public.

18. Les recommandations de 1997 impliquent que l'AIR doit inclure un principe exigeant que la mise en œuvre de la réglementation passe par les "moyens les moins anticoncurrentiels". Il s'agit d'un critère rigoureux. Le bilan des chapitres consacrés à la qualité de la réglementation, tel qu'il a été réalisé par le Comité de la gestion publique, démontre que les normes de l'AIR, lorsqu'elles sont formalisées, considèrent d'une manière ou d'une autre les effets sur la concurrence. Néanmoins, cet examen ne s'est pas focalisé sur l'utilisation du critère des "moyens les moins anticoncurrentiels", car il s'est concentré sur la Recommandation du Conseil de 1995 plutôt que sur les Recommandations de 1997. Seul un petit nombre des examens de la politique de la concurrence réalisés par ce Comité ont abordé les détails de la procédure de criblage de l'AIR. En Irlande, par exemple, le rapport s'inquiète du fait que les critères de l'AIR en matière de politique de la concurrence risquent d'être trop généraux pour guider des bureaucrates non experts, et suggère qu'une formation ou des informations supplémentaires leur soient dispensés pour les rendre plus pratiques et spécifiques. Bien que les rapports n'aient pas examiné cette question de manière systématique, il est raisonnable de conclure qu'un principe clair de mise en œuvre par les "moyens les moins anticoncurrentiels" n'est pas encore répandu.

19. La formulation de la recommandation de 1997, selon laquelle les réglementations doivent être compatibles "autant que possible" avec les principes visant à faciliter la concurrence, ne peut probablement pas être rédigée de manière plus précise. Il serait déraisonnable de recommander une checklist ou norme spécifique d'AIR à titre de prescription générale, car ce qui est approprié et faisable dépendra du point de savoir qui réalise effectivement l'AIR, et dans quel contexte économique et politique. Les critères sont susceptibles de varier selon les pays. Par exemple, si les critères de criblage incluent des critères structurels, comme le nombre ou la taille relative des entreprises d'une industrie affectée, ces paramètres pourront varier selon le volume des échanges et l'échelle de l'économie locale. Il pourrait également être contre-productif de proposer de rendre plus explicite le critère du "moindre mal pour la concurrence". En effet, il ne faut pas que ce critère signifie que seule la concurrence compte. En revanche, entre différentes solutions possibles à un problème produisant à peu près le même impact net, il doit imposer de choisir celle qui a le moindre impact sur la concurrence. Néanmoins, on pourrait tout aussi bien prétendre que le choix doit se porter sur la solution qui produit le moindre impact sur un autre paramètre, par exemple le respect de la vie privée ou la protection de l'environnement. Par ailleurs, on pourrait également soutenir que les aspects quantitatifs de l'analyse des impacts économiques inclura nécessairement une analyse des effets concurrentiels nets, de telle sorte que ce principe équivaldrait à comptabiliser deux fois les bénéfices de la

concurrence. Le fait que seul un petit nombre de pays ont un critère clair imposant le recours aux “moyens les moins anticoncurrentiels” implique que ces contre arguments pourraient avoir un poids substantiel.

Exclusions, exemptions et régimes spéciaux

20. Les Recommandations de 1997 appelaient à étendre la politique de la concurrence aussi largement que possible dans toute l'économie, et, dès lors, à réduire ou éliminer les exemptions faisant échapper à son champ d'application. La Recommandation attirait particulièrement l'attention sur les lacunes d'ordre sectoriel. Celles-ci peuvent résulter de décisions délibérées et de compromis dans la conception de la loi sur la concurrence elle-même, mais résultent plus souvent d'une autre législation. Chaque lacune ou exclusion signifie en effet qu'une autre politique est jugée plus importante que la concurrence.

Autorisation réglementaire

21. Le champ d'application de la politique de la concurrence ne peut généralement pas être déterminé à partir des textes des lois sur la concurrence. Les principes généraux d'interprétation peuvent créer des exclusions fondées sur d'autres lois ou décisions officielles, qui ne font elles-mêmes aucune référence explicite aux lois sur la concurrence. Les lois ou pratiques de tous les Membres examinés incluent, sous une forme ou une autre, un principe général de coercition ou d'autorisation réglementaire, qui exempte une conduite par ailleurs exigée ou autorisée par une autre autorité gouvernementale. Ce principe peut être inscrit dans la loi sur la concurrence elle-même, ou peut résulter de la pratique des tribunaux. En vertu d'un principe général d'interprétation de la loi, une loi sur la concurrence est considérée comme une loi d'application générale, mais des lois particulières ou spéciales incompatibles avec la loi générale créent des exclusions de son champ d'application. Il est difficile de dresser le catalogue de ces exclusions car les textes qui les instaurent ne se trouvent pas nécessairement rassemblés au même endroit. En outre, une exclusion ou exemption *de facto* peut résulter d'une restriction limitant les recours disponibles, voire même simplement d'une politique ou pratique de non-exécution dans certains secteurs ou situations, et ces sources peuvent être pratiquement impossibles à identifier de manière fiable.

22. Dans un petit nombre de juridictions, la loi sur la concurrence contient une disposition pour le traitement des réclamations faisant état d'un conflit avec cette loi. L'effet est généralement le même qu'en vertu du principe général habituel : la loi sur la concurrence n'a pas priorité, et d'autres réglementations ou programmes sont susceptibles de prévaloir sur elle, au moins dans des situations où il ne serait pas possible de se conformer aux deux. Le rapport sur les Pays-Bas attire l'attention sur les effets potentiels d'une délégation légale rédigée en termes larges :

[Cette] exemption ... jette le doute sur la force de l'engagement de réformer la réglementation sur la base des principes de la concurrence. Les interdictions édictées par la loi ne s'appliquent pas aux accords soumis à l'approbation d'une autorité administrative en vertu d'une autre législation, qui pourraient être déclarés nuls ou interdits par une autre autorité, ou qui ont pris naissance en vertu d'une autre exigence légale. La loi sur la concurrence se situe donc à l'extrémité de la chaîne de priorités. Le simple risque de conflit, telle la possibilité qu'une autre autorité puisse approuver, voire même désapprouver, la conduite, pourrait signifier que la loi sur la concurrence ne s'applique pas ... En l'absence même d'une exemption légale, un tribunal pourrait ne pas accorder la préséance à la loi sur la concurrence sur un système réglementaire entrant potentiellement en conflit avec elle. Mais si cela se produisait effectivement, sa décision pourrait probablement être corrigée par la législation. L'exemption en blanc tranche tous ces conflits par avance, et ce dans un sens contraire aux intérêts de la politique de la concurrence.

Plusieurs décisions de justice ont édicté, aux Etats-Unis, une règle qui semble favoriser la politique de la concurrence. Comme le note le rapport, les tribunaux américains répugnent à “prononcer des annulations

en application implicite' d'une autre disposition réglementaire et ne le font que dans des 'cas d'incompatibilité totale entre les dispositions antitrust et les dispositions réglementaires.' Cette doctrine consacre la primauté des principes de concurrence et signifie que, si le Congrès veut exclure une conduite de la loi sur la concurrence ou lui appliquer des règles spéciales, il doit le dire très clairement." En pratique, cependant, les tribunaux américains ont inféré certaines exemptions en l'absence d'intention législative claire, pour certains aspects de la réglementation boursière et pour les tarifs des transports publics. L'effet pratique de la règle américaine ne diffère pas beaucoup de l'effet des règles de neutralité concurrentielle appliquées dans d'autres juridictions.

23. La République tchèque et la Hongrie déploient des efforts législatifs instructifs afin de contrôler les actions gouvernementales et réglementations anticoncurrentielles. L'Office de la Concurrence hongrois peut contester des actions gouvernementales anticoncurrentielles devant les tribunaux. Il ne l'a jamais fait, mais la menace a parfois été persuasive. La loi sur la concurrence de la République tchèque a interdit aux autorités gouvernementales de prendre des mesures qui restreignent ou éliminent la concurrence économique. Le rapport conclut qu'il est précieux d'instaurer ce principe dans la loi, même en l'absence de sanction obligatoire en cas de violation de ce principe. Néanmoins, l'harmonisation a été jugée plus importante, et cette disposition a été remplacée par un texte repris dans la loi de l'UE concernant la conduite des entreprises prestataires de services publics ou bénéficiant de droits spéciaux et exclusifs.

24. Les pays fédéraux qui délèguent aux autorités des gouvernements locaux peuvent de ce fait permettre de larges exemptions. En Allemagne, où les gouvernements locaux ne peuvent pas accorder une exemption du champ d'application de la loi nationale, la délégation prend la forme de l'application du droit national aux problèmes locaux, par les autorités des *Länder*. Par contraste, la doctrine de l'"action d'Etat" aux Etats-Unis permet une conduite privée anticoncurrentielle si elle intervient en vertu d'une politique de l'Etat visant à déplacer la concurrence, et si cette politique est clairement articulée, exprimée en termes affirmatifs et activement supervisée. La doctrine générale canadienne de l'autorisation réglementaire est appliquée le plus souvent dans le contexte de comités provinciaux de commercialisation et de commissions de fixation des prix. Étant donné que ces doctrines de l'exemption risquent "de faire ... de la politique nationale de la concurrence l'otage d'exemptions législatives locales," et que les gouvernements locaux, comme les gouvernements nationaux, peuvent choisir de protéger leurs producteurs plutôt que leurs consommateurs, les rapports sur les Etats-Unis et le Canada appellent à un examen approfondi de leurs effets réels. Mais les rapports admettent qu'il est peu probable que les doctrines seront modifiées, car la concurrence est jugée moins importante, dans chacun de ces pays, que les principes constitutionnels du fédéralisme et du respect des prérogatives provinciales.

Entités gouvernementales

25. L'application de la politique nationale de la concurrence à l'action réglementaire locale exige du doigté, même dans les pays non fédéraux. Les décisions locales peuvent autoriser une conduite privée anticoncurrentielle, ou des décisions comme le refus d'octroi de licences peut constituer une entrave à l'entrée sur le marché. Les interventions des gouvernements locaux peuvent évincer des prestataires plus efficaces du secteur privé et provoquer des plaintes pour concurrence déloyale.

26. Dans pratiquement tous les pays, la loi sur la concurrence s'applique aux opérations commerciales d'entités liées au gouvernement. Au Mexique, la constitution définit certains monopoles d'Etat, mais ils demeurent néanmoins soumis aux exigences de la loi, et ont été sanctionnés pour comportement d'exclusion affectant d'autres marchés. Il s'agit du modèle classique. Même si les entités gouvernementales bénéficient d'une certaine protection ou d'un monopole autorisé, les sociétés de droit public sont toujours soumises aux règles et sanctions normales de la loi sur la concurrence. Cette application revêt généralement une importance particulière en matière d'abus de position dominante. Il n'existe qu'un seul pays examiné, les Etats-Unis, dans lequel les entités publiques, y compris les sociétés

de droit public, échappent aux responsabilités découlant du droit des ententes. L'exemption anormale ainsi observée aux Etats-Unis s'explique par l'existence d'un système de poursuites judiciaires particulièrement virulent ; dans ces conditions, l'exemption vise probablement à protéger le trésor public contre des procès privés sollicitant un triplement des dommages intérêts.

27. L'application de la loi sur la concurrence aux opérations de l'Etat dépend dans une certaine mesure de leur forme juridique. Si la loi s'applique à des "entreprises", une opération de l'Etat pourra être exemptée s'il est déterminé, en fait ou en droit, qu'il ne s'agit pas d'une "entreprise." L'application dépend également du processus suivi et de l'intention sous-jacente à l'opération. La loi peut prescrire que les opérations de l'Etat obéissent à des principes de concurrence, mais les décisions sur la signification réelle de cette prescription peuvent être prises par des ministres ou fonctionnaires autres que l'autorité nationale de la concurrence. Les dispositions complexes du Danemark sur l'application de la loi sur la concurrence aux fonctionnaires locaux illustre cette difficulté. Généralement, la règle apparente inclut le principe du "moindre effet anticoncurrentiel" :

L'activité commerciale des administrations gouvernementales centrales ou locales est également couverte, en théorie, si elle affecte des conditions concurrentielles ; toutefois, la Loi ne s'applique évidemment pas à la production interne des autorités gouvernementales. Bien que le Conseil ne puisse pas intervenir contre les pratiques anticoncurrentielles d'une autorité gouvernementale, si celles-ci sont nécessaires pour les besoins des tâches qui lui sont assignées par la loi, une autorité municipale est néanmoins obligée de choisir des solutions comportant les moindres effets anticoncurrentiels. Par ailleurs, une municipalité ne peut pas réduire la concurrence dans des domaines qui ne relèvent pas de sa sphère d'autorité légale, ni fermer les yeux sur une conduite anticoncurrentielle si cela n'est pas nécessaire afin de remplir ses obligations légales. La difficulté d'application du principe tient, bien entendu, au fait que l'"autorité compétente", qu'il s'agisse du ministère ou du conseil local, décide si son action est nécessaire ou doit autrement l'emporter sur la politique de la concurrence. Il n'existe aucun moyen évident d'obtenir une décision judiciaire ou d'exercer un recours judiciaire contre cette décision.

28. C'est lorsque l'opération en cause est un service commercial ordinaire que la concurrence déloyale est la plus facile à identifier. Dans la configuration la plus classique, lorsque l'opération de l'Etat est liée à un service public ou à une politique, le conseil usuel est de séparer, si possible, les éléments qui sont principalement commerciaux et de les soumettre à la discipline du marché. Les Pays-Bas ont étudié ce sujet en profondeur :

La concurrence déloyale exercée par des entités liées au gouvernement a suscité une attention considérable ... [Un] rapport de 1997 rédigé par un panel d'experts désignés ... décrit un cadre conceptuel pour les organisations (semi) gouvernementales qui font concurrence à des sociétés privées sur le marché ... Le rapport parvient à la conclusion qu'il n'est pas souhaitable que ces entités se livrent à des opérations sur le marché, car il n'est pas possible d'empêcher la distorsion de la concurrence. Il conclut qu'en principe, les activités commerciales devraient être séparées de l'Etat et que ce dernier devrait s'en retirer, bien que l'on puisse admettre certaines exceptions à cette règle de séparation structurelle : les activités commerciales intrinsèques à [ses] obligations publiques, les activités commerciales liées à la recherche scientifique, les activités visant à soutenir le maintien d'une capacité industrielle physique minimum, ou une situation de concurrence pour la prestations de services d'intérêt public, telle la distribution d'électricité. Même pour ces exceptions, le rapport appelait à l'application de règles de conduite par une nouvelle autorité indépendante de supervision, afin de parvenir à des conditions concurrentielles égales.

29. Le contrôle des aides publiques vise également à empêcher ou corriger des distorsions du marché résultant d'une concurrence déloyale subventionnée. Il s'agit d'une question d'importance croissante en Europe, où les pays suivent le modèle ou l'exemple de l'UE et ajoutent cette question à leurs lois nationales. Le rapport sur la République tchèque note une forte mobilisation de ressources pour garantir que les subventions ou préférences accordées par les gouvernements locaux ou nationaux à tous les niveaux ne faussent pas la concurrence en favorisant certaines entreprises ou certains produits. L'OPEC a le pouvoir d'ordonner à des entreprises de rembourser l'aide reçue ou d'ordonner à l'autorité ayant fourni cette aide d'éliminer la distorsion concurrentielle. L'autorité de la concurrence joue un rôle similaire en Pologne et en Espagne, et le rapport sur la Turquie recommande une mesure similaire.

30. Quelques autorités de la concurrence contrôlent le respect des règles sur les marchés publics et les avis d'appel d'offres. Ce rôle renforce un objectif de la réforme, à savoir rendre les opérations de l'Etat plus efficaces en se fondant si possible sur des mécanismes de marché. Il peut également appuyer l'engagement de poursuites afin de lutter contre les soumissions concertées, qui représentent un problème courant en matière de politique de la concurrence.

Secteurs bénéficiant d'un régime spécial

31. La capacité de la politique de la concurrence à fournir un cadre convenable pour une vaste réforme de la réglementation est partiellement déterminée par l'étendue et la justification des exemptions générales ou du régime spécial dont bénéficient certains types d'entreprises ou d'actions. Ce régime peut représenter une application efficace des principes de la concurrence, en adaptant les règles aux spécificités factuelles d'une industrie. Le contrôle des monopoles infrastructurels en fournit un exemple courant. Toutefois, ce régime spécial peut également représenter des choix législatifs de redistribution.

32. L'exclusion trouve habituellement sa source dans une loi autorisant ou exigeant une conduite qui limite la concurrence. Elle peut prendre la forme d'un monopole légal, d'un contrôle des prix ou d'une réglementation à l'entrée qui limite la concurrence. Elle peut permettre une conduite qui serait autrement interdite, par exemple des prix de revente imposés, ou habiliter un administrateur ou autre préposé à contrôler l'entrée sur le marché afin d'empêcher la concurrence. Dans la plupart des cas, le régime spécial ne confère pas une exemption complète de tous les contrôles de la concurrence. Dans le tableau ci-dessous, le "x" indique qu'il existe un certain type d'exclusion ou d'exemption, ou des règles concurrentielles spéciales pour le secteur ou le produit concerné. Un "o" indique qu'il existe une autre loi ou autorité chargée des questions de concurrence du secteur, sous la forme d'un contrôle des prix ou de l'entrée, ou parfois pour l'application des règles de concurrence.⁶ L'exclusion étant rarement totale, et sachant que l'existence d'une loi ou autorité séparée ne signifie pas nécessairement que la concurrence est abolie, il ne serait pas justifié de tirer des conclusions ou corrélations quantitative significatives à propos de l'effet ou de l'étendue des "exemptions", sur la base des informations générales de ce tableau. Le tableau montre quels secteurs ou situations sont généralement considérés comme méritant une attention ou dérogation spéciale.

Tableau 1 : Exclusions, règles spéciales, autorités d'exécution de la loi et autorités réglementaires

	AUSTRALIA	BELGIUM	CANADA	CZECH REP.	DENMARK	EU	FINLAND	FRANCE	GERMANY	GREECE	HUNGARY	IRELAND	ITALY	JAPAN	KOREA	MEXICO	NETHERLANDS	NEW ZEALAND	NORWAY	POLAND	PORTUGAL	SLOVAK REP.	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED KINGDOM	UNITED STATES	TOTAL
General																													
Labour			x	x	x	x					x					x		x						x			x	10	
SMEs	x							x	x					x														4	
R&D JVs			x	x	x													x									x	5	
Standards			x	x					x									x										4	
Primary production																													
Agriculture, co-ops	x	xo				xo	x	x	x	x	xo			x	x			x	x	x				x	x	x	xo	17	
Sugar																										o		1	
Fishing			x							x									x									3	
Mining																									o		1		
Nuclear energy																	x											1	
Oil & gas	x	o		o								o				xo				o								6	
Petrochemicals																x												1	
Infrastructure																													
Electricity	x	xo	o				o	o			o	o		o	x	o		o	o	xo	o	o		o	o	o	o	18	
Natural gas	x							o		o						xo		o	xo	o	o					o	o	10	
Water	x								x											xo	o					o		5	
Telecoms	o	o	xo	o	o		o	o			o	o		o	xo	xo		o	o	xo	o			o	o	o	o	19	
Postal service				o								o			x			o			o	x		o				7	
Transport																													
Railways						xo		x	x	o	o					o	o				o			o	o	xo		11	
Air transport, mergers		o				xo			x					x		o	o	x		o						o	x	10	
Water transport			xo			xo			x			o	x	x	o		x					x					xo	10	
Road transport				o	xo	o			o		o	o	x			o		o				o			o		xo	11	
Taxis						o					o	o							o					x	o			6	
Business																													
Finance, insurance			xo	o		x	o		x			o	x		xo	xo	x			xo							xo	12	
Bank mergers		o	o					x							o										x			5	
Commercial agents										x																		1	
Distribution co-ops					x												x											2	
Export cartels			x											x	x												x	4	
Motor vehicle distribution						x																						1	
Services, health, culture, morals																													
Services, professions	o	x							x	x		o	x	x	o	o		x				o			x			12	
Health care									x									x							x			3	
Pharmacies, drug prices				o	o		o				o	o										x		o	o			8	
IP, performing rights		x							x					x	x	x		x	x					x				8	
Performing ass'ns		x																										1	
Sports			x						x																		x	3	
Media, broadcasting	x		o	o							o	o													o	o		8	
Movie theatres																												1	
Publications (RPM)					x			x	x	x				x	x		x	x				x						9	
Publishing		o										o														o	x	4	
Alcoholic beverages							o							x	o				o						o			5	
Pubs											o																	1	
Tobacco					x					x													x					3	

Source: Rapports par pays du Secrétariat de l'OCDE, rapports annuels et autres documents soumis au Comité de la Concurrence.

33. Une évaluation complète de ces dispositions spéciales supposerait de procéder à une analyse de type AIR, afin d'examiner leurs objets et leurs effets, et de se demander si elles servent un intérêt public primordial qui ne pourrait pas être servi d'une manière moins anticoncurrentielle. Ces analyses détaillées ont rarement été observées dans les pays examinés. Il n'entraîne pas dans le champ du projet de réforme de la réglementation de réaliser ces analyses pour toutes ces questions dans tous les pays examinés. Les rapports ont pris note des études qui étaient disponibles, et ont été souvent liées à des programmes de recherche sur l'autorité de la concurrence et de sensibilisation du public à l'impératif de la concurrence.

34. Les exclusions générales les plus courantes incorporent des choix évidents de politique publique ou permettent des groupements d'entreprises qui sont susceptibles d'être efficaces et même favorables à la concurrence. L'exemption générale la plus répandue évite une interdiction littérale inappropriée des restrictions et monopoles sur le marché du travail. Habituellement, les exemptions accordées sur le marché du travail ne s'étendent pas aux accords visant à restreindre la concurrence sur les marchés de produits. Les exemptions en matière de propriété intellectuelle évitent des conflits avec ces droits de propriété, si la politique publique visant à récompenser l'innovation et la créativité permet un certain degré de "monopole." Les exemptions en faveur d'organisations de normalisation, d'établissements de recherche et de développement, et de sociétés d'auteurs et compositeurs permettent des catégories de groupements d'entreprises qui sont susceptibles d'être efficaces. Il n'existe aucun motif de contester les principes sous-jacents à ces exemptions, bien qu'il faille évaluer certains cas particuliers avec beaucoup de soin et d'attention, afin de s'assurer que l'application de ces exemptions ne va pas plus loin que cela n'est nécessaire pour réaliser leurs objectifs.

35. Certaines lois sur la concurrence incluent des dispositions spéciales dites "*de minimis*" ou "*bagatelle*" au profit des petites et moyennes entreprises. Ce régime permet aux petites entreprises de se grouper pour être plus efficaces, et permet d'économiser des ressources en autorisant les autorités de mise en oeuvre à ignorer une conduite si elle ne risque pas de réduire significativement la concurrence. Il est difficile de concevoir ces règles de telle sorte qu'elles ne soient ni trop larges ni trop étroites. Sur des marchés de petite taille ou en se groupant avec d'autres entreprises, les petites entreprises peuvent, elles aussi, détenir une puissance de marché. Fonder une exemption sur la taille de l'entreprise revient à oublier la puissance de marché sur des petits marchés. Mais fonder une exemption sur des critères plus axés sur les effets, comme la part de marché, accroît l'incertitude pour les entreprises. Afin de minimiser le risque de conséquences fâcheuses si le champ d'application est imprécis, et de maintenir la cohérence dans le traitement des problèmes les plus importants, ces exemptions ne s'étendent généralement pas à des conduites "injustifiables", comme la fixation de prix minimum.

36. L'agriculture bénéficie presque partout d'un régime spécial. Des exemptions ou règles spéciales permettent des accords de coopération dans la transformation des matières premières et la distribution, et elles s'étendent souvent à des secteurs fonctionnellement similaires, comme les pêcheries et l'industrie forestière. Leur principal objet est de se prémunir contre les caprices du temps, de lutter contre des influences extérieures dues au caractère de biens publics de certaines de ces ressources, et de compenser la position prétendument plus faible des producteurs dans les négociations avec les acheteurs en aval. Ce régime spécial peut également s'expliquer par la volonté de permettre une coordination dans le contexte de programmes de subventions fondés sur des soutiens des prix. Dans la mesure où la production primaire est structurellement atomisée, le régime spécial pourrait ici être analogue à l'exemption accordée sur le marché du travail. Mais l'analogie s'effondre si une coopérative peut monopoliser un produit final important. Les monopoles dans l'industrie laitière sont un motif fréquent de contentieux à propos de la légitimité et de l'étendue acceptable de ces exemptions.

37. Les seuls autres produits de base ou industriels qui suscitent fréquemment une attention spéciale sont le pétrole et le gaz. Des objectifs de politique nationale et de gestion des ressources expliquent probablement le monopole ou le contrôle sur la production primaire. Des règles spéciales sur la distribution et l'importation sont plus souvent manifestement destinées à limiter la concurrence. Certaines sont motivées par le souci de préserver de petits concurrents, en disciplinant implicitement ou handicapant la distribution contrôlée par de grandes sociétés pétrolières internationales. Néanmoins, il est plus probable que ces contraintes soutiennent ou imitent le partage du marché et la collusion existante sur le marché.

38. Le secteur financier fait couramment l'objet d'un régime spécial, spécialement dans le domaine des fusions. Les autorités de réglementation bancaire examinent la conformité des fusions aux normes prudentielles, et peuvent également être chargés d'évaluer les effets sur la concurrence, soit en vertu de la

législation bancaire, soit en vertu de la loi sur la concurrence. Aux Pays-Bas, l'autorité de réglementation bancaire a conservé les deux rôles à titre de mesure transitoire après l'introduction d'une nouvelle loi sur la concurrence. En Turquie, les fusions bancaires ont été exemptées du contrôle exercé en vertu de la loi sur la concurrence, car la crise financière nationale exigeait une action immédiate pour traiter les questions prudentielles et systémiques. Plus généralement, il se peut que les pouvoirs d'examen soient concurrents ou consécutifs. L'Italie pratique le partage de responsabilités le plus inhabituel ; les banques sont soumises à la loi générale sur la concurrence, mais la loi est appliquée dans ce secteur par l'autorité de réglementation bancaire, qui est la Banque d'Italie. Le rapport sur l'Italie observe que le fait d'avoir confié à l'autorité de réglementation bancaire la responsabilité d'appliquer la loi n'ouvre pas seulement des perspectives nouvelles à l'autorité de la concurrence sur cette application, mais peut également avoir encouragé une application plus vigoureuse de la loi.

39. Dans le domaine de la distribution et des échanges, plusieurs pays reconnaissent et exemptent expressément les accords de coopération, sous réserve de respecter certaines conditions. Néanmoins, seuls 2 de ces pays l'ont mentionné en décrivant leurs exemptions et régimes spéciaux. Il est probable que des groupes similaires bénéficient d'un régime équivalent dans la plupart des pays, au moyen d'exemptions au cas par cas ou de l'exercice d'un pouvoir discrétionnaire dans la fixation des priorités d'application de la loi. Les groupements d'exportateurs sont spécifiquement exemptés par certaines lois, mais ils sont généralement tolérés, même en l'absence d'exemptions expresses. Un petit nombre de juridictions revendiquent leur compétence pour sanctionner une conduite anticoncurrentielle si son effet défavorable n'est ressenti qu'au-delà de leurs frontières. (Par contraste, le critère des "effets" intérieurs est désormais courant, et les pays revendiquent le pouvoir d'appliquer leurs lois pour faire sanctionner des conduites extérieures à leurs frontières qui nuisent à la concurrence à l'intérieur de ces frontières).

40. Il est fréquent que le secteur des services et des professions libérales soit autorisé à exercer une certaine forme d'auto-réglementation, par l'intermédiaire d'une organisation syndicale ou professionnelle qui est équivalente à un accord horizontal à grande échelle. Des accords de cette envergure attirent inévitablement l'attention des autorités de la concurrence. La protection législative peut soustraire le processus au contrôle antitrust. Cette protection est un objectif commun des efforts de réforme, qui cherchent à introduire la concurrence dans la mesure où cela est compatible avec la protection des consommateurs dans des situations d'information asymétrique. Les autorités chargées de l'application du droit de la concurrence s'intéressent également de très près aux lignes de démarcation des exemptions et au régime spécial de l'auto-réglementation.

41. Le secteur de la santé bénéficie occasionnellement d'un régime spécial. Les prestataires eux-mêmes sont habituellement couverts par l'exemption bénéficiant aux professions auto régulées. La motivation de ce régime spécial est souvent le désir du gouvernement de réguler les coûts et la qualité du service, puisque le gouvernement paie ce service. Pour la même raison, les prix des produits pharmaceutiques font souvent l'objet de contrôles minutieux. La pratique répandue du contrôle de l'entrée dans le secteur de la pharmacie au détail, fondé sur la constatation d'un besoin économique plutôt que sur la simple justification de qualifications professionnelles suffisantes, s'avère plus problématique. En effet, elle est trop souvent justifiée, de manière non convaincante, par la volonté de contrôler les coûts de remboursement et de garantir un service accessible.

42. Un grand nombre de pays se sont dotés de lois spéciales sur le tabac et les boissons alcoolisées. Elles saisissent l'occasion de profiter de la demande non élastique de ces produits, de la contrôler ou de la taxer. Le problème le plus notoire de politique de la concurrence observé en Irlande découle des réglementations qui empêchaient l'ouverture de nouveaux pubs, initialement adoptées un siècle plus tôt pour faire baisser la consommation excessive d'alcool, et probablement également pour empêcher une concurrence excessive. Un grand nombre de pays contrôlent ou monopolisent la vente au détail ou en gros de boissons alcoolisées, et un petit nombre maintiennent le contrôle de l'Etat sur l'industrie du tabac ou

imposent des règles comme des prix fixes ou permettent la pratique de prix imposés de revente au détail. Certaines de ces politiques sont liées à des lois sur les taxes à la consommation ; en d'autres termes, elles régularisent la structure et les pratiques du secteur afin de simplifier et de surveiller le recouvrement des taxes. L'effet de ces politiques sur la concurrence est révélé par le nombre de consommateurs qui traversent les frontières, lorsque cela est possible, pour acheter dans des pays qui n'ont pas de contrôles similaires.

43. Le secteur de l'édition, des médias et des droits de diffusion bénéficie généralement d'un régime spécial, bien que l'intention soit parfois de le contrôler plus étroitement, plutôt que de l'exempter. Certaines exemptions empêchent toutes contestations formalistes de groupements d'entreprises efficaces. Les exemples incluent les sociétés de collecte des redevances et des droits de représentation, et les ligues sportives. Mais le "monopole" des droits de diffusion pour les événements les plus populaires peut être réglementé. Il existe souvent des règles spéciales à propos de la propriété et de la concentration dans les médias. Elles peuvent être interprétées comme compatibles avec les valeurs concurrentielles de libre entrée et de libre choix du consommateur, mais sont généralement expliquées dans d'autres termes, à savoir la diversité et l'équilibre des points de vue. Les règles relatives aux fusions et concentrations dans le secteur des médias semblent être plus rigoureuses que la loi sur la concurrence ne le serait dans le même contexte, mais leur effet réel dépendrait de la manière dont l'analyse de la loi sur la concurrence caractériserait réellement les effets sur les marchés et la concurrence. Une autre disposition spéciale courante permet, voire exige, des prix imposés pour les livres ou périodiques. L'imposition de prix maximum de revente peut protéger les consommateurs contre la puissance de marché des distributeurs, mais ces règles s'étendent généralement également à l'imposition de prix minimum de revente. Les effets de ces règles sont contestés. La suppression de ces règles dans certains pays n'a pas fait baisser les ventes de livres, bien qu'elle ait pu changer les méthodes de distribution. Ces règles ont probablement pour effet d'augmenter les prix moyens. En Espagne, le Tribunal a estimé que les économies annuelles que les consommateurs réaliseraient si des remises plus importantes étaient autorisées atteindraient plus de 10% des ventes au total. Le traitement dérogatoire des produits culturels appelle des justifications, afin de démontrer que les produits culturels, considérés dans un contexte de marché, présentent des caractéristiques spéciales qui expliqueraient des différences dans la manière dont ils doivent être traités. Il s'agit de produits "expérimentaux", dont la qualité est souvent inconnue avant leur consommation. Les consommateurs exigent du produit qu'il soit à la fois connu et nouveau, combinaison paradoxale qui rend difficile toute prévision du marché par les producteurs. Cette combinaison implique un taux d'innovation rapide et un haut risque d'échec. Comme certains autres secteurs qui contestent l'analyse de base, les produits culturels comme les livres sont produits à un coût fixe relativement élevé mais à un coût marginal pratiquement insignifiant. La coordination le long de la chaîne de distribution peut être parfaitement justifiée par la volonté de répartir les risques et de soutenir l'innovation exigée par les consommateurs. Mais une exemption formelle et expresse, à moins d'être formulée avec le plus grand soin, risquerait d'augmenter les prix ou de réduire la production dans une mesure supérieure à celle qui est nécessaire à cet effet.

44. Un grand nombre des autres exclusions particulières ou des pratiques d'octroi d'un régime spécial ressemblent à des reliques historiques ou à des réponses à la pression exercée par des groupes d'intérêts ayant dû faire face à des poursuites judiciaires en application de la loi. La Norvège autorise des monopoles municipaux d'exploitation de salles de cinéma, héritage d'il y a un siècle, époque à laquelle le cinéma était encore une nouveauté. La Corée autorise des restrictions territoriales sur une spécialité nationale, le vin de riz. Le système du régime spécial révèle souvent les présuppositions fondamentales de politiques nationales très anciennes. Au Japon, l'une des cibles principales de la réforme a été l'habitude de contrôler l'entrée au moyen de jugements portés par l'administration sur l'équilibre probable de l'offre et de la demande, qui était caractéristique de sa tradition de politique industrielle. En Allemagne, les efforts de réforme ont critiqué les pratiques et exigences découlant de la tradition des maîtres artisans, qui accroît actuellement les coûts d'entrée et entrave la flexibilité pour l'exercice de ces activités. Au Canada, des controverses impliquant de grandes entreprises nationales, nées à propos de transactions particulières dans

le secteur bancaire et des compagnies aériennes, a conduit le législateur à fixer des règles et procédures spéciales ; néanmoins, ces règles n'accordent pas nécessairement un traitement plus clément aux industries concernées. Aux Etats-Unis, les parties à des actions judiciaires ont parfois persuadé le Congrès d'intervenir et de sanctionner les autorités qui avaient engagé ces actions, par exemple pour permettre des contrats de distribution restrictive de boissons non alcoolisées. Lorsque le législateur met en balance d'autres intérêts et valeurs et la loi, la politique et les traditions de la concurrence, il est fréquent que les intérêts industriels prévalent. En créant des règles spéciales pour une industrie après qu'elle ait été dans le collimateur de l'autorité chargée d'appliquer le droit de la concurrence, le législateur semble faire signe à cette autorité de regarder ailleurs. Cependant, les législateurs semblent répugner à rejeter totalement les principes de la concurrence. Peu de ces régimes spéciaux créent des exemptions complètes en faveur de cas flagrants de monopoles ou de prix imposés. Ils sont plus susceptibles de tailler des règles sur mesures pour l'industrie concernée, et ces règles spéciales sont parfois à peu près aussi astreignantes que le seraient les règles du droit commun de la concurrence.

Réglementation sectorielle de la concurrence

45. L'infrastructure est le contexte le plus courant dans lequel s'inscrivent les régimes spéciaux de politique de la concurrence. La loi sur la concurrence était sans objet pour les services publics fournis par des monopoles naturels d'Etat, jusqu'à ce que la concurrence commence à apparaître sur certains de leurs services ou fonctions. La plupart font actuellement l'objet d'une réglementation pour contrôler l'exploitation de l'élément « monopole naturel » de la grille ou du réseau. Les régimes spéciaux et exemptions sont plus difficiles à justifier dans le domaine des transports, exception faite des aspects qui impliquent également une infrastructure de réseau-grille. Les contrôles des prix et de l'entrée (ou les exemptions qui autorisent des ententes de fixation des prix) pour les transports routiers, aériens et maritimes ont été justifiés par la volonté d'empêcher une concurrence excessive. Les transports routiers et aériens ont été déréglementés dans une mesure substantielle (bien que certains problèmes de services internationaux restent à résoudre), mais les exemptions ou régimes spéciaux demeurent courants pour les transports maritimes, les autocars et les taxis. En théorie, un régime sectoriel peut être un moyen d'appliquer les principes généraux de la concurrence de manière plus efficiente aux problèmes communs à une industrie particulière. Il conviendrait au minimum de contrôler attentivement le bien-fondé de cet argument d'efficacité accrue, plus particulièrement lorsque les règles spéciales ou le régime particulier apparaissent dans des situations autres que la réglementation d'une infrastructure constituant un monopole naturel.

46. La plupart des aspects de la réglementation sectorielle visant à promouvoir ou protéger la concurrence sont couverts dans l'inventaire des chapitres sectoriels. Cette étude se concentrera sur les relations entre les institutions qui sont chargées de promouvoir ou protéger des politiques qui affectent la concurrence. L'autorité de la concurrence et l'autorité sectorielle peuvent ne pas toujours concevoir des problèmes similaires en termes similaires. Le rapport sur l'Italie expose la problématique générale :

La force de l'engagement sur le thème des politiques de la concurrence varie dans les différents rouages de l'Etat. En principe, une structure raisonnable de consultation est en place entre l'Autorité et les agences sectorielles qui partagent certaines responsabilités avec elle. En pratique, il demeure possible pour l'Autorité et une autre autorité réglementaire de traiter de la même conduite, en appliquant des règles tirées de sources différentes. Le problème conceptuel commun de savoir qui réglemente l'accès à un service public monopolistique lorsque cet accès est contrôlé par le prix, demeure encore dans les limbes en termes d'attribution de compétence. La fixation d'un prix supérieur au coût de revient pour un service public essentiel peut constituer un abus de position dominante, tout comme la fixation d'un prix inférieur au coût de revient afin d'exclure la concurrence peut constituer une pratique de prix prédateurs, mais il est difficile d'en juger pour une autorité réglementaire et l'autorité chargée de poursuivre les ententes illicites, en

raison de la difficulté de déterminer les coûts économiques. Les différentes autorités concernées ne stockent pas les mêmes informations et ne peuvent pas toujours s'échanger ces informations, en raison des différences de contraintes et protections légales qui s'appliquent aux moyens dont les informations sont obtenues.

47. Les travaux d'examen ont révélé quelques modèles cohérents de variation institutionnelle, dans les similitudes entre les lois et les autorités, et dans les systèmes de coordination et de contrôles et équilibres. Le modèle le plus courant consiste à rendre les autorités réglementaires responsables des prix et services des monopoles naturels, alors que le traitement des différends à propos de l'accès au réseau est assuré en coordination avec les autorités de la concurrence, qui appliquent les principes généraux relatifs à l'abus de position dominante pouvant couvrir la même conduite. En d'autres termes, la compétence en matière de différends liés à l'accès est partagée. Dans certains pays, la loi sectorielle reconnaît explicitement que chaque autorité peut l'appliquer, et définit un protocole ou impose une obligation de concertation entre les autorités chargées de l'exécution de la loi. Si les relations ne sont pas claires et s'il en découle des problèmes, les rapports recommandent parfois des améliorations pour y remédier. En Irlande, le rapport suggère ce qui suit :

...un processus structuré de coordination et un fondement légal pour que les autorités puissent s'en remettre les unes aux autres, sans risque et sans diluer ni compromettre l'application de la politique de la concurrence. L'Autorité et les autorités de réglementation sectorielle devraient se concerter sur des affaires dont elles sont respectivement saisies, et se concerter lorsqu'elles sont chargées de poursuites dans la même affaire. Afin d'y parvenir, elles doivent avoir le droit de s'échanger des informations. La présence d'un représentant de l'Autorité dans les instances d'appel des décisions de l'autorité de réglementation sectorielle est une excellente idée pour intégrer des perspectives politiques.

Mais il est beaucoup moins important d'instituer des protocoles formels que de partager des conceptions politiques. Si les autorités sont en désaccord sur ce qui doit être fait ou pourquoi, un protocole formel ne fera que structurer leur désaccord.

48. Le protocole formel peut donner un rôle de contrôle à l'autorité de la concurrence. L'autorité de la concurrence peut notamment, si l'intervention réglementaire se fonde sur la puissance de marché détenue dans l'industrie réglementée, être responsable de définir le marché et de déterminer si une entreprise détient une puissance de marché sur celui-ci. La structure la plus développée et la plus systématique de ce genre se trouve au Mexique. Dans ce pays, la CFC s'occupe directement d'aspects concurrentiels de la réglementation sectorielle spécifique et de l'allocation des licences et permis. La CFC peut déterminer quels agents économiques peuvent participer aux procédures d'appel d'offres pour l'adjudication de marchés, concessions, licences et permis. Par ailleurs, la CFC peut déterminer s'il existe une concurrence effective, ou si l'un des agents détient un pouvoir de marché substantiel, à titre de condition pour qu'une autorité de réglementation sectorielle impose une réglementation comme un plafonnement des prix. A cet égard, la CFC peut également déterminer que la concurrence a été restaurée en raison de changements des conditions du marché, de telle sorte que la réglementation peut être abrogée. L'application des mêmes normes par la même autorité experte dans tous ces contextes permet d'intégrer la politique de la concurrence dans la politique réglementaire. Mais la structure formelle n'empêche pas les désaccords qui peuvent s'élever à propos du pouvoir de l'autorité de réglementation sectorielle d'exercer un certain nombre de voies et moyens de droit.

49. Dans un petit nombre de pays, une autorité sectorielle spécifique applique des lois sur la concurrence qui sont taillées sur mesures pour ce secteur. Les Etats-Unis en sont l'exemple type. Cette structure peut créer de graves incohérences. En raison de leur expérience limitée de l'analyse de la concurrence, et, dans certains cas, en raison de leur obligation de promouvoir le bien-être de l'industrie, l'attitude des autorités de réglementation sectorielle peut comporter un biais systématique, qui consiste à

voir le monde de la manière dont l'industrie qu'ils réglementent le voient eux-mêmes. Des autorités de réglementation sectorielle ont approuvé des fusions —contre l'avis de la Division Antitrust—qui ont conduit à créer une puissance de marché dans le domaine du transport aérien et à des problèmes de monopole dans les transports ferroviaires. D'autres régimes spéciaux couvrent les transports maritimes, les coopératives agricoles, les pêcheries et le conditionnement de la viande. Les établissements financiers sont soumis à des règles de concurrence spéciales, particulièrement en matière de fusions, qui sont appliquées par 4 autorités de réglementation différentes et la Division Antitrust également, qui appliquent les mêmes directives formelles mais peuvent aboutir à des résultats différents en appliquant des présomptions différentes à propos des marchés de produits et des marchés géographiques. Le rapport sur les Etats-Unis appelle à éliminer les vestiges restants de ce morcellement de l'analyse et de l'application de la loi.

50. Par ailleurs, l'existence d'institutions sectorielles qui appliquent la même loi substantielle et la même analyse de fond semble mieux fonctionner qu'un système de règles spéciales pour chaque secteur. Le schéma "Une loi-plusieurs autorités de réglementation" est le modèle de base utilisé au Royaume-Uni, et l'Italie l'emploie dans le secteur bancaire, tandis que les Etats-Unis en appliquent une version dans certains secteurs. L'application de la même loi de base encourage évidemment la convergence et réduit les conflits entre les politiques et les autorités, particulièrement lorsque les lois explicitent clairement que les principaux généraux prévalent. Les lois américaines sur les télécommunications et l'énergie n'évincent pas les lois antitrust, de telle sorte que les autorités de réglementation sectorielle doivent réaliser leurs objectifs de manières compatibles avec la loi sur la concurrence. Le rapport sur les Etats-Unis a décrit comment ce processus fonctionne dans le secteur de l'énergie :

La structure réglementaire n'a pas complètement évincé la loi sur la concurrence, mais coexisté avec elle. Les tribunaux ont donné instruction à l'autorité de réglementation d'inclure la politique de la concurrence dans sa compréhension et son application des critères plus larges d'"intérêt public", et l'autorité de réglementation a suivi cette instruction. Le Congrès a clairement soutenu le mouvement de déréglementation, en prenant, à la fin des années 1970, des mesures qui ont commencé à supprimer les contrôles des prix sur le gaz, et à introduire des alternatives concurrentielles pour la production d'électricité. Par ailleurs, les autorités de la concurrence ont encouragé ces mouvements à un stade précoce, en offrant des conseils et une assistance informels et formels.

Le Royaume-Uni a instauré un partage complexe de fonctions entre les nombreuses institutions qui sont responsables à la fois de la politique de la concurrence, de son application et de la réglementation sectorielle. Les nombreuses autorités de réglementation partagent généralement l'objectif de protéger et promouvoir la concurrence, ce qui est compatible avec les tâches réglementaires qui incluent des aspects de contrôle de l'industrie pouvant engendrer une puissance monopolistique. Les autorités de réglementation dans le secteur du gaz, de l'électricité, des télécommunications, de l'eau et des transports ferroviaires ne partagent pas seulement des objectifs, mais ont les pleins pouvoirs pour appliquer la Loi sur la Concurrence (*Competition Act*) aux côtés de l'OFT. Plusieurs caractéristiques de l'approche britannique essaient d'empêcher des applications divergentes de la loi par les différentes autorités. Toutes appliquent les mêmes procédures, y compris un "point unique de notification" à l'OFT. Les directives des autorités de réglementation sectorielle à propos du respect de la loi sur la concurrence sont élaborées conjointement avec l'OFT. Plus important encore, les appels de toutes les décisions prononcées en vertu de la Loi sur la Concurrence, qu'elles soient rendues par l'OFT ou des autorités de réglementation sectorielle, suivent la même voie vers une juridiction désormais dénommée « Cour d'Appel de la Concurrence » (*Competition Appeal Tribunal*), qui peut garantir la concordance entre elles.

51. Un autre modèle consiste regrouper en une seule institution toutes les institutions administratives qui appliquent des lois affectant la concurrence, y compris la réglementation économique des monopoles naturels. Ce regroupement peut conduire à confier toutes ces fonctions à l'autorité de la concurrence. Certaines autorités de la concurrence ont eu recours aux dispositions des lois générales sur la concurrence

qui prohibent l'abus de position dominante pour réguler les prix des monopoles infrastructurels. Mais les fonctions de contrôle sectoriel diffèrent de l'exécution *a posteriori* de la loi, et peuvent appeler des procédures et règles différentes. Les Pays-Bas reconnaissent ces différences en utilisant une variante de ce modèle : lorsque le rapport a été rédigé, l'autorité de réglementation du secteur de l'électricité était en cours de transformation en chambre au sein du NMa.

52. Le contrôle exercé par les tribunaux encourage la cohérence et tranche les conflits. Certains pays ont délibérément constitué des juridictions d'appel spécialisées pour traiter à la fois des autorités de réglementation sectorielle et du droit de la concurrence. Au Royaume-Uni, la Cour d'Appel de la Concurrence (*Competition Appeal Tribunal*) sert cette fonction ; en outre, la Commission de la Concurrence joue un rôle intégrateur, car elle assume la double fonction de réviser les décisions réglementaires et d'enquêter et statuer sur des questions de concurrence. En Pologne, le Tribunal anti-monopoles démontre le rôle de cette institution dans l'intégration de considérations politiques. Constitué en tant qu'instance judiciaire indépendante chargée de contrôler l'administration d'Etat, ce Tribunal devient une force importante dans le développement de la politique. L'un des motifs qui ont conduit à créer un tribunal spécialisé au sein du système judiciaire, composé de magistrats expérimentés en droit commercial, a été la volonté de rompre avec l'approche formaliste généralement rencontrée dans les juridictions administratives. Sa compétence élargie, qui englobe désormais des affaires provenant de l'office de la concurrence et des autorités de réglementation de l'énergie, des télécommunications et des transports ferroviaires, ainsi que des questions de droit de la consommation comme les contrats d'adhésion, augure que les politiques seront désormais appliquées de manière cohérente dans les affaires de concurrence et la réglementation sectorielle. La création d'une juridiction d'appel commune pour les affaires de concurrence peut marquer une volonté délibérée de s'écarter de la pratique habituelle. En Allemagne et en France, par exemple, ce sont les juridictions de droit privé qui sont familières des contentieux du droit des affaires et du droit commercial, plutôt que les juridictions de droit administratif qui traitent des contentieux avec l'administration, qui statuent sur les appels des décisions appliquant le droit de la concurrence et des décisions des autorités de réglementation sectorielle tranchant des différends relatifs à l'accès au réseau.

53. La coordination, voire même la centralisation, est recommandée pour éviter les incohérences. Néanmoins, dans certains pays où la culture de la concurrence était par ailleurs faible au sein du gouvernement, les examens ont suggéré de donner aux ministres des rôles explicites en matière de politique de la concurrence. Ces rôles n'iraient cependant pas jusqu'à des mesures d'exécution forcée de la loi. Il s'agirait plutôt de les rendre responsables d'éliminer les restrictions à la concurrence dans leurs propres sphères de compétence, ce qui élargirait le champ de la politique de la concurrence et soulignerait sa vaste importance horizontale. Les examens ont noté que les ministres et autorités de réglementation sectorielle pouvaient créer des offices anti-ententes pour travailler avec l'autorité chargée de l'application du droit de la concurrence et de conseiller les industries sur leurs obligations de se conformer à la loi sur la concurrence.

54. Les exclusions et régimes institutionnels spéciaux incorporent un équilibre entre la politique de la concurrence et d'autres politiques ou objectifs. Cet équilibrage peut intervenir au cas par cas, plutôt qu'en vertu de règles généralement applicables. Quelques régimes de droit de la concurrence le prévoient d'ailleurs explicitement. Exceptionnellement, les lois peuvent permettre à l'autorité chargée de l'exécution de fonder sa décision sur des considérations autres que de politique de la concurrence.⁷ Le processus d'octroi ou de refus des exemptions des interdictions légales, qui est usuel pour de nombreuses autorités d'exécution, revient généralement à faire la balance des effets économiques nets, selon des principes de "bon sens", mais les critères autorisés peuvent inclure d'autres considérations, tel l'emploi.⁸ Les autorités chargées de l'exécution du droit de la concurrence n'assument généralement pas elles-mêmes la responsabilité de faire la balance avec d'autres considérations politiques. Le processus de décision peut néanmoins établir cette balance, si les décisions de première instance sont prises par des tribunaux non

spécialisés dont les membres représentent des groupes d'intérêts, ou par des magistrats non spécialisés jouissant d'un pouvoir d'appréciation souveraine pour l'interprétation des preuves des effets, ou la détermination des sanctions à infliger ou des réparations à ordonner. Dans un petit nombre de pays, les processus institués par le droit de la concurrence autorisent le gouvernement ou un ministre à invoquer d'autres politiques afin d'annuler des décisions d'exécution. Ce type d'intervention est particulièrement fréquent en matière de fusions. Ces interventions apparemment *ad hoc* posent des problèmes de transparence, de prévisibilité et de loyauté.

55. L'étendue des exclusions ou règles spéciales pour certains secteurs particuliers est désormais très homogène d'un pays à l'autre. Des pays qui avaient auparavant de longues listes d'ententes expressément exemptées ont désormais supprimé la plupart de celles-ci. La corrélation entre l'étendue des régimes sectoriels spécifiques et l'efficacité de la politique n'est pas évidente. Une exécution active de la loi peut stimuler des correctifs législatifs ; les Etats-Unis, qui ont la réputation d'exécuter vigoureusement la loi sur la concurrence, ont plus d'exemptions et de régimes spéciaux que la plupart des autres pays. La Recommandation de 1997, invitant à combler lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces, demeure parfaitement valable et pertinente. Mais il faut être réaliste à propos du volume de travail restant à accomplir pour y parvenir. Pour les régimes spéciaux ou exclusions les plus courants, les lacunes ne sont pas importantes et des considérations d'intérêt public légitimant une certaine forme de régime spécial sont plausibles. Dans l'application de cette recommandation, il conviendrait de focaliser l'attention sur les différences de réglementation ou d'application qui protègent les monopoles et sur les conditions ou pratiques manifestement anticoncurrentielles.

Institutions chargées du droit de la concurrence et de son application

Indépendance

56. La politique de la concurrence est compromise par la recherche de rente : plus le potentiel de profit à tirer d'un monopole est élevé, et plus forte est l'incitation à essayer d'influencer les décideurs afin d'obtenir ou de protéger ce profit. Ainsi, il peut être particulièrement important pour une autorité responsable d'empêcher les monopoles d'être protégée contre toute influence dictée par la recherche d'une rente.. Pratiquement toutes les juridictions déploient certains efforts pour séparer les applications de la politique de la concurrence des décisions politiques du parlement ou du gouvernement. La promesse abstraite d'indépendance s'appuie généralement sur d'autres garanties institutionnelles.

57. Certaines autorités de la concurrence sont délibérément placées en dehors de la structure des ministères, afin d'être autosuffisantes sur le plan administratif et substantiel. Un petit nombre d'autorités de la concurrence ont elles-mêmes reçu le statut ou le rang de ministères. Ce statut peut renforcer leur indépendance décisionnelle. Plusieurs autorités ou fonctionnaires qui sont décrits comme indépendants sont néanmoins connectés à un ministère. Dans certains pays où le fonctionnaire ou l'autorité de décision a un statut spécial, la bureaucratie sur laquelle il s'appuie fait partie du ministère. Mais même dans les cas où l'autorité ou le fonctionnaire chargé de la politique de la concurrence fait intégralement partie d'un ministère, la nécessité d'une décision indépendante et non politique peut être officiellement reconnue dans une certaine mesure. Il est fréquent que le Ministre ait interdiction de donner des instructions à propos des mesures ou décisions à prendre dans certains cas particuliers.

58. Afin de reconnaître à la fois la nécessité de l'indépendance et le désir de contrôle fonctionnel, l'application de la loi sur la concurrence peut exiger l'intervention de plusieurs autorités à différents niveaux. Elles peuvent inclure le secrétariat d'un ministère, responsable d'ouvrir les enquêtes et de recommander les actions à entreprendre, d'un expert, d'un conseil représentatif ou d'un tribunal extérieur

au gouvernement qui agit en tant que décideur indépendant, et, peut-être également, d'un tribunal ou d'une cour spécialisée afin de statuer sur les appels de ces décisions. Des institutions complexes tendent à augmenter les coûts et à rallonger la durée des procédures, et les désaccords entre elles à propos de la politique à tenir peuvent être un facteur d'incertitude. Par ailleurs, la possibilité d'apporter des corrections au fil de ce processus peut améliorer l'étude des affaires et les résultats de leur traitement.

59. Le pouvoir de nommer le décideur est le principal obstacle politique à l'indépendance décisionnelle. Dans les pays à régime présidentiel, cette nomination est généralement effectuée par le président. Lorsque le chef de l'Etat procède à cette nomination, celle-ci est généralement proposée par le gouvernement ou soumise à l'approbation du parlement. Dans certains pays cependant, le pouvoir de nomination est exercé au niveau ministériel. Une forte influence ministérielle sur la nomination tend à avoir pour corollaire une impression de moindre indépendance. Reconnaissant que l'intervention des politiques dans le processus de nomination pourrait conduire à un contrôle politique indirect, plusieurs pays tentent de mettre des obstacles à une politisation excessive. Certains pays encouragent le professionnalisme en sollicitant des candidatures pour les positions les plus élevées et en les soumettant à plusieurs tours de sélection préalables. D'autres prescrivent des qualifications et une expérience professionnelle pour garantir que l'autorité soit composée de technocrates spécialisés. Un petit nombre réserve des places à des fonctionnaires de carrière au comité chargé de prendre les décisions. Mais, pour certaines autorités de décision plus grandes, le système adopte l'approche opposée, allant même jusqu'à désigner des membres afin de représenter certains groupes d'intérêts particuliers. Cette représentation prescrite par la loi garantit à ces groupes d'intérêts que leurs préoccupations seront entendues, mais fait apparaître l'autorité comme une instance politique, statuant sur les affaires sur la base d'une négociation et d'un marchandage sur les intérêts économiques. La protection des mandats est aussi importante que la transparence de la nomination. Les plus fortes protections des mandats des hauts dirigeants sont probablement celles de la CFC mexicaine, dont les membres restent en fonctions pendant un seul mandat non renouvelable de 10 ans. Dans la plupart des autorités comprenant de multiples membres, les durées de mandat sont échelonnées pour garantir la continuité.

60. Les vertus fonctionnelles de l'indépendance décisionnelle peuvent être dupliquées dans les structures des autorités elles-mêmes. La HCO de Hongrie est substantiellement indépendante du gouvernement, mais inclut en outre un organisme décisionnel séparé, le Conseil de la Concurrence, qui est foncièrement indépendant du reste de la HCO. Ses membres fonctionnaires bénéficient de l'équivalent d'une protection à vie de leur mandat, d'une manière assez comparable à celle des divisions de décision du *Bundeskartellamt* en Allemagne.

61. Le contrôle des ressources, du budget ou du personnel confère un contrôle indirect sur la politique et l'action. Peu d'autorités sont entièrement libres de cette influence. Pour certaines, le budget de l'autorité de la concurrence est un poste séparé du budget qui doit être examiné et approuvé par le parlement. Pour beaucoup, le budget et les autres politiques de ressources sont entre les mains d'un ministre, qui peut être soit le ministre auquel l'autorité est rattachée, soit le ministre des finances qui prépare le budget national. Peu de pays ont essayé de fournir une source de financement qui ne dépendrait pas d'une dotation parlementaire. Toutefois, la possibilité pour l'autorité de se financer grâce à des redevances ou en conservant une partie des amendes infligées pourrait créer des incitations perverses à engager des poursuites.

62. Le degré approprié d'indépendance diffère selon qu'il s'agit de définir la politique, d'ouvrir des enquêtes et d'engager des poursuites, ou de prendre des décisions. Il est rare que toutes ces fonctions soient assignées à une seule autorité. L'élaboration de la politique est habituellement une responsabilité ministérielle, bien que des autorités de la concurrence séparées aient généralement au minimum un rôle consultatif à propos de la politique. La fixation de priorités et l'engagement de poursuites sont des fonctions "exécutives", mais les fonctionnaires qui en sont responsables occupent des postes de

fonctionnaires de carrière ou des mandats protégés. Les fonctions de décision sont celles pour lesquelles l'indépendance est la plus importante, et qui sont le plus souvent accomplies par une autorité extérieure au gouvernement.

63. Dans les cas où aucune autorité indépendante de cette nature ne traite spécifiquement des questions de concurrence, les tribunaux tendent à devenir les décideurs clés. Les autorités spécialisées qui ont été créées pour statuer sur les appels des décisions administratives peuvent faire office, dans une mesure croissante, d'instances de décision de première instance. Si le principal décideur est un tribunal indépendant, il y a moins de raisons d'être inquiet à propos de l'indépendance de l'autorité. Toutefois, le fait de s'en remettre à des tribunaux peut rendre difficile d'établir des priorités dans l'ordre des poursuites à engager. Dans certains pays Membres, les tribunaux ont été lents à s'intéresser à l'importance des questions de concurrence.

64. Les préoccupations et controverses à propos de l'indépendance se sont principalement élevées à propos d'affaires structurelles complexes, de monopole, de privatisation et de fusions. Pour poursuivre l'exécution de la loi à l'encontre d'ententes et d'abus flagrants, il est probable qu'il existe une plus grande indépendance de fait et moins de besoins de moyens de la garantir. Pour les affaires structurelles qui ont des implications en termes de politique industrielle, application de la loi et intervention coexistent dans la plupart des juridictions. Un grand nombre de juridictions prévoient explicitement une intervention ministérielle dans les affaires de fusions. Dans un petit nombre de pays, les décisions sur les fusions relèvent de la responsabilité du gouvernement. Dans certains pays, un ministre peut avoir le pouvoir discrétionnaire de renvoyer ou non un projet de fusion à l'autorité de la concurrence, pour étude et contrôle. Si le ministre est déterminé à l'autoriser, elle ne sera pas soumise à l'autorité de la concurrence, et le ministre évitera donc l'embarras d'autoriser une transaction que l'autorité indépendante de la concurrence déclare contraire à l'intérêt public. Le ministre ou le gouvernement peut avoir le pouvoir d'infirmer la décision de l'autorité de la concurrence en appel, ou d'invoquer d'autres objectifs politiques pour annuler des décisions ou recommandations fondées sur la concurrence. La publicité est un puissant barrage à l'abus de ce pouvoir discrétionnaire. Les soupçons que le règlement transactionnel d'une grande affaire de fusion aux Etats-Unis ait été motivé par des considérations politiques ont conduit à une législation qui exige dorénavant une procédure publique de notification et de commentaire, avant qu'un tribunal ne puisse approuver le règlement négocié par le gouvernement d'affaires antitrust.

65. L'accès aux décideurs est important pour que les autorités de la concurrence puissent jouer leur rôle de sensibilisation à l'impératif de la concurrence, et les vertus de l'indépendance pourraient devenir des handicaps pour cette fonction. Néanmoins, la pratique dément cette observation. En Hongrie et en Corée, la possibilité pour les fonctionnaires chargés de la politique de la concurrence, de haut rang mais indépendants, d'accéder directement au processus de décisions ministérielles, a apporté un soutien efficace à cette politique. En effet, ce rôle de sensibilisation du public est d'autant plus efficace qu'il est joué par une autorité indépendante, dont les avis politiques sont crédibles car son historique d'application de la loi lui a conféré la réputation d'être honnête et libre de toute influence. Néanmoins, rien ne garantit dans certains pays que les avis de l'autorité seront entendus, précisément parce qu'elle est extérieure à la structure gouvernementale. Dans certains pays où d'autres agences sont admonestées de se concerter avec l'autorité indépendante de la concurrence sur des propositions politiques, cette admonestation reste souvent lettre morte.

66. Dans la quasi-totalité des pays Membres examinés, les autorités chargées de la politique de la concurrence s'appliquent activement à convaincre du bien-fondé de la réforme ou à empêcher des réglementations anticoncurrentielles. Mais ce rôle n'est pas toujours assumé par l'autorité chargée de faire appliquer la législation de la concurrence. Lorsqu'il existe un organisme ministériel chargé de la politique de la concurrence, séparé de l'autorité chargée de l'application de la législation de la concurrence, cet organisme ministériel participe habituellement au débat politique au sein du gouvernement. Il n'en

demeure pas moins qu'une autorité indépendante a plus de possibilités de contribuer au débat public. Certains pays ont exprimé la crainte que l'implication dans des questions politiques et réglementaires ne sape l'indépendance indispensable à une application efficace de la loi. Les examens ont néanmoins révélé la volonté de confier un rôle plus étendu à l'autorité chargée de l'application de la loi, y compris dans ces contextes, en raison de la contribution unique qu'elle peut apporter au débat politique en raison de son expérience sur le terrain et de sa position indépendante. Dans les cas où la structure d'application de la législation est encore très faible et le statut et l'indépendance de l'autorité n'est pas encore très bien établie, les examens reconnaissent qu'il est hautement prioritaire de renforcer l'application de la loi. Plusieurs autorités chargées de l'application de la loi, solidement établies, rapportent qu'elles consacrent 10% ou plus de leurs ressources à des études et démarches de sensibilisation touchant à des problèmes que la simple application de la loi ne peut pas résoudre.

Questions d'application de la Loi

67. L'examen des lois substantielles a révélé certaines questions techniques qui affectent leur application lorsque la réglementation est importante. L'"auto-réglementation" est un problème courant, si les concurrents d'un secteur l'utilisent pour contrôler la concurrence. Les associations sont le vecteur habituel de ce type de réglementation et, dès lors, la cible usuelle des poursuites engagées pour faire appliquer la loi. Certaines lois contiennent des règles interdisant expressément les agissements anticoncurrentiels d'une association, obviant ainsi à la nécessité de prouver ou d'inférer un accord particulier entre les membres impliqués dans chacun de ces agissements. L'application de sanctions efficaces afin de dissuader ce type de conduite peut également exiger des règles spéciales, par exemple afin de rendre les membres responsables des actes de l'association, ou d'imputer le chiffre d'affaires des membres à l'association, en utilisant ce total comme base de calcul de l'amende. Dans un petit nombre de pays, la coopération horizontale dans l'industrie a été soutenue par les "conseils administratifs" des fonctionnaires. Ces instructions n'ont pas autant de forces qu'une autorisation ou injonction réglementaire, mais elles ont historiquement produit des effets similaires. Les réformes visant à régulariser les pratiques administratives et à accroître la transparence peuvent aider à réduire cet abus. Néanmoins, la tâche est une gageure. D'autres autorités ou ministères peuvent essayer de minimiser la trace de leurs conseils en ne les délivrant qu'oralement — exactement comme les entreprises qui imposent des prix de revente ne le font pas en vertu d'accords écrits, à présent que les sanctions sont plus lourdes. Par ailleurs, les entreprises qui préféreraient ignorer les conseils et informer l'autorité de la concurrence du problème pourront néanmoins ne pas vouloir prendre le risque de contrarier un fonctionnaire ministériel important. Lorsque ces problèmes peuvent être surmontés, et lorsque les doctrines formelles de l'autorisation réglementaire ou de l'action d'Etat ne sont pas un obstacle, l'intervention du droit de la concurrence a été utilisée pour réformer des restrictions d'auto-réglementation, essentiellement dans le secteur des professions libérales et autres services, qui bénéficiaient de l'appui des autorités réglementaires.

68. Le droit de la concurrence a également été un important outil de réforme dans le processus de contrôle et de restructuration des monopoles infrastructurels. Les examens ont fait état de situations et de problèmes communément rencontrés. Dans un petit nombre de pays, l'interdiction d'abus de position dominante posée par la loi sur la concurrence a directement servi à réguler les prix monopolistiques. Dans le processus de déréglementation et de réforme, qui consiste à ouvrir des secteurs antérieurement monopolisés à de nouveaux entrants et à contrôler les abus commis par le détenteur historique de l'ancien monopole, le droit de la concurrence a souvent ouvert la voie ou servi de fondement à des règles sectorielles sur l'accès et la discrimination. Toutefois, les principes généraux de la concurrence et les doctrines sectorielles divergent parfois. La fixation de seuils de parts de marché pour identifier la puissance sur le marché en est un exemple notable. Un seuil inférieur inflexible pourrait constituer une application transitoire efficace des principes généraux à un problème sectoriel particulièrement épineux, pêchant par excès de zèle pour corriger le comportement du détenteur opiniâtre d'un monopole historique. Mais l'application impassible de ce seuil à de nouveaux entrants, au moment où ils acquièrent eux-mêmes une

position significative sur le marché, irait à l'encontre du but recherché. Dans quelques rares cas, l'application de la loi sur la concurrence a servi à séparer les éléments monopolistiques et concurrentiels dans une industrie en cours de déréglementation. Le principal exemple de cette application a été le procès antitrust qui a brisé le monopole téléphonique national aux Etats-Unis. Un petit nombre de lois confèrent ce grand pouvoir à la loi sur la concurrence et à sa procédure d'application, et les pouvoirs analogues conférés dans d'autres pays n'ont jamais été utilisés à cet effet. Dans l'immense majorité des cas, un texte de loi spécifique est généralement adopté pour opérer des restructurations de cette envergure.

69. De nombreux examens par pays ont mis en lumière certains aspects du processus quasi-réglementaire d'examen et de contrôle des fusions. Il a souvent été question de l'équilibre avec d'autres politiques, explicitement ou implicitement, dans l'évaluation des partages de responsabilité entre les autorités chargées de l'application du droit de la concurrence, les tribunaux dotés d'un pouvoir de décision indépendant et les ministères détenant d'autres portefeuilles. L'étendue du réexamen, et, dès lors, de la balance coût/bénéfice des règles et procédures d'application du droit de la concurrence en matière de fusions, a attiré l'attention sur un pays, la Grèce, où une "réforme" qui exigeait de l'autorité qu'elle consacre toutes ses ressources à l'examen et à l'approbation des fusions, l'a empêchée de prendre toute mesure à propos d'autres problèmes plus importants. Par ailleurs, dans un petit nombre de pays, les réexamens ont recommandé de réviser les réglementations sur le contrôle des fusions afin de faciliter le respect du droit des fusions, notamment en éliminant le critère de la part de marché de la liste des conditions déclenchant une obligation de notification.

70. Les Recommandations de 1997 appellent à faire respecter énergiquement et efficacement le droit de la concurrence. L'efficacité des mesures d'application forcée de la loi dépend de questions juridiques techniques qui relèvent de juridictions spécialisées, et pour lesquelles des recommandations généralisées ne seraient guère utiles. Toutefois, une préoccupation générale combine ces questions juridiques à un principe économique, et peut s'exprimer en une double question : les sanctions sont-elles assez fortes pour dissuader une conduite anticoncurrentielle, et d'autres solutions, tels des dommages intérêts ou des actions privées, sont-elles suffisantes pour corriger ses conséquences ? Seules comptent les sanctions et recours appliqués en pratique, bien plus que ce qui est prévu par la loi, et la pratique réelle dépend elle-même des tribunaux. Dans certains pays, seul un tribunal peut imposer des sanctions ou accorder toute autre réparation. Même lorsqu'une autorité peut infliger une amende, le traitement par les tribunaux de l'appel qui s'ensuit indique si les questions de concurrence sont prises au sérieux. On observe une tendance claire à infliger des pénalités financières plus lourdes à l'encontre des ententes injustifiables, mais il reste encore beaucoup à faire. Il est fréquemment indiqué que les amendes infligées dans des affaires de prix imposés et de soumissions concertées sont les plus fortes jamais prononcées dans des affaires de délinquance en col blanc ; dans certains pays cependant, les amendes effectives ne représentent toujours qu'une très faible fraction du gain économique probable des violations. Un très petit nombre de pays imposent des sanctions à des décideurs individuels. Si les sanctions sont trop faibles pour dissuader des violations, les mesures d'application forcée de la loi ne sont pas encore assez efficaces pour que la politique de la concurrence empêche une conduite anticoncurrentielle qui pourrait contrecarrer la réforme.

NOTES

1. Les recommandations de 1997 accordent plus d'attention à la concurrence que ne le faisait la Recommandation du Conseil concernant l'amélioration de la qualité de la réglementation officielle. La Recommandation du Conseil de 1995 et la checklist qui l'accompagne se concentrent principalement sur le processus administratif, bien qu'elles notent l'importance de supprimer les entraves à la concurrence afin d'accélérer la réforme structurelle et l'adaptation à la mondialisation. Le Comité de la Concurrence est intervenu activement dans le processus qui a produit le Rapport de 1997, et l'intérêt soutenu manifesté par le Comité explique sans aucun doute pourquoi la politique de la concurrence a une place plus prééminente dans ce Rapport.

2. Texte intégral de la Recommandation 1 :
 1. Adopter, au niveau politique, de vastes programmes de réforme de la réglementation comportant des objectifs clairs et prévoyant des cadres précis pour leur mise en oeuvre.
 - Définir les principes d'une "réglementation de qualité" afin de guider la réforme, en s'inspirant de la Recommandation de 1995 du Conseil de l'OCDE concernant l'amélioration de la qualité de la réglementation officielle. Une réglementation de qualité devrait : (i) être nécessaire pour répondre à des objectifs clairement définis, et de nature à assurer la réalisation de ces objectifs ; (ii) reposer sur un fondement juridique rationnel ; (iii) procurer des avantages qui justifient les coûts, compte tenu de la répartition des effets produits dans l'ensemble de la collectivité ; (iv) engendrer le moins possible de coûts et de distorsions sur le marché ; (v) promouvoir l'innovation au moyen des mécanismes d'incitation du marché et d'approches fondées sur des objectifs ; (vi) être claire, simple et pratique pour les utilisateurs ; (vii) concorder avec les autres réglementations et politiques ; et (viii) être compatible autant que possible avec les principes visant à faciliter la concurrence, les échanges et l'investissement aux niveaux national et international.
 - Créer, au sein de l'administration, des mécanismes efficaces et crédibles pour assurer la gestion et la coordination de la réglementation et de sa réforme ; veiller à ce que les compétences des autorités responsables de la réglementation et des divers niveaux d'administration ne se chevauchent pas ni ne fassent double emploi.
 - Encourager la réforme à tous les niveaux d'administration et au sein d'organismes privés comme les organismes de normalisation.

3. Texte intégral de la Recommandation 2 :
 2. Réexaminer systématiquement les réglementations pour vérifier si elles répondent toujours avec efficacité et efficacie aux objectifs qui leur sont assignés.
 - Réexaminer les réglementations (économiques, sociales et administratives) à la lumière des principes relatifs à une réglementation de qualité et selon le point de vue de l'utilisateur plutôt que celui du responsable de la réglementation. Axer ce réexamen sur les réglementations dont la réforme produira les avantages les plus importants et les plus visibles, en particulier sur celles qui apportent des restrictions à la concurrence et aux échanges et affectent les entreprises, notamment les PME.
 - Examiner aussi bien les propositions relatives à de nouvelles réglementations que les réglementations existantes.
 - Intégrer l'analyse d'impact de la réglementation dans la définition, le réexamen et la réforme des réglementations.
 - Actualiser les réglementations en prévoyant des mécanismes de révision automatique comme les clauses de caducité automatique.

4. Texte intégral de la Recommandation 5 :

(5.) Réformer les réglementations économiques dans tous les secteurs afin de stimuler la concurrence, et les éliminer sauf celles qui s'avèrent être le meilleur moyen de répondre aux intérêts généraux de la collectivité :

- Examiner en toute priorité les dispositions des réglementations économiques qui apportent des restrictions à l'entrée sur le marché, à la sortie du marché, à la tarification, à la production, aux pratiques commerciales habituelles et à diverses formes d'organisation de l'activité industrielle et commerciale.
- Promouvoir l'efficacité et le passage à une situation de concurrence effective dans les cas où les réglementations économiques restent nécessaires à cause d'un risque d'abus de position de force sur le marché. En particulier : (i) séparer les activités potentiellement concurrentielles des réseaux de services d'utilité publique réglementés, et procéder par ailleurs aux restructurations requises pour réduire l'influence économique des entreprises en place ; (ii) garantir l'accès aux réseaux essentiels à tous les entrants sur le marché dans des conditions de transparence et de non discrimination ; (iii) recourir au plafonnement des prix et à d'autres mécanismes pour encourager les gains d'efficacité si des mesures de contrôle des prix s'imposent pendant la période de transition vers une situation de concurrence.

5. Texte intégral de la Recommandation 7 :

(7.) Recenser les liens importants avec d'autres objectifs de l'action gouvernementale et élaborer des politiques qui permettent de réaliser ces objectifs en favorisant la réforme :

- Adapter en tant que de besoin, les politiques prudentielles et autres politiques sociales telles que, par exemple, les politiques de la santé, concernant la sécurité, la protection des consommateurs, la sécurité d'approvisionnement énergétique de manière à ce qu'elles répondent à leurs objectifs aussi efficacement que possible dans le cadre d'un environnement concurrentiel.
- Examiner les dispositifs non réglementaires, entre autres, les subventions, la fiscalité, les politiques de passation des marchés publics, les instruments commerciaux tels que les droits de douane et autres dispositifs de soutien, et les réformer lorsqu'ils faussent indûment la concurrence.
- Faire en sorte que les programmes conçus pour réduire les coûts potentiels de la réforme de la réglementation soient bien ciblés, aient un caractère transitoire et facilitent la réforme au lieu de la retarder.
- Mettre en oeuvre la totalité des recommandations issues de l'Etude de l'OCDE sur l'emploi afin d'améliorer la capacité des travailleurs et des entreprises à s'adapter et à mettre à profit les nouvelles perspectives qui peuvent s'offrir pour les entreprises et l'emploi.

6. Les informations données dans ce tableau à propos des pays qui n'ont pas été examinés dans le cadre du programme de réforme de la réglementation proviennent de documents soumis dans le cadre du projet sur les indicateurs réglementaires et des rapports annuels.

7. L'Afrique du Sud, pays non-membre, est l'un des pays qui se sont dotés de ce système.

8. L'un des critères d'exemption apparemment assez large souvent invoqué en Europe, celui de la promotion du progrès technique ou économique, est souvent interprété au sens étroit, c'est-à-dire en termes d'efficacité.

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OECD Global Forum on Competition

REGULATORY REFORM: STOCK-TAKING OF EXPERIENCE WITH REVIEWS OF COMPETITION LAW AND POLICY IN OECD COUNTRIES - AND THE RELEVANCE OF SUCH EXPERIENCE FOR DEVELOPING COUNTRIES

-- Note by the Secretariat --

This note by the Secretariat is submitted FOR DISCUSSION under Session I of the Global Forum on Competition to be held on 12-13 February 2004.

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STOCK-TAKING OF EXPERIENCE WITH REVIEWS OF COMPETITION LAW AND POLICY

-- Suggested Issues and Questions for Discussion --

1. Introduction

1. The competition policies and institutions of more than 20 countries¹ have been subject to in-depth peer review since 1998. Nearly all of those reviews were done in connection with the OECD's horizontal program on regulatory reform. That project now provides an occasion for examining what has been learned through this process. The annex to this paper summarises and discusses some of the key findings of those reviews. It is based on a paper that is being prepared for the OECD's Special Group on Regulatory Policy (SGRP), which is preparing to re-examine the general recommendations about regulatory reform and regulatory policy from the OECD's 1997 *Report on Regulatory Reform*². That 1997 Report provided the framework for the reviews in the Competition Committee.

2. Several perspectives were taken in these reviews. In addition to discussing the reviewed country's competition law and the institutions that apply it, the reviews examined the foundations of competition policy and institutions in the context of the country's business, economic, political, and legal traditions. The reviews also dealt with the relationship between regulatory institutions and competition and with policy advocacy. At one level, the interaction of competition policy with regulation is a matter of process and technique. But at another level, it calls for assessing the importance of competition and markets in economic policy, compared to other goals and policies. Substantive competition laws and enforcement procedures have been of considerable interest in the peer review process; however, recommendations at that level of detail would be impracticable in the regulatory reform context, so the background paper contains less about those topics. In any event, differences in laws and procedures appear less important than differences in economic and policy cultures in explaining variations in enforcement effectiveness.

3. Despite those differences, the reviews showed broad areas of similarity. Substantive laws generally apply similar rules to the same kinds of conduct, and enforcement institutions follow generally similar forms. To a surprising degree, the scope of competition policy was revealed to be similar too, as most of the same sectors or activities are subject to exemptions or special treatment, or present the same problems of enforcement and advocacy, in all of the countries reviewed. The similarities are due in part to similarities of legal context and economic development in the Member countries reviewed. But even for countries that differ more from OECD Members in those respects than the Members differ from each other, much of the experience from the reviews may nonetheless be useful and instructive.

4. Notably, many of the reviewed countries have undergone wide-ranging programs of administrative, economic, or political reform. Thorough competition-based reform programs have aimed to stimulate development and improve economic performance. Several reviewed countries have undergone major regime changes from central planning to market economies. How competition policy was able to contribute to changes of that magnitude should be of interest to other countries that face challenges of a similar scale.

2. Suggested Issues and Questions for Discussion

5. The 1997 recommendations and their supporting explanations imply that competition policy should enjoy a privileged position in regulation. The questions set out below explore what that might mean. Should there be a presumption in favour of competitive-market solutions to problems? How strong should that presumption be? Is it realistic to require that other policies should be pursued only through means that distort competition as little as is necessary to achieve them? If not, how much distortion should be permitted? And who should decide?

2.1 *The scope of competition policy: exclusions, exemptions, and special treatment*

6. The premise of competition-based reform is that competition is a general principle for organising the economy. It follows that the first reform recommendation about competition law is that it should apply as broadly as possible: “Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.” This does not mean that only competition matters. Rather, tolerating monopoly or collusion instead of competition calls for justification. Regulations may encourage, or even require, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may permit price co-ordination, prevent advertising or other avenues of competition, or require territorial market division. The principal object of concern is legislation or other official, general action that confers special treatment. But claims that competition law and policy must be balanced against other laws and policies can come up in other contexts, including the application of competition law itself.

- The scope and nature of exclusions and special regimes are broadly similar: that is, they are found for most of the same sectors and types of conduct in most of the countries reviewed. The common examples include agriculture and co-operatives, labour, intellectual property and performing rights, infrastructure industries, financial services, media, and self-regulation of professional services. What can we conclude from the similarities? Which ones demonstrate that the same problems of anti-competitive protection need to be reformed everywhere? Which imply that the same other goals and values are considered more important in these sectors everywhere?
- *De minimis* rules, to exempt small firms or small transactions, may be a useful and transparent way to economise on enforcement resources. But definitions and boundaries may be drawn to protect favoured interests. Does special treatment compromise the principle that competition law applies to all? Or does exempting the small and weak assure the public that the law will be applied instead to control abuses by the large and powerful?
- Nearly everywhere, there is a general rule that exempts conduct that is authorised or required by some other law or regulation. Only some of those rules give a priority to competition policy. Should there be a clear general rule that favours competition policy in the event of a conflict between different laws or regulations?
- What is the process for considering exemption from competition law based on other policy considerations? Is that done best by the same institutions and process that apply competition law, or by something or someone outside it?
- Some exclusions, including some that reverse particular law enforcement efforts, look like special deals for sectors with political power. How can competition policy become a general, horizontal principle if its scope is subject to that degree of political interference?

- Where government interests or actions are involved, application of competition policy commonly encounters problems. Government operations may provoke complaints from users about monopoly or from private sector providers about unfair competition. Local officials may encourage non-competitive private conduct or deny licences and thus prevent entry. How can competition law correct gaps in the scope of competition policy that result from government conduct in the marketplace? What is the experience in applying legal prohibitions to official action or government entities? How much must be left to advocacy and structural reform?

2.2 *Sector regulation and deregulation*

7. Some special treatments and related regulatory programs may be fully consistent with a broadly-applicable competition policy, of course. They may represent a more efficient way to apply general competition principles, by adapting them to recurring fact patterns. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. The need for reform arises when changes in technology or in other institutions lead to reconsideration of the basic premise, that competition policy and institutions would be inadequate to discipline market power. Regulators may try to prevent co-ordination or abuse in an industry, just as competition policy does. Different regulators may apply different standards, though, and policies which appeared similar may have led to different outcomes.

- What considerations enter into the relationships between institutions for competition law enforcement and competition-policy regulation? Is it feasible for a sector-specific regulatory authority to apply competition laws that are custom-built for that sector? Or is it better, if the functions are separated, for sectoral institutions to apply the same substantive law and analysis?
- Where is it best to combine the administrative institutions that apply laws affecting competition, including economic regulation of natural monopolies, into one? Particularly in smaller countries, this can economise on the use of expert resources. But the functions of sector oversight differ from those of *ex post* enforcement and may call for different procedures and rules.
- Where regulatory intervention is premised on market power in the regulated industry, the competition authority may be responsible for defining the market and determining whether a firm has market power in it. Is it enough to require that sector regulators consult with competition experts before reaching these decisions? Should the competition agency have legal control over these determinations? Or should consistency be promoted by subjecting them to a common appeal authority?
- In infrastructure sectors, promoting investment and development may be important concerns, along with supporting competition and efficiency. Those considerations need not be inconsistent. But priorities and sequencing matter, and reforms must take account of institutional capacities. What is the appropriate role of the competition agency in considering these issues and in designing and implementing infrastructure reforms and privatisation?

2.3 *Policy and advocacy*

8. Competition problems from regulation often begin where enforcement jurisdiction stops. In nearly all reviewed countries, competition policy offices are active in advocacy to reform anti-competitive regulations. This function is particularly important where competitive market institutions are unfamiliar. In

that setting, advocacy involves educating the public and other parts of the government as well as providing views about official policies and decisions affecting competition. But advocacy is not always done by the enforcement agency. Where there is a ministerial policy office separate from the enforcement agency, the ministry office typically participates in policy debate within the government.

- When does an enforcement agency have standing and authority to advise about policies that are outside of its law enforcement ambit? How important is having statutory authorisation to engage in advocacy?
- Does an independent competition agency make a more credible contribution to public debate, because of its stance and expertise? Or does participation in public debate undermine the independence needed for effective enforcement?
- For relatively new or uncertain competition agencies, is advocacy a good way to bring the importance of competition to public attention? Or is it more important to establish an enforcement record?
- What resources are needed for effective advocacy? What are the appropriate roles of agency staff and officials and of outside expert consultants or advisors?
- The process of regulatory impact analysis (RIA) is related to the advocacy and policy work of competition officials. If there is there a systematic process for assessing and correcting the regulatory stock or for improving the quality of the regulatory flow, how does it take account of competition? What has been the role of competition policy officials in these processes? How does RIA apply a principle of “least anti-competitive means”?

2.4 *Competition policy institutions and enforcement*

9. The recommendation for vigorous law enforcement against collusive behaviour, abuse of dominant position, and anticompetitive mergers implies the need for vigorous and effective enforcement institutions. The enforcer’s stature, credibility, and independence from political influence are important considerations, particularly if decisions are to be based on competition impacts rather than balanced against other policies. Competition policy is challenged by rent-seeking: the greater the potential for monopoly profit, the greater the incentive to try to influence decision-makers to obtain or protect that profit. Thus it may be particularly important for a body that is responsible for preventing monopoly to be shielded from rent-seeking influence.

- Virtually every jurisdiction makes some effort to separate applications of competition policy from political pressures, either by the legislature or the government. On the other hand, institutional designs may try bring in a non-expert and potentially political perspective, in the appointment process or in the structure of decision-making institutions. How effective are commonly used measures such as administrative separation from ministries or the government, separate budgeting, fixed terms and tenure protection? What is the experience with entrusting decisions to bodies that include representatives from interest groups?
- The most commonly encountered obstacle to effective, vigorous enforcement is the unwillingness of courts to support sanctions that are strong enough to deter anti-competitive conduct. There has been a clear trend toward stronger financial penalties against hard-core cartels, but much remains to be done. What can be done to educate and persuade judges and policy-makers about the importance of protecting competition by deterring and if necessary

punishing conduct that undermines it? How can other remedies such as damages or private suits supplement public enforcement effectively?

2.5 *Linkages to other market-related policies*

10. Policies that are frequently linked to competition policy and institutions, and that have thus been discussed in many of the reviews, include consumer protection, unfair competition, public procurement, subsidies and state aids, and international trade. Most, but not all, of the goals and effects of these policies are typically considered to be complementary to or consistent with those of competition policy.

- What are the advantages, and disadvantages, of combining these complementary functions with competition policy and law enforcement, particularly where resources and expertise are constrained?

2.6 *The role of competition policy in large-scale reform*

11. In different conditions, the scope of reform will differ. In some cases, the need may be to establish institutions in the first place, not just to reform ones that are not working as intended. Or, the object of reform may be the structure of ownership, governance, intervention, and protection, rather than the methods for devising and applying regulation. The reviews have shown that successful reform efforts include strong competition policy elements. An early review offered an insight that explains the linkage between competition-based reform and long-term economic improvement: “healthy competition trains an economy in adaptive capacities.” That observation was made by an official of a Member country which implemented in the 1990s a broad-based, long-term reform program based on competition principles and established for the first time in its history a credible competition enforcement system.

- Whether the competition culture is strong enough to support durable reform is an issue that came up in several reviews. What are the conditions in which the links between competition, reform, and development are persuasive to policy makers and to the public?
- Where the commitment to competition is uncertain or untested, what is the best way to create broader support and acceptance? Is it prudent, or necessary, to give other agencies and ministries a responsibility and mission to protect and promote competition? There is a risk of inconsistency and capture by interest groups; on the other hand, spreading the competition culture helps overcome the notion that competition is just a technical specialty, rather than a fundamental principle.

NOTES

- ¹ Countries reviewed under the OECD regulatory reform programme are: Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Norway, Netherlands, Poland, Spain, Turkey, United Kingdom and the United States. Most of these country reports are available at www.oecd.org/comp. South Africa and Chile as well were reviewed under the OECD programme of cooperation with non members. These reports are also available at www.oecd.org/comp.
- ² The 1997 Report on Regulatory Reform is available at www.oecd.org.

ANNEX

1. The OECD's horizontal program on regulatory reform has generated in-depth peer reviews of the competition policies and institutions of 20 Member countries. The Special Group on Regulatory Policy (SGRP) is taking stock of what has been learned in this process, in preparation for a report to the Council in 2005.

2. The recommendations of the 1997 *OECD Report on Regulatory Reform* are the framework for this overview. The major themes that emerge from the general recommendations of the 1997 *Report* involve the regulatory process, sectoral reforms, enforcement, and advocacy. The 20 country studies have examined the history and context of competition policy, the basic norms, the institutional structures and powers for enforcement, exclusions and special sectoral problems, and policy studies and advocacy. Those studies followed a standard format, which was motivated in part by a set of analytical questions that underlay the 1998 project to develop indicators about regulatory quality.

3. This review will concentrate on issues related most closely to regulation and the regulatory process. It concludes that competition policies are stronger and more coherent, and regulatory policies recognise more clearly the value of market competition, where they have supported each other to motivate reform and independent enforcement defends competition principles from opportunistic intervention. The basic recommendations of the 1997 *Report* are still sound, but expectations about their implementation should be realistic. Although the value of competition is widely acknowledged, only a weak consensus requires that other policies be promoted by the least anticompetitive means.

4. The country studies presented to the Competition Committee examined substantive laws, enforcement processes, and institutional forms in a level of detail that will not be directly relevant to the SGRP's work. Because of variations in institutions among the members, it is difficult to distill general prescriptions that would be useful in that context. The level of enforcement effectiveness across the Member countries is broadly similar. In a few countries, the system seems particularly effective, and in a few others, particularly ineffective—but the variations are probably due more to differences in their economic and political cultures than to differences in institutional forms or practices.

The 1997 report recommendations

5. Competition policy is prominent in the 7 basic recommendations of the 1997 OECD Report on Regulatory Reform. These call for formal reform programs, systematic review of regulations, transparency and non-discriminatory application, effective competition policy and enforcement, reform of anti-competitive economic regulation, reduction of regulatory barriers to trade and investment, and support of reform in linkages to other policy objectives. Five of the 1997 recommendations deal in whole or in part with competition policy or enforcement.¹ Taken together, the 1997 recommendations and their supporting explanations imply that competition policy should enjoy a privileged position in regulation, by combining a strong presumption in favour of competitive-market solutions to problems with the principle that other policies should be pursued only through means that distort competition as little as is necessary to achieve them.

Principal recommendations of the 1997 Report

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
2. Review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively.
3. Ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied.
4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
5. Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
6. Eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles.
7. Identify important links with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Source: OECD Report on Regulatory Reform, 1997

6. The recommendations about regulatory quality and process recognise the priority of supporting market competition. The first recommendation's criteria of good regulation include minimising costs and market distortions and being compatible, as far as possible, with competition and open trade and investment.² Much depends on how much is "possible," of course. The 1997 Report calls on governments to establish reform institutions which will adopt and apply the explicit principle that regulation should not impair competition, trade, and investment any more than is necessary to achieve other, legitimate purposes. The second recommendation, about systematic review, reinforces the special importance of competition and trade,³ by noting that reviewing regulations that restrict competition and trade would be "particularly" likely to yield significant, visible benefits.

7. One recommendation deals solely with the scope of competition law and the powers and performance of the enforcement institutions:

4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy:

- Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.
- Enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform.
- Provide competition authorities with the authority and capacity to advocate reform.

The first point is a particular concern in the regulatory context. It repeats the claim that competition has some priority over other policies. Examining sectors and practices that are exempted from the coverage of competition law involves asking why policy should tolerate or prefer monopoly or collusion. Special treatment through limited exemptions or special enforcement structures may respond to other policies or other political forces. Are there institutional methods for applying special treatment in a sector that achieve the desired balance better than others? In general, what is the nature of the exemption for conduct that is authorised or required by some other law or regulation? Virtually every jurisdiction has such a rule, but only some of those rules give a priority to competition policy. What is the process for considering exemption from the otherwise-applicable rules of competition law based on other policy considerations? Is that done by the same institutions and process that apply competition law, or by something or someone outside it?

8. The second point could cover nearly all of competition law and enforcement. The recommendation concentrates on how competition law protection substitutes for regulatory protection. Although the country reports tried to highlight the connection between competition law and regulation, the Committee's interest during the reviews was often broader. The call for vigorous and effective enforcement implies the need for vigorous and effective enforcement institutions. Institutional structure and resources and law enforcement powers and processes were of great interest to the Committee. The enforcer's stature, credibility, and independence from political considerations test the balance between competition and other policies. The third point highlights advocacy because enforcement jurisdiction often stops where problems from regulation begin. The relevant issues include the agency's standing and authority to advice about policies that are outside of its law enforcement ambit, the resources that are devoted to this function, and its experience and record of effectiveness. It is related to two other recommendations, about deregulation and about linkage to other policies.

9. The separate recommendation about the process of economic deregulation is also directly relevant to competition policy.⁴ The implications of this recommendation are the subject of the stocktaking of the sectoral chapters in the Working Party on Competition and Regulation of the Competition Committee. The final recommendation is about linkages to other goals and policies, but it nonetheless continues to imply a priority for competition, notably in the first two of its sub-paragraphs.⁵ Policies that are frequently linked to competition policy and institutions and that have thus been discussed in many of the country reports include consumer protection, unfair competition, public procurement, subsidies and state aids, and international trade. Most, but not all, of the goals and effects of these policies are typically considered to be complementary to or consistent with those of competition policy.

Competition policy in reform programs

10. The recommendations about the regulatory process test the competition culture. Each of the competition policy reviews has begun by examining how competition policy has been grounded in the country's business, economic, political, and legal traditions. By assessing how the policy-making system understands and appreciates the principles of competition, the reviews have asked how those principles have motivated the process of regulatory reform.

11. Virtually every Member country now has some formal program about the reform of its regulations. The occasions, motivations, and justifications for these reform programs vary. The immediate stimulus for a reform program may be a fiscal or financial crisis, prolonged stagnation or recession, or a major challenge such as market opening or regime change. Reform may be promoted to enhance efficiency, productivity, and growth, or to simplify administration and reduce compliance burdens and red tape. These goals are neither exhaustive nor mutually exclusive, of course. And programs to attack red tape can incorporate economic performance issues, too. Thoroughgoing reform efforts are likely to include strong competition policy elements. The most vivid examples are the large-scale projects to overhaul a

centralised economic system, sometimes conjoined with the replacement of a non-democratic political system. In some of these total-reform experiences, competition policy and institutions have been central.

12. The link between competition policy and major reform was apparent long before the deregulation movement that began in the late 1970s. The US competition policy institutions are a product of the “Progressive” reforms of the early 20th century. The German competition law and the *Bundeskartellamt* were centrepieces of the post-WWII reforms that created the social market economy (and its Cartel Regulation had been a key element of the reform program to tame runaway inflation in 1923). In both countries, broad political and public support for a conception of competition affects the prospects for reform and the shape that reform typically takes. As the US study observed, because of the cultural acceptance of a competition norm in the US economic “constitution,” reforms that emphasise competition can be justified as a return to political and policy roots. Germany’s conception of competition policy also explains its reform path, as the reputation of the *Bundeskartellamt* encouraged policymakers to rely on competition law in settings where most other countries have relied on sectoral regulatory intervention. A more recent example of competition policy leading economic reform is Hungary. In 1984 and again in 1990 a general competition law was the first product of a wave of reform effort, implying recognition that competition was fundamental. When the freely elected government enacted the competition law in November 1990, the Prime Minister called it the “constitution” of economic life. In the Netherlands, the comprehensive competition law, which became effective in 1998, was developed along with (though not formally as a part of) the broad competition-based MDW reform program, which was launched originally in 1994 and continued after the 1998 elections. Several reports called attention to the model of comprehensive competition-based reform underway in Australia.

The Australian competition policy review

Australian governments have undertaken a comprehensive review of federal and state-level laws and regulations in order to eliminate unjustified anti-competitive effects. This review is unprecedented in its scope and ambition in OECD countries. The programme derived from the 1993 Report on National Competition Policy. Following nearly two decades of declining economic performance, that Report to the heads of Australian governments found that “Australia is facing major challenges in reforming its economy to enhance national living standards...” One of the challenges was “the reform of regulation which unjustifiably restricts competition.”¹

Because competition law could not itself correct regulatory barriers to competition that stemmed from other laws, the report called for “a new mechanism”: the adoption by all Australian governments of a set of principles aimed at ensuring that statutes or regulations do not restrict competition unless it is in the public interest. This would involve:

Acceptance of the principle that any restriction of public competition must be clearly demonstrated to be in the public interest.

Subjecting new regulatory proposals to increased scrutiny, with a requirement that any significant restrictions on competition lapse after a set period, unless re-enacted after scrutiny through a public review process.

Subjecting existing regulations imposing a significant restriction on competition to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than five years unless re-enacted after scrutiny through a further review process.

Ensuring that reviews of regulations take an economy-wide perspective to the extent practicable.

In April 1995, the Council of Australian Governments signed the Competition Principles Agreement embodying these recommendations, and review schedules were agreed to in 1996. A substantial proportion of the process has been completed. Larger government enterprises must now apply competitive neutrality principles, which means fairer competition with the private sector. Most of the 1,700 pieces of legislation identified as containing competition restraints have been reviewed. This policy appears to have established a culture of rigorous justification for new business regulation, too.²

Thorough reform, of labour and financial markets and tax policy as well as competition policy, has strengthened Australia's economic performance. The limited impact of the 1997 Asian financial crisis on Australia showed that its economy was becoming more resilient. The OECD's economic surveys of Australia link the program of structural reform to growth in output, income, employment, and productivity. The most recent noted that the structural reforms over the last 2 decades were the principal factors underpinning the pick-up in productivity growth, finding that the programme had improved multifactor productivity growth by about 1 percentage point. Australia's GDP is now about 2½ per cent higher than it would otherwise have been, and Australian households' annual incomes are about A\$7 000 higher, as a result of reforms.³

1. Hilmer, F., Raynor, M. and Taperell, G. (The Independent Committee of Inquiry) (1993), *National Competition Policy*, Australian Government Publishing Service, Canberra.

2. OECD (2001) Economic Survey of Australia.

3. OECD (2003) Economic Survey of Australia.

13. Whether the competition culture is strong enough to support durable reform is an issue that came up in several reviews. For example, the report on Mexico observed that its reforms have been the product of experts in the government, and the competition law and policy lacked a clear base of support in the public at large, the constituency for competition policy was not well identified, and there had been little visible effort to develop a public constituency yet. The report on Japan observed that calls for stronger antitrust enforcement have traditionally come from labour and consumer groups, which are often somewhat suspicious of other aspects of reform. Thus, it was not clear that the interests supporting reform appreciate how competition should be part of that process. In some countries, notably Korea and the Czech Republic, the key problem for economic reform has been to correct serious weaknesses in corporate finance and governance. The philosophical and political motivation of competition policy fully supports those financial and corporate reforms, but the tools of competition law enforcement may not be best suited for the necessary tasks. Nonetheless, where economic reform includes such structural changes, competition policy institutions can be prominent. Korea's FTC has made regulation of the *chaebol* a high priority, applying special laws for that purpose. Mexico's sweeping reform program in the early 1990s assigned critical tasks to the CFC, to make analytically consistent judgements about the presence of market power in privatisation transactions.

14. The recommendation for systematic review and regulatory impact analysis (RIA) is related to the advocacy and policy work of appropriate competition officials. It also addresses in an operational way the priority of competition among other policy goals. If there is there a systematic process for assessing and correcting the regulatory stock or for improving the quality of the regulatory flow, how does it take account of competition? In RIA, how is a principle of "least anti-competitive means" applied? What has been the role of competition policy officials in these processes?

15. Some process for reviewing proposed laws and regulations is virtually universal. Where the functions of competition policy and enforcement are in separate bodies, the policy office is more likely to be responsible for examining proposals to determine whether they might affect competition, while the enforcement office may look only at proposals that directly affect how the competition law is applied. The enforcement office might deal with the stock of regulations, as well as the flow of new ones, but in a non-

systematic way. That is, the office may receive and investigate complaints about constraints on competition that result from the existing regulatory structure and advocate changing them.

16. Some agencies have played particularly key roles in reformed processes for reviewing regulations and proposals. The chairman of Korea's Fair Trade Commission was the president of Korea's Committee of Economic Regulatory Reform in the late 1990's, and he is still a member of it, while other KFTC officials serve on its working subcommittees. For Mexico, the report recommended that the CFC take a similar position, on Mexico's Economic Deregulation Council. For Italy, the report linked the role of the agency to RIA by recommending that competition impacts should be made an explicit RIA criterion and that the Authority should participate in the RIA process routinely. By the time the report was issued, these recommendations had been implemented, so that a representative of the Authority was involved in the *Observatorio* on simplification of rules and procedures, and the guide about RIA supported a market-competition criterion for assessing new regulations. Competition enforcement agencies usually participate in economic restructuring programs, but it is less common for them to be actively involved or responsible for the formal process of regulatory review and evaluation, either in preparing standards or in performing actual evaluations. Whether they should be involved would depend on the institutional structure. In Italy, where the report recommended formal involvement, there is no competition policy office in a ministry to serve that function.

17. Including competition in RIA is the essence of the regulatory process recommendations. This would not involve having the competition policy office or enforcement agency review and clear every proposal. Rather, a well-designed RIA process should include criteria to identify those that might have significant competitive effects, for referral to the competition policy experts who would then do a more thorough assessment. The process should describe explicitly the role and power of the competition enforcement agency or policy office. If the assessment concludes that the proposal or regulation indeed would constrain competition significantly, the proponent or the government should be required to respond to that finding, either to correct the proposal to eliminate those effects or to explain, publicly, why it is required in the public interest.

18. The 1997 recommendations imply that RIA should include a principle of "least anti-competitive means" to accomplish the regulation's purpose. This is a stringent test. The stocktaking for the regulatory quality chapters by the Public Management Committee shows that some consideration of effects on competition is common where RIA standards are formalised. That review did not focus on the use of a "least anti-competitive means" test, though, because it emphasised the 1995 Council Recommendation rather than the 1997 recommendations. Only a few of the competition reviews in this Committee addressed the details of RIA screening. In Ireland, for example, the report was concerned that the RIA competition policy criteria might have been too general to guide non-expert bureaucrats, and it suggested additional guidance or training to make them more practical and specific. Although the reports did not examine this question systematically, it is fair to conclude that a clear principle of "least anti-competitive means" is not yet prevalent.

19. The phrasing of the 1997 recommendation, that regulations should be compatible with competition "as far as possible," probably cannot be made any more precise. It would be unwise to recommend a specific RIA checklist or standard as a general prescription, because what is appropriate and feasible will depend on who is actually doing it and on the economic and political context. The criteria would likely vary among countries. For example, if screening criteria include structural tests such as the number or relative size of firms in an industry affected, suitable levels might vary with the volume of trade and the scale of the local economy. It could also be counter-productive to propose making a "least harm to competition" standard even more explicit. It could not mean that only competition counts. Rather, among different possible solutions to a problem that have about the same net impact, it holds that the choice should be one that has the least impact on competition. Similar claims might be advanced, though, that the

choice should be the one with the least impact on some other value, such as personal privacy or protection of the environment. And it might also be argued that the quantitative aspects of an assessment of economic impacts will necessarily include an assessment of net competitive effects, so that this principle would amount to counting the benefits of competition twice. That only a few countries have a clear “least anti-competition means” criterion implies that counter-arguments could be substantial.

Exclusions, exemptions, and special regimes

20. The 1997 Recommendations called for extending competition policy as widely as possible across the economy, and thus for reducing or eliminating exemptions from coverage. The Recommendation called particular attention to sectoral gaps. Those may result from deliberate decisions and compromises in the design of the competition law itself, but more often they result from other legislation. Each gap or exclusion means in effect that some other policy is considered more important than competition.

Regulatory authorisation

21. The scope of competition policy cannot usually be determined from the texts of the competition laws. General principles of construction may create exclusions based on other laws or official actions, which may not refer explicitly to the competition laws at all. The laws or practices of all Members examined include some general principle of regulatory compulsion or authorisation, which exempts conduct that is required or authorised by other government authority. This may be in the competition law itself, or it may result from the practice of the courts. Under a common principle of interpreting statutes, a competition law is considered a law of general application, but particular laws or special laws that are inconsistent with the general law create exclusions from it. Cataloguing these exclusions is difficult because the acts which exclude are not necessarily collected in one place. Moreover, a *de facto* exclusion or exemption may result from a restriction on available remedies or even simply a policy or practice of non-enforcement in some sectors or situations, and these can be almost impossible to identify reliably.

22. In a few jurisdictions, the competition law contains a rule for dealing with claims of conflict with it. The effect is usually the same as under the common general principle: the competition law has no priority, and other regulations or programs are likely to supersede it, at least in situations where complying with both would not be possible. The scope of the exclusion could depend on how it is crafted. The report on the Netherlands called attention to the potential effects of broadly-phrased statutory deference:

[This] exemption ... casts doubt on the strength of the commitment to reform based on competition principles. The law's prohibitions do not apply to agreements that are subject to the approval of an administrative agency pursuant to other legislation, that could be declared invalid or prohibited by another agency, or that have arisen pursuant to another statutory requirement. Competition law thus stands at the end of the priority line. Even the mere potential for conflict, such as the possibility that another agency could approve, or even disapprove, the conduct, could mean that the competition law does not apply. ... Even without the statutory exemption, a court might not accord the competition law precedence over a potentially conflicting regulatory system. But if that indeed happened, the decision could presumably be corrected by legislation. The blanket exemption decides all those conflicts in advance, and decides them contrary to the interests of competition policy.

Court decisions in the US have created a rule that appears to favour competition policy. As the report noted, the US courts say that “‘repeal by implication’ from another regulatory statute is disfavoured and will be found only ‘in cases of plain repugnancy between the antitrust and regulatory provisions.’ This

doctrine evidences the primacy of competition principles, and it means that, if Congress wants to exclude conduct from competition law or apply special rules to it, it must say so clearly.” In practice, though, the US courts have inferred some exemptions in the absence of clear legislative intent, for aspects of securities regulation and for common carrier tariffs. The practical effect of the US rule does not differ greatly from the effect of competition-neutral rules in other jurisdictions.

23. The legislative efforts to control anti-competitive government actions and regulations in the Czech Republic and Hungary are instructive. The Hungarian Competition Office can challenge anticompetitive government actions in court. It has never done so, but the threat has occasionally been persuasive. The competition law of the Czech Republic prohibited action by government authorities that restricts or eliminates economic competition. The report concluded that having the principle in the law was valuable even without a mandatory sanction for violating it. Harmonisation was considered more important, though, and this provision was replaced by language taken from EU law concerning the conduct of firms providing public services or granted special and exclusive rights.

24. Federal countries that defer to local government authority may permit wide-ranging exemptions as a result. In Germany, where local governments cannot confer exemption from national law, deference is achieved by having officials in the *Länder* apply national law to local problems. By contrast, the “state action” doctrine in the US permits anti-competitive private conduct if it is pursuant to a state policy to displace competition, and that policy is clearly articulated, affirmatively expressed, and actively supervised. Canada’s general doctrine about regulatory authorisation is applied most often in the context of provincial marketing boards and price-setting commissions. Because these exemption doctrines risk “holding ... national competition policy hostage to local legislative relief,” and local governments, just like national ones, may choose to protect their producers rather than their consumers, the US and Canada reports called for a thorough review of the actual effects. But the reports admitted that the doctrines were unlikely to be modified, because competition was considered less important in each country than constitutional principles of federalism and respect for provincial prerogatives.

Government entities

25. Applying national competition policy to local regulatory action requires sensitivity even in non-federal countries. Local decisions may authorise non-competitive private conduct, or actions such as denying licences may prevent entry. Local government operations may displace more efficient private sector providers and provoke complaints about unfair competition.

26. In nearly all countries, the competition law applies to commercial operations of entities related to the government. In Mexico, the constitution defines some state-connected monopolies, but they are still subject to the law’s requirements, and they have been sanctioned for exclusionary behaviour affecting other markets. That is the usual pattern. Even where government entities have some protection or authorised monopoly, government-related corporations are still subject to the normal rules and sanctions of the competition law. This coverage is usually of particular importance concerning abuse of dominance. Only in one country reviewed, the US, are government-related entities as such, even government-owned corporations, immune from antitrust liability. The anomalous US exemption is explained by the unusually fierce enforcement system, as the exemption is probably intended to protect the public treasury from private suits for treble damages.

27. Application of competition law to government operations depends to some extent on their legal form. Where the law applies to “undertakings,” then a government operation might be exempted if it is determined, whether in fact or by fiat, that it is not an “undertaking.” Application depends also on process and will. The law may prescribe competition in government operations, but decisions about what that actually means may be made by ministries or officials other than the national competition agency.

Denmark's complex provisions about applying competition law to local officials illustrate the difficulty. Unusually, the ostensible rule includes a "least anti-competitive effect" principle:

Business activity of central or local government administrations is also covered, in theory, if the activity affects competitive conditions; however, the Act evidently does not apply to in-house production by government authorities. Although the Council cannot intervene against anti-competitive practices that are undertaken by a government authority if those are necessary to tasks it is assigned by law, a municipal authority is obliged to choose solutions with the least anti-competitive effects. And a municipality cannot impair competition in areas that are not subject to its legal authority to act, or condone anti-competitive conduct where that is not necessary for fulfilling its legal obligations. The difficulty in applying this principle, of course, is that the "competent authority", whether the ministry or the local council, decides whether its action is necessary or otherwise properly overrides competition policy. There is no evident means of judicial appeal and decision.

28. Unfair competition is easiest to identify where the government operation is an ordinary commercial service. In the more typical setting, where the government operation is connected with some public service or policy, the usual advice is to separate, where possible, the elements that are principally commercial and subject them to market discipline. The Netherlands considered this subject in depth:

Unfair competition from entities related to the government has received considerable attention. ... [A] 1997 report by a panel of appointed experts ... outlines a conceptual framework for (semi-) government organisations that compete in the market with private companies. ... The report concluded that market operations by these entities are undesirable, because it is not possible to prevent distortion of competition. The report concluded that in principle, commercial activities should be segregated and divested, although some exceptions to this rule of structural separation might be admitted: commercial activities intrinsic to [their] public duties, commercial activities relating to scientific research, activities to support maintaining a minimum physical plant capacity, or a situation of competition for the public duties, such as for electricity distribution. Even for these exceptions, the report called for rules of conduct applied by a new, independent supervisory authority to achieve equal competitive conditions.

29. Oversight of state aids is also aimed at preventing or correcting market distortions that result from subsidised unfair competition. This is an increasingly important topic in Europe, where countries are following the EU model or example and adding the subject to their national laws. The report on the Czech Republic noted its major commitment of resources to ensuring that subsidies or preferences provided by the local or national governments at all levels may not distort competition by favouring some firms or products. The OPEC has the authority to order firms to return the aid provided or to order the agency providing the aid to eliminate the competitive distortion. Other countries where the competition agency plays a similar role include Poland and Spain, and the report on Turkey recommended adopting it there.

30. A few competition agencies oversee compliance with rules about public procurement and tendering. This role reinforces a goal of reform, to make government operations more efficient by relying where possible on market mechanisms. It may also buttress enforcement against the common competition policy problem of collusive bid rigging.

Sectors with special treatment

31. The ability of competition policy to provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for general exemptions or special treatment for types of enterprises or actions. This treatment may represent efficient application of competition principles, by adapting rules to common industry fact patterns. A frequent example is regulatory oversight of infrastructure monopolies. Special treatment can also, however, represent redistributive legislative choices.

32. The typical source of an exclusion is a law authorising or requiring conduct that limits competition. This can take the form of legal monopoly, price control, or entry regulation to limit competition. It might permit conduct that would otherwise be forbidden, such as resale price maintenance, or empower an administrator or an incumbent to control entry in order to prevent competition. In most cases, special treatment does not confer complete exemption from all competition oversight whatsoever. In the following table, an “x” indicates that there is some kind of exclusion, exemption, or special competition rules for the sector or subject. An “o” indicates that there is some other law or agency involved with issues in the sector affecting competition, by controlling price or entry or sometimes by applying competition rules.⁶ Because exclusion is rarely total, and because existence of a separate law or agency does not necessarily mean that competition is suppressed, it would not be sound to draw significant quantitative conclusions or correlations about the effect or the extent of “exemptions” based on the general information in this table. The table shows which sectors or situations are commonly thought to deserve special attention or dispensation.

Table 1: Exclusions, special rules, enforcers, and regulators

	AUSTRALIA	BELGIUM	CANADA	CZECH REP.	DENMARK	EU	FINLAND	FRANCE	GERMANY	GREECE	HUNGARY	IRELAND	ITALY	JAPAN	KOREA	MEXICO	NETHERLANDS	NEW ZEALAND	NORWAY	POLAND	PORTUGAL	SLOVAK REP.	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED KINGDOM	UNITED STATES	TOTAL
General																													
Labour			x	x	x	x					x					x		x						x			x	10	
SMEs	x							x	x					x														4	
R&D JVs			x	x														x									x	5	
Standards			x	x					x									x										4	
Primary production																													
Agriculture, co-ops	x	xo			xo	x	x	x	x	xo				x	x		x	x	x					x	x		x	xo	17
Sugar																												1	
Fishing		x								x									x									3	
Mining																												1	
Nuclear energy																x												1	
Oil & gas	x	o		o								o				xo			o									6	
Petrochemicals																x												1	
Infrastructure																													
Electricity	x	xo	o			o	o			o	o	o	o	o	x	o		o	o	xo	o	o		o	o	o	o	18	
Natural gas	x							o		o						xo		o		xo	o	o				o	o	10	
Water	x								x											xo	o					o	o	5	
Telecoms	o	o	xo	o	o		o	o		o	o	o	o	o	xo	xo		o	o	xo	o			o	o	o	o	19	
Postal service				o								o			x			o		xo	o	x		o		o	o	7	
Transport																													
Railways					xo		x	x	o	o				o	o					o			o		o	o	xo	11	
Air transport, mergers		o		xo				x				x		o	o	x		o								o	x	10	
Water transport		xo		xo				x			o	x	x	o		x						x					xo	10	
Road transport				o	xo	o				o	o	x				o	o			xo	o			o		o	xo	11	
Taxis					o					o	o							o					x	o				6	
Business																													
Finance, insurance		xo	o		x	o		x			o	x		xo	xo	x				xo							xo	12	
Bank mergers		o	o				x							o											x			5	
Commercial agents										x																		1	
Distribution co-ops				x												x												2	
Export cartels		x												x	x												x	4	
Motor vehicle distribution						x																						1	
Services, health, culture, morals																													
Services, professions	o	x							x	x	o	x	x	o	o		x					o			x			12	
Health care								x									x							x				3	
Pharmacies, drug prices				o	o	o					o	o									x		o	o				8	
IP, performing rights		x						x						x	x	x		x	x					x				8	
Performing ass'ns		x																										1	
Sports		x						x																			x	3	
Media, broadcasting	x	o	o								o	o						o							o	o		8	
Movie theatres																		o										1	
Publications (RPM)				x			x	x	x			x	x			x	x				x							9	
Publishing		o										o														o	x	4	
Alcoholic beverages						o								x	o			o							o			5	
Pubs											o																	1	
Tobacco				x						x													x					3	

Source: OECD Secretariat country reports, annual reports and other submissions to the Competition Committee.

33. Full evaluation of these special provisions would apply an analysis like RIA, examining their purposes and effects and asking whether they serve a compelling public interest that could not be achieved in a less anticompetitive way. Such detailed analyses were rarely found in the countries reviewed. It was beyond the scope of the regulatory reform project to undertake such analyses for all of these items in all of the countries reviewed. The reports took note of studies that were available, which were often found in conjunction with competition agency research and advocacy programs.

34. The most common general exclusions incorporate obvious public policy choices or permit joint ventures that are likely to be efficient and even pro-competitive. The most common general exemption avoids inappropriate literal prohibition of restraints and monopolies in the labour market. Labour exemptions typically do not extend to agreements to restrain competition in product markets. Exemptions for intellectual property avoid conflicts with those property rights where public policy to reward innovation and creativity permits a degree of “monopoly.” Exemptions for standards-setting organisations, research and development, and intellectual property and performing rights societies permit classes of joint ventures that are likely to be efficient. There is no reason to question the principles underlying these exemptions, although care and attention may be needed in assessing particular cases to be sure that in application they do not extend further than necessary to achieve their purposes.

35. Some competition laws include special *de minimis* or *bagatelle* provisions for the benefit of small and medium sized businesses. This treatment can permit small firms to achieve efficiencies together, and it can save resources by permitting the enforcer to ignore conduct that is unlikely to impair competition significantly. Designing these rules to be neither too broad nor too narrow is a difficult task. In small markets or in combination with other firms, even small enterprises can have market power. Basing an exemption on the size of the firm means market power in small markets is overlooked. But basing an exemption on criteria that might be more relevant to effects, such as market share, increases uncertainty for business. To minimise the risk of harm if the coverage is imprecise, and to maintain consistency in dealing with the most important problems, these exemptions do not usually extend to “hard core” conduct such as fixing minimum prices.

36. Agriculture receives special treatment nearly everywhere. Exemptions or special rules permit co-operative arrangements in primary processing and distribution, and they often extend to functionally similar sectors such as fisheries and forestry. The principal purpose is to insure against vagaries of weather, to overcome externalities due to the public goods nature of some of these resources, and to compensate for the producers’ allegedly weaker bargaining position against downstream buyers. Another explanation for special treatment is to permit co-ordination in the context of subsidy programs based on price supports. To the extent that primary production is structurally atomised, special treatment here might be analogous to the exemption for labour. But where a co-operative can monopolise an important end product market, the analogy breaks down. Monopolies in processing dairy products are common points of contention about the legitimacy and permissible scope of these exemptions.

37. The only other primary or industrial product that frequently gets special attention is oil and gas. National politics and resource management goals probably explain monopoly or control on primary production. Special rules about distribution and importation are more often obviously intended to limit competition. Some are rationalised in terms of preserving small competitors, by implication disciplining or handicapping distribution controlled by larger international oil companies. More likely, though, these constraints sustain or mimic market division and collusion.

38. Special treatment for the financial sector is common, especially for mergers. Banking regulators examine mergers for compliance with prudential standards, and they may also be responsible for assessing effects on competition, either under banking legislation or under the competition law. In the Netherlands, the banking regulator retained both roles as a transition measure after the introduction of the new competition law. In Turkey, bank mergers were removed from competition law oversight because the national financial emergency demanded immediate action to deal with prudential and system issues. More commonly, there may be concurrent or consecutive powers of review. The most unusual division of responsibility is in Italy, where banks are subject to the general competition law, but the law is enforced in this sector by the bank regulator, which is the Bank of Italy. The report on Italy observed that giving the bank regulator the responsibility to take enforcement action, not just offer views to the competition agency about it, may have encouraged it to be more vigorous.

39. In distribution and trade, several countries give specific recognition and exemption to co-operative arrangements, subject to compliance with conditions. Only 2 countries mentioned this in describing their exemptions and special regimes, though. Similar groups probably get equivalent treatment in most countries, through case-by-case exemption or exercise of discretion about setting enforcement priorities. Exporting cartels are specifically exempted in some laws, but even without explicit exemptions they are usually tolerated. Few jurisdictions claim competence to sanction anti-competitive conduct if the adverse effect is only felt beyond their borders. (By contrast, an inward “effects” test is now common, and countries claim the power to enforce their laws against conduct outside their borders that harm competition within them).

40. Services and professions are often permitted to exercise some form of self-regulation, through a trade or professional organisation that is equivalent to a large-scale horizontal agreement. Agreements of that scope would inevitably draw the attention of the competition authorities. Legislative protection may remove the process from antitrust oversight. Such protection is a common object of reform efforts, which seek to introduce competition to the extent that is consistent with consumer protections in situations of asymmetric information. Competition law enforcement also pays close attention to the borderlines of exemptions and special treatment for self-regulation.

41. Health care occasionally receives special treatment. Providers themselves are typically covered by exemption for self-regulated professions. The motivation for special treatment is often the government’s desire to regulate costs and service quality, because the government is paying for it. For the same reason, pharmaceutical prices are often subject to elaborate controls. More problematic is the common practice of controlling entry into retail pharmacy services based on a finding of economic need, rather than just a showing of sufficient professional qualifications. This too is typically rationalised, unconvincingly, in terms of controlling reimbursement costs and ensuring accessible service.

42. Many countries have special laws about tobacco and alcoholic beverages. These follow the opportunity to profit from, control, or tax the inelastic demand for these products. The most notorious competition policy problem in Ireland was the regulations that prevented opening new pubs, originally enacted a century ago to curb excessive drinking, and probably also to prevent excessive competition. Many countries control or monopolise retail or wholesale trade in alcoholic beverages, and a few retain state control over the tobacco industry or impose rules such as fixed prices or permit resale price maintenance. Some of these policies are tied to excise laws; that is, they regularise the sector’s structure and practices in order to simplify and monitor tax collection. The effect of these policies on competition is revealed by how much consumers cross borders where possible to shop in countries without similar controls.

43. Publishing, media, and performing arts commonly receive special treatment, although sometimes the intention is closer scrutiny, rather than exemption. Some exemptions prevent formalistic challenges to efficient joint ventures. Examples include societies for collecting royalties and performing rights fees and sports leagues. But the “monopoly” of broadcast rights for the most popular events may be regulated. There are often special rules about ownership and concentration in media. These might be construed as consistent with competition values of free entry and consumer choice, but they are usually explained in other terms, of viewpoint diversity and balance. The media merger and concentration rules appear intended to be more stringent than competition law would be in the same setting, although whether that is the actual effect would depend on how the competition law analysis would actually characterise the effects on markets and competition. Another common special provision permits or even requires fixed prices for books or periodicals. Maximum resale price maintenance might protect consumers from dealer market power, but these rules usually extend to minimum resale price maintenance too. The effects of these rules are contested. Eliminating these rules in some countries has not impaired book sales, although it may change distribution methods. The rules probably increase average prices. In Spain, the Tribunal estimated

that annual consumer savings from permitting deeper discounts would total more than 10% of sales. Anomalous treatment of cultural goods calls for justification, to show that there are special characteristics of cultural products, considered in a market context, that would explain differences in how they should be treated. They are “experience” goods, whose quality is often unknown before consumption. Consumers demand both familiarity and novelty, a combination that makes it difficult for producers to predict the market. The combination implies a rapid rate of innovation and a high risk of failure. Like some other sectors that challenge basic analysis, cultural goods such as books are produced at relatively high fixed cost but nearly trivial marginal cost. Co-ordination along the distribution chain may well be justified, to spread the risks and support the innovation that consumers demand. But a formal, explicit exemption, unless carefully crafted, may increase prices or curtail output more than is necessary for that purpose.

44. Many of the other particular exclusions or practices in granting special treatment look like historical relics or responses to pressure from interest groups that faced enforcement action. Norway permits municipal monopolies of movie theatres, a leftover from a century ago when movies were a novelty. Korea authorises territorial constraints on a national specialty, rice wine. The pattern of special treatment often reveals basic presuppositions of longstanding national policies. In Japan, a principal target of reform has been the habit of controlling entry through administrators’ judgements about the likely balance of supply and demand, which was characteristic of its industrial policy tradition. In Germany, reform efforts have criticised practices and requirements from its master crafts tradition that now increase the costs of entry and constrain flexibility in doing business. In Canada, controversies involving major national firms that arose over particular transactions in banking and airlines led the legislature to set up special procedures and rules; these rules do not necessarily give the relevant industries more lenient treatment, though. In the US, parties to enforcement actions have sometimes persuaded Congress to step in and correct the enforcers, for example, to permit restrictive distribution contracts for soft drinks. When the legislature balances other interests and values against competition law and policy, traditions and industry interests often prevail. By creating special rules for an industry after it has been under scrutiny from the competition enforcer, the legislature appears to be signalling the enforcer to look elsewhere. Legislators appear loath to reject competition principles out of hand, though. Few of these special treatments create complete exemptions for blatant monopolies or price fixing. They are more likely to tailor rules for the industry setting, and sometimes the special rules are about as exacting as the general competition rules would be.

Sectoral competition regulation

45. Infrastructure is the most common setting for special competition policy regimes. Competition law was irrelevant to state-owned natural monopoly utilities until competition began to appear for some of their services or functions. Most are now subject to regulation to control exploitation of the natural monopoly element of the grid or network. Special regimes and exemptions for transport are more difficult to justify, except for aspects that also involve a network-grid infrastructure. Controls on prices and entry (or exemptions to authorise price fixing cartels) for trucks, airplanes, and ships have been rationalised in terms of preventing excessive competition. Trucking and air transport have been substantially deregulated (although there are some international service problems that remain to be solved), but exemptions or special treatments remain common for ocean shipping, buses, and taxicabs. In theory, a sector regime could be a means of applying general competition principles more efficiently to common problems in an industry. But a special regime may just be less demanding, rather than more efficient. At least, the claim of greater efficiency should be checked carefully, especially where the special rules or regime appear in situations other than regulation of natural-monopoly infrastructure.

46. Most aspects of sector regulation to promote or protect competition are being covered in the stocktaking of the sector chapters. This review will focus on relationships among institutions that are charged with promoting or protection policies that affect competition. The competition agency and the

sector agency may not always conceive of similar problems in the same terms. The Italy report outlined the common issues:

The strength of commitment to competition policies in the various parts of the regulatory state varies. In principle, a reasonable structure of consultation is in place among the Authority and the sectoral agencies that share some responsibilities with it. In practice, it remains possible for the Authority and another regulator to deal with the same conduct, applying rules drawn from different sources. A common conceptual problem, of who regulates access to a monopoly facility when access is controlled by price, remains in jurisdictional limbo. Pricing above cost for an essential facility can be an abuse of dominance, just as pricing below cost to exclude competition can be predatory, but these are difficult judgements to make, for a regulator and for an antitrust enforcer, because it is difficult to determine economic costs. Information is not maintained on the same basis at different agencies, and it cannot always be exchanged with others, because of differences in the legal constraints and protections that apply to the ways information is obtained.

47. Reviews revealed some consistent patterns of institutional variation, in similarities between laws and agencies and in systems for co-ordination and checks and balances. The most common pattern is for regulators to be responsible for the prices and services of natural monopolies, while dealing with disputes about network access in co-ordination with competition authorities, who apply general rules about abuses by dominant firms that could cover the same conduct. That is, jurisdiction over access disputes is shared. In some countries, the sector law acknowledges explicitly that each might apply, and it sets out a protocol or assigns responsibility for consultation between the enforcers. Where the relationships are not clear, and problems arose as a result, the reports sometimes recommended improvement. In Ireland, the report supported

... a structured process of co-ordination and a legal basis for the agencies to defer to each other without risk and without diluting or compromising the application of competition policy. The Authority and sectoral regulators should advise each other about matters that may come under the others' jurisdiction, and consult when they find they are both pursuing the same matter. To do this meaningfully, they must have the right to exchange information with each other. Having someone from the Authority sit on appeal panels for sectoral regulator decisions is an excellent idea for integrating policy perspectives.

But formal protocols are much less important than shared policy conceptions. If agencies disagree about what should be done or why, a formal protocol just structures their dispute.

48. The formal protocol may give the competition authority a controlling role. Notably, where regulatory intervention premised on market power in the regulated industry, the competition authority may be responsible for defining the market and determining whether a firm has market power in it. The most extensive and systematic structure of this kind is in Mexico. There, the CFC is directly concerned with competition aspects of sector-specific regulation and the allocation of licenses and permits. The CFC can determine which economic agents may participate in auctions for public enterprises, concessions, licenses and permits. And the CFC may determine whether effective competition exists, or whether one of the agents has substantial market power, as a condition for a sector regulator to impose regulation such as price caps. In that connection, the CFC may also determine that competition has been restored, because of changes in market conditions, so the regulation should be terminated. Application of the same standards by

the same expert body in all of these settings helps integrate competition policy into regulatory policy. But the formal structure does not prevent disagreement, which can arise in connection with the sector regulators' power to implement remedies.

49. In a few countries, a sector-specific authority applies competition laws that are custom-built for that sector. The principal example of this pattern is the US. This structure can create serious inconsistencies. Because of their limited experience with competition analysis, and in some cases because of their responsibility to promote industry well-being, sector regulators may have systematic bias in favour of seeing the world the same way the regulated industry has. Sector regulators approved mergers—against the advice of the Antitrust Division—that led to market power at airline hubs and to monopoly problems in railroad service. Other special regimes cover ocean shipping, agricultural co-operatives, fisheries, and meat packing. Financial institutions are subject to special competition rules, particularly about mergers, applied by 4 different regulators and the Antitrust Division too, who use the same formal guidelines but may reach different results by applying different presumptions about product and geographic markets. The report on the US called for eliminating the remaining vestiges of this balkanisation of analysis and enforcement.

50. Having sectoral institutions that apply the same substantive law and analysis appears to work better than having special rules for each sector. “One law-many regulators” is the basic model used in the UK, and Italy uses it in banking, while the US uses a version of it in some sectors. Applying the same basic law evidently encourages convergence and reduces conflicts between policies and agencies, particularly where the statutes make clear that the general principles govern. The US telecoms and energy statutes explicitly do not displace the antitrust laws, so the regulators in those sectors have to achieve their goals in ways that are consistent with competition law. The US report described how this was happening in the energy sector:

The regulatory structure did not displace the competition law completely, but coexisted with it. The courts have instructed the regulator to include competition policy in its understanding and application of broader “public interest” criteria, and the regulator has followed that instruction. Congress has clearly supported the move toward deregulation, taking actions in the late 1970s that began to eliminate price controls for gas and to introduce competitive alternatives for electric power generation. And the competition agencies have encouraged these moves at every stage, offering informal and formal advice and assistance.

The UK has set up a complex sharing of functions among the many institutions that are responsible for both competition policy and enforcement and sectoral regulation. The numerous regulators generally share the objective of protecting and promoting competition, which is consistent with regulatory tasks that include controlling aspects of the industry that may be subject to monopoly power. Not only do they share objectives, but the sector regulators for gas, electricity, telecoms, water, and rail have full power to apply the Competition Act along with OFT. Several features of the UK approach try to prevent divergent applications of the law by the different authorities. All use the same procedures, including a “single notification point” at OFT. The sector regulators' guidelines about compliance with the competition law are developed in conjunction with OFT. Most importantly, appeals from all Competition Act decisions, whether by OFT or by sectoral regulators, follow the same path to what is now called the Competition Appeal Tribunal, which can ensure consistency among them.

51. Another model is to combine all of the administrative institutions that apply laws affecting competition, including economic regulation of natural monopolies, into one. This could mean having all of these functions done by the competition authority. Some competition authorities have used the provisions of general competition laws that prohibit exploitative abuse of a dominant position to regulate the prices of infrastructure monopolies. But the functions of sector oversight differ from those of *ex post* enforcement

and may call for different procedures and rules. The Netherlands recognises the differences by using a variant of this model: when the report was prepared, the electric power regulator was being set up as a chamber within NMa.

52. Oversight from the courts can encourage consistency and correct conflicts. Some countries have set up specialist appellate bodies deliberately to deal with both sector regulators and competition law. In the UK, the Competition Appeal Tribunal serves this function; in addition, the Competition Commission plays an integrating role, as it both reviews regulatory decisions and investigates and decides about competition matters. The Antimonopoly Court in Poland demonstrates the policy-integrating role of such an institution. Established as an independent judicial check on the state administration, this Court is becoming a force in the development of policy. One reason to establish a specialist court, within the judicial system and composed of judges with commercial law experience, was to shift away from the formalist approach that is usually encountered in administrative courts. Its broader jurisdiction, now including cases from the competition office and regulators for energy, telecoms, and railways, as well as consumer issues such as contracts of adhesion, promises to ensure that policies are applied consistently in competition cases and in sector regulation. A common appeal path for issues related to competition may be created as a deliberate departure from standard practice. In Germany and France, for example, the private law courts that are familiar with business and commercial disputes, rather than the administrative courts that oversee public officials, decide appeals from decisions applying the competition law and from actions by sector regulators resolving disputes about network access.

53. Co-ordination and even centralisation is recommended to avoid inconsistency. Nonetheless, in some countries where the competition culture elsewhere in the government was weak, the reviews suggested giving explicit competition policy roles to ministries. Such roles would not involve law enforcement, though. Rather, making them responsible for eliminating constraints on competition within their own jurisdictions would extend the scope of competition policy and emphasise its broad, horizontal importance. The reviews noted that ministries and sector regulators could establish antitrust offices to work with the competition enforcement agency and to advise industries about their compliance obligations.

54. Exclusions and special institutional regimes incorporate a balance between competition policy and other policies or goals. The same balancing might be done case by case, rather than through generally applicable rules. A few competition law regimes even provide for this explicitly. Unusually, the laws might permit the enforcer to base its decision on considerations other than competition policy.⁷ The process of granting or denying exemptions from statutory prohibitions, which is common for many enforcers, usually amounts to a “rule of reason” balance of net economic effects, but the permitted criteria might include other considerations such as employment.⁸ Competition enforcers do not usually take responsibility themselves for balancing other policies. The decision process may produce a balance anyway, if first-instance decisions are made by non-expert tribunals whose members represent interest groups or by non-expert judges with discretion about interpreting evidence of effects or imposing sanctions or remedies. In a few countries, competition law processes authorise the government or a minister to invoke other policies in order to override enforcement decisions. This kind of intervention is especially common concerning mergers. Such seemingly *ad hoc* interventions raise concerns about transparency, predictability, and fairness.

55. The extent of exclusions or special rules for particular sectors is now fairly consistent. Countries that once had long lists of explicitly exempted cartels have repealed most of them. Correlation between the extent of sector-specific treatment and policy effectiveness is not obvious. Active enforcement may stimulate legislative correction: the US, with a reputation for aggressive enforcement, has more exemptions and special regimes than most. The 1997 Recommendation, to fill gaps in coverage unless compelling public interests cannot be served in better ways, remains sound. But expectations should be realistic about how much remains to be done to comply with it. For the most common special regimes or exclusions, the

gaps are not wide and public interest considerations for some degree of special treatment are plausible. In applying this recommendation, attention should focus on those differences in rules or enforcement that protect monopolies and clearly anti-competitive conditions or practices.

Competition law and enforcement institutions

Independence

56. Competition policy is challenged by rent-seeking: the greater the potential for monopoly profit, the greater the incentive to try to influence decision-makers to obtain or protect that profit. Thus it may be particularly important for a body that is responsible for preventing monopoly to be shielded from rent-seeking influence. Virtually every jurisdiction makes some effort to separate applications of competition policy from political decisions by the legislature or the government. The abstract promise of independence is usually backed up with other institutional guarantees.

57. Some competition agencies are deliberately placed outside the structure of ministries, to be self-sufficient administratively and substantively. A few competition bodies have had the status or rank of ministries themselves. That status can reinforce decisional independence. Several agencies or officials which are described as independent are nonetheless connected to a ministry. In some places where the deciding official or body has a special status, the supporting bureaucracy is part of a ministry. But even where the competition policy body or official is fully part of a ministry, there may be some special recognition of the need for independent, non-political decision. Often the Minister is barred from issuing instructions about action or decision in particular cases.

58. To recognize both the need for independence and the desire for functional control, enforcement may require action by several bodies in different positions. These may include a ministry secretariat responsible for initiating investigations and recommending action, an expert or representative council or tribunal outside the government that acts as the independent decision-maker, and perhaps a separate specialized tribunal or court to decide appeals from those decisions. Complex institutions tend to increase costs and lengthen the enforcement process, and disagreements among them about the proper course of policy can create uncertainty. The opportunity for correction, on the other hand, can improve analysis and outcomes.

59. The power to appoint the decision-maker is the principal political check on decision-making independence. In countries with presidential systems, the president typically makes the appointment. Where the head of state makes the appointment, the nomination typically comes from the government or is subject to legislative approval. In some countries, though, appointment power is exercised at the ministerial level. Strong ministerial influence on appointment tends to correlate with a perception of less independence. Recognizing that politics in the appointment process could lead to indirect political control, several countries try to set obstacles to excessive politicization. Some countries encourage professionalism by soliciting applications for the top positions and subjecting them to a pre-screening personnel evaluation. Others prescribe professional qualifications and experience in order to ensure an expert, technocratic body. A few reserve places for career officials on the decision-making panel. But for some larger decision-making bodies, the system takes the opposite approach, even designating members to represent particular interest groups. Representation mandated by law assures those interests that their concerns are heard, but it makes the body appear to be a political one, deciding matters based on negotiation and bargaining about economic interests. Protected tenure is as important as transparent appointment. The strongest tenure protections for top officials are probably those of Mexico's CFC, whose members serve a single, non-renewable 10 year term. In most multi-member bodies, terms are staggered to provide continuity.

60. The functional virtues of independent decision-making may be duplicated in structures within agencies themselves. Hungary's HCO is substantially independent of the government, but in addition, the HCO includes a separate decision-making body, the Competition Council, which is substantially independent of the rest of HCO. Its civil-servant members enjoy what amounts to lifetime tenure protection, somewhat like the decision divisions of Germany's Bundeskartellamt.

61. Control over resources, of budget or personnel, confers indirect control over policy and action. Few agencies are entirely free of this influence. For some, the competition agency's budget is a separate item for the legislature to see and approve. For many, the budget and other resource policies are in the hands of a ministry, either the ministry with which the agency is affiliated or the treasury or finance ministry that writes the whole budget. A few countries have tried to provide a source of funds that would not depend on legislative appropriation. Relying on fees or retaining proportion of fines imposed can create perverse enforcement incentives, though.

62. The appropriate degree of independence differs for policy making, investigation and prosecution, and decision-making. It is rare that all of these functions are assigned to one body. Policy making is typically a ministerial responsibility, although separate competition policy bodies usually have at least an advisory role about policy. Setting priorities and initiating enforcement action are "executive" functions, but the officials who are responsible are usually in career or tenure-protected positions. Decision-making is the function for which independence is most important, and which is most often done by a body outside the government.

63. Where there is no such independent body dealing specifically in competition issues, the courts tend to become key decision-makers. Specialised bodies that were established to decide appeals from administrative decisions may serve increasingly as first-instance decision-makers. Where the principal decision-maker is an independent court, there is less reason for concern about the independence of the agency. Reliance on courts may make it difficult to establish enforcement priorities, though. Courts in some Member countries have been slow to warm to the importance of competition issues.

64. Concerns and controversies about independence have arisen principally with respect to complex structural cases, of monopoly, privatisation, and mergers. For law enforcement against naked cartels and abuse, there is likely to be greater independence in fact and less need for means to guarantee it. For the structural matters that have industrial policy implications, enforcement and intervention co-exist in most jurisdictions. Many jurisdictions provide explicitly for ministerial intervention in merger cases. In a few countries, decisions about mergers are the government's responsibility. In some countries, a minister may have discretion about whether to refer a proposed merger to the competition authority for study and review. If the minister is determined to permit it, it will not be referred, and thus the minister will avoid the embarrassment of authorizing a transaction that the independent competition authority says is contrary to the public interest. The minister or the government may have the power to reverse the competition authority's decision on appeal or to invoke other policy goals in order to override competition-based decisions or recommendations. Publicity is an important check on abuse of discretion. Concerns that the settlement of a major US merger case in the 1970s was motivated by political considerations led to legislation that now requires a public notice-and-comment process before a court can approve the negotiated resolution of government antitrust cases.

65. Access to decision-makers is important to the advocacy role of competition agencies, and thus for this function the virtues of independence might be disabilities. But this turns out not to be true in practice. In Hungary and Korea, direct personal access for high-ranking but independent competition policy officials in the ministerial decision process has supported effective policy advocacy. Advocacy from an outside position raises public consciousness, and a reputation for probity and freedom from influence based on an enforcement record makes an agency's policy advice credible. But being outside the government structure

in some countries means there is no assurance that the advice will be heard. In some countries where other agencies are admonished to consult with the independent competition office about policy proposals, the admonition is often disregarded.

66. In nearly all members reviewed, competition policy offices are active in advocacy to reform or prevent anti-competitive regulations. But this is not always done by the enforcement agency. Where there is a ministerial policy office separate from the enforcement agency, the ministry office typically participates in policy debate within the government. An independent agency has a better opportunity to contribute to public debate, though. In some countries, there has been a concern that involvement in policy and regulatory issues will undermine the independence needed for effective enforcement. The reviews nonetheless urged a broader role for the enforcement body even in those settings, because of the unique contribution it can make to policy debate based on its hands-on experience and its independent position. Where the enforcement structure was still very weak and the agency's status and independence were not well established, the reviews recognised that shoring up enforcement was a higher priority. Several well-established enforcement agencies report devoting 10% or more of their resources to analysis and advocacy aimed at problems that cannot be solved by law enforcement alone.

Enforcement issues

67. Examination of substantive laws revealed some technical issues that affect applications where regulation is important. "Self-regulation" is a common problem, if competitors in a sector use it to control competition. Associations are the usual vehicle for this regulation and thus the usual target of enforcement. Some laws contain rules specifically prohibiting anti-competitive actions by an association, obviating the need to prove or infer particular agreement among the members concerning each such action. Applying meaningful sanctions to deter this conduct can require special rules, too, such as making members liable for the associations' actions or attributing the members' turnover to the association and using that total as the basis for calculating the fine. In a few countries, horizontal co-operation in industry has been supported by "administrative guidance" from officials. Such instructions are not quite as strong as regulatory authorisation or compulsion, yet they have historically had similar effects. Reforms to regularise administrative practices and increase transparency can help reduce this abuse. The task is challenging, though. Other agencies or ministries may try to reduce the evidence of their guidance, by delivering it only orally—just as price fixers learn not to write down their agreements as enforcement becomes more serious. And firms that might prefer to disregard the guidance and inform the competition agency about the problem may be reluctant to risk crossing an important ministry official. Where such problems can be overcome, and formal doctrines of regulatory authorisation or state action are not a bar, competition law intervention has been used to reform self-regulatory restraints, most notably in professional and other services, that were supported by regulatory authorities.

68. Competition law has also been an important reform tool in the process of controlling and restructuring infrastructure monopolies. The reviews have reported on commonly encountered situations and problems. In a few countries, the competition law prohibition of abusive exploitation of a dominant position has been used directly to regulate monopoly prices. In the process of deregulation and reform, typically of opening up previously monopolised sectors to new entry and controlling abuse by the historic incumbent, competition law has often led the way or served as a backup to sector rules about access and discrimination. General competition principles and sector doctrines sometimes diverge, though. A notable example is the common market share thresholds for identifying market power. A lower, inflexible threshold might be an efficient transitional application of general principles to a particularly thorny sector problem, erring on the side of zeal in order to correct the behaviour of a stubborn historic monopolist. But wooden application to new entrants just as they achieve a significant market position themselves is self-defeating. Infrequently, competition law enforcement has been used to separate monopoly and competitive elements in a deregulating industry. The principal example of this application was the US antitrust suit that

broke up the national telephone monopoly. Few laws give the competition law and enforcement process this much power, and analogous powers in other countries have never been used for this purpose. Rather, restructuring on this scale is typically done through specific legislative action.

69. Aspects of the quasi-regulatory process of merger review and control drew attention in many reviews. The balance with other policies was often at issue, explicitly or implicitly, in assessing divisions of responsibility among competition enforcers, independent decision-making tribunals, and ministries with other portfolios. The scope of review, and hence the cost-benefit balance of merger enforcement rules and processes, drew attention in one country, Greece, where a “reform” which required the agency to spend all of its resources reviewing and approving mergers was preventing it from taking any action about other, more important problems. And in a few countries, the reviews recommended revising the regulations about merger review to facilitate compliance, notably by eliminating the use of market share as a requirement for notification.

70. The 1997 Recommendations call for vigorous and effective enforcement. Enforcement effectiveness depends upon technical legal issues that are specialised within jurisdictions, about which generalized recommendations would not be helpful. There is a general concern that combines those legal issues with economic principle, though, and that is whether sanctions are strong enough to deter anti-competitive conduct, and whether other remedies such as damages or private suits are sufficient to correct its consequences. What matters are the sanctions and remedies that are applied in practice, more than what is provided in the statutes, and actual practice depends on the courts. In some countries, only a court can impose sanctions or award other relief. Even where an agency can impose a fine, the courts’ treatment of the appeal that follows indicates whether competition issues are taken seriously. There has been a clear trend toward stronger financial penalties against hard-core cartels, but much remains to be done. Frequently, fines against price-fixing and bid-rigging are said to be the largest ever against white-collar violations; however, in some countries, the actual fines are still a very small fraction of the likely economic gain from the violations. Very few countries impose sanctions on individual decision-makers. Where sanctions are too low to deter violations, enforcement is not yet effective enough for competition policy to prevent anti-competitive conduct that could frustrate reform.

NOTES

¹ The 1997 recommendations pay more attention to competition than does the 1995 Recommendation of the Council on Improving the Quality of Government Regulation. The 1995 Council Recommendation and accompanying checklist focus principally on administrative process, although they do note the importance of removing barriers to competition in order to speed structural reform and adaptation to globalisation. The Competition Committee was active in the process that produced the 1997 Report, and the Committee's sustained interest no doubt explains why competition policy has a more prominent place there.

² The full text of Recommendation 1:

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.

- Establish principles of “good regulation” to guide reform, drawing on the 1995 OECD Recommendation on Improving the Quality of Government Regulation. Good regulation should: (i) be needed to serve clearly identified policy goals, and effective in achieving those goals; (ii) have a sound legal basis; (iii) produce benefits that justify costs, considering the distribution of effects across society; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.
- Create effective and credible mechanisms inside the government for managing and co-ordinating regulation and its reform; avoid overlapping or duplicative responsibilities among regulatory authorities and levels of government.
- Encourage reform at all levels of government and in private bodies such as standards setting organisations.

³ The full text of Recommendation 2:

2. Review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively.

- Review regulations (economic, social, and administrative) against the principles of good regulation and from the point of view of the user rather than of the regulator. Target reviews at regulations where change will yield the highest and most visible benefits, particularly regulations restricting competition and trade, and affecting enterprises, including SMEs.
- Review proposals for new regulations, as well as existing regulations.
- Integrate regulatory impact analysis into the development, review, and reform of regulations.
- Update regulations through automatic review methods, such as sunseting.

⁴ The full text of Recommendation 5:

5. Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests:

- Review as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices and forms of business organisation.
- Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: (i) separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to reduce

the market power of incumbents; (ii) guarantee access to essential network facilities to all market entrants on a transparent and non-discriminatory basis; (iii) use price caps and other mechanisms to encourage efficiency gains when price controls are needed during the transition to competition.

⁵ The full text of Recommendation 7:

7. Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform:

- Adapt as necessary prudential and other public policies in areas such as safety, health, consumer protection, and energy security so that they remain effective, and as efficient as possible within competitive market environments.
- Review non-regulatory policies, including subsidies, taxes, procurement policies, trade instruments such as tariffs, and other support policies, and reform them where they unnecessarily distort competition.
- Ensure that programmes designed to ease the potential costs of regulatory reform are focused, transitional, and facilitate, rather than delay, reform.
- Implement the full range of recommendations of the OECD Jobs Study to improve the capacity of workers and enterprises to adjust and take advantage of new job and business opportunities.

⁶ The information on this table about countries that have not been reviewed in the regulatory reform program comes from submissions in connection with the regulatory indicators project and from annual reports.

⁷ A non-Member country with such a system is South Africa.

⁸ One seemingly broad criterion for exemption that is often found in Europe, the promotion of technical or economic progress, is usually interpreted narrowly, that is, in terms of efficiency.

Unclassified

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OECD Global Forum on Competition

THE GENERAL STRATEGY OF A COMPETITION REGULATOR - AN INTRODUCTORY FRAMEWORK

-- Contribution by Professor Allan Fels --

This note is submitted by Profesor Allan Fels under Session I of the Global Forum on Competition to be held on 12-13 February 2004.

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ANALYSING COMPETITION REGULATION STRATEGY

*By Professor Allan Fels, AO
Australia and New Zealand School of Government*

1. Introduction

1. This paper provides a short introduction to a framework or model which is useful for regulators in analysing the work which they perform. The framework is also useful for officials in government departments who may have to oversee the legislation and its general application by independent regulators, courts and others.

2. There are typically three key questions for a regulator or official in any country, developed or developing:

- What should be done (i.e. what would be of public value to the nation?)
- What may be done (i.e. what does the legislation permit or require to be done?)
- What can be done (i.e. what is administratively possible, given the resources and powers available to the regulator?)¹

3. The framework or model is based on strategy models first developed in business schools but now applicable, with adaptation, to the work of regulators, and public officials generally.

4. I then draw especially on the framework which has been developed by Professor Mark Moore² of Harvard's Kennedy School of Government, a teacher at the Australian and New Zealand School of Government (ANZSOG), for extending this model to the public sector.

2. Strategy Models

2.1 *A Private Sector Model*

5. I shall first briefly outline a particular private sector business strategy model.

6. It is useful to consider that model before considering its adaptation to regulation.

7. The model focuses on three key variables and their relationships. Essentially a business's strategy can be analysed by reference to:

- its output, or value added
- its operating capability
- market demand

and by reference to their interrelationships to one another.

Each variable can be fruitfully analysed in depth

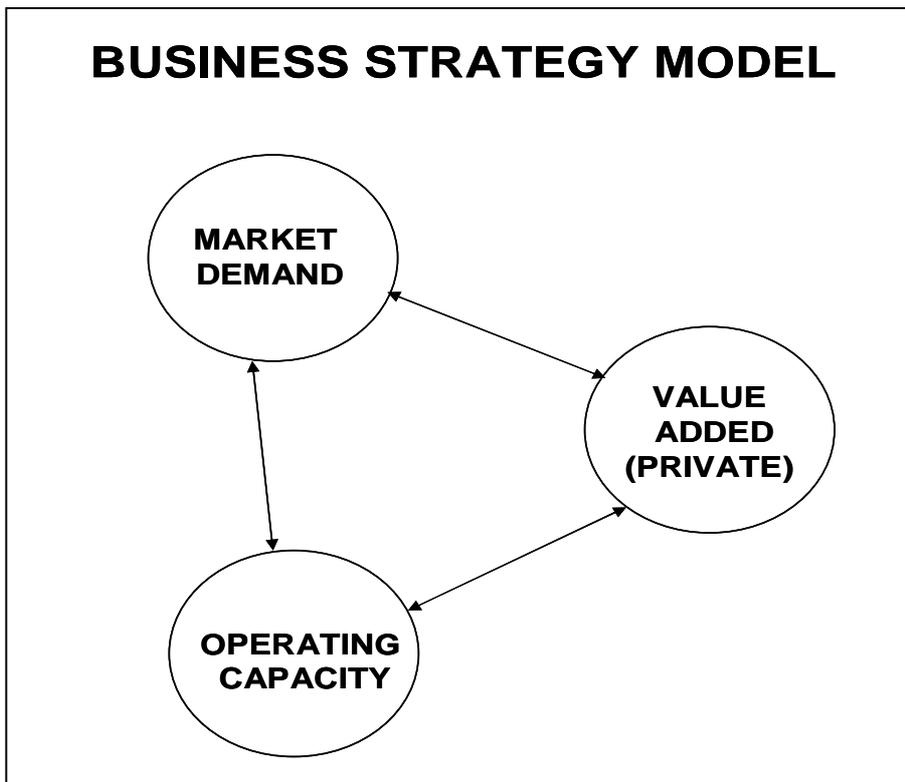


Figure 1 - A Business Strategy Model

8. Then the interrelationships of the three variables can be studied to throw light on the effectiveness of the firm's strategy e.g. value added may not match demand; or operating capability may not be sufficient to support the value added dictated by demand.

9. The model is useful in focusing on three key variables in a business strategy, in studying each in depth, in considering their interrelationships, and in reminding one that no one variable can be considered in isolation from the other variables e.g. value added cannot be considered without reference to operating capability or market demand.

2.2 A Competition Policy Strategy Model

10. Adapting this for a competition policy strategy, the key variables are:

- the value added to the public (public value)
- the operating capability. This includes the powers and resources of the regulator.
- the "authorising environment" i.e. the political environment which gives rise to legislation, regulation, and other political requirements and values which govern the work of the competition policy.

11. This model is shown below:

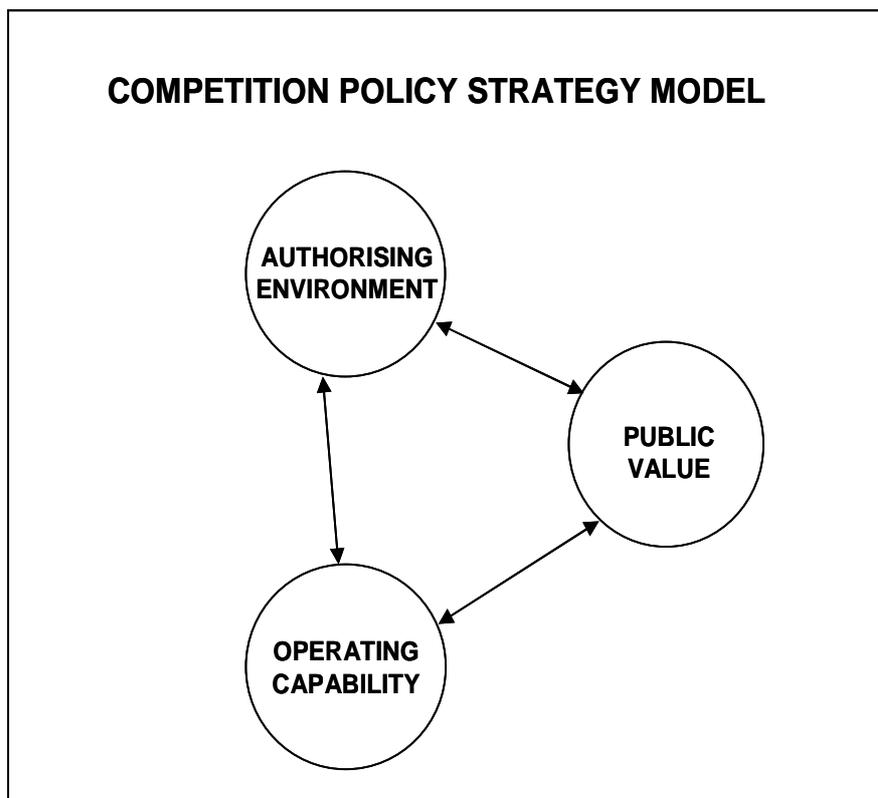


Figure 2 – Competition Policy Strategy Model

3. The variables

12. In this part of the paper, we discuss the nature of each variable briefly. It is contended that each variable is a useful focus in itself for regulators and administrators.

3.1 *Public Value Added*

- Public value is a concept which refers to the collective value created for the public of a country by government through services, laws, regulation and other action³. Public value is ultimately defined by citizens themselves. Value tends to fall into three categories: outcomes, services and trust.
- Public value may be compared with private sector output or value added but there are some substantial differences. Broadly speaking the private sector is judged by its output (as valued by the market). In the public sector, the contribution of a public agency is judged by its contribution to social outcomes or various social outcomes. This may or may not be measured by reference to a single, simple “output” or set of “outputs”. For example, a competition regulator would be seen as contributing to the outcome of a competitive, more efficient economy with lower prices and better goods and services. This may, in practice, be measured (somewhat controversially) by some indicator of its output, e.g. the number of successful court cases. Unlike in the private sector value does not stop here, however. Public value does not normally rest just on some notion of output. Under most public sector activities, there are a number of additional features which can add to public value. These include fairness in

process and perhaps fairness in outcome, or fairness in opportunity. Figure 3 suggests some dimensions of public value.

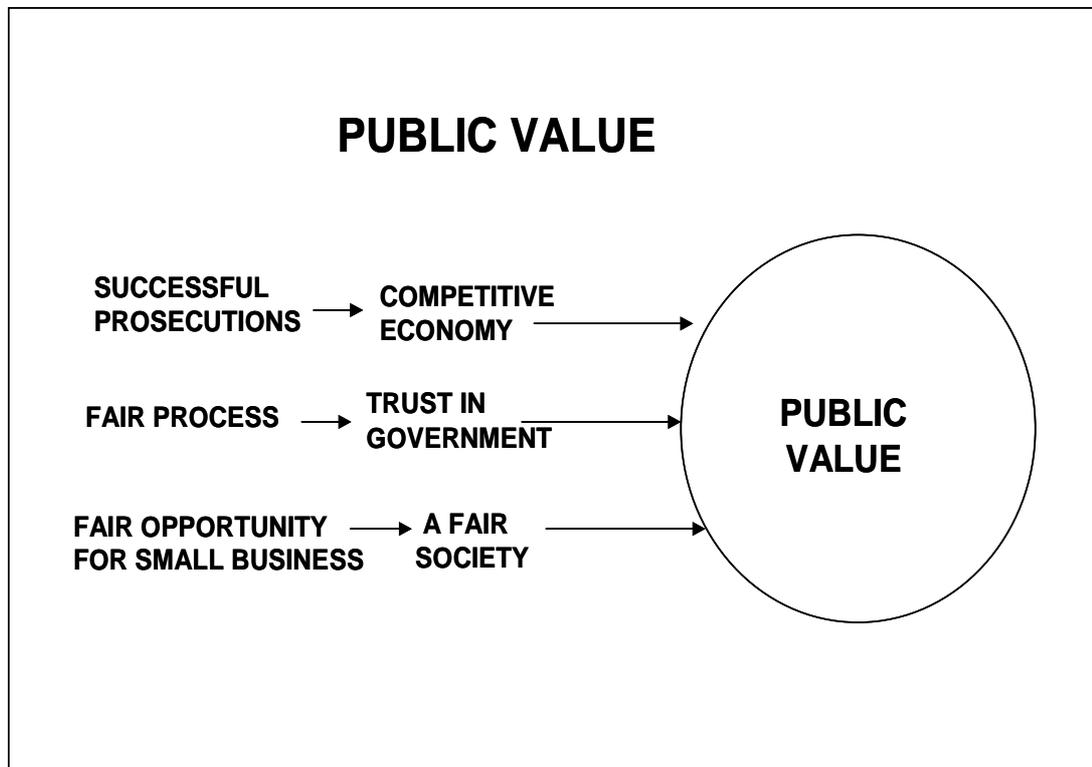


Figure 3 – Public Value

- The term “public value added” refers to the addition to or subtraction from the collective welfare of a country that results from a particular public policy or public institution. The term “value added” draws attention to the fact that value added can be increased by decreasing the amount of input per unit of output (e.g. by conserving resources) or by increasing the quantity or quality of output with a given amount of input. Some discussions of regulatory strategy neglect one or other of the dimensions of value added. They may emphasise the value achievable by reducing inputs for a given output or they may overstate the public value of an activity by stressing the value of outputs, ignoring the input costs. Some regulators may get locked into increasing value by reducing inputs ignoring that they can add value by increasing output quantity or quality. Or they focus on increasing output without regard to input cost.
- There is much discussion and controversy concerning what constitutes public value in competition law and policy. There are discussions about the objectives and outcomes of the application of competition law and the conclusions may differ according to the stage of development of the economy. The conclusions that are drawn in these controversies may be embodied in the framework set out in this paper.
- Even though the term “public value added” is difficult to reach agreement on and to specify, it is nevertheless a very useful device for focussing discussions about competition law and policy. If a policy does not add to public value, it is not justified.

3.2 *The Authorising Environment*

- The “authorising environment” refers to the laws and regulations (and other explicit or implicit values) which authorise the nature and scope of the public value which a competition policy strategy seeks to achieve.
- An analysis of the authorising environment requires some analysis of interest group pressures, the media, social attitudes, political parties, the courts and so on. Some of the influences are shown in Figure 4.
- Even though those implementing the policy are bound to comply with its instructions, nevertheless it is unwise in any strategy analysis to ignore the factors which drive that environment and which cause it to be unstable or changing, or to be the source of ambiguity, conflicting or ambiguous directives and so on. It is these factors which can give rise to sudden changes in the mandate of a regulator. Such possible changes may need to be recognised in strategy planning.

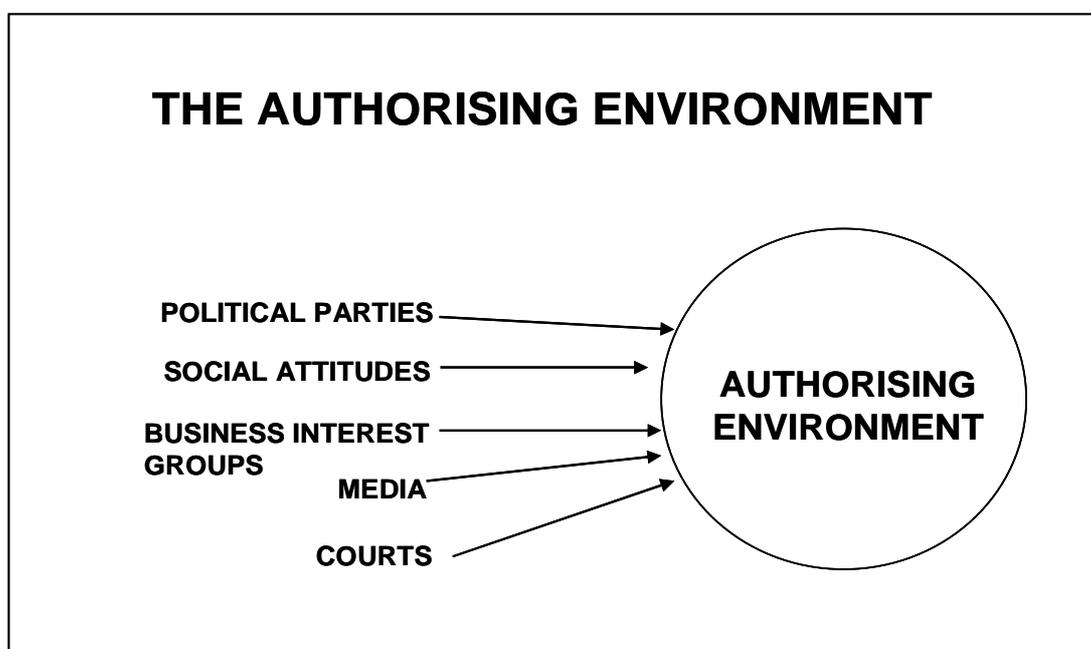


Figure 4 – The Authorising Environment

13. There is not time here to pursue a full analysis of the many factors affecting the authorising environment. However, some general points may be made about it, and some additional ones are made in **Appendix One**.

- The authorising environment is likely to differ from one country to another. In particular the authorising environment in a country with a newly established competition policy is likely to differ from that in a country with a well established competition policy. Likewise the environment will differ depending upon the stage of economic development. To develop this point further, one would need to make a more systematic analysis of the many factors affecting the authorising environment and to consider its implications for legislation or the exercise of regulatory authority. Simply this means that some laws are unacceptable in some countries, even though acceptable in others.

- It is clear from this discussion however that the role of advocacy is likely to be especially important unless one has a passive attitude to the authorising environment. Fuller analysis of this model would dig more deeply into the role and nature of advocacy particularly having regard to the likelihood of a mismatch discussed later in this paper between public value and operating capability on the one hand and the authorising environment on the other hand. Advocacy may change that relationship by altering the authorising environment.

3.3 *Operating Capability*

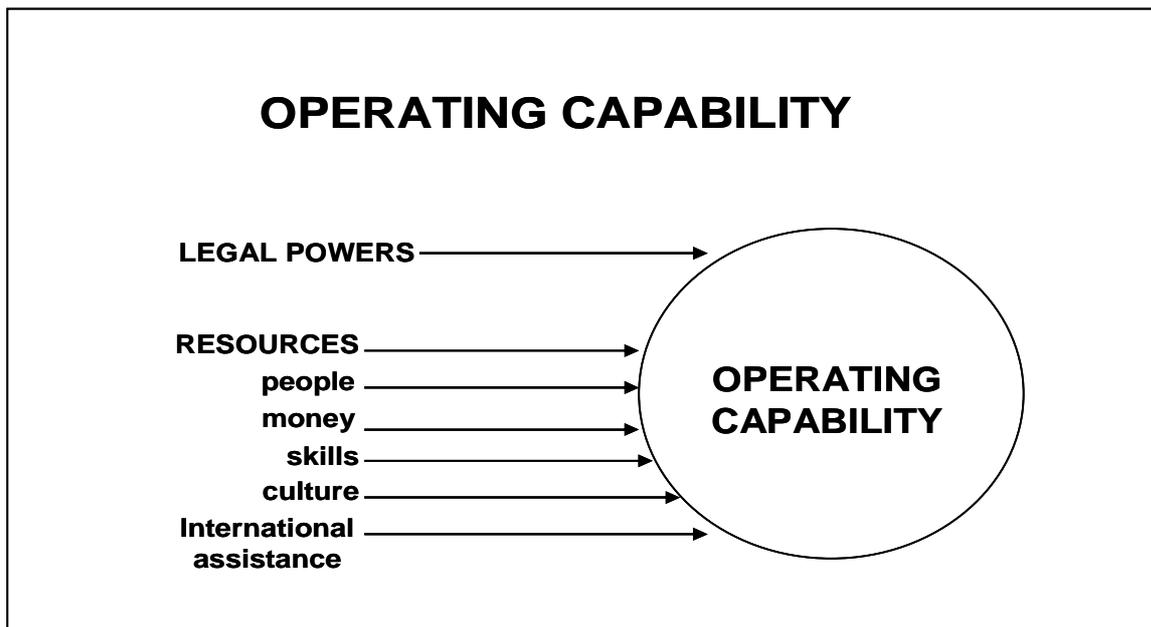


Figure 5 – Operating Capability

- Operating capability refers to the legal authority; physical, human and financial resources; culture, and organisational structure and arrangements employed to carry out the tasks of the regulatory authority or government agency.
- Competition policy requires very detailed enforcement and administration. It differs from some other policies where, once the law has been enacted, there is relatively little for the government to do. A tax rate change or an import tariff rate change, once enacted, requires relatively little implementation by the government. The law is changed at the stroke of a pen and nothing remains but for the market to get to work to reallocate resources. Competition law is quite different. Once the law has been enacted a plethora of activities must occur: the undertaking of investigations; decision making in the light of investigations; judicial processes including appeals; educational activities and so on.
- Substantial regulatory institutions need to be set up. They need to develop appropriate, economic and legal skills. In developing countries they can benefit from technical assistance and other help with capacity building. Sometimes regulatory institutions are in a weak position at the outset of the policy process and this means in turn that the law must be limited in its ambitions.

- In most countries the courts have a key role. They may or may not have good processes. They often have difficulty with economics. They are in many countries accepted as legitimate forums for the resolution of important disputes over property rights. In all countries, but perhaps especially in developing countries, they need education in this area of the law.

4. The interrelationship of the variables

14. The next step is to relate the three circles to one another to determine if they are in alignment. If they are this is not necessarily cause for complacency, e.g. the authorising environment may set a low public value on an important activity. However, even more interesting is a misalignment e.g. the public value is less than or greater than that desired by the authorising environment. Such misalignments tend to be unstable.

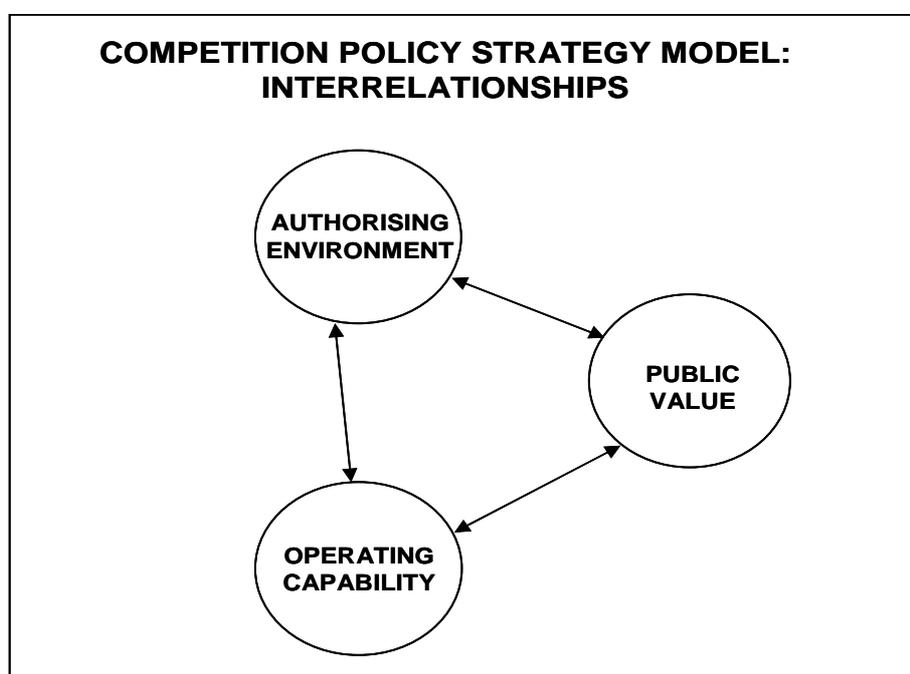


Figure 6 – A Competition Policy Strategy Model: interrelationships

15. Consider some of the possible relationships. First, public value may be misaligned with the authorising environment. The vigour of the regulator in enforcing the law and achieving public value may upset interest groups that are important politically. This may have consequences – the government may weaken the law, reduce the resources of the regulator, alter its membership. Or the regulator may pull back on its activity. Or it may through advocacy bring the authorising environment into line with its expanded public value. If the regulator is independent, it has more ability to survive political tensions compared to otherwise.

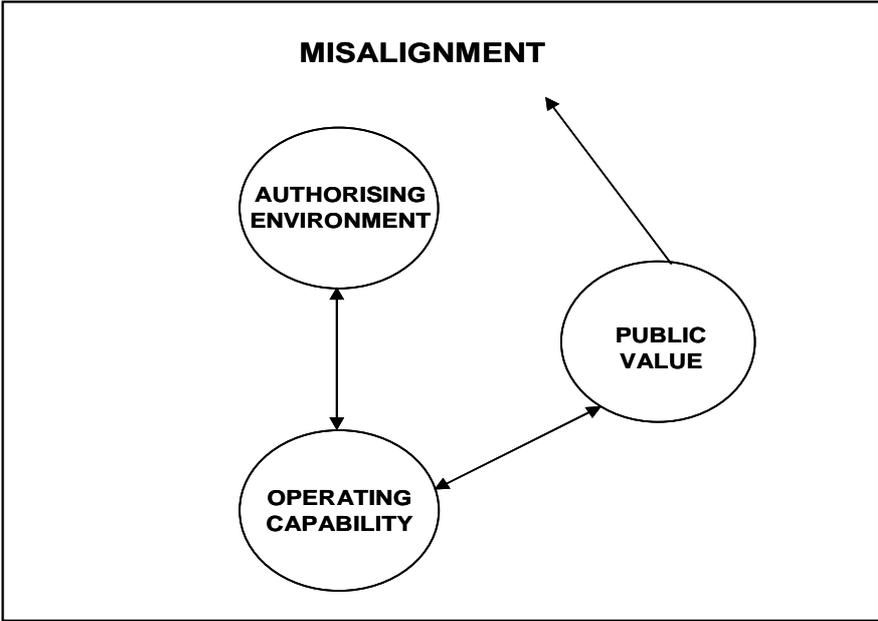


Figure 7 – Misalignment

16. Second, another misalignment may be between public value and operating capability. There may be great public value in having a full scale competition law with all the bells and whistles of an advanced economy but if there is no administrative capacity to implement it, value may not be achieved. Another possible instance of mismatch would be where there is a global cartel which harms a country which has no capacity to prosecute it. Public value can only be achieved by establishing operating capability.

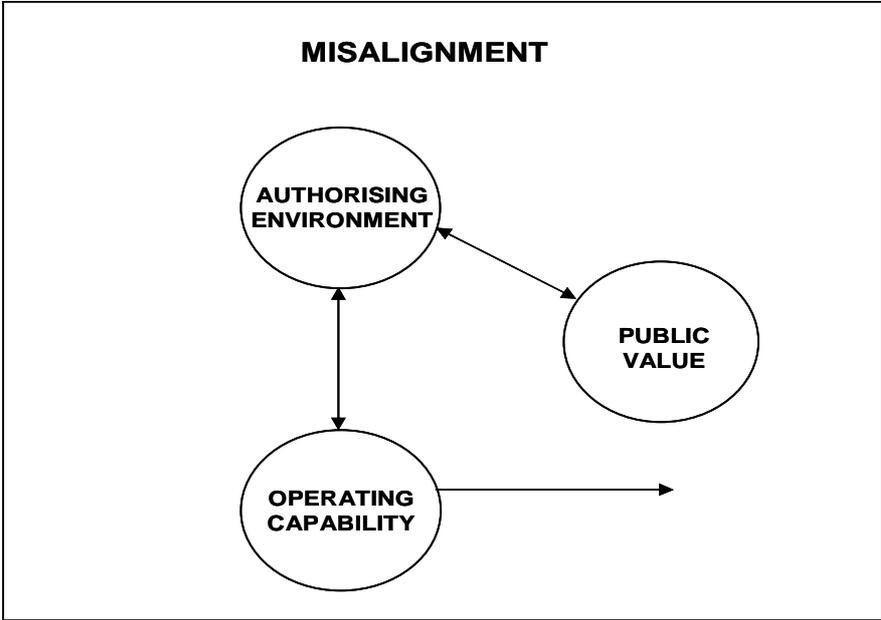


Figure 8 – Misalignment

4.1 Co-Producers

17. It is sometimes useful to extend the model to cover instances where those implementing the strategy need to receive help (or may receive hindrance sometimes) from others in achieving desired

outcomes. Co-producers include business, the legal profession, the courts etc⁴. Of great importance to developing countries is foreign assistance.

18. The issues of co-producers are not pursued in this paper.

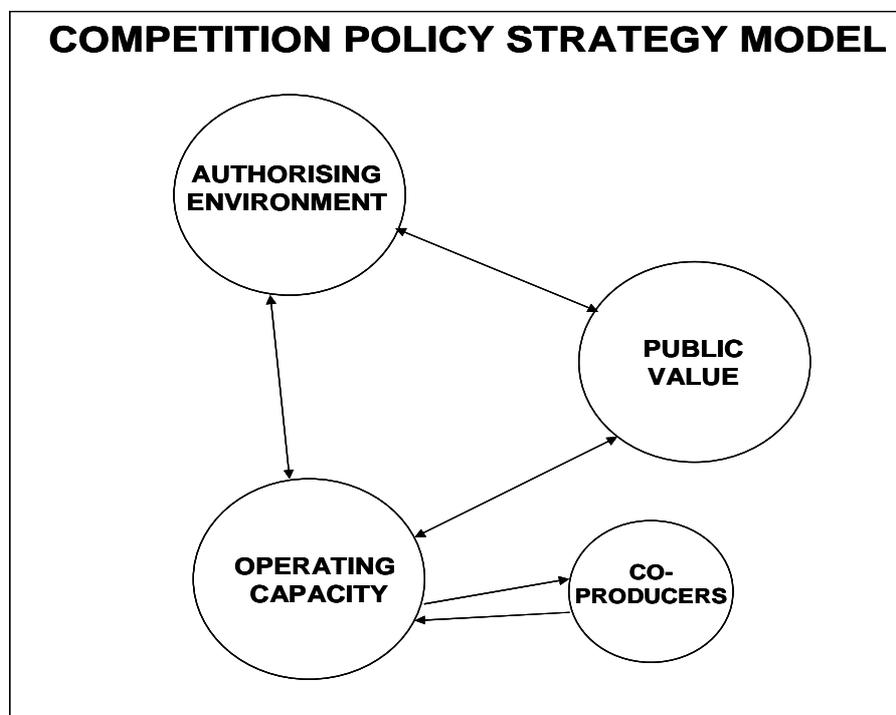


Figure 9 – A Competition Policy Strategy model: co-producers

5. The use of the framework

19. Each circle is important in itself. But its relationship with the other circles is of great importance since each depends upon and is influenced by the others.

20. A great deal of analysis of regulatory issues – whether by regulators, academics, lawyers, advisers etc – tends to locate itself in one circle and to disregard the others despite their relevance.

21. Much discussion at seminars and conferences is about the public value of a particular action or policy? e.g. there would be high value from merger law. This may overlook that there is no mandate for such a law from the authorising environment, or that there is no administrative capability of implementing such a law.

22. As has been mentioned, there is also a tendency to emphasise only the input or output side of value added, and to focus on narrow aspects of public value, e.g. on output measure.

23. Some discussions within regulatory bodies may focus entirely on what the authorising environment will permit (whether this refers to the political environment or to the courts as well). Such discussions would often benefit from a greater focus on public value.

24. Yet other discussions within regulatory bodies focuses entirely on operating capability, on what is possible, without considering public value or the authorising environment. The focus may be on

maximising the output given the operating capability. It may neglect, for example, that the authorising environment could be well disposed to increasing the operating capability with changed laws or more resources if it was persuaded of public value.

25. Finally, some problems are seen as beyond the capability of an organisation by virtue of ignoring the role of the co-producers.

26. This model is a useful way of organising discussion about a competition policy strategy, or part of it.

5.1 *Competition Agencies and Competition Policy Administrators*

27. In most countries, there is an independent regulatory authority. Policy is determined by government departments. The model is useful for either the regulator or the administrator although they may have somewhat different perspectives. The general policy maker for example may be concerned with more general questions than is a regulator. For example, the general policy maker may be as concerned with the operating capability of the courts and of other institutions as much that of the regulator with its narrower focus on its own operating capability.

NOTES

¹ There is a fourth question that is also usually important. This concerns whether the outcomes which the regulator seeks to achieve require or are facilitated by the actions of others. For example, if the aim is to secure compliance by business with the competition law, the regulator, in the end, depends upon business taking, of its own accord, certain actions e.g. educational programs for its employees so that they do not break the law. There is not time today to deal with the issue of analysing “co-producer” contributions even though it has far reaching implications for regulators and governments.

² See Moore, M. 1995, Creating Public Value: Strategic Management in Government, Harvard University Press, Cambridge, Massachusetts. I have also drawn on work by two other teachers at the School – Professor John Alford of ANZSOG and Professor Herman Leonard of the Kennedy School.

³ Creating Public Value, Strategy Unit, Cabinet Office, UK.

⁴ Depending on one’s perspective the courts could belong to any one of several circles. For the regulator, they may be in either the authorising environment or the co-producer circle. For the government official overseeing competition policy as a whole, they would be in the operating capability circle.

APPENDIX 1

- An important characteristic of competition law is that it encounters somewhat contradictory seeming attitudes by those affected by it. Most people and most businesses want their suppliers and their customers and sometimes their competitors to be subject to the stringent application of competition law. This is for their own benefit. However, when the law is applied to themselves they do not welcome it. It is usually harmful to their interests, and they put these ahead of any acceptance that there may be public interest considerations. And in any case they often fail to see the public interest considerations that may be involved in cases affecting their own immediate interests.

This inevitably leads to strong pressures against competition law. The losers from competition are most often a powerful lobby while the winners are a weak one. Moreover, the size of the property rights involved in competition law is very large and this exacerbates the tensions. In just about every country there is quite strong opposition by big business lobbies to the vigorous application of competition law. They seek its watering down, they may support its general application but seek special exemptions and special deals, and since the amounts of money involved can be very large they press vigorously to weaken competition law.

- Competition law normally involves substantial government intervention to achieve competitive market, so-called “free competitive markets”. This is in some respects a paradox and it can create unusual constituencies which either favour or oppose competition law. Some promarket-minded persons oppose competition law because too much intervention is needed to achieve good market outcomes. Other persons who temperamentally do not enthuse about the working of markets or who have some kind of antimarket attitude are often supportive that competition policy is applied because it is seen as striking at big business, a worthy target at all times in their view.

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Organisation de Coopération et de Développement Economiques
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03-Dec-2003

Français - Or. Anglais

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Forum mondial de l'OCDE sur la concurrence

**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROÎTRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

(Note de référence du Secrétariat)

Cette note est soumise POUR DISCUSSION dans le cadre de la session II du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

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Français - Or. Anglais

LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT ECONOMIQUE EN PROMOUVANT LA CONCURRENCE

1. Introduction

1. Les autorités de la concurrence sont confrontées à de nombreux défis ou obstacles dans leurs efforts pour promouvoir la concurrence, que cette promotion prenne la forme de la mise en œuvre du droit de la concurrence ou d'actions de sensibilisation de la collectivité et de l'Etat aux avantages de la concurrence. Le "manque de culture de la concurrence" a été identifié ailleurs comme une entrave majeure, dont découlent de nombreux défis et obstacles.

2. Il apparaît que le "manque de culture de la concurrence" est dû à la volonté de ceux qui prévoient d'être lésés par l'introduction de la concurrence de défendre leurs intérêts personnels, et au fait qu'ils ont le pouvoir de s'y opposer. La concurrence promeut et accélère le changement économique, ce qui peut être un facteur de redistribution de la richesse, car il accroît la richesse à distribuer. Néanmoins, même si la richesse individuelle s'accroît, certains individus ou groupes peuvent vouloir influencer sur le sens de la redistribution de cette richesse. Ceux qui s'attendent à être les "perdants" de la redistribution peuvent s'opposer à la concurrence. Le succès de leur opposition dépend de leur puissance politique. Ceux qui s'attendent à être les "gagnants" de l'introduction de la concurrence peuvent ne pas en tirer un gain individuel important, ou être inconscients des gains qu'ils peuvent tirer de la concurrence. La concentration typique des "perdants" et la dispersion typique des "gagnants" des changements politiques individuels rendent plus facile d'organiser l'opposition à la concurrence que sa promotion. L'expérience souligne l'importance de persuader les gagnants dispersés et les détenteurs d'un pouvoir politique de soutenir l'introduction de la concurrence.

3. Outre les motifs sous-jacents au "manque de culture de la concurrence", cette note identifie trois autres types d'obstacles à la promotion de la concurrence.

4. Le premier type est lié aux caractéristiques spécifiques des petites économies en développement. Les marchés locaux de ces économies peuvent actuellement être approvisionnés par des technologies inefficaces qui seraient évincées par des technologies plus efficaces, opérant à une échelle significativement plus élevée, si le protectionnisme était supprimé et la concurrence internationale introduite. En outre, les élites économiques et politiques peuvent occuper une position si limitée que la collusion est facile. Dans les micro-Etats, le PIB peut être trop faible pour justifier les coûts fixes entraînés par la mise en œuvre de la politique de la concurrence. Enfin, la position des gouvernements des petites économies dans leurs négociations commerciales avec les grandes entreprises multinationales peut être telle que la mise en œuvre du droit de la concurrence est difficile ou non crédible.

5. Le second type d'obstacles surgit dans le secteur informel. La localisation essentiellement rurale du secteur informel dans les pays en développement peut le mettre hors de portée des autorités de la concurrence qui sont implantées en zone urbaine. La petite taille des entreprises et des marchés a pour effet de rendre trop peu rentables, en termes de coût/efficacité, les avantages qui pourraient découler de l'exécution de la loi sur la concurrence à l'encontre des entreprises et de la mise en place de réformes

promouvant la concurrence. Certains aspects délictueux du secteur informel peuvent déborder sur le secteur formel au point d'y fausser la concurrence.

6. La troisième source d'obstacles tient à la lente adaptation des institutions, réseaux d'institutions et individus à un changement culturel.

7. Cette note est organisée de la manière suivante. La première grande section fournit un cadre dans lequel seront analysés les obstacles à la promotion de la concurrence. La seconde grande section donne des exemples spécifiques de défis et obstacles. Cette seconde section a été rédigée pour inciter les délégués à soumettre ou présenter d'autres exemples de défis ou d'obstacles à la promotion de la concurrence lors du Forum Mondial de l'OCDE sur la Concurrence de février 2004. Nous espérons que les discussions sur les exemples fournis par les délégués conduiront à un échange d'expériences sur la manière dont ces défis ont été traités, la révision du cadre analytique ici proposé, et l'identification de moyens efficaces de surmonter les défis/obstacles ou d'atténuer leurs effets.

8. La note s'achève sur une série de questions pour discussion.

2. Cadre d'analyse des défis ou obstacles identifiés

2.1. Défis et obstacles identifiés

9. Plusieurs représentants des autorités de la concurrence et autres experts ont identifié des défis et obstacles à la concurrence. Ces défis vont du plus superficiel —manque de ressources financières—au plus profond —manque de culture de la concurrence. Etiqueter un défi comme "superficiel" n'en minimise pas pour autant l'importance, mais reconnaît qu'il est la manifestation immédiate de causes plus profondes. Les débats porteront sur la question de savoir si la meilleure réponse consiste à livrer un assaut frontal aux causes profondes, ou s'il est préférable d'adopter une approche oblique tout en douceur.

10. Lors d'un atelier régional de l'Organisation Mondiale du Commerce en 2001, des représentants de pays en développement ont identifié les facteurs suivants comme autant d'obstacles à la promotion de la concurrence :

- Manque d'équipements
- Manque de personnel suffisant
- Manque de ressources financières
- Manque d'accès aux informations à la fois pour réaliser des enquêtes et tenter des actions
- Manque de formation appropriée du personnel
- Manque de compétences techniques de l'autorité de la concurrence
- Existence d'intérêts personnels bureaucratiques
- Corruption
- Manque d'institutions et d'individus indépendants, y compris l'impossibilité pour l'autorité de la concurrence de prendre toute décision ou d'imposer toute sanction sans l'accord du ministre compétent
- Manque de cadre légal approprié
- Manque de volonté politique
- Manque de culture de la concurrence.¹

¹ Ces éléments, dont certains ont été regroupés, sont extraits de OMC 2001a, pp. 12, 15 et 19.

11. A ces problèmes pourraient s'ajouter les défis qui transparaissent d'autres débats :

- Difficultés à gagner des procès en justice, y compris en raison de difficultés procédurales
- Difficultés à appliquer la loi sur la concurrence au secteur informel
- Distorsion de la concurrence dans le secteur formel, en raison du débordement des activités délictueuses du secteur informel
- Difficultés à introduire la concurrence dans les petits pays en développement, y compris une tendance à être ignorée par les grandes entreprises multinationales
- Pouvoirs d'enquêtes insuffisants
- Sanctions insuffisantes en cas de violation des lois sur la concurrence ou de respect tardif ou incomplet des injonctions de fournir des informations
- Prise par les pouvoirs publics —aux niveaux local, régional et national — de mesures qui sapent la concurrence par leurs politiques réglementaires, de marchés publics, de privatisation, de subventions et entrepreneuriales.

12. Ces obstacles peuvent être classés en quatre types différents. Le groupe le plus grand et peut-être le plus important rassemble les obstacles liés à l'absence ou à la faiblesse de la culture de la concurrence. Les trois autres types sont spécifiques à des types particuliers d'économies. Le premier regroupe des obstacles spécifiques à de petits pays en développement. Le second regroupe des obstacles spécifiques aux "secteurs informels", particulièrement ceux des pays en développement. Le troisième regroupe les obstacles rencontrés dans les pays dans lesquels la concurrence a été récemment introduite et où les institutions sont à la traîne. Les quatre sous-sections suivantes de cette note traitent respectivement ces quatre types d'obstacles.

2.2. *Défis et obstacles dus au manque de culture de la concurrence*

13. La plupart des défis énumérés ci-dessus découlent de l'absence d'une culture de la concurrence. Comme un auteur l'a exprimé, "[A] long terme, la politique de la concurrence doit être compatible avec des objectifs et valeurs publiquement acceptés, qui sont exprimés dans le processus politique." [Wise 2002] Cette sous-section commence par proposer une définition de la "culture de la concurrence." Elle décrit ensuite comment certains défis découlent de l'absence d'une culture de la concurrence. Elle donne des arguments sur les motifs pour lesquels une culture de la concurrence peut faire défaut, et un certain soutien empirique en faveur de ces arguments. Enfin, elle analyse l'approche utilisée pour établir une culture de la concurrence.

2.2.1. *Définition de la "culture de la concurrence"*

14. La "culture de la concurrence", tel que ce concept est utilisé en l'occurrence, signifie qu'il existe un soutien politique pour utiliser la concurrence sur les marchés comme le moyen par défaut ou "normal" d'organiser des activités économiques hors de la famille, des bureaucraties gouvernementales et des entités économiques individuelles (ou des entreprises individuelles), et que ce soutien se traduit par le fait que la concurrence devient effectivement le principe organisateur par défaut ou "normal".²

² Afin d'éviter la confusion, il convient de noter que l'expression "culture de la concurrence" a un autre sens connexe. Ce sens est donné *entre autres* dans un discours d'un fonctionnaire canadien. "[L]a culture de la concurrence".... vise la conscience que tant le grand public que les acteurs économiques ont des règles de la concurrence." [Discours de Southey disponible sur <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02476e.html>; le Réseau International de la Concurrence, p. iii, propose une définition pratiquement identique] Les deux significations sont liées, dans la mesure où un large soutien de la mise en oeuvre du droit de la concurrence est nécessaire pour qu'elle soit efficace dans les démocraties. Le développement de cette conscience est un pas vers l'obtention du soutien de la concurrence.

2.2.2. *Défis découlant de l'absence d'une culture de la concurrence*

15. Les développements qui suivent illustrent la manière dont un grand nombre des obstacles précités et qui entravent l'introduction de la concurrence découlent de l'absence d'une culture de la concurrence.

16. En premier lieu, le manque de volonté politique d'une autorité de la concurrence découle du manque de soutien politique en faveur de la concurrence, c'est-à-dire "le manque d'une culture de la concurrence." Le soutien d'un objectif, s'il ne s'accompagne pas du soutien des moyens habituels pour atteindre cet objectif, ou de la proposition de moyens alternatifs, ne peut pas être considéré comme un soutien.

17. En second lieu, le manque de volonté politique se traduit par des faiblesses spécifiques de l'autorité de la concurrence, car le gouvernement, reflétant la volonté politique, ne délègue pas une partie suffisante de ses ressources ou pouvoirs à l'autorité de la concurrence. Les faiblesses spécifiques sont notamment les suivantes :

- Des ressources inadéquates (moyens financiers, quantité et qualité appropriées du personnel,³ formation adéquate du personnel, accès aux informations pour les enquêtes et actions judiciaires, équipements)
- Pouvoirs inadéquats, y compris une autonomie inappropriée (par exemple, pour ouvrir une enquête sans demande ou autorisation formelle, pour diligenter une procédure ou engager des poursuites judiciaires, pour enquêter —avec des perquisitions, des saisies de documents qui seront acceptées à titre de preuves dans le cadre d'une procédure, des citations contraignant des témoins à déposer ou des injonctions ordonnant la production de documents ou de réponses écrites à des questions—, pour infliger des sanctions ou demander à un tribunal d'infliger des sanctions pour défaut de production de documents/d'informations dans les délais et de manière complète, ou pour violation de la loi sur la concurrence elle-même, pour promettre de manière crédible de ne pas engager des poursuites ou de limiter les pénalités [par exemple, dans le contexte d'un programme de clémence], et pour initier des programmes de sensibilisation à l'impératif de la concurrence, sans demande formelle)
- L'exemption, l'exclusion ou la simple non-application du droit de la concurrence à certaines activités économiques.

18. Certaines de ces faiblesses peuvent avoir d'autres sources que le manque de culture de la concurrence. En particulier, le fait que l'autorité de la concurrence dispose de "pouvoirs inadéquats" peut résulter de valeurs sociales plus larges en ce qui concerne le pouvoir de l'Etat. Dans les juridictions ayant un passé non lointain de pratiques abusives de l'Etat en matière de collecte d'informations ou de sanctions, la volonté politique de donner ces pouvoirs à une autorité de l'Etat, même une autorité de la concurrence bien intentionnée, risque d'être faible ou absente.

³ Une plainte spécifique mais récurrente tient à la difficulté d'attirer un personnel professionnel, bien formé et motivé vers les autorités de la concurrence. A défaut de volonté politique d'instaurer une exception limitée aux règles de la fonction publique en faveur de l'autorité de la concurrence, ces règles peuvent plafonner les salaires au-dessous du niveau du marché pour ces personnes, ou imposer de faire appel à du personnel surnuméraire d'autres administrations de préférence à de nouvelles recrues mieux qualifiées, ou imposer d'autres contraintes. Dans de nombreuses économies, les fonctionnaires de la concurrence qui vont dans le privé peuvent tripler leur salaire ou plus.

19. Le manque de volonté ou de soutien politique se traduit habituellement dans le fait que d'autres institutions, tant à l'intérieur qu'à l'extérieur du gouvernement, n'apportent également aucun soutien à la concurrence. Les pouvoirs publics, aux niveaux local, régional et national, peuvent prendre des mesures qui sapent la concurrence dans leurs politiques réglementaires, de marchés publics, de privatisation, de subventions et entrepreneuriales. Ils peuvent également fournir des informations tardives ou incomplètes sur leurs initiatives réglementaires à l'autorité de la concurrence, pour commentaire ou contrôle par celle-ci. Les tribunaux peuvent être peu disposés à imposer de lourdes sanctions pour violations du droit de la concurrence, considérant qu'elles sont disproportionnées et moralement injustes dans l'environnement politique et social.

20. Le manque de volonté politique se traduira également en attitudes de tolérance envers des problèmes plus vastes, qui réduisent incidemment l'efficacité de l'autorité de la concurrence, notamment la corruption et la défense des intérêts personnels de la bureaucratie.

2.2.3. *Les raisons de l'absence d'une culture de la concurrence*

21. Dans de nombreux pays, il n'existe aucun soutien politique permettant d'utiliser la concurrence sur le marché afin d'organiser des activités économiques hors de la famille, de l'Etat et des entreprises individuelles. Il est juste de dire que nombre de philosophies populaires prévalant ici et là ne soutiennent pas une vaste concurrence sur le marché. Indépendamment des querelles philosophiques, les intérêts personnels purs et simples sont également un motif d'opposition à la concurrence sur le marché. Cette section se focalise sur ces intérêts personnels.

2.2.3.1. La thèse de base

22. Le changement économique produit des gagnants et des perdants. Dans le contexte de la croissance économique, ce processus a été baptisé la "destruction créative" du processus de concurrence schumpéterienne. Dans ce processus, de meilleurs produits ou une production plus efficace évincent ceux qui sont en place, ou, pour reprendre la description plus graphique de Schumpeter, le processus de destruction créative est "le...processus de mutation industrielle ... qui révolutionne sans arrêt la structure économique de l'intérieur de l'ancienne structure, la détruit sans arrêt, et crée sans arrêt une nouvelle structure." [Schumpeter, p. 83]

23. Une concurrence économique accrue promeut et accélère le changement économique. Deux catégories d'exemples peuvent l'illustrer. La première catégorie couvre les cas où la réforme réglementaire introduit la concurrence lorsqu'elle avait été supprimée par la réglementation économique. En particulier, les autorités réglementaires ont moins d'informations que les entreprises réglementées, disposent d'instruments limités pour contrôler les entreprises réglementées, et poursuivent souvent des objectifs autres que l'efficacité économique. Si la "destruction créative" de la concurrence est introduite et peut fonctionner, les profits ou bénéfices excessifs sont souvent réduits, et les entreprises moins efficaces sont perdantes par rapport à des entreprises plus efficaces, car les premières ne sont plus protégées par le parapluie de la réglementation. Les investissements antérieurs réalisés sous l'ancien régime réglementaire peuvent perdre de leur valeur, voire même perdre toute valeur, faisant de leurs propriétaires les perdants du changement économique. (Les gains réalisés par ailleurs peuvent en faire les gagnants nets.) La seconde catégorie d'exemples couvre les cas où la suppression des barrières administratives à l'entrée accroît la concurrence. Le fait d'avoir permis aux compagnies aériennes aux Etats-Unis d'emprunter des itinéraires de leur choix à des prix de leur choix a conduit nombre d'entreprises à la faillite, et, en dernier ressort, à un mode plus efficace de transport aérien et à l'expansion de Southwest, compagnie aérienne très efficace. Les voyageurs par avion ont bénéficié d'une baisse des tarifs et d'un service plus fréquent et de meilleure qualité desservant les petites villes.

24. Les opposants à une culture de la concurrence sont probablement ceux qui s'attendent à perdre du fait du changement économique, ceux qui ne veulent pas risquer de perdre, et ceux qui ne s'attendent pas à gagner du fait du changement économique.^{4,5} La perte peut être économique, mais elle peut également être une perte de pouvoir (par ex. pour un bureaucrate, celle du pouvoir de prendre des décisions), ou une perte d'autres valeurs sociales.⁶ "Perdre" ne signifie pas nécessairement une perte de richesse. En effet, l'introduction de la concurrence accroît généralement la richesse globale. Toutefois, si des personnes évaluent également leur richesse relative, les "perdants" incluront ceux qui deviendront plus riches en termes absolus, mais plus pauvres relativement à d'autres avec lesquels ils se comparent, lorsque ces derniers acquerront plus de richesse.

25. L'ignorance joue un rôle dans l'opposition à la concurrence. Certains qui gagneraient à la concurrence ne soutiennent pas une culture de la concurrence car ils ne savent pas qu'ils feraient partie des gagnants. L'aversion du risque joue également un rôle. Certaines personnes préfèrent ne pas risquer d'être des perdants, même s'ils ont plutôt une chance d'être des gagnants, et peuvent d'ailleurs espérer gagner globalement. Il peut y avoir un groupe relativement important de personnes qui n'espèrent pas gagner au changement économique. Elles peuvent être indifférentes au changement, ou peuvent préférer l'absence totale de changement si elles perçoivent qu'il peut être perturbateur.

26. Un puissant argument milite en faveur d'un large soutien de la concurrence, même si elle produit des gagnants et des perdants. En effet, la concurrence améliore généralement l'efficacité économique et,

⁴ Cette opinion rejoint celle de Parente et Prescott 1999 & 2000. Ils attribuent les différences observées dans les revenus d'un pays à l'autre à des différences de PTF (productivité totale des facteurs). Les différences de PTF sont elles-mêmes imputées à des différences de politiques. (le stock de connaissances exploitables étant le même d'un pays à l'autre). Ils estiment que les contraintes politiques qui produisent les plus grands effets sont celles qui s'exercent sur les pratiques de travail et l'utilisation de technologies plus productives. Ils formulent l'hypothèse, exemples à l'appui, que de nombreuses barrières à l'adoption de nouvelles technologies sont mises en place pour "protéger les intérêts de groupes qui sont les tenants des pratiques de production actuelles."

⁵ Certains auteurs soutiennent que la redistribution économique n'est pas le motif pour lequel le changement économique capable d'accroître les richesses, telle l'introduction de la concurrence, est bloqué. Ils prétendent plutôt que la redistribution du pouvoir politique est le motif de l'opposition au changement. Acemoglu et Robinson soutiennent, par exemple : "[L']effet du changement économique sur le pouvoir politique est un facteur-clé pour déterminer si des avancées technologiques et des changements économiques bénéfiques seront bloqués. En d'autres termes, nous proposons une 'hypothèse du perdant politique.' Nous prétendons que ce sont les groupes dont le pouvoir politique, et non les rentes économiques, sera érodé qui bloqueront les avancées technologiques. Si des agents sont des perdants économiques mais n'ont aucun pouvoir politique, ils ne pourront pas empêcher les progrès technologiques. S'ils détiennent et conservent un pouvoir politique (ne sont pas des perdants politiques), ils n'auront aucune incitation à bloquer le progrès. Ce sont donc les situations dans lesquelles les agents détiennent un pouvoir politique qu'ils s'attendent à perdre qui génèrent la plus grande incitation à bloquer. Notre analyse suggère que nous devrions davantage nous intéresser à la nature des institutions politiques et aux déterminants de la distribution du pouvoir politique si nous voulons comprendre le retard technologique." [Acemoglu et Robinson 2000a]

⁶ Pour une discussion détaillée des problèmes d'évaluation des politiques du point de vue de la richesse économique, voir Hausman et McPherson 1996, particulièrement le Ch. 7 "Efficacité." Les auteurs concluent le chapitre en ces termes : "On ne peut raisonnablement pas évaluer des politiques, institutions ou situations exclusivement en fonction de leur succès à satisfaire les préférences non comparables, sur un plan interpersonnel, des individus. En effet, la richesse n'est pas la satisfaction des préférences, et il semble que d'autres facteurs comme la liberté, l'égalité et la justice comptent également." [p. 99]

dès lors, le bien-être économique.⁷ Une plus grande richesse économique signifie que les gagnants ont les moyens d'indemniser les perdants, de telle sorte que tout le monde peut en profiter. Cette indemnisation est rare. (Les paiements effectués pour les "coûts d'échec [« stranded costs »]" dans le secteur de l'électricité dans plusieurs pays étaient des exceptions). Cependant, s'il existe de nombreuses politiques liées destinées à accroître l'efficacité, dont chacune s'accompagne de groupes différents de gagnants et de perdants, de telle sorte qu'une personne particulière est gagnante aussi souvent qu'elle est perdante, l'effet à long terme pour la plupart des personnes sera d'en faire des gagnants nets. Et, dans ces circonstances, les personnes soutiendront cet ensemble de politiques à long terme visant à accroître l'efficacité, si elles ignorent à l'avance qu'elles seront parmi les perdants nets, et ne sont pas trop hostiles au risque.

27. Il en découle au moins trois questions. En premier lieu, les juridictions ne coïncident pas avec les économies. La remarque est particulièrement vraie pour les petites juridictions. Ainsi, il est possible qu'une politique accroisse le bien-être économique sans qu'elle fasse des perdants nets de certaines personnes d'une juridiction donnée. Ainsi qu'il a déjà été noté ci-dessus, à moins qu'il n'existe de nombreuses politiques liées et que les perdants ne soient éliminés au fil du temps, les juridictions démocratiques peuplées de perdants nets s'opposeront à une politique économiquement efficace.

28. En second lieu, il peut être difficile de prévoir l'effet distributif de politiques économiquement efficaces. Lorsque la richesse et le pouvoir sont concentrés, la redistribution provoquée par des politiques économiquement efficaces peuvent soit concentrer davantage soit éroder cette richesse et ce pouvoir. Si l'érosion ne peut pas être empêchée à l'avance, ceux qui sont politiquement puissants s'opposeront néanmoins à une politique économiquement efficace.

29. En troisième lieu, il peut exister une opposition innée à tout changement économique accroissant le bien-être. En particulier, il peut être difficile pour les gagnants d'"acheter le silence" des perdants. C'est un truisme de dire que les pertes découlant du changement tendent à être concentrées, par exemple entre les fabricants de chaussures, et les gains tendent à être dispersés, par exemple entre ceux qui portent des chaussures. Les perdants peuvent plus facilement mobiliser leurs ressources pour combattre le changement que les gagnants pour le promouvoir, car les tricheurs, en l'occurrence les francs-tireurs (ceux qui bénéficieraient d'une réorientation politique mais ne contribuent pas au coût nécessaire pour que cette politique soit adoptée), sont plus faciles à identifier dans un petit groupe.

30. L'opposition à la redistribution causée par la concurrence peut persister longtemps. Dans une étude du développement divergent observé au Canada et aux Etats-Unis parmi les économies du Nouveau Monde, les auteurs suggèrent que les données naturelles de base (par ex. le climat et les types de sols) ont entraîné des degrés différents d'inégalités en termes de richesse, de capital humain et de puissance politique. Cette inégalité a été préservée, soutiennent-ils, par les institutions qui ont été développées et l'effet de ces institutions sur l'accès aux opportunités économiques. Ils suggèrent ce qui suit : "Dans l'ensemble, lorsqu'il existait des élites qui étaient fortement différenciées du reste de la population en termes de richesse, de capital humain et d'influence politique, elles semblent avoir utilisé leur position pour restreindre la concurrence." [Sokoloff et Engerman 2000]

31. Cette note soutient la thèse principale que l'opposition à la redistribution des richesses, causée par la concurrence, est le principal obstacle au développement d'une culture de la concurrence. Pour être couronnée de succès, l'opposition exige un pouvoir politique suffisant. Etant donné que la concurrence est généralement bénéfique, puisqu'elle produit une plus grande richesse globale, la gestion de la redistribution peut être l'un des sous objectifs clés de l'introduction réussie de la concurrence. Cela peut

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Il existe plusieurs exceptions bien connues, notamment lorsqu'il existe de grandes économies d'échelle ou de dimension, lorsqu'il existe des externalités, ou lorsque certaines informations sur les caractéristiques ou actions de certains acteurs économiques ne sont pas connues des autres acteurs.

expliquer pourquoi nous constatons que des lois sur la concurrence ne s'appliquent pas à certains secteurs puissants où, théoriquement, la loi pourrait raisonnablement être appliquée.

2.2.3.2. Le soutien empirique

32. La thèse énoncée ci-dessus bénéficie d'un vaste soutien empirique. Ce soutien est anecdotique, mais les anecdotes proviennent tant des pays en développement que des pays développés. Ces anecdotes rapportent que la redistribution des richesses et, dans une certaine mesure, le pouvoir politique, sont le principal motif pour lequel la concurrence se heurte à une opposition. La redistribution des richesses est probablement également le motif de l'opposition à l'introduction de la concurrence dans certains secteurs spécifiques. Les exemples cités comprennent notamment les chauffeurs de taxi qui s'opposent à l'augmentation du nombre de licences de taxi lorsque celles-ci sont numériquement limitées, ou encore les producteurs nationaux qui s'opposent à la réduction des droits de douane ou à l'élimination des quotas qui font barrage à la concurrence étrangère.

33. En Indonésie, les milieux universitaires discutaient d'une loi sur la concurrence depuis quelque temps, mais l'introduction de cette loi a été retardée et n'a vu le jour qu'après un changement politique substantiel. La description de ce processus illustre les relations entre l'incidence des conduites anticoncurrentielles et les intérêts économiques personnels de ceux qui détiennent un pouvoir politique. Elle souligne également le rôle d'aiguillon du changement que peuvent jouer des institutions extérieures :

“L'intérêt porté à l'élaboration d'une loi exhaustive sur la concurrence en Indonésie remonte à 1990 environ. C'est à cette époque que des professeurs de droit, des membres de différents partis politiques, des organisations non gouvernementales et certaines institutions gouvernementales ont commencé à discuter de la nécessité d'une telle loi. En fait, plusieurs groupes différents, y compris le Parti Démocrate Indonésien et le Ministère du Commerce indonésien (en coopération avec la Faculté de Droit de l'Université d'Indonésie), ont rédigé des projets de loi sur la concurrence. Toutefois, ces projets de loi n'ont pas été sérieusement examinés par les dirigeants de l'époque, car une grande partie des pratiques de concurrence déloyale et de monopole qui étaient commises, souvent par les plus grandes entreprises industrielles et commerciales indonésiennes, l'étaient avec le soutien direct et actif du gouvernement. Le capitalisme des copains était à l'ordre du jour sous le gouvernement dit de l'"Ordre Nouveau" de l'ancien Président Suharto, jusqu'en 1998 environ.

“Bien que l'adoption de la Loi Numéro 5 en 1999 soit intervenue partiellement pour satisfaire aux conditions d'une Lettre d'intention conclue entre le gouvernement indonésien et le Fonds Monétaire International en juillet 1998, il n'en demeure pas moins que l'adoption de la loi a également recueilli beaucoup de soutien de la part des hommes politiques, du gouvernement, du public et de la presse, qui ont jugé qu'elle était un moyen de traiter les problèmes croissants posés par les pratiques monopolistiques et de concurrence déloyale découlant de pratiques étroitement liées de corruption rampante, collusion et népotisme (connues sous l'acronyme indonésien de "KKN") qui avaient lieu en Indonésie en complicité entre le gouvernement et certaines entreprises favorisées.” [OCDE 2001, pp. 56-7]

34. La seconde anecdote vient du Bangladesh où GrameenPhone a introduit un service de téléphonie sans fil dans les zones rurales. L'explication du fondateur de GrameenPhone sur les raisons pour lesquelles le modèle de GrameenPhone n'a pas été largement reproduit donne une bonne idée des motifs pour lesquels l'introduction de la concurrence à plus grande échelle est difficile. “Les bonnes idées ne sont pas imitées instantanément ; GrameenPhone a mis près de cinq ans à aller du concept au lancement[D]ans la plupart des pays en développement, il faut des mois pour constituer une nouvelle société et des années pour obtenir une licence de téléphonie mobile, sans même parler des difficultés à composer une équipe

dirigeante et à attirer les capitaux. Comme dans de nombreux pays, les bureaucraties étatiques résistent aux activités entrepreneuriales qui pourraient redistribuer le pouvoir. Les intérêts acquis protègent des monopoles et quasi monopoles privés et publics. Il existe des obstacles systémiques et des barrières énormes à l'entrée. [Harvard Business Review 2003]

35. La résistance à la redistribution causée par la concurrence est également présente dans des pays développés ayant des autorités de la concurrence expérimentées. Les marchés publics des collectivités locales japonaises font l'objet de la troisième anecdote. “*Dango* [la formation de cartels pour déterminer l'issue d'avis d'appel d'offres publics] est une coutume vieille de près de 100 ans au Japon, qu'il est impossible de détruire brutalement,” selon Yoji Otani du Credit Suisse First Boston à Tokyo, cité dans le Financial Times. M. Otani ajoute : “En particulier, les collectivités locales veulent protéger les petits entrepreneurs et leurs employés, et ferment les yeux lorsque cela arrive.” Le même article donne la mesure de l'ampleur de la pratique : la marge bénéficiaire brute des marchés de travaux publics oscille entre 10 et 15 pour cent, contre 5 à 10 pour cent pour les projets privés. [Financial Times 2003] La réponse a été la Loi concernant l'élimination et la prévention de la participation à des soumissions concertées, etc. du 31 juillet 2002, qui vise à prévenir les “soumissions concertées avec la participation du gouvernement”, c'est-à-dire la participation d'employés du gouvernement central, de ministères ou de collectivités locales et d'entreprises de droit public spécifiées à des soumissions concertées organisées par les soumissionnaires. [OCDE, à paraître]

36. Le dernier exemple est une observation à propos des relations entre la concentration du pouvoir politique, la concentration du pouvoir économique et la concurrence économique. Il s'agit d'une question qui a été bien étudiée, particulièrement lors des discussions européennes sur le rôle de la politique de la concurrence.⁸ Cependant, certains auteurs au moins voient une dynamique très différente dans les actuels pays en développement.

“[L]e problème le plus redoutable que le monde en développement doit affronter est structurel —et c'est un problème dont l'Occident a peu l'expérience. C'est le phénomène d'une minorité dominante le marché, des minorités ethniques qui, pour des raisons largement différentes, tendent à dominer économiquement, dans les conditions du marché, les majorités « indigènes » appauvries qui les entourent... Dans des environnements de libre marché, ces minorités, ensemble avec des investisseurs étrangers (qui sont souvent leurs partenaires commerciaux) tendent à accumuler une richesse exagérément disproportionnée, qui alimente l'envie et le ressentiment parmi les majorités pauvres.

⁸ Quatre objectifs politiques de la protection de la concurrence ont été discutés, tels que décrits par Gerber. Trois d'entre eux concernent au moins les relations entre le pouvoir politique et le pouvoir économique. Le premier, la protection de la liberté économique (héritage du libéralisme du dix-neuvième siècle) semble entrelacé avec la protection de la concurrence économique, sinon équivalent à celle-ci. Le second, la promotion de la concurrence, est vu comme un moyen de promouvoir d'autres idéaux sociaux, habituellement “protéger la concurrence pour créer et maintenir des structures de pouvoir qui sont appréciées par la société ou les communautés qui la composent.” Par exemple, afin d'empêcher une concentration excessive de puissance économique et la menace corrélative pour la démocratie, ou pour réduire les barrières internationales afin de construire le marché intérieur de l'Union Européenne. En troisième lieu, la protection de la concurrence est vue comme une promotion de la justice sociale, parfois exprimée sous le terme de “traitement équitable” des PME par comparaison avec leurs grands concurrents, et parfois sous le terme de “traitement équitable” des acheteurs. En quatrième lieu, la protection de la concurrence est vue comme une promotion de la politique économique, notamment parce qu'elle contribue à réduire l'inflation, ou les barrières au changement économique, ou parce qu'elle accroît la capacité des entreprises nationales à être compétitives sur les marchés internationaux. [Gerber 1998, pp. 418-420]

“Lorsque des réformes démocratiques donnent la parole à ces majorités auparavant silencieuses, des démagogues opportunistes peuvent rapidement aiguïser l’animosité majoritaire pour en faire des mouvements ethno-nationalistes puissants, capables de renverser les marchés et la démocratie.” [Chua 2003]

37. Les quelques observations qui précèdent soutiennent l’idée que les intérêts personnels de ceux qui perdront, ou qui ne s’attendent pas à gagner, des changements économiques entraînés par la concurrence, sont les principaux obstacles à l’adoption généralisée d’un système de concurrence. Dans l’exemple indonésien, le lien causal entre le changement politique et l’adoption d’une “culture de la concurrence” est très clair. Mais il est peut-être plus intéressant, dans l’immédiat, d’étudier comment il est possible, dans un climat de changement politique plus graduel, de surmonter les obstacles à l’adoption d’une “culture de la concurrence”. Tel est le sujet de la sous-section suivante.

2.2.4. *Comment certaines autorités de la concurrence ont-elles promu une “culture de la concurrence” ?*

38. Un grand nombre d’autorités de la concurrence rendent publics les bienfaits de la concurrence, ce qui peut sensibiliser des masses de personnes qui seraient autrement inconscientes des avantages que la concurrence leur procure. Cette démarche peut être vue comme un effort pour aider les citoyens des démocraties à faire, à plus long terme, des choix éclairés sur là où réside leur intérêt. La plus grande difficulté est, peut-être, de convaincre ceux qui détiennent le plus d’influence politique qu’ils bénéficieraient également d’une plus grande concurrence. L’autorité mexicaine de la concurrence fournit ci-dessous un exemple de la persuasion des deux groupes.

39. Au Mexique, la culture de la concurrence s’est implantée dans le système politique et économique au cours des dix dernières années environ. L’autorité de la concurrence, créée au début des années 1990, est le symbole de l’acceptation progressive de la concurrence. Un représentant de l’autorité mexicaine de la concurrence a défini sa stratégie en ce qui concerne la création de l’autorité et le renforcement du soutien à la concurrence. L’autorité a estimé qu’elle devait bénéficier de l’appui du gouvernement, des différents acteurs économiques et du public. La transparence —de telle sorte que les parties concernées puissent suivre les actions de l’autorité et tirer des conclusions sur son utilité à long terme —a été utilisée pour contrer le risque de perdre l’appui du secteur concerné dès qu’une enquête était lancée. A cet égard, il a été fait un choix stratégique des cas qui contribueraient à démontrer au public l’importance de la concurrence pour une économie de marché saine et le bien-être du public. [OMC 2001b, Para. 100]

40. En Indonésie également, il a été jugé important de s’assurer un vaste soutien en faveur d’une loi sur la concurrence. “Le défi le plus important [pour la mise en oeuvre de la loi sur la concurrence] a été d’établir que la loi améliorerait le bien-être des gens.” [OMC 2001b, para. 92] Cependant, comme la citation précédente l’illustre clairement, la conquête d’un appui populaire n’a pas suffi à elle seule ; l’opposition des tenants du « capitalisme des copains » devait également être vaincue.

* * * * *

41. Cette section a suggéré que la volonté de défendre des intérêts personnels est la principale raison qui incite des individus et des groupes à ne pas soutenir, ou à s’opposer à la concurrence comme moyen par défaut d’organiser des activités économiques. Elle a exposé à la fois la thèse sous-jacente à cette suggestion et des observations qui la corroborent. Les observations sur l’introduction de la concurrence, secteur par secteur, confirment la vue générale relative à l’introduction de la concurrence au niveau de toute l’économie. La meilleure réponse aux causes de l’opposition à la concurrence dépend des spécificités

de chaque juridiction. L'une de ces réponses est d'essayer de persuader ceux qui sont susceptibles de gagner à la concurrence mais pensent à tort qu'ils y perdront, ou, bien que ce ne soit pas l'idéal, à tailler dans le vif les exceptions et exclusions afin de fissurer la résistance, ou à adopter d'autres stratégies.

2.3. *Défis et obstacles dans les petits pays en développement*

42. Les petits pays en développement sont confrontés à des défis spécifiques lorsqu'il s'agit de promouvoir la concurrence. Ces obstacles ont fait l'objet de débats lors du Forum Mondial de l'OCDE sur la Concurrence qui s'est tenu en février 2003, mais, dans un souci d'exhaustivité, certains d'entre eux seront de nouveau évoqués ici. Afin d'introduire le sujet, cette section commence par une description faite par Trinidad et Tobago. Elle s'ouvre sur une description faite par un pays anonyme—taille et niveau de développement inconnus—illustrant que les mauvais résultats de l'introduction de la concurrence étrangère, redoutés par Trinidad et Tobago peuvent effectivement se produire. A la suite de ces descriptions, certains des défis les plus courants dans les petits pays en développement sont identifiés et analysés. Ces défis sont notamment les suivants : l'importance de l'échelle minimum efficiente pour approvisionner certains marchés par rapport à la demande sur ces marchés, une population faible, un PIB peu élevé par rapport aux coûts fixes d'une autorité de la concurrence, et des positions de négociation déséquilibrées des gouvernements de ces micro états vis-à-vis des grandes entreprises multinationales.

43. Trinidad et Tobago a décrit son économie comme “une économie de monoculture tournée essentiellement vers l'exportation et tributaire des importations”, caractérisée par “la domination qu'exercent les entreprises multinationales sur les grands secteurs de production”, et par le fait que “[les] producteurs locaux sont principalement des micro entreprises selon les normes internationales et des entreprises familiales dans beaucoup de cas.” Elle a exprimé les préoccupations suivantes en ce qui concerne la concurrence :

“(1) Avec l'ouverture croissante des économies, les gains de bien-être que procure la concurrence à l'économie pourraient-ils être perdus si les nouveaux concurrents sont des entreprises étrangères qui évincent des acteurs locaux ? Du fait de la petite taille de l'économie, les effets d'éviction pourraient se généraliser et avoir des répercussions sociales ...

“(2) Les économies de petite taille sauront-elles discipliner efficacement les grandes entreprises multinationales, étant donné le déséquilibre des rapports de force ? Dans de nombreux cas, le PIB du pays ne représente qu'une fraction du revenu annuel de l'entreprise multinationale. Un droit de la concurrence est dénué de tout intérêt s'il ne peut qu'en théorie mettre fin aux abus de position dominante .”[OMC 2000]

44. Un représentant d'un pays non identifié a évoqué l'effet de l'ouverture des marchés dans son pays : “[La] production locale a souffert en raison de l'afflux des importations. Cela a eu pour conséquence un chômage massif, une perte de revenu et une crise sociale, entraînant finalement la paralysie de l'économie.” [OMC 2001a, p. 13] Ces observations semblent refléter certaines des préoccupations exprimées par Trinidad et Tobago.

45. Les défis purement économiques sont abordés les premiers. Il semble que deux catégories différentes de marchés sont concernées :

a.) Les marchés internationaux sur lesquels un petit pays détient une faible part d'un produit clé, par exemple une terre et un climat propices à la culture d'un produit particulier. Les actifs du pays permettent de générer des “rentes économiques”, par exemple au motif que ses sols sont particulièrement bien adaptés, ou parce que la réglementation du marché engendre ces rentes. La vente de ces actifs à des étrangers fera inévitablement perdre ces rentes au petit pays.

Toutefois, la question qui en découle naturellement est la suivante : pourquoi ces actifs ont-ils été vendus à un prix inférieur à la valeur des rentes économiques ?

- b.) Les marchés locaux caractérisés par le fait que différentes technologies peuvent être utilisées pour approvisionner le marché, qu'une technologie inefficace prédomine actuellement et que la technologie la plus efficace permet des économies d'échelle si importantes que la concurrence ne se développera pas dans un petit pays. (L'échelle minimum efficace est importante par rapport à la demande) Comme les débats du Forum Mondial de l'OCDE sur la Concurrence de février 2003 l'ont mis en lumière, cette situation peut engendrer des défis pour la concurrence ; Cependant, il semble qu'en pratique les préoccupations liées à la concurrence et l'équité l'emportent généralement sur les préoccupations liées aux pertes d'efficacité, de telle sorte qu'il a généralement été jugé préférable d'avoir plus de concurrents opérant à une petite échelle inefficace que d'avoir moins de concurrents opérant à une échelle efficace plus importante.

46. Un second type de défi identifié lors du Forum Mondial de l'OCDE sur la Concurrence de 2003 se rapporte à la population. Dans un petit pays ou un pays en développement, les élites commerciale et politique se composent d'un petit nombre de personnes. La petite taille de l'élite commerciale peut rendre la collusion explicite plus facile à cacher, et faciliter la collusion tacite. Par ailleurs, la parenté des élites politique et commerciale est un facteur aggravant.

47. Un troisième type de défi identifié a trait au PIB. Une petite économie risque de disposer de ressources limitées pour la mise en œuvre du droit de la concurrence. En outre, on peut craindre qu'une autorité de taille minimum soit "trop grande" pour une économie très petite, de telle sorte que ses effets bénéfiques sur les prix profiteraient à un trop petit nombre de produits et services, et que les coûts directs de l'autorité seraient supérieurs aux avantages qu'elle procure. Cependant, cet argument ne vaut que pour un très petit pays.⁹ L'une des stratégies possibles consiste à lier la mise en œuvre du droit de la concurrence à un domaine connexe, telle la protection des consommateurs. A titre d'alternative, les petits pays peuvent également chercher à réduire les coûts et à accroître le "poids" de l'autorité en la rattachant à une autorité régionale chargée de l'application de la loi.

⁹ Une récente étude estime que "le gain annuel de bien-être aux [Etats-Unis], procuré par la dissuasion de l'exercice de la puissance de marché, grâce aux lois antitrust telles qu'elles sont actuellement appliquées, pourrait facilement excéder 1 pour cent du PIB, soit \$100 milliards par an." (Il s'agit d'une estimation de la perte de poids mort évitée et des pertes dues à la recherche de rentes, c'est-à-dire le "triangle de la perte de poids mort" plus une portion du "rectangle des profits" estimés gaspillés par la recherche de rente.) [Baker 2003]

Si l'"efficacité" de la mise en œuvre du droit de la concurrence était la même aux Etats-Unis et à Trinidad et Tobago, c'est-à-dire en supposant que de nombreuses conditions de comparabilité soient satisfaites, ce chiffre suggère qu'à Trinidad et Tobago, dont le PIB 2002 GDP est estimé à USD 9.372 milliards, une autorité de la concurrence coûtant moins de USD 9.4 millions par an serait rentable. En l'occurrence, le coût inclut non seulement le coût direct mais les coûts additionnels imposés au judiciaire, et les coûts de respect de la loi sur la concurrence imposés aux entreprises. Et la barre de USD 9.4 millions est probablement trop haute, car l'effet d'une petite autorité de la concurrence sur les prix des produits échangés à l'échelle internationale —qui peuvent représenter une large part des importations d'une petite économie— n'est probablement pas mesurable. Si les exportations du pays sont en concurrence avec des exportateurs d'autres pays, l'effet marginal de l'application par un petit pays du droit de la concurrence sur ces marchés peut également être non mesurable.

Le chiffre de USD 9.4 millions excède largement la taille minimum d'une autorité de la concurrence. Par exemple, le budget 2002 du Conseil de la Concurrence de Lettonie s'élevait à environ LVL 200.000 soit environ USD 350.000. [Conseil de la Concurrence de Lettonie 2002.] Ce chiffre est à mettre en équation avec le PIB 2002 qui était légèrement inférieur à celui de Trinidad et Tobago et s'élevait à USD 8.406 milliards.

48. Un quatrième type de défi identifié se rapporte aux positions déséquilibrées de négociation. Trinidad et Tobago s'inquiète du fait que de grandes entreprises multinationales puissent menacer de quitter le pays si elles ne peuvent pas agir comme elles l'entendent en termes de concurrence (ou autre). Le comportement ainsi redouté est similaire à celui qui s'est réellement produit dans un pays en transition. Dans ce pays, une société étrangère a subordonné son achat d'une société nationale, *entre autres*, à sa radiation du Registre d'Etat des Entreprises Dominantes. (Dans ce pays, les entreprises inscrites au Registre d'Etat des Entreprises Dominantes étaient soumises à un régime spécial de contrôle des prix). Le Ministre responsable de cette société a signé le contrat. Cependant, le ministre responsable de la concurrence n'a donné son accord qu'à condition que de nombreux aspects de la conduite de la société soient réglementés. Le Secrétariat ignore quelle a été l'issue finale.

49. Les petits pays en développement sont confrontés à un ensemble spécifique de défis en matière de promotion de la concurrence. Ces défis vont de ceux qui sont dus à des économies d'échelle dans des secteurs non marchands, jusqu'à ceux qui ont dus au fait que la population est faible ou que le PIB est peu élevé, en passant par ceux qui sont dus au déséquilibre de la position de négociation vis-à-vis de grandes entreprises multinationales.

2.4. Défis et obstacles dans le secteur informel

50. La promotion de la concurrence dans le "secteur informel" (SI) présente des défis et obstacles spécifiques. Bien que superficiellement le SI semble hautement concurrentiel, il n'en demeure pas moins que le marché est affecté par des conduits anticoncurrentielles. En outre, le SI revêt une importance significative dans certains pays. Dans certains pays en développement, le SI absorbe la majorité de l'emploi. Les défis auxquels se heurte la promotion de la concurrence se rapportent aux caractéristiques spécifiques du SI. En premier lieu, une grande partie du SI est rurale, et le SI rural peut être hors de portée des autorités situées en zone urbaine. En second lieu, l'absence de grandes entreprises peut rendre les coûts de mise en œuvre trop élevés, même en tenant compte des effets bénéfiques de la dissuasion. En troisième lieu, la petite taille d'un grand nombre des marchés du SI peut rendre la conception de réformes de promotion de la concurrence trop coûteuse par rapport à ses avantages probables. En quatrième lieu, les effets concurrentiels des activités délictueuses dans le SI ne sont probablement pas une priorité en matière d'application de la loi. Néanmoins, certaines entreprises peuvent causer suffisamment de dommages sur le plan de la concurrence et être suffisamment proéminentes pour qu'il soit avantageux qu'une autorité applique rigoureusement la loi sur la concurrence. Par ailleurs, d'autres moyens plus larges de promouvoir la concurrence, notamment en promouvant la réforme de la réglementation d'intrants importants sur une série de marchés du SI, notamment les services financiers et l'immobilier, peuvent être suffisamment bénéfiques pour que l'engagement de poursuites soit rentable.

51. Cette section commence par une brève description du secteur informel. Elle se poursuit en donnant un exemple de réforme pro concurrentielle de la réglementation ayant des effets positifs sur le SI, bien qu'elle soit extérieure au SI. Enfin, elle identifie certaines caractéristiques qui rendent difficile de promouvoir la concurrence dans le SI.

52. Les activités du secteur informel peuvent être divisées en deux grandes catégories. La première regroupe les stratégies de débrouillardise ou les activités de survie : jobs occasionnels, jobs temporaires, jobs non payés, agriculture de subsistance, ou détention de multiples jobs. La seconde regroupe les "stratégies de dissimulation des gains" qui peuvent être divisées en deux sous catégories. La première de ces sous catégories est la fraude fiscale ou l'évitement d'autres réglementations, y compris l'immatriculation des sociétés. La seconde de ces deux sous catégories regroupe le crime et la corruption.¹⁰

¹⁰ Il existe des preuves que les secteurs informels sont plus importants dans les pays faisant peser de lourdes "charges" sur les entreprises formelles (taxes, réglementations) et connaissant une plus grande corruption.

53. Des estimations de la taille du SI sont disponibles, en dépit de la difficulté compréhensible de le mesurer. Le SI représente plus de la moitié de la population active totale employée dans certains pays à bas revenus. Mais il ne représente que 4-6% dans les pays à revenus élevés.¹¹ Le Tableau 1 (voir annexe) fourni par l'Organisation Internationale du Travail donne des statistiques plus détaillées, y compris une ventilation entre zones rurales et urbaines. La pauvreté et la participation au SI sont étroitement liées. Le SI couvre une variété de secteurs, y compris l'agriculture, les industries manufacturières, le commerce, les services, la construction et transport. [Blunch et al]

54. Les problèmes de concurrence dans le SI incluent un accès limité ou inexistant à des intrants comme l'information, la finance, l'immobilier, la technologie, et, de la même manière, un accès limité ou inexistant aux marchés.¹² En outre, il peut y avoir des conduites anticoncurrentielles comme l'exclusion de l'accès à des produits clés ou l'exclusion des marchés les plus efficaces. [Varcin 2000] Le secteur informel peut également avoir des effets négatifs sur la concurrence dans le secteur formel. Les produits et services vendus dans le secteur formel peuvent servir à blanchir l'argent d'activités criminelles du secteur informel. Les bénéfices du blanchiment signifient que le vendeur n'exige pas les mêmes rendements que le ferait un vendeur non délictueux. Dès lors, les produits et services servant au blanchiment de capitaux peuvent évincer ceux fournis par des vendeurs honnêtes. Cette éviction en l'absence d'une plus grande efficacité entraîne une distorsion de la concurrence.

55. Une réforme promouvant la concurrence hors du SI peut avoir des effets économiques positifs sur le SI. Selon un rapport de la Banque Mondiale, "Les réformes qui ont réduit cette distorsion et éliminé différentes formes d'intervention de l'Etat (soutien des prix, intrants subventionnés et crédits bonifiés, soutien en faveur de la commercialisation)—ont généralement été suivies d'une accélération de la croissance agricole." La croissance des revenus agricoles en résultant a eu pour effet d'accroître la demande locale de produits et services fournis par des pauvres non-agriculteurs vivant en zone rurale. Ces produits et services incluent certains exemples types du SI, notamment la construction rurale, les services personnels, les activités manufacturières simples, et les travaux de réparation. La croissance sur ces marchés a également réduit la pauvreté. L'accès à la terre joue un rôle important dans la réduction de la pauvreté. [Banque Mondiale 2001, p. 67]

[Johnson, Kaufmann et Zoido-Lobaton 1998] Cependant, d'aucuns soutiennent que le fait de délier les petites entreprises ou les entreprises informelles de la "charge" de respecter des réglementations et d'acquiescer des taxes rend impossible pour les autorités politiques et le secteur informel d'atteindre un accord sur des stratégies qui aident au développement à plus long terme, notamment la réduction de la dégradation environnementale, l'amélioration de la sécurité au travail, l'expansion de la sécurité sociale et l'accroissement du rendement de l'impôt pour mieux financer les services publics. [Tendler 2002]

¹¹ Banque Mondiale "Concept de Secteur Informel," sur : <http://lnweb18.worldbank.org/eca/eca.nsf/Sectors/ECSPE/2E4EDE543787A0C085256A940073F4E4?OpenDocument>

¹² "Il existe également des preuves accablantes que les participants au secteur informel sont confrontés à de multiples contraintes diverses, y compris un accès limité ou un manque d'accès aux ressources et marchés, ainsi qu'à la terre et à l'infrastructure physique (voir Sethuraman 1997, Tokman 1990)." Cité dans Blunch, Canagarajah et Raju 2001.

"Le travail dans l'économie informelle se caractérise par de bas niveaux de qualification et de productivité, des revenus faibles ou irréguliers, de longues heures de travail, des lieux de travail exigus ou mal définis, des conditions de travail dangereuses et malsaines, et l'absence d'accès à l'information, aux marchés, aux finances, à la formation et à la technologie." [Organisation Internationale du Travail, "S'affranchir de la pauvreté par le travail," 2003, p. 29 disponible sur (<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-i-a.pdf>)

56. La Banque Mondiale a identifié la petite taille des marchés impliquant la population pauvre comme une barrière à la réforme sur ces marchés, bien que ces réformes présentent une “efficacité potentielle dans la réduction de la pauvreté.” [Banque Mondiale, p. 72] C’est probablement parce qu’il est coûteux pour les responsables politiques de concevoir des réformes appropriées au contexte économique, social et politique. Mais la Banque note également des barrières à l’entrée des PME sur certains marchés qui sont bien connues des autorités de la concurrence —exigences d’expérience, procédures complexes ou coûteuses d’enregistrement et de soumission, et comportement non-concurrentiel sur les marchés – de telle sorte que la conception de réformes appropriées peut parfaitement être moins coûteuse que redoutée. Une grande partie du SI implique ces mêmes marchés.

57. Deux autres observations peuvent être formulées qui suggèrent que la promotion de la concurrence dans le secteur informel peut exiger une stratégie différente de celle qui est appliquée dans le secteur formel. En premier lieu, les autorités de la concurrence sont habituellement implantées dans les plus grandes villes d’un pays. Les difficultés de transport et de communications qui coupent les entreprises rurales des marchés produisent également l’effet inverse, c’est-à-dire coupent les autorités urbaines de la concurrence des conduites anticoncurrentielles survenant dans les zones rurales. Les plaintes peuvent ne jamais parvenir aux autorités et, si elles leur parviennent, une enquête appropriée à leur sujet peut être trop coûteuse. En second lieu, les entreprises impliquées dans le SI tendent à être très petites. (L’OIT définit une petite entreprise ou une micro entreprise comme une entreprise composée de moins de 5 ou 10 personnes). La petite taille des entreprises atténue l’effet dissuasif des poursuites engagées à l’encontre d’une entreprise isolée en vertu du droit de la concurrence. En particulier, il est rationnel pour les autorités de la concurrence d’utiliser leurs ressources limitées pour se consacrer à des violations ou auteurs de violations plus importants. Réciproquement, il est rationnel que d’autres petites entreprises croient que l’autorité de la concurrence ne consacrerait pas de ressources pour poursuivre une seconde petite entreprise, après qu’une première ait été poursuivie. En fait, il faudrait peut-être une kyrielle de poursuites pour modifier leurs convictions. En conséquence, poursuivre une petite entreprise n’aura aucun effet dissuasif sur les autres. Ainsi, la petite taille des entreprises du SI peut signifier qu’elles échappent à toute application du droit de la concurrence.

58. Le secteur informel des pays en développement pose des défis et obstacles spécifiques à la promotion de la concurrence. La petite taille des entreprises et des marchés, couplée à leurs localisations parfois difficiles d’accès, peut exiger des stratégies différentes. Ces stratégies alternatives peuvent inclure la nécessité de réformer les marchés des intrants et de réduire les barrières aux marchés pour les sortants.

2.5. *Défis et obstacles liés à l’adaptation des institutions y compris les institutions judiciaires*

59. Lorsqu’une collectivité a adopté la concurrence comme principe d’organisation économique, il faut du temps pour que les institutions s’adaptent aux nouvelles demandes. Les adaptations institutionnelles impliquent également une adaptation des individus et des réseaux d’institutions.

60. Fréquemment, les individus doivent faire un nouvel apprentissage et s’adapter. Par exemple, les mêmes personnes qui administreraient auparavant un régime de contrôle des prix vont devoir dorénavant appliquer une loi sur la concurrence. Ou encore, un magistrat qui arbitrait auparavant des litiges entre entreprises nationalisées impliquant un ensemble de lois dans un système politico-économique pourra dorénavant devoir trancher des actions judiciaires engagées par une autorité gouvernementale de la concurrence contre des entreprises, en appliquant un ensemble de lois complètement différent.

61. Potentiellement, les institutions s’adaptent avec plus de difficultés que les individus. Par exemple, la “mémoire institutionnelle” et les approches analytiques en résultant peuvent perdurer longtemps après que tous les individus ayant participé aux événements soient partis. Ainsi, si des autorités de la concurrence ont participé à des contrôles des prix répétés ou permanents, les attitudes de base et les

approches analytiques ont persisté, d'après les informations rapportées, longtemps après que la politique et l'objet fondamental de l'institution aient changé.

62. Le fait que différentes institutions s'adaptent à des vitesses différentes peut ajouter aux défis existants. Par exemple, les lois peuvent avoir changé mais les réglementations et procédures doivent les rattraper. Ou encore, les facultés de droit peuvent ne pas disposer de matériels d'études appropriés pour que leurs diplômés soient préparés au nouveau système. Ou encore, la loi sur la concurrence peut utiliser des concepts économiques alors que les instances judiciaires connaissent mal le raisonnement économique. Ces difficultés peuvent être résolues au cas par cas si l'autorité de la concurrence peut expliquer les données économiques d'un dossier devant le juge, mais les juristes qui ont l'expérience de l'ancien système peuvent ne pas être préparés à formuler des arguments économiques. Les règles des tribunaux en matière de témoignage peuvent rendre difficile de faire appel à un économiste en qualité d'expert pour formuler ces arguments. Et il se peut que la pratique des tribunaux ne permette pas à des «masters» calés en économie de travailler directement pour le juge. La conséquence peut d'être d'exclure tout argument économique de l'enceinte du tribunal. Cela signifierait qu'ils ne seraient pas explorés pendant une enquête ouverte en vertu de la loi sur la concurrence, et, dès lors, que les preuves soumises pour soutenir ou réfuter des arguments économiques ne seraient pas recherchées. Ainsi, les limites au rythme de changement des institutions individuelles peuvent limiter le rythme d'adaptation des réseaux d'institutions.

63. Outre les difficultés d'introduire l'économie dans le raisonnement judiciaire, il existe d'autres raisons pour lesquelles les institutions judiciaires augmentent les défis posés à la promotion de la concurrence, dans l'exercice de leur rôle de règlement des différends entre les entreprises ou entre les entreprises et l'autorité de la concurrence. En particulier, les tribunaux peuvent juger lentement et être engorgés, de telle sorte que les différends sont tranchés dans des délais commercialement intolérables. Ils peuvent également avoir des difficultés à traiter d'affaires complexes comme celles qui relèvent du droit de la concurrence. Par ailleurs, les professionnels du droit peuvent ne pas connaître les précédents étrangers et les normes pertinentes pour accélérer l'élaboration d'une jurisprudence cohérente. [OCDE 2000, pp. 187-8]

64. Enfin, les gouvernements sub-nationaux peuvent être à la traîne des changements intervenus au niveau national. Alors que les institutions nationales et leurs employés peuvent bénéficier d'une grande assistance technique, changer les compétences et perspectives d'employés de milliers de municipalités peut excéder les capacités des formateurs, si prolifiques soient-ils.

65. En conclusion, le rythme d'adaptation des institutions peut faire obstacle à la promotion de la concurrence, indépendamment de la force d'une culture de la concurrence parmi les détenteurs du pouvoir politique ou le grand public. Ces défis consistent notamment à fournir aux individus les ressources et stimulants pour apprendre. Ils consistent également à aiguillonner des institutions anciennes afin qu'elles s'adaptent, ou à les remplacer par des institutions totalement nouvelles, et à maintenir une cohérence et un élan de changement suffisants, puisque différentes institutions s'adaptent à différentes vitesses.

* * * * *

66. Cette section a pris pour point de départ l'ensemble des défis ou obstacles à la promotion de la concurrence qui ont été identifiés par les autorités de la concurrence et d'autres experts. Ceux-ci ont été organisés en quatre groupes de défis selon leur cause fondamentale possible. Le plus grand groupe, et peut-être le plus important, regroupe les défis attribués à un "manque de culture de la concurrence." Les autres groupes sont ceux qui découlent des caractéristiques des petites économies en développement et du secteur informel des pays en développement, ainsi que de l'adaptabilité des institutions. Le "manque de culture de la concurrence" a été imputé aux intérêts personnels de certains groupes et individus, au fait que le

changement économique produit des perdants et des gagnants, et que la concurrence accélère le changement économique. Ainsi, les opposants à la concurrence sont probablement ceux qui s'attendent à perdre du fait de la concurrence, ou qui ont peur de prendre le risque de perdre de ce fait, ou qui ne savent pas qu'ils sont susceptibles de gagner du fait de la concurrence. Bien qu'il soit rationnel pour beaucoup d'individus et de groupes, sinon la plupart, de soutenir la concurrence parce qu'ils en sont les gagnants nets à plus long terme, il existe des circonstances dans lesquelles des individus ou groupes s'opposent rationnellement à la concurrence. Deux points en découlent. En premier lieu, gérer la redistribution qui peut résulter de la concurrence peut être un sous objectif clé de la promotion de la concurrence dans une économie. En second lieu, démontrer à ceux qui sont susceptibles d'être les gagnants nets de la concurrence que la concurrence leur profitera, peut être un autre sous objectif clé.

3. Exemples spécifiques de défis ou obstacles

67. Cette section donne quelques exemples spécifiques de cas dans lesquels les autorités de la concurrence ont été confrontées à des défis et obstacles à la promotion de la concurrence. Ces exemples ne sont pas destinés à des débats en tant que tels, mais entendent plutôt inspirer les délégués afin qu'ils soumettent ou présentent d'autres exemples de défis ou obstacles à la promotion de la concurrence lors du Forum Mondial de l'OCDE sur la Concurrence en février 2004.

68. Ces exemples sont organisés selon une classification grossière entre : (1) les effets directs sur la concurrence, (2) la neutralité concurrentielle, (3) les interfaces avec la réglementation, et (4) la promotion par le gouvernement de structures de marché anti-concurrentielles. Deux sections supplémentaires sont consacrées à la corruption et aux défis et obstacles rencontrés par l'autorité de la concurrence en tant qu'institution. Aucune position n'est prise sur le point de savoir si les actions anti-concurrentielles procèdent d'une simple inadvertance ou d'une intention délibérée, probablement due au désir politique d'aider des entrepreneurs particuliers, ou d'accroître les revenus produits par les actifs détenus par des collectivités locales, ou due à la corruption ou à toute autre cause. Cependant, lorsqu'il semble qu'il existe des conflits d'objectifs d'ordre public au sens large, ceux-ci sont évoqués.

3.1. Effets directs sur la concurrence

3.1.1. L'Etat acheteur

69. Les Etats sont fréquemment actifs sur les marchés. Ils achètent régulièrement des produits et services ou sont fournisseurs de licences sur des produits et services qui seront vendus à leurs citoyens. Il existe plusieurs moyens pour les acheteurs d'accroître ou de réduire la concurrence en changeant leur conduite vis-à-vis des fournisseurs. Ils peuvent organiser des avis d'appel d'offres. Ils peuvent élargir la gamme de produits ou services qu'ils sont disposés à acheter. Ils peuvent grouper les achats pour accroître la taille et réduire la fréquence des achats. Ils peuvent changer le volume ou le calendrier de fourniture des informations dont les concurrents disposent à propos des offres d'autres entreprises. Les Etats disposent de ces stratégies et d'autres encore pour promouvoir la concurrence. Mais ils n'y recourent pas toujours.

70. L'Etat peut nuire directement à la concurrence : il peut éliminer la concurrence en désignant des fournisseurs monopolistiques sans organiser des avis d'appel d'offres. Ou il peut désigner plusieurs fournisseurs sans avis d'appel d'offres. Ainsi, un exemple spécifique de choix d'un prestataire de services sans avis d'appel d'offres ouvert à la concurrence a eu lieu dans un pays où le Ministère de la Privatisation détenait 40% de l'une des bourses. Le Ministère a choisi de vendre les actions détenues par l'Etat via cette bourse, alors même que ces actions devaient être cotées sur deux bourses. Une plainte a été déposée. L'autorité de la concurrence a recommandé des changements qui ont été acceptés par le Ministère.

71. Il est parfois plus efficace de n'avoir qu'un seul fournisseur dans un territoire donné. Tel est le cas, par exemple, lorsqu'il existe de grandes "économies de densité," c'est-à-dire lorsque le coût moyen de fourniture du service dans un territoire donné est plus faible lorsqu'il existe plus de clients, ou lorsque chaque client consomme plus. La collecte des ordures est un service qui présente des "économies de densité" et est fréquemment acheté par le gouvernement des collectivités locales. Il est souvent judicieux pour une municipalité de soumissionner pour être l'unique entreprise de ramassage des ordures (dans toute la ville ou certains quartiers) plutôt que de permettre à plusieurs entreprises de se concurrencer chaque jour dans chaque rue. C'est ce qu'on appelle la "concurrence *pour* le marché" par distinction avec la "concurrence *sur* le marché." Les Etats peuvent promouvoir la concurrence en choisissant comme il convient entre la "concurrence *pour*" et "la concurrence *sur* les marchés," et en garantissant que les avis d'appel d'offres subséquents n'avantagent pas les titulaires actuels. Dans un exemple spécifique, une autorité de la concurrence nationale a enquêté sur une plainte incriminant la manière dont les marchés d'adjudication du service de ramassage des ordures avaient été conçus ; en d'autres termes, l'autorité a enquêté pour déterminer si la concurrence sur le marché était efficiente. Dans cette décision particulière, elle a jugé que la concurrence *pour* le marché était la plus appropriée, de telle sorte que le plaignant —qui aurait souhaité une partie du marché adjudgé de manière concurrentielle— a été débouté.

72. Une autorité de la concurrence peut s'impliquer dans la promotion de la concurrence en recommandant aux Etats de prescrire des règles claires en matière d'avis d'appel d'offres ouverts à la concurrence. Dans un pays au moins, l'autorité de la concurrence a envoyé un avis aux autorités de la capitale afin qu'elles élaborent et publient des règles en matière d'avis d'appel d'offres concurrentiels. Ces règles pourraient traiter plusieurs questions, notamment les cas dans lesquels ces avis doivent être lancés, la manière dont ils doivent être publiés, les cas dans lesquels une offre doit être considérée comme non valable (par exemple, s'il y avait trop peu de soumissionnaires), la manière dont les adjudicataires seront choisis, et les modalités d'annonce publique de l'adjudicataire, afin de garantir un contrôle public destiné à lutter contre la corruption et de veiller à ce que la municipalité ne contribue pas involontairement à une entente.

3.1.2. *L'Etat membre d'ententes et boycotteur d'accès*

73. Les Etats nuisent parfois à la concurrence en rejoignant des ententes et en appliquant des droits d'accès élevés à un produit ou service essentiel, voire même en rejoignant un groupe de boycott pour refuser l'accès. Les études de cas suivantes – et une « situation de fait », puisqu'aucune décision n'a été prise dans ce cas sur le point de savoir si une violation du droit de la concurrence avait été commise – illustre, ou illustre potentiellement, chacune de ces possibilités.

74. Dans un cas, plusieurs sociétés de taxis se sont plaintes auprès de l'autorité de la concurrence que la réglementation des taxis leur avait infligé un traitement discriminatoire. L'autorité de la concurrence a enquêté et découvert une entente entre des taxis. Les membres d'une association de taxis avaient conclu un accord de prix uniformes. Ils s'étaient ensuite engagés envers la municipalité à se conformer à cet accord de prix. L'autorité de la concurrence a poursuivi l'association de taxis et ses membres, mais n'avait pas compétence pour poursuivre la municipalité.

75. Cette affaire de concurrence, désormais terminée, présente une ressemblance avec les événements qui se sont déroulés en Irlande en 2002-2003, où une association de tous les principaux industriels de la transformation du bœuf, la Beef Industry Development Society, a proposé un plan pour réduire le nombre d'usines de traitement. Les propriétaires d'usines demeurant en activité devaient indemniser les propriétaires d'usines devant être fermées. Enterprise Ireland, agence d'état responsable de l'industrie nationale, a soutenu le plan. En 2002 l'Irish Farmers' Association s'est déclarée inquiète que le regroupement n'ait un effet défavorable sur les agriculteurs en permettant aux transformateurs de gérer la

production et, dès lors, les prix. En 2003, l'Autorité de la Concurrence a engagé une action devant la High Court à l'encontre du plan, mais à la fin de l'année 2003, le différend n'est toujours pas tranché.

76. Appliquer un droit d'accès élevé peut également fausser ou empêcher la concurrence, bien qu'en pratique les autorités de la concurrence aient souvent des difficultés à déterminer "à quel point ce droit doit être élevé pour être trop élevé." Ce problème est illustré par deux exemples.

77. Dans le premier exemple, l'exploitant de la décharge publique de la ville était une "entité budgétaire d'utilité publique," qui n'était pas suffisamment séparée de la municipalité pour être une personne morale. Cependant, les prix d'utilisation de la décharge étaient fixés par l'exploitant de celle-ci —et non par les autorités municipales—. Un concurrent qui utilisait la décharge s'est plaint que les prix d'accès étaient trop élevés. L'autorité de la concurrence a recommandé à la municipalité que l'exploitation de la décharge (monopole local) soit séparée de la collecte d'ordures, qui pourrait potentiellement être assurée par plusieurs entreprises. La municipalité a suivi ce conseil.

78. Dans le second exemple cité par un pays différent, les gouvernements locaux sont habituellement propriétaires des sociétés de distribution d'électricité et facturent des prix élevés pour l'accès au réseau. (Ils ne refusent pas cet accès). Cette situation fausse la concurrence, car des producteurs concurrents plus efficaces ne peuvent pas faire des offres inférieures aux prix facturés par la société locale. Par ailleurs, les consommateurs paient globalement des prix plus élevés pour l'électricité. Les gouvernements locaux utilisent les fonds ainsi générés pour payer d'autres services municipaux. En l'occurrence, il semble y avoir des objectifs politiques conflictuels.

79. L'exemple suivant illustre un boycott collectif auquel une municipalité a participé. Dans ce cas, les municipalités et entreprises de collecte des ordures se sont entendues pour limiter l'accès à la décharge municipale aux membres de leur accord. Finalement, d'autres municipalités de la région ont passé contrat avec d'autres entreprises de collecte des ordures. Mais lorsque ces entreprises ont demandé à utiliser la décharge municipale, la municipalité propriétaire de celle-ci s'est conformée à l'accord et ne leur a pas autorisé l'accès. L'autorité de la concurrence a ordonné la levée de la restriction à l'utilisation de la décharge.

3.1.3. *L'Etat promoteur de la concurrence*

80. Dans certains cas, les gouvernements locaux promeuvent activement la concurrence. Deux exemples en sont donnés ici. Dans le premier exemple, la municipalité a abaissé le coût des intrants dont les concurrents ont besoin. Dans le second exemple, la municipalité a directement accru la concurrence en modifiant les dispositions anticoncurrentielles d'une licence qu'elle avait délivrée.

81. Dans le premier exemple, un quasi-monopole avait hérité, de l'ère communiste, pratiquement tous les "bons" emplacements de vente de journaux et magazines. En réaction à cette situation, la municipalité a désigné de nouveaux emplacements supplémentaires et lancé une soumission concurrentielle pour leur attribution. Cette décision a permis le démarrage de nouvelles sociétés de distribution de presse.

82. Dans le second exemple, la municipalité a promu la concurrence dans le domaine de la télévision par câble en modifiant les conditions de licence. La municipalité avait organisé un avis d'appel d'offres concurrentiel pour choisir un nouveau fournisseur de télévision par câble utilisant une technologie supérieure. De nombreuses petites sociétés de télévision par câble fournissaient déjà les consommateurs de la municipalité. Aux termes de la licence, les fournisseurs existants ne pouvaient ni fournir les logements propriétés de la municipalité, ni étendre leurs services sans le consentement de l'adjudicataire. Dans ces conditions, aucune nouvelle société de TV par câble ne pouvait entrer sur le marché. Après enquête,

l'autorité de la concurrence a suggéré que le gouvernement municipal modifie la licence de télévision par câble pour éliminer ces restrictions, permettant ainsi à la concurrence *sur* le marché de persister.

83. Généralement, le gouvernement, local ou national, joue un rôle dans la concurrence en tant qu'auteur de la réglementation en la matière, c'est-à-dire en tant qu'autorité définissant et appliquant les règles de concurrence. Cependant, les cas précités démontrent que l'Etat est souvent actif sur les marchés en tant qu'acheteur, ou fournisseur d'un intrant nécessaire. Et il peut, dans ces rôles, agir pour favoriser la concurrence ou nuire à la concurrence.

3.2. *Neutralité concurrentielle*

84. L'Etat peut traiter les entreprises nationalisées d'une manière plus favorable que les entreprises privées, ou les entreprises détenues par un autre Etat. Cette discrimination nuit à la concurrence et réduit le bien-être économique en faussant les choix économiques. La "neutralité concurrentielle" signifie que le fait qu'une entreprise appartient à l'Etat ne lui confère aucun avantage ni désavantage concurrentiel par rapport à ses concurrents du secteur privé, simplement au motif qu'elle est détenue par l'Etat. Comme l'illustrent les exemples ci-dessous, certaines questions de neutralité concurrentielle se fondent avec des questions d'aides de l'Etat.

85. Appliquer des règles divergentes en matière de concession de licences est un moyen d'opérer une discrimination entre les entreprises du secteur public et les entreprises du secteur privé. Dans un pays, le Cabinet des Ministres a décidé d'exiger des licences pour un service particulier. Le Cabinet a concédé des conditions exclusives pour les entreprises nationalisées et les a exemptées du paiement de redevances de licence pendant cinq ans. L'autorité de la concurrence a jugé cette décision discriminatoire et de nature à créer des barrières insurmontables à l'entrée pour les entreprises privées. A l'époque, les entreprises privées détenaient un total cumulé de 55% du marché, de telle sorte que leur exclusion aurait eu un effet significatif. L'autorité a saisi le Cabinet d'une demande visant à suspendre et reconsidérer sa décision, ce que le Cabinet a fait.

86. Dans une affaire séparée de concession de licence discriminatoire, une entreprise privée souhaitait commencer à offrir des services de transport d'ordures dans la ville de Jõhvi en Estonie. Mais les règles de circulation lui interdisaient d'exploiter des poids lourds dans les rues de la ville. Par contraste, une entreprise du secteur public de Jõhvi avait un permis de circulation permanent l'autorisant à exploiter ces camions. Le Comité de la Concurrence a jugé que les conditions pour obtenir des permis de circulation permettant aux entreprises d'offrir des transports d'ordures étaient inégales, et déclaré que toutes les entreprises devraient être soumises à une restriction concurrentielle uniforme découlant des conditions routières. Ultérieurement, le Conseil Municipal de Jõhvi a adopté une nouvelle réglementation sur les permis de circulation pour les véhicules lourds, instituant une taxe. Cependant, la taxe pouvait être réduite pour des services de transport financés sur le budget de la ville. Le Comité de la Concurrence a jugé que cette disposition était discriminatoire et recommandé de ne pas l'appliquer. Le Conseil Municipal a abrogé cette disposition, et soumis un projet de réglementation au Comité de la Concurrence pour commentaires. [Comité Estonien de la Concurrence 1998]

87. Le subventionnement de services commerciaux sur des fonds publics est un autre moyen d'opérer une discrimination entre les entreprises publiques et les entreprises privées. Dans le premier cas décrit ci-dessus, les subventions ont financé des pratiques de prix prédatrices. Dans les deux cas suivants, les entreprises publiques ont été facturées à des prix substantiellement inférieurs à ceux facturés à des entreprises privées pour des services identiques.

88. Les concurrents de la société nationalisée de radio d'un petit pays ont soutenu que le programme commercial de cette société offrait des espaces publicitaires à des prix prédateurs. Les concurrents ont

également allégué que le programme commercial était subventionné par la société mère, qui recevait elle-même des allocations de l'Etat. L'autorité de la concurrence a estimé que la société nationalisée de radio était dominante et jugé qu'elle avait offert des espaces publicitaires à des prix prédateurs. L'autorité a ordonné à la société de radio nationalisée de séparer complètement les coûts et profits de son programme commercial du reste de la société, et interdit au programme commercial de poursuivre une politique de prix prédatrice. Dans le même pays, la société nationalisée de radio n'était pas tenue de payer des redevances à l'Institut National de Météorologie et d'Hydrologie (NMHI) pour obtenir des bulletins et prévisions météorologiques, alors que les sociétés privées de radio y étaient tenues. L'autorité de la concurrence a jugé cette pratique discriminatoire et le NMHI a changé ses pratiques de prix pour éliminer cette discrimination.

89. Dans le dernier exemple de discrimination en matière de prix, un monopole légal a été soumis à une réglementation plafonnant les prix, lorsqu'il vendait à des entités économiques gouvernementales, mais n'était pas réglementé lorsqu'il vendait à des entités non-gouvernementales. Le monopole a ultérieurement facturé aux entités non-gouvernementales le double du prix réglementé, pour le même service. L'autorité de la concurrence a jugé qu'il n'existait aucune structure de coût de revient qui justifie la différence de prix et noté que le fait de facturer des prix différents était contraire à la Constitution, qui garantissait l'absence de discrimination fondée sur la forme juridique de propriété. La discrimination en matière de prix et la pratique de prix élevés ont été jugées constitutives d'une violation du droit de la concurrence. Pendant l'enquête, le ministère ayant réglementé le monopole a révisé ses règles tarifaires pour mettre fin à la violation.

90. La non-neutralité concurrentielle est parfois alléguée lorsque des entreprises nationalisées réalisent leur expansion sur des marchés qui sont approvisionnés par des entreprises à capitaux privés, ou, réciproquement, lorsque des entreprises privées souhaitent réaliser leur expansion sur des marchés approvisionnés par des entreprises nationalisées. La préoccupation des entreprises privées est que les avantages des sociétés nationalisées en termes de coûts du capital et peut-être de faibles exigences en matière de taux de rendement commercial des investissements puissent se doubler d'une comptabilité obscure. Les entreprises privées s'inquiètent que ces facteurs conjugués ne puissent permettre à des entreprises nationalisées moins efficaces d'évincer des entreprises privées plus efficaces lorsqu'elles se concurrencent pour approvisionner un marché. Bien que le risque d'éviction préoccupe les entreprises privées, il n'en demeure pas moins que la réduction de l'efficacité des marchés est une préoccupation d'ordre public.

91. Interdire les aides publiques illégales peut former partie d'un plan de promotion de la neutralité concurrentielle. L'idée est d'interdire les aides publiques qui faussent ou menacent de fausser la concurrence en favorisant certaines entreprises ou la production de certains biens. En vertu des règles de l'Union Européenne, qui sont peut-être les règles les plus étendues en la matière, constitue "aide publique" toute aide accordée par un Etat membre ou par le biais des ressources d'un Etat membre, sous une forme quelconque. L'aide peut prendre de multiples formes, notamment des subventions publiques, des prêts sans intérêts, des abattements ou dégrèvements fiscaux, des garanties ou participations de l'Etat, et la fourniture par l'Etat de produits et services à des conditions préférentielles. Le statut légal de l'aide ne dépend pas du point de savoir si le bénéficiaire est une entité de droit privé ou public.

92. Dans de nombreux pays, les plaintes pour non-neutralité concurrentielle se centrent sur l'exemption des entreprises nationalisées de certains impôts et taxes, la dispense de surveillance réglementaire, ou l'accès à des capitaux à plus bas coût en raison de la garantie (explicite ou implicite) contre la faillite dont jouissent les entreprises nationalisées. Toutefois, comme l'illustrent les exemples ci-dessus, la non-neutralité concurrentielle peut prendre des formes encore plus virulentes.

3.3. *Interfaces avec la réglementation*

93. La réglementation peut contredire, remplacer, tenter de reproduire ou utiliser la concurrence. Cette section s'attachera tout particulièrement aux cas où la réglementation entre en contradiction avec la concurrence. La réglementation peut servir des objectifs légitimes d'ordre public. Parfois, la concurrence n'est pas souhaitable ; elle gênerait ou empêcherait la réalisation de l'objectif d'ordre public. Dans d'autres cas, l'autorité de la concurrence peut être en mesure de contribuer à identifier comment réaliser les objectifs d'ordre public à un moindre coût global grâce à la concurrence. Cette section comprend une discussion des principes adoptés par un pays pour traiter l'interface concurrence-réglementation, puis donne des exemples particuliers des domaines où l'interface concurrence-réglementation pourrait être améliorée.

94. Certains pays ont développé des principes généraux sur la manière d'approcher l'interface entre la concurrence et la réglementation. Les Etats-Unis en sont un exemple. La structure fédérale du pays a pour effet que l'interface entre la concurrence et la réglementation est différente au niveau fédéral par rapport au niveau d'Etat. En ce qui concerne le niveau fédéral, la réglementation n'évince généralement pas la concurrence. L'exception concerne le cas où il existe une "antinomie totale entre la législation antitrust et les dispositions réglementaires." Cette exception n'a été appliquée que dans un très petit nombre de cas. En ce qui concerne le niveau de l'Etat, la priorité a été donnée au principe du fédéralisme. Les Etats sont souverains en vertu de la Constitution ; seul le Congrès peut se soustraire à leur autorité. Si un Etat "articule clairement" et "supervise activement" une conduite, cette conduite ne peut pas être jugée en infraction avec la loi antitrust. (C'est la "doctrine de l'acte d'Etat.") En vertu d'une loi de 1984, le gouvernement local ne peut pas être poursuivi en dommages-intérêts en vertu de la loi antitrust. L'OCDE a recommandé aux Etats-Unis de "Réaliser une étude approfondie afin de déterminer l'étendue de la doctrine de l'acte d'Etat et de ses effets, dans la perspective de l'élaboration d'un texte visant à en réduire la portée ou à la supprimer." L'OCDE explique que "l'impact de la doctrine de l'acte d'Etat et des législations anticoncurrentielles édictées à l'échelon des Etats et à l'échelon local est préoccupant. Les réglementations des Etats et les législations spéciales entravent la concurrence et peuvent retarder la réforme dans de nombreux domaines, comme les secteurs des services professionnels, de la distribution, des télécommunications et de l'électricité." [OCDE 1999, ABA 2002, pp. 1213-1222] En dépit de la doctrine de l'acte d'Etat, les autorités de la concurrence peuvent saisir des opportunités de formuler des commentaires publics pour plaider en faveur d'une meilleure réglementation auprès des autorités réglementaires d'Etat et fédérales.

95. L'exemple suivant illustre une contradiction entre le critère de la tarification en matière d'abus de position dominante sous l'empire du droit de la concurrence, et le critère de la tarification dans la réglementation sur l'électricité. L'exemple est issu d'un pays en transition au milieu des années 1990. Le Conseil des Ministres avait adopté une résolution qui avait modifié la réglementation des prix de l'électricité. (L'électricité était un monopole). Alors que l'ancienne méthode se fondait sur le coût de revient, la nouvelle s'en écartait. Les prix ont augmenté à un niveau significativement plus élevé que ce que l'autorité de la concurrence estimait être un reflet approprié du coût de revient. L'autorité a donc jugé que la tarification constituait un abus de position dominante et suggéré au Conseil des Ministres d'annuler cette réforme de la méthodologie de tarification.

3.3.1. *Réglementation excluant inutilement des produits de substitution ou de nouveaux fournisseurs*

96. Les gouvernements excluent parfois des concurrents en fixant des normes réglementaires qui sont trop élevées. En d'autres termes, il peut exister suffisamment de consommateurs qui préfèrent un produit ou service de moindre qualité à un coût inférieur, mais la réglementation limite cette option. On citera comme exemple une réglementation des taxis qui exigeait que le coffre dépasse une certaine taille. Cette règle excluait tous les modèles d'une marque de voitures qui étaient auparavant utilisées comme taxis.

L'autorité de la concurrence a demandé à la municipalité de changer la réglementation afin de permettre une plus grande concurrence.

97. Dans un autre exemple de spécification excessive, le règlement des écoles d'un pays exigeait que les enfants portent un modèle particulier de chaussure en toile à l'intérieur de l'école. Lors de l'enquête de l'autorité de la concurrence, seul un fabricant de chaussures produisait des chaussures répondant à ces spécifications, alors que d'autres fabricants nationaux proposaient d'autres modèles, y compris des modèles en toile. Peu après l'enquête, toutefois, d'autres fabricants ont commencé à fournir des chaussures répondant aux exigences de la réglementation.

98. L'exemple suivant concerne une réglementation qui aurait exclu des produits de substitution et empêché l'accès de nouveaux entrants, si elle était demeurée en vigueur. Le Ministère du Commerce avait introduit de nouvelles règles interdisant la vente de plusieurs produits par de petits détaillants. Ces produits incluaient des spiritueux, vêtements et chaussures dans des magasins sans cabine d'essayage, des pierres précieuses, ainsi que des armes à feu, médicaments, herbes médicinales, poisons et narcotiques. Les plaignants ont prétendu que ces nouvelles règles limitaient la concurrence et favorisaient les entités nationalisées et les entités du "système" du Ministère. L'autorité de la concurrence a appris que la vente d'un grand nombre de ces produits était concédée sous licence par d'autres ministères ou administrations publiques, et que seuls les concédants de licences pouvaient les révoquer. L'autorité anti-monopoles a donné instruction au Ministère du Commerce de mettre fin à sa violation en abrogeant ou modifiant les nouvelles règles.

3.3.2. *Réglementation nuisant à la concurrence sur un marché connexe*

99. La réglementation sur les services publics peut fournir de nombreux exemples de la manière dont la réglementation d'un service public nuit à la concurrence sur un marché connexe. L'exemple qui suit est inhabituel en ce qui concerne le secteur —services financiers—et l'audace qu'il implique.

100. Dans cet exemple, la législation avait désigné un monopole sur un marché, et le détenteur de ce monopole avait pratiqué un système de vente liée entre un service concurrentiel et un service monopolistique. La législation avait désigné la Banque d'Epargne nationale d'un pays en transition comme l'unique entité offrant des comptes de privatisation. Plus d'une centaine d'autres banques et sociétés étaient autorisées à négocier des certificats de privatisation. La Banque d'Epargne a refusé de servir les comptes de privatisation si les clients souhaitaient négocier les certificats de privatisation auprès d'une autre société. Etant donné que la Banque d'Epargne avait un monopole légal, l'autorité de la concurrence a recommandé au Ministre de l'Economie de réviser la réglementation de concession des licences.

3.3.3. *Délégation du pouvoir réglementaire*

101. La délégation de pouvoirs réglementaires aux entreprises qui sont en mesure d'inspecter et de contrôler leurs concurrents a des effets négatifs évidents sur la concurrence: il sera plus facile pour l'entreprise détenant des pouvoirs réglementaires de désavantager ses rivaux, voire même de les expulser du marché. Il n'en demeure pas moins cependant que le gouvernement local a effectivement délégué son pouvoir réglementaire dans plusieurs cas.

102. Certains gouvernements locaux ont délégué leurs pouvoirs réglementaires à l'une des entreprises concurrentes dans les services suivants : transports urbains (autobus), publicité sur enseignes, affiches et panneaux, et stationnement dans le quartier historique. Dans l'une de ces variantes, les inspecteurs des transports urbains (taxis, minibus, autobus), qui étaient des fonctionnaires, détenaient également des entreprises dans le marché sur lequel ils exerçaient leurs fonctions d'inspecteurs.

103. A l'occasion, des gouvernements nationaux ont également délégué des pouvoirs réglementaires à des entreprises concurrentes. Un gouvernement national a chargé une association, à laquelle appartenait une minorité d'entreprises, de certifier des entités plaçant des marins à l'étranger. Dans un autre pays, l'autorité gouvernementale de normalisation nationale a délégué à la même entité à la fois le droit de certifier des produits et le droit unique d'accréditer d'autres organisations de certification.

104. Les autorités de la concurrence ont répondu à cette délégation du pouvoir réglementaire en envoyant directement des suggestions aux autorités municipales, y compris dans des pays où les autorités de la concurrence n'ont aucun pouvoir d'imposer leurs suggestions. Parfois, la suggestion était très directe, à savoir créer des organismes indépendants des entreprises réglementées, ou récupérer le pouvoir réglementaire ainsi délégué.

105. Par ailleurs, certaines autorités vont au-delà de suggestions pures et simples. Dans un cas, l'autorité de la concurrence a réalisé une enquête approfondie sur les allégations de concurrence déloyale en matière de transports urbains dans une ville. A la fin de l'enquête, l'autorité a envoyé des commentaires à la fois au ministère national des transports et au conseil municipal. Au ministère, l'autorité a suggéré d'améliorer la réglementation et les règles d'embauche, afin d'empêcher que les inspecteurs ne détiennent des intérêts dans les entreprises inspectées. Au conseil municipal, l'autorité a adressé une demande afin qu'il élabore un système réglementaire de transports urbains reposant sur des paramètres économiques, accompagné de ses propres analyses des flux de passagers, ainsi qu'une demande d'amélioration du système d'avis d'appel d'offres ouvert à la concurrence.

3.4. *Promotion par l'Etat d'une structure de marché anticoncurrentielle*

106. En dépit des avis donnés de longue date par les autorités de la concurrence, des économistes universitaires et autres experts éminents, conseillant de ne pas privatiser des monopoles ou autres structures non concurrentielles, cette pratique continue. Les outsiders ont retenu en postulat que les ministères des finances avaient besoin d'encaisser leurs recettes immédiatement et compté fortement sur les avantages pour les consommateurs de la concurrence accrue qui résulterait probablement d'une structure plus concurrentielle. D'autres motifs de ne pas privatiser pourraient tenir aux difficultés d'ajustement des dirigeants et employés à la concurrence et aux entreprises plus petites, et convaincre les agences de privatisation de leur point de vue. Ou encore, que la privatisation est plus rapide et plus aisée si une seule entreprise est en vente et non plusieurs, peut-être parce qu'il peut être plus facile pour des acquéreurs de réaliser un audit de pré-acquisition sur une entreprise ayant un historique de résultats plus ancien.

107. Dans un domaine connexe, il existe des cas dans lesquels des ministères ou gouvernements prennent des mesures pour accroître la concentration selon des méthodes qui nuisent à la concurrence. Un exemple possible de cette attitude a été fourni ci-dessus, dans l'industrie du bœuf irlandaise.

3.4.1. *Privatisation d'une structure non concurrentielle*

108. Des entreprises exerçant les activités les plus variées ont été privatisées en tant que monopoles. Outre les services publics comme l'électricité, le gaz naturel et les télécommunications, certains pays ont privatisé ou discuté de la privatisation d'activités comme les services de paquebots et services de ports fluviaux, les cinémas, les gaz industriels, le secteur pharmaceutique (de la production à la vente au détail, en passant par les grossistes répartiteurs), et les magasins de vente au détail de produits alimentaires et autres.

109. Les préoccupations structurelles ont été liées au risque de concentrations horizontales et verticales. Les préoccupations horizontales ont été inspirées par la crainte de voir se créer un monopole

privé ou une entreprise hautement dominante, lorsque des économies d'échelle auraient permis la coexistence de plusieurs concurrents ayant une taille efficiente. Bien que cette préoccupation puisse ne pas être trop sérieuse à long terme, si les barrières à l'entrée étaient faibles au moment de la privatisation de certains de ces monopoles, il n'en demeure pas moins que les marchés en cause, notamment le marché immobilier et le marché financier, n'étaient pas encore opérationnels à l'époque.

110. Les préoccupations verticales ont été inspirées par la crainte que certaines entreprises n'aient pas accès à un produit ou service essentiel, au motif qu'il aurait été privatisé et incorporé dans un concurrent. Les distributeurs au détail et installations de stockage de pétrole (essence) en sont un exemple classique dans une région isolée d'un grand pays. Les distributeurs de la région ne pouvaient s'approvisionner en pétrole qu'auprès d'installations de stockage locales ; les distances étaient trop grandes pour qu'ils utilisent des installations de stockage situées ailleurs. De nouveaux distributeurs de pétrole voulaient pénétrer sur le marché afin de faire concurrence à l'entreprise en place, mais les installations locales de stockage avaient été privatisées comme la plupart des points de vente au détail, et cette entreprise refusait de louer toute surface de stockage aux nouveaux revendeurs au détail. En outre, l'entreprise dominante s'était vue conférer le droit de concéder des licences de revendeurs de pétrole dans la région.

111. L'entreprise de paquebots et d'exploitation d'un grand port fluvial, évoquée ci-dessus, fournit un second exemple d'intégration verticale posant des problèmes de concurrence. Une proposition a été faite pour privatiser les lignes de paquebots, une partie de l'entreprise de réparation des navires, un grand port fluvial et le système de communication et de radio-navigation pour les fonder en une seule entreprise. Cette proposition aurait eu des effets manifestes sur la concurrence en matière de services de transport, et l'autorité de la concurrence a donc proposé une structure plus concurrentielle.

3.4.2. *Promotion d'une concentration anti-concurrentielle*

112. Dans un exemple, des usines de producteurs de sucre avaient été scindées en entreprises concurrentes après la chute du régime communiste. Quelque temps après, le Ministère de l'Agriculture a pris une directive ordonnant leur regroupement (sans que l'on sache avec certitude s'il s'agissait d'une fusion ou d'une association étroite). Il en est résulté une forte hausse des prix du sucre. L'autorité de la concurrence a ordonné le retrait de la fusion/de l'association des usines de sucre qui avaient reçu injonction de se regrouper. Elle leur a également ordonné de cesser de coordonner les achats et les prix de vente. En Pologne, un regroupement similaire des producteurs de sucre a été proposé au sein de quatre holdings, et l'Office antimonopole a envoyé un mémoire au Premier ministre en s'opposant à un projet de décret du Conseil des Ministres qui aurait entériné ce projet. [OCDE 1997, p. 501]

113. L'autorité de la concurrence polonaise s'est illustrée dans plusieurs autres exemples embrassant tous les secteurs économiques. Au cours des premières années de la phase de transition, des représentants de l'autorité de la concurrence polonaise ont participé à des équipes préparant des projets de restructuration et de privatisation dans l'acier, le pétrole, le charbon, les transports et les chemins de fer. L'autorité s'est efforcée de faire adopter les dispositions garantissant la mise en place d'une structure compétitive au sein de l'industrie (restructuration) ou de décourager un excès de concentration à la suite de la privatisation. Il est fréquent que dans le cadre de ces efforts, « les nécessités d'une politique de la concurrence aient dû céder le pas à la nécessité d'injecter du capital dans l'industrie et aux exigences de la politique sociale (récession, chômage). » [OECD 1995, p. 408]

114. On comprend mal pourquoi des propositions de privatisation de monopoles continuent d'être acceptées. En particulier, il peut être utile d'identifier des cas où ces propositions ont été rejetées en faveur d'une structure plus concurrentielle, puis d'identifier pourquoi l'optique d'une "culture de la concurrence" a emporté la conviction des responsables politiques. Il peut également être utile d'étudier pourquoi l'objectif public d'une concentration parrainée par l'Etat est toujours un moyen de surmonter les obstacles

à la sortie d'un marché. Et, si tel est le cas, il pourrait être utile d'étudier si des stratégies moins anticoncurrentielles ont réussi à surmonter des barrières à la sortie.

3.5. Corruption

115. La corruption peut directement réduire la concurrence de plusieurs manières. Elle peut notamment prendre la forme de pots-de-vin versés à l'agent public chargé des achats pour qu'il accepte une offre particulière ou n'examine que négligemment des offres concurrentes, celle de pots-de-vin versés aux directeurs commerciaux des concurrents potentiels pour qu'ils n'agissent pas de manière trop compétitive, celle de pots-de-vin versés à l'agent public chargé de rédiger le cahier des charges pour qu'il soit conforme au produit d'une société plutôt qu'à ceux qui répondraient au mieux aux besoins, ou celle de pots-de-vin versés à l'agent public qui contrôle si le produit livré est conforme aux spécifications. La Commission Parlementaire des Comptes de l'Ouganda a rapporté, en 1999, une série d'exemples de corruption réduisant directement la concurrence. La Commission a constaté que les produits nets totaux recueillis par l'Etat grâce à la privatisation étaient quasiment nuls. La raison en était que les ventes étaient truquées par une collusion entre des membres du comité chargé d'examiner les offres et l'une des sociétés soumissionnaires ou l'ancienne équipe de direction de l'entité para-étatique en question. [Transparency International (UK), pp. 14-15] La corruption pendant les périodes de privatisation peut saper le soutien populaire en faveur de la libéralisation économique en général, y compris la concurrence économique en particulier.

116. Le lien de causalité peut également aller dans le sens inverse. En d'autres termes, moins de concurrence peut provoquer plus de corruption. Une étude à paraître des pots-de-vin payés à des services publics dans des économies en transition d'Europe de l'Est et d'Asie Centrale révèle que les pots-de-vin payés à des services publics sont plus élevés dans des pays souffrant de plus grandes contraintes en termes de capacité de fourniture de services publics, et caractérisés par des niveaux bas de concurrence dans le secteur des services publics, et par le fait que les services publics sont nationalisés. [Clarke et Xu 2003]

117. Mais la corruption peut également réduire indirectement la concurrence en accroissant les barrières à l'entrée ou en rendant certains accords de promotion de la concurrence irréalisables. Une étude réalisée par Transparency International au Bangladesh a constaté qu'environ 65% des ménages urbains déclaraient qu'il était pratiquement impossible d'obtenir une licence commerciale sans argent ou influence. [TI (UK), p. 24] La nécessité de financer un service universel est parfois avancée comme un motif d'interdiction de la concurrence. Il est prétendu qu'un monopole est nécessaire pour générer les profits excédentaires qui serviront à la même entreprise à fournir également des services économiquement non rentables. Une solution consiste à exiger des consommateurs —quel que soit leur fournisseur—qu'ils paient une redevance pour un service universel, qui servira ensuite à financer des services non rentables. Mais lorsque le gouvernement ne peut pas garantir que les fonds payés pour le service universel ne seront pas détournés, ce type d'arrangement n'est pas faisable.

118. La corruption peut gravement saper la concurrence. Elle peut le faire directement en "truquant le terrain de jeu." Ou elle peut saper la concurrence indirectement en rendant l'entrée sur les marchés plus difficile, ou, de manière encore plus indirecte, en sapant le soutien populaire en faveur de la concurrence de manière plus générale.

3.6. Défis et obstacles rencontrés par l'autorité de la concurrence en tant qu'institution

119. Plusieurs défis et obstacles identifiés par des autorités de la concurrence peuvent être classifiés comme des faiblesses institutionnelles. Il s'agit notamment du manque de pouvoirs, de l'insuffisance des ressources, y compris les ressources humaines, et de l'insuffisance d'indépendance.

3.6.1. *Pouvoirs d'enquête*

120. Certaines autorités de la concurrence estiment qu'elles disposent de pouvoir d'enquête insuffisants. Il s'agit notamment des pouvoirs de perquisition et de saisie de documents qui pourraient servir de preuves d'une violation du droit de la concurrence. Ou encore du pouvoir d'ordonner la production de documents et des réponses écrites à des questions de l'autorité de la concurrence, et du pouvoir d'exiger la déposition orale de témoins. Dans une juridiction au moins, les membres de l'autorité de la concurrence ne peuvent pas entrer dans les locaux d'une entreprise sans une autorisation de celle-ci. D'autres n'ont pas même ce pouvoir. Certaines autorités se heurtent à la question de savoir si seuls les locaux des entreprises peuvent être perquisitionnés, ou si ce pouvoir de perquisition s'étend à des domiciles privés ou des véhicules, ou encore s'il est possible de pratiquer des fouilles sur des personnes. S'agissant des documents, si l'autorité peut uniquement prendre des copies lors de l'enquête, il peut en découler une perte d'informations—par ex. le même stylo a-t-il été utilisé sur ces deux documents?—et des difficultés potentielles pour produire des copies à titre de preuves en justice.

3.6.2. *Sanctions*

121. L'absence de sanctions rigoureuses réduit les stimulants à se conformer à la loi sur la concurrence. En particulier, il pourrait être plus profitable pour une entreprise de payer à répétition de faibles amendes, ou de prendre le risque de payer un jour une faible amende, que de renoncer à un comportement anticoncurrentiel illégal. Parallèlement, une personne qui a reçu une injonction de fournir des informations encourt une sanction faible si elle répond de manière incomplète ou tardive à cette injonction.

122. Une "politique de clémence" peut contribuer à promouvoir la concurrence. Lorsqu'il a été établi que des violations de la loi sur la concurrence exposent à de lourdes sanctions et que les violations sont effectivement sanctionnées, le fait de donner à l'autorité de la concurrence le pouvoir de proposer des sanctions plus faibles en échange de preuves permettant de contribuer à établir d'autres violations de la loi sur la concurrence (c'est-à-dire une "politique de clémence") peut aider l'autorité à promouvoir la concurrence grâce à l'application de la loi.

3.6.3. *Indépendance*

123. L'"indépendance" de l'autorité de la concurrence par rapport à toute influence politique quotidienne peut affecter la capacité de l'autorité à promouvoir la concurrence et la confiance du public dans son travail. (Il est clair qu'une autorité de la concurrence doit être indépendante de toutes entreprises ou associations soumises à sa compétence). L'indépendance est jugée importante pour une application uniforme, prévisible et transparente du droit de la concurrence et la promotion d'une réforme de la réglementation qui soit pro-concurrentielle. En effet, l'autorité doit pouvoir se focaliser sur la concurrence, plutôt que de devoir faire des arbitrages internes entre des objectifs politiques conflictuels. L'indépendance peut rehausser l'apparence d'impartialité.

124. Les autorités de la concurrence identifient le plus souvent une "plus grande indépendance" comme le moyen/la mesure susceptible de conduire à une meilleure promotion/une meilleure réalisation des objectifs poursuivis. Dans cette enquête —réalisée auprès des autorités de la concurrence invitées au Forum Mondial de l'OCDE sur la Concurrence en 2003—environ le tiers des autorités interrogées ont donné cette réponse. (On notera cependant que 50% des autorités ayant répondu à ce questionnaire ont indiqué qu'elles se considéraient elles-mêmes totalement indépendantes de toute influence politique, et 45% de ces autorités qu'elles s'estimaient extrêmement indépendantes de cette influence.) [OCDE 2003]

125. Par ailleurs, certaines autorités de la concurrence considérées comme efficaces ne sont pas formellement indépendantes. Ce groupe inclut la Division Antitrust du Département (c'est-à-dire Ministère) de la Justice des Etats-Unis et le Bundeskartellamt en Allemagne. Elles illustrent le fait que la loi formelle n'est pas aussi importante que le soutien politique de leur indépendance. Réciproquement, le soutien politique dépend de l'existence d'une "culture de la concurrence."

3.6.4. *Ressources, y compris dotation en personnel*

126. L'influence de la taille et du budget sur l'efficacité des autorités de la concurrence n'est pas évidente ni directe. Habituellement, des ressources supérieures permettent à une autorité d'être plus efficace. Ainsi, le Secrétariat de l'OCDE a recommandé d'accroître les ressources des institutions de la concurrence dans plusieurs de ses examens des Pays membres. Mais, dans une petite économie ayant relativement peu de personnes convenablement éduquées, l'effet peut être très différent. Si les emplois publics sont occupés par un petit nombre de personnes qualifiées, le fait d'étoffer le personnel de l'autorité de la concurrence pourra priver d'autres domaines politiques de ressources humaines, au moins jusqu'à ce qu'un plus grand nombre de personnes soient convenablement éduquées.

127. En outre, lorsque l'autorité de la concurrence devient plus efficace, les entreprises et associations engagent des experts de la concurrence pour les assister dans leurs relations avec l'autorité de la concurrence. Ces acheteurs d'expertise en matière de concurrence entrent ainsi en lice avec le petit nombre d'experts de l'autorité de la concurrence, et, paient dans certains pays des rémunérations qui équivalent à plusieurs multiples des traitements servis aux fonctionnaires de l'autorité de la concurrence. Ces larges écarts salariaux peuvent provoquer des rotations rapides du personnel au sein des autorités de la concurrence. Cette rotation élevée augmente les coûts de formation des autorités. Et, ce qui est peut-être encore plus important, cette rotation élevée peut avoir pour conséquence que l'autorité est habituellement représentée par du personnel relativement moins expérimenté que les experts représentant les entreprises.

128. Cependant, les contraintes en termes de ressources ne font pas tout. Il arrive qu'une très petite autorité de la concurrence puisse être très efficace. Par exemple, au moment où il était fortement probable que le secteur bancaire soit exempté du droit de la concurrence, l'autorité de la concurrence albanaise, qui ne comportait que quatre personnes, a fait équipe avec la banque centrale et gagné la bataille politique pour assujettir pleinement les banques au droit de la concurrence.

4. **Questions pour discussion**

129. Les autorités de la concurrence sont confrontées à plusieurs défis ou obstacles lorsqu'elles promeuvent la concurrence. Cette étude a suggéré que le "manque de culture de la concurrence" est la cause fondamentale du plus grand groupe de ces défis, qui est peut-être également le groupe le plus significatif. Le "manque de culture de la concurrence" a été imputé aux intérêts personnels de certains groupes et individus qui s'opposent au changement économique que la concurrence produit. Mais il existe d'autres défis qui sont attribués aux caractéristiques des petites économies en développement, et à celles du secteur informel des pays en développement, ainsi qu'à l'adaptabilité des institutions.

130. Dans les petites économies en développement, certains défis ont été attribués aux économies d'échelle dans le secteur des produits et services non-marchands, et à l'éviction des technologies à petite échelle par de nouvelles technologies à grande échelle. D'autres défis ont été attribués à la petite taille des entreprises et élites politiques, ou à un faible PIB, ou au déséquilibre des positions de négociation vis-à-vis de grandes entreprises multinationales.

131. Dans les grands secteurs informels, les défis ont été imputés à la petite taille des entreprises souvent rurales. Elles sont difficiles à atteindre, et les marchés qu'elles approvisionnent sont habituellement très petits.

132. Les exemples spécifiques de défis ou d'objectifs ont illustré différents effets de l'action de l'Etat sur la concurrence. Il semble que les exemples provenant des pouvoirs publics locaux soient encore plus nombreux. Bien que cela puisse être un pur hasard statistique, il se peut également que cette situation soit due au fait que les pouvoirs publics nationaux ont de plus larges perspectives politiques que les pouvoirs publics locaux.

133. Les délégués sont invités à examiner les questions suivantes :

- *Quels défis et obstacles sont importants dans leur propre pays ou économie ?*
 - *L'absence d'une "culture de la concurrence" est-elle la cause foncière des obstacles à la concurrence ?*
 - *Existe-t-il des obstacles spécifiques aux petits pays en développement ?*
 - *Existe-t-il des obstacles spécifiques au secteur informel ?*
 - *Les obstacles institutionnels sont-ils significatifs ?*
- *Quelles sont les réponses efficaces à ces défis et obstacles, peut-être sur la base de leurs propres expériences ? Certaines causes profondes peuvent-elles être traitées directement ?*
- *Quelles autres leçons peut-on tirer, par exemple quelles erreurs peut-on éviter, des expériences faites dans leur pays ou leur économie ?*

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

(Background note by the Secretariat)

This note is submitted FOR DISCUSSION under Session II of the Global Forum on Competition to be held on 12-13 February 2004.

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English - Or. English

**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT
THROUGH THE PROMOTION OF COMPETITION**

1. Introduction

1. Competition authorities face a number of challenges or obstacles when they promote competition, whether that promotion is through enforcing a competition law or through trying to persuade society and government of the advantages of competition. The “lack of a competition culture” has been identified elsewhere as the central impediment. Many challenges and obstacles follow from this central impediment.

2. It appears that the “lack of a competition culture” is due to the self-interest of those who expect to lose with the introduction of competition and who have the power to oppose it. Competition promotes and accelerates economic change, which can redistribute wealth as it increases overall wealth. Even when everyone’s wealth increases, there may nevertheless be a sense of redistribution if individuals or groups value relative changes in wealth. Expected “losers” in the redistribution may oppose competition. The success of their opposition depends on their political power. The expected “winners” from the introduction of competition may not individually gain much, or may be unaware that they would gain from competition. The typical concentration of “losers” and dispersion of “winners” from individual policy changes makes the organisation of opposition easier than that of promotion. Experience points to the importance of persuading the dispersed winners and the politically powerful to support the introduction of competition.

3. In addition to the reasons for a “lack of a competition culture,” three other types of impediments to competition promotion are identified in this note.

4. The first type consists of the specific features of small developing economies. The local markets in these economies may currently be supplied by means of inefficient technology that would be displaced by more efficient technology optimally operating at significantly larger scale, if trade protection were removed and international competition were introduced. Furthermore, the business and political elites may be sufficiently small in these economies that collusion is easy. In micro-states, GDP may be too small to justify the fixed costs of competition enforcement. And, finally, the bargaining position of governments of small economies vis-à-vis large multinational enterprises may be such that competition law enforcement is difficult or not credible.

5. The second type arises in the informal sector. The rural location of much of the informal sector in developing countries may put it beyond the reach of urban-based competition authorities. The small size of enterprises and of markets renders the benefits of both competition law enforcement against enterprises and the design of competition-promoting reforms too small given the cost. Criminal parts of the informal sector may spill-over to distort competition in the formal sector.

6. The third source of impediment is the slow adaptation of institutions, networks of institutions, and individuals to a cultural change.

7. This note is organised as follows. The first major section provides a framework within which to analyse impediments to competition promotion. The second major section provides specific examples of challenges and obstacles. The second section is intended to inspire delegates to submit or present other examples of challenges or obstacles to competition promotion at the OECD Global Forum on Competition in February 2004. It is hoped that discussions of the examples submitted by delegates would lead to the exchange of experiences about how these challenges have been addressed, a revision of the analytical framework proposed here, and the identification of effective ways to overcome the challenges/obstacles or to attenuate their effects.

8. The note ends with questions for discussion.

2. A framework for identified challenges or obstacles

2.1. Challenges and obstacles identified

9. A number of competition authority representatives and other experts have identified challenges or obstacles to competition. These challenges range from the superficial—lack of financial resources—to the profound—the lack of a competition culture. To label a challenge superficial is not to downgrade it, but rather to acknowledge that it is the proximate manifestation of deeper causes. Whether the better response is a head-on assault on the profound causes, or a softly-softly oblique approach working from the proximate challenges, is a topic for discussion.

10. In a 2001 World Trade Organisation regional workshop, representatives from developing countries identified the following as impediments to competition promotion:

- lack of equipment
- lack of sufficient personnel
- lack of financial resources
- lack of access to information both for research and to prosecute cases
- lack of appropriate training for staff
- lack of technical ability within the competition authority
- the existence of bureaucratic self-interest
- corruption
- lack of independent institutions and individuals, including the impossibility of the competition authority to make any decision or impose any sanction without the approval of the relevant minister
- lack of an appropriate legal framework
- lack of political will
- lack of a culture of competition.¹

11. To these woes might be added challenges inferred from other discussions:

- difficulties in winning cases in court, including due to procedural difficulties
- difficulties of applying competition law to the informal sector
- the distortion of competition in the formal sector from spill-over of criminal activities in the informal sector
- difficulties of introducing competition in small developing countries, including a tendency to be ignored by large multinational enterprises

¹ These items, some of which have been combined, are from WTO 2001a, pp. 12, 15 and 19.

- insufficient powers of investigation
- insufficient sanctions for violation of competition laws or for slow or incomplete compliance with mandatory demands for information
- government—at local, state and national levels—taking actions that undermine competition in their regulatory, procurement, privatisation, subsidy and entrepreneurial policies.

12. These impediments can be organised into four types. The largest and perhaps most important group are those related to a lack or a weakness of a competition culture. The three other types are specific to particular types of economies. First are those specific to small developing countries. Second are those specific to “informal sectors,” particularly those in developing countries. Third are those in which competition was recently introduced and institutions lag behind. The following four sub-sections of this note address these four types of impediments, respectively.

2.2. *Challenges and obstacles due to the lack of a competition culture*

13. Most of the challenges listed above follow from the lack of a competition culture. As one author has expressed it, “[I]n the long run, competition policy must be consistent with publicly accepted goals and values, which are expressed in the political process.” [Wise 2002] This sub-section first offers a definition of “competition culture.” It then describes how some challenges follow from the absence of a competition culture. It provides arguments as to why a competition culture may be lacking, as well as some empirical support for those arguments. Finally, it discusses an approach that has been used for establishing a competition culture.

2.2.1. *“Competition culture” defined*

14. “Competition culture” as used here means that there is political support to use competition in markets as the default or “normal” way to organise economic activities outside the family, government bureaucracies and single economic entities (or single enterprises), and that this support is translated into competition actually being the default or “normal” organising principle.²

2.2.2. *Challenges that follow from the absence of a competition culture*

15. The derivation of many of the above-listed impediments to the introduction of competition from the absence of a competition culture can be seen as follows.

16. First, the lack of political will for a competition authority follows from the lack of political support for competition, i.e., the “lack of a competition culture.” Support of an objective without support of the usual means to attain that objective, and without offering an alternative means, cannot be considered support.

17. Second, lack of political will translates into specific weaknesses of the competition authority because government, reflecting the political will, does not delegate a sufficient part of its resources or powers to the competition authority. The specific weaknesses include:

² To avoid confusion, it should be noted that the phrase “competition culture” has another, related meaning. This meaning is provided *inter alia* in a speech by a Canadian official. “[C]ompetition culture”...refers to an awareness among both the public at large and economic actors of the rules of competition.” [Speech by Sally Southey avail. at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02476e.html>; an almost identical definition is offered by the International Competition Network, p. iii] The two meanings are related in that broad support for competition law enforcement is necessary for it to be effective in democracies. Building awareness is one step toward gaining support.

- Inadequate resources (financial, appropriate quantity and quality of personnel,³ appropriate training for personnel, access to information for research and prosecution, equipment)
- Inadequate powers including inadequate autonomy (e.g., to open an investigation without a formal request or permission, to hold proceedings or to bring prosecution to a court, to investigate—enter premises, seize documents that will be accepted as evidence in a proceeding or court, compel witnesses to testify or to require the production of documents or written responses to questions—to sanction or request a court to impose sanctions either for the timely and complete provision of documents/information or for violation of the competition law itself, to credibly promise either not to prosecute or to limit penalties [e.g., in the context of a leniency programme], to initiate competition advocacy without a formal request)
- The exemption, exclusion or simple non-application of the competition law to some economic activities.

18. Some of these weaknesses can have sources other than the lack a competition culture. In particular, “inadequate powers” for the competition authority can result from broader social values about government power. In jurisdictions with a not-distant history of abusive information-gathering or sanctioning by the state, the political will to provide these powers to any part of government, even a well-intentioned competition authority, may be weak or absent.

19. Lack of political will or support typically also translates into other institutions both within and outside of government being unsupportive of competition. Governments at local, state and national levels may take actions that undermine competition in their regulatory, procurement, privatisation, subsidy and entrepreneurial policies. Also, they may provide late or incomplete information about their regulatory initiatives to the competition authority for comment or oversight. Courts may be reluctant to impose large sanctions for competition violations because the sanctions may appear to be disproportionate and morally unfair in the political and social environment.

20. Lack of political will also translate into tolerance of broader problems that incidentally reduce the effectiveness of the competition authority, such as corruption and bureaucratic self-interest.

2.2.3. *Why a competition culture may be absent*

21. In many countries, there is not political support to use market competition to organise economic activities outside the family, government, and single enterprises. It is fair to say that a number of philosophies popular at one time and place or another do not support widespread market competition. Leaving aside philosophical disputes, bald self-interest is also a basis for opposition to market competition. Self-interest is the focus of this section.

2.2.3.1. The basic thesis

22. Economic change produces winners and losers. In the context of economic growth, this process has been called the “creative destruction” of the process of Schumpeterian competition. In this process,

³ One specific but recurring complaint is the difficulty of attracting professional, well-trained and motivated personnel to a competition authority. Absent political will to make a limited exception to the civil service rules for the competition authority, these rules may cap salaries below the market level for such persons, or may require superfluous staff from elsewhere in the bureaucracy to be employed in preference to better-qualified new recruits, or may impose other constraints. In many economies, competition officials moving to private sector employment can triple or more their salary.

better products or more efficient production displace existing ones or, in Schumpeter's more graphic description, the process of creative destruction is "the...process of industrial mutation...that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one." [Schumpeter, p. 83]

23. Increased economic competition promotes and accelerates economic change. This can be illustrated by two classes of examples. One class is when regulatory reform introduces competition where it had been suppressed by economic regulation. In particular, regulators have less information than regulated firms, have limited instruments to control regulated firms, and often pursue objectives other than economic efficiency. When the "creative destruction" of competition is introduced and allowed to operate, then often excessive profits or benefits are reduced, and less efficient firms lose out to more efficient firms since the former are no longer protected by the umbrella of regulation. Earlier investments made under the old regulatory regime may be rendered less valuable, perhaps even worthless, perhaps making owners of those investments losers from economic change. (Gains elsewhere may make them net winners.) A second class of examples is when tearing down administrative barriers to entry increases competition. Allowing airlines in the United States to fly routes of their choosing at prices of their choosing led to the bankruptcy of a number of firms and, eventually, a more efficient pattern of air transport and the expansion of Southwest, a very efficient airline. Air travellers benefited from lower airfares as well as more frequent and higher quality service to smaller cities.

24. The opponents of a competition culture are presumably those who expect to lose from economic change, those who do not want to risk losing, and those who do not expect to gain from economic change.^{4,5} While the loss may be economic, it could also be a loss of power (e.g., as a bureaucrat making decisions), or a loss of other social values.⁶ "Losing" does not necessarily mean losing wealth. The introduction of competition generally increases overall wealth. However, if persons also value their relative

⁴ This is consistent with the view in Parente and Prescott 1999 and 2000. They attribute the observed differences in incomes across countries to differences in TFP (total factor productivity). Differences in TFP are attributed to differences in policies. (The stock of useable knowledge is the same across countries.) They find that the policy constraints that have the largest effects are those on work practices and on the use of more productive technologies. They hypothesise, and provide examples, that many barriers to the adoption of new technologies are put into place to "protect the interests of groups vested in current production practices."

⁵ Some authors argue that economic redistribution is not the reason welfare-enhancing economic change, such as the introduction of competition, is blocked. Rather, they argue that the redistribution of political power is the reason for opposition. Acemoglu and Robinson argue, for example: "[T]he effect of economic change on the political power is a key factor in determining whether technological advances and beneficial economic changes will be blocked. In other words, we propose a 'political loser hypothesis.' We argue that it is groups whose political power, not economic rents, will be eroded that will block technological advances. If agents are economic losers but have no political power they cannot impede technological progress. If they have and maintain political power (are not political losers) then they have no incentive to block progress. It is therefore situations where agents have political power which they expect to lose that generates the key incentive to block. Our analysis suggests that we should look more to the nature of political institutions and the determinants of the distribution of political power if we want to understand technological backwardness." [Acemoglu and Robinson 2000a]

⁶ For a detailed discussion of the problems of evaluating policies from the point of view of economic welfare, see Hausman and McPherson 1996 especially Ch. 7 "Efficiency." The authors conclude the chapter with, "One cannot reasonably evaluate policies, institutions, or states of affairs exclusively in terms of their success at satisfying the interpersonally non-comparable preferences of individuals. For welfare is not preference satisfaction, and it seems that things such as freedom, equality, and justice also matter." [p. 99]

wealth then “losers” includes those who become wealthier absolutely but poorer relatively as others with whom they compare themselves gain yet more wealth.

25. Ignorance plays a role in opposition to competition. Some who would gain from competition do not support a competition culture because they do not know that they would be among the winners. Risk-aversion also plays a role. Some persons prefer not to risk being losers even though they have a chance of being winners instead, and overall can expect to gain. There may be a relatively large group of persons who do not expect to gain from economic change. They may be indifferent to change, or they may prefer no change if they perceive it to be disruptive.

26. There is a strong argument for broad support of competition, even when it produces winners and losers. Competition generally improves economic efficiency and thus economic welfare.⁷ Greater economic welfare means that winners could afford to compensate losers and everyone would benefit. Such compensation is rare. (The payments made for so-called “stranded costs” in the electricity sector in a number of countries were exceptions.) However, if there are many linked efficiency-enhancing policies, each with different sets of winners and losers so that any particular person is a winner as often as she or he is a loser, then the long-run effect will be for most persons to be net winners. And in these circumstances, persons will support such a long-run set of efficiency-enhancing policies if they do not know in advance that they will be among the net losers, and they are not too risk adverse.

27. At least three issues follow. First, jurisdictions are not coterminous with economies. This is particularly true for small jurisdictions. Thus, it is possible for a policy to increase economic welfare but for the policy to predictably make persons in one jurisdiction net losers. Unless, as noted earlier, there are many linked policies and the winners and losers wash out over time, then those democratic jurisdictions populated with net losers will oppose an economically efficient policy.

28. Second, it may be difficult to predict the distributional effect of economically efficient policies. Where wealth and power are concentrated, the re-distribution caused by economically efficient policies may either further concentrate or erode that wealth and power. If erosion cannot be prevented in advance, then an economically efficient policy will nevertheless be opposed by the politically powerful.

29. Third, there may be a built-in opposition to welfare-increasing economic change. In particular, it may be difficult for winners to “buy off” losers. It is a truism that losses from change tend to be concentrated, e.g., amongst the shoemakers, and the gains tend to be dispersed, e.g., among those who wear shoes. The losers can more easily marshal their resources to fight change than can the winners to promote it since cheaters, in this case free riders (those who would benefit from a policy direction but who do not contribute to the cost of getting that policy adopted), are easier to identify in a small group.

30. The opposition to redistribution caused by competition may persist over a long period of time. In a study of the differing development of Canada and the United States among New World economies, the authors suggest that the initial factor endowments (such as climate and soil types) resulted in differing degrees of inequality in wealth, human capital and political power. This inequality has been preserved, they posit, by the institutions that were developed and the effect of those institutions on access to economic opportunity. They suggest that, “Overall, where there existed elites who were sharply differentiated from the rest of the population on the basis of wealth, human capital, and political influence, they seem to have used their standing to restrict competition.” [Sokoloff and Engerman 2000]

⁷ There are well-known exceptions such as where there are large economies of scale or scope, where there are externalities, or where certain information about the characteristics or actions of some economic actors is not known to others.

31. The principal thesis of this note is that opposition to the redistribution of wealth caused by competition is the main obstacle to the development of a competition culture. Successful opposition requires sufficient political power. Because competition is generally beneficial, producing greater overall wealth, managing the redistribution can be one of the key sub-objectives for the successful introduction of competition. This can explain why we see competition laws not applying to powerful sectors where, on a theoretical basis, the law could reasonably be applied.

2.2.3.2. The empirical support

32. There is much empirical support for the thesis stated above. The support is anecdotal, but the anecdotes are from both developing and developed countries. In these anecdotes, the redistribution of wealth, and to some extent political power, is the primary reason competition is opposed. Redistribution of wealth is probably also the reason introducing competition to specific sectors is opposed. Examples include taxi drivers opposing increasing the number of taxi licenses where they are subject to numerical limits and domestic producers opposing reducing tariffs or eliminating quotas that had hindered foreign competition.

33. In Indonesia, academics had discussed a competition law for some time, but the introduction of a competition law was delayed until after substantial political change. A description of this process illustrates the relationship between the incidence of anticompetitive conduct and the economic self-interest of those in political power. It also points out the possible role of outside institutions in spurring change.

“The interest in developing a comprehensive competition law in Indonesia dates back to around 1990. It was at this time that legal scholars as well as members of various political parties, nongovernmental organisations, and certain government institutions began to discuss the need for such a law. In fact, a number of different groups, including the Indonesian Democratic Party and the Indonesian Ministry of Trade (in co-operation with the Faculty of Law University of Indonesia), produced draft competition laws. These proposed draft laws, however, were not given serious attention by those in power at the time, because much of the unfair business competition and monopolistic practices that was taking place, often by Indonesia’s largest industries and businesses, was the result of direct and active government support. Crony capitalism was the order of the day under the so-called "New Order" government of former President Suharto, right up to about 1998.

“While Law Number 5’s passage in 1999 came about in part to satisfy conditions of a Letter of Intent entered into between the Indonesian government and the International Monetary Fund in July 1998, the law’s passage also drew much support from politicians, the government, the public, and the press as a means to address growing concerns about monopolistic practices and unfair business practices stemming from the closely related practices of rampant corruption, collusion, and nepotism (known by the Indonesian acronym "KKN") that had been taking place in Indonesia between the government and favoured businesses.” [OECD 2001, pp. 56-7]

34. The second anecdote is from Bangladesh where GrameenPhone has introduced wireless telephone service into rural areas. The explanation of the founder of GrameenPhone as to why GrameenPhone’s model has not been widely replicated provides insights as to why the broader introduction of competition is difficult. “Good ideas aren’t replicated instantly; GrameenPhone took nearly five years to go from concept to launch.[I]n most developing countries, it takes months to incorporate a new company and years to get a cellular license, not to mention the difficulties in assembling management and attracting capital. And in many countries, government bureaucracies resist entrepreneurial activities that may redistribute power. Vested interests protect private and public monopolies and quasi monopolies. There are systemic obstacles and huge barriers to entry.” [Harvard Business Review 2003]

35. Resistance to redistribution caused by competition is also present in developed countries with experienced competition authorities. Procurement by local government in Japan is the subject of the third anecdote. “*Dango* [the formation of cartels to determine the outcome of tenders for public contracts] is a custom that has been around for 100 years in Japan, which is impossible to just suddenly destroy,” according to Yoji Otani of Credit Suisse First Boston in Tokyo, as quoted in the *Financial Times*. Mr. Otani goes on to say, “In particular, local governments want to protect smaller contractors and their employees, and look the other way when these things happen.” The same article provides a measure of the significance of the practice: the gross profit margin for public works contracts is 10-15 per cent, compared with 5-10 per cent for private projects. [Financial Times 2003] A response has been the Act Concerning Elimination and Prevention of Involvement in Bid Rigging etc. of 31 July 2002, which is aimed at preventing so-called “government-involved bid rigging,” in which employees of central and local government ministries and agencies and specified public corporations have been involved in bid rigging organised by bid participants. [OECD forthcoming]

36. The final example is an observation about the relationship among the concentration of political power, the concentration of economic power, and economic competition. This is a topic that has been well-explored especially in European discussions of the role of competition policy.⁸ However, at least some authors see a very different dynamic in today’s developing countries.

“[T]he most formidable problem the developing world faces is structural—and it’s one the West has little experience with. It’s the phenomenon of the market-dominant minority, ethnic minorities who, for widely varying reasons, tend under market conditions to dominate economically the impoverished “indigenous” majorities around them....In free-market environments, these minorities together with foreign investors (who are often their business partners), tend to accumulate starkly disproportionate wealth, fuelling ethnic envy and resentment among the poor majorities.

“When democratic reforms give voice to these previously silenced majorities, opportunistic demagogues can swiftly marshal majoritarian animosity into powerful ethno nationalistic movements that can subvert both markets and democracy.” [Chua 2003]

37. The handful of observations provided here support the view that the self-interest of those who will lose, or who do not expect to gain, from the economic changes wrought by competition are the main opponents to the widespread adoption of competition. In the Indonesian example, the causal link between political change and the adoption of a “competition culture” is very clear. But it is of perhaps more immediate interest to consider how, in a climate of more gradual political change, impediments to the adoption of a “competition culture” can be overcome. This is the subject of the next sub-section.

⁸ Four political objectives of competition protection have been discussed, as described by Gerber. Three of these are at least arguably about the relationship between political and economic powers. First, the protection of economic freedom (a legacy of nineteenth century liberalism) is seen as intertwined with or even equal to the protection of economic competition. Second, the promotion of competition is seen as a way to promote other social ideals, typically “protecting competition in order to create and maintain structures of power than are valued by the society or by communities within it.” For example, to prevent excessive concentration of economic power and the accompanying threat to democracy, or to reduce international barriers in order to construct the internal market of the European Union. Third, competition protection is seen as promoting social justice, sometimes expressed as “fairness” for SMEs as compared with large competitors, sometimes as “fairness” for purchasers. Fourth, competition protection is seen as promoting economic policies, such as inflation reduction, or reducing barriers to economic change, or increasing the capability of domestic firms to compete in international markets. [Gerber 1998, pp. 418-420]

2.2.4. *How some competition authorities have promoted a “competition culture”*

38. Many competition authorities publicize the benefits of competition, which may increase awareness among masses of persons who would otherwise be unaware of how they would benefit. This can be seen as trying to help voters in democracies make, over the longer term, informed choices about where their interests lie. The greater difficulty is, perhaps, convincing those who hold greater political influence that they, too, would benefit from more competition. The Mexican competition authority provides an example below of persuasion to both groups.

39. In Mexico, a competition culture has been spreading through the political and economic system over the past decade or so. The competition authority, established in the early 1990s, is a symbol of the gradual acceptance of competition. A representative of the Mexican competition authority outlined its strategy for establishing the authority and strengthening support for competition. The authority found it needed support from government, from the various corporate sectors, and from the public. Transparency—so that interested parties could follow the agency’s actions and draw conclusions about its long-run usefulness—was used to counter the jeopardy into which support by the relevant part of the corporate sector was placed as soon as an investigation was launched. Strategic choice of case was used to demonstrate to the public the importance of competition for a healthy market economy and public welfare. [WTO 2001b, Para. 100]

40. In Indonesia, too, attracting broad support for a competition law was considered important. “The most important challenge [in implementing the competition law] that was being faced was to establish that the law would improve the welfare of the people.” [WTO 2001b, para. 92] However, as the earlier quotation makes clear, gaining popular support was not alone sufficient; opposition from crony capitalists also had to be overcome.

* * * * *

41. This section has suggested that perceived self-interest is the main reason for individuals and groups to oppose, or to not support, competition as the default way to organise economic activities. Both the basic thesis for this and observations consistent with the thesis were offered. Observations on the sector-by-sector introduction of competition would support the overall view developed as regards the economy-wide introduction of competition. The best response to the causes of opposition to competition depends on the specificities of each jurisdiction. These can include trying to persuade those likely to win under competition but who incorrectly expect to lose or, while not ideal, to carve out exceptions and exclusions to fissure the resistance, or other strategies.

2.3. *Challenges and obstacles in small developing countries*

42. Small developing countries face specific challenges to the promotion of competition. These were discussed in the OECD Global Forum on Competition in February 2003, but for completeness some of those ideas will be repeated here. To introduce the topic, this section begins with a description by Trinidad and Tobago. Next is a description by an anonymous country—size and level of development unknown—illustrating that the bad outcome from introducing foreign competition feared by Trinidad and Tobago may indeed occur. Following these descriptions, some of the challenges which are more common in small developing countries are identified and discussed. These relate to minimum efficient scale to supply some markets being large relative to demand in those markets, small population, small GDP relative to the fixed costs of a competition agency, and to asymmetric bargaining positions of governments of micro-states vis-à-vis large multinational enterprises.

43. Trinidad and Tobago described its economy as, “monoculture producers, export-oriented and import dependent” with “major productive sectors [dominated] by multinational corporations,” and “[l]ocal producers [which] are largely micro-firms by international standards, and family firms in many cases.” It expressed the following concerns regarding competition:

“(1) With the increased opening of the economies, could welfare-creating effects of competition leak out of the economy if new entrants are foreign firms and they displace local incumbents? Because of the smallness of the economy, displacement effects could be widespread and there could be social repercussions. ...

“(2) Will smaller economies be able to effectively discipline large MNCs, given the power asymmetry? In many cases, the GDP of the country is a fraction of the annual income of the MNC. A competition law becomes meaningless if it can only in theory stop abuses of dominance....”[WTO 2000]

44. A representative from an unnamed country reported the effect of opening markets in his country: “[L]ocal production suffered due to the influx of foreign imports. Massive unemployment, loss of income and social crisis resulted and the economy effectively came to a standstill.” [WTO 2001a, p. 13] This seems to reflect some of the concerns expressed by Trinidad and Tobago.

45. The purely economic challenges are addressed first. There seem to be two different categories of markets concerned:

a.) International markets where a small country owns a small part of a key input, e.g., land and climate suitable for growing a particular crop. “Economic rents” may be generated by the country’s assets, e.g., perhaps its soils are especially well suited, or perhaps the regulation of the market causes rents to be generated. Selling those assets to foreigners would indeed mean that the economic rents no longer go to the small country. However, the natural follow-up question would be why these assets would have been sold for less than the value of the economic rents.

b.) Local markets in which various technologies can be used to supply the market, an inefficient technology currently predominates, and the most efficient technology has such significant scale economies that competition in a small country will not develop. (The minimum efficient scale is large compared with demand.) As discussed in the OECD Global Forum on Competition in February 2003, this situation can produce challenges to competition. However, it seemed that in practice concerns of competition and of equity usually outweighed concerns of efficiency losses, that is, that having more competitors operating at inefficiently small scale was usually preferred to having fewer competitors operating at larger, efficient scale.

46. A second type of challenge identified in the 2003 OECD Global Forum relates to population. In a small or a developing country, the business elite and the political elite are small. The small size of the business elite may make explicit collusion easier to hide, and tacit collusion may be easier. The closeness of the political and business elites is also a complicating factor.

47. A third type of challenge identified relates to GDP. A small economy may be able to provide only limited enforcement resources. In addition, there is a concern that a minimum-sized authority would be “too large” for a very small economy, for example, that its beneficial effects on prices would be spread across too few goods and services so the direct cost of the authority would be larger than its benefits. However, this argument is valid only for a very small country indeed.⁹ A possible strategy is to combine

⁹ A recent paper estimates that the “annual welfare benefits in the [United States] from deterring the exercise of market power through the antitrust laws as they are enforced today could readily exceed 1 percent of GDP, or \$100 billion per year.” (This is an estimate of avoided deadweight loss plus losses due to rent-

competition enforcement with a related field, such as consumer protection. Alternatively, small countries may also seek to reduce costs and increase “clout” by joining a regional law enforcement body.

48. A fourth type of challenge identified relates to asymmetric bargaining positions. Trinidad and Tobago is concerned that large multinational firms may threaten to leave the country if they do not get their way on competition (or other) issues. The feared behaviour is similar to that which actually occurred in one transition country. There, a foreign company conditioned its purchase of a domestic company on *inter alia* its removal from the State Register of Dominant Enterprises. (In this country, enterprises on the State Register of Dominant Enterprises were subject to special price supervision.) The minister responsible for that company signed the agreement. However, the minister responsible for competition consented only if many aspects of the company’s conduct were regulated. The final outcome is not known to the Secretariat.

49. Small developing countries present a specific set of challenges to the promotion of competition. The challenges range from those due to economies of scale in non-traded sectors, to those due to having a small population or small GDP, and to those due to being in an asymmetric bargaining position vis-à-vis large multinational firms.

2.4. Challenges and obstacles in the informal sector

50. The promotion of competition in the “informal sector” (IF) presents specific challenges and obstacles. While superficially the IF would appear to be highly competitive, anti-competitive conduct affects markets there. In addition, the IF is significant in some countries. In some developing countries, the IF absorbs a majority of employment. The competition promotion challenges relate to the specific characteristics of the IF. First, much of the IF is rural and the rural IF may be beyond the reach of urban-based authorities. Second, the absence of larger enterprises may render the cost of enforcement, even taking into account beneficial deterrence effects, too costly. Third, the small size of many IF markets may make the design of competition-promoting reforms too costly for the likely benefits. Fourth, the competitive effects of criminal activities in the IF are probably not a law enforcement priority. Nevertheless, some enterprises may cause sufficient anticompetitive harm and be sufficiently prominent that it may be beneficial for an authority to enforce a competition law. And other, broader means of promoting competition, such as promoting regulatory reform for important inputs into a range of IF markets, such as financial services and land, may be sufficiently beneficial to be cost-effective to pursue.

seeking, i.e., the “deadweight loss triangle” plus a portion of the “profits rectangle” estimated to be dissipated in rent-seeking.) [Baker 2003]

If the “effectiveness” of enforcement were the same in the United States and in Trinidad and Tobago, meaning that many conditions of comparability were satisfied, then this suggests that in Trinidad and Tobago, 2002 GDP estimated at USD 9.372 billion, a competition authority costing less than USD 9.4 million per year would be cost-effective. Cost, here, includes not just the direct cost but also the additional costs imposed on the judiciary and compliance costs imposed on business. And the hurdle of USD 9.4 million is probably too high, since the effect of a small enforcement authority on prices in internationally traded goods—which can be a large fraction of imports in a small economy—is probably not measurable. If the country’s exports compete with a number of exporters in other countries, then the marginal effect of competition enforcement in those markets by a small country may also be immeasurable.

The figure of USD 9.4 million greatly exceeds the minimum size of a competition authority. For example, the 2002 budget for the Latvian Competition Council was about LVL 200,000 or about USD 350,000. [Latvian Competition Council 2002.] This compares with a GDP in the same year just smaller than that of Trinidad and Tobago at USD 8.406 billion.

51. This section begins with a brief description of the informal sector. Next, an example of pro-competition regulatory reform outside the IF having positive effects on the IF is provided. Finally, some characteristics that make promoting competition in the IF difficult are identified.

52. Informal sector activities can be divided into two main types. First are coping strategies or survival activities: casual jobs, temporary jobs, unpaid jobs, subsistence agriculture, or holding multiple jobs. Second are “unofficial earning strategies” which can be divided into two sub-types. First among these is tax evasion or avoidance of other regulations including company registration. Second among these sub-types are crime and corruption.¹⁰

53. Estimates of the size of the IF are available, despite the understandable difficulty of measuring it. The IF accounts for more than half of the total labour force employed in some low-income countries. But it accounts for only 4-6% in the high-income countries.¹¹ Table 1 (see appendix) from the International Labour Organisation provides more detailed statistics, including a breakdown between rural and urban. Poverty and participation in the IF are strongly linked. The IF spans a variety of sectors including agriculture, manufacturing, trade, services, construction, and transport. [Blunch et al]

54. Competition problems in the IF include limited or no access to inputs such as information, finance, land, and technology, and similarly limited or no access to markets.¹² In addition, there can be anticompetitive conduct such as exclusion from access to key inputs or exclusion from the most efficient marketplaces. [Varcin 2000] The informal sector may also have negative effects on competition in the formal sector. Goods and services sold in the formal sector can be used to launder money generated by criminal activities in the informal sector. The benefits from the laundering mean that the seller does not require the same returns as a non-criminal seller does. Hence, goods and services used for money laundering can displace those supplied by non-criminals. This displacement in the absence of greater efficiency is a distortion of competition.

55. Competition-promoting reform outside the IF can have positive economic effects on the IF. According to a World Bank report, “Market-oriented reforms that [*inter alia*] ...dismantled various forms of state intervention (price supports, input and credit subsidies, [and] support for marketing products)—have generally increased agricultural [output and productivity] growth.” The resulting growth in agricultural incomes meant there was more local demand for goods and services provided by non-farm

¹⁰ There is evidence that informal sectors are larger in countries with greater “burdens” on formal enterprises (taxes, regulations) and with more corruption. [Johnson, Kaufmann and Zoido-Lobaton 1998] However, there is also an argument that relieving small or informal enterprises of the “burden” of complying with regulations and taxes makes it impossible for political authorities and the informal sector to reach agreement on strategies that aid development in the longer run, such as reducing environmental degradation, improving workplace safety, expanding social security, and increasing tax yield to better fund public services. [Tendler 2002]

¹¹ World Bank “Concept of Informal Sector,” at: <http://inweb18.worldbank.org/eca/eca.nsf/Sectors/ECSPE/2E4EDE543787A0C085256A940073F4E4?OpenDocument>.

¹² “There is also overwhelming evidence that informal sector participants face a variety of constraints including limited or lack of access to resources and markets as well as to land and physical infrastructure (see Sethuraman 1997, Tokman 1990).” Quoted in Blunch, Canagarajah and Raju 2001.

“Work in the informal economy is characterized by low levels of skill and productivity, low or irregular incomes, long working hours, small or undefined workplaces, unsafe and unhealthy working conditions, and lack of access to information, markets, finance, training and technology.” [International Labour Organisation, “Working Out of Poverty,” 2003, p. 29 avail at (<http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-i-a.pdf>)]

rural poor. These goods and services include some which are typical of the IF such as rural construction, personal services, simple manufacturing, and repair. The growth in these markets also reduced poverty. Access to land plays an important part in poverty reduction. [World Bank 2001, p. 67]

56. The small size of markets involving poor people has been identified by the World Bank as a barrier to reform in those markets, despite such reforms being potential “powerful forces for poverty reduction.” [World Bank, p. 72] This is presumably because it is costly for policymakers to design reforms appropriate for the economic, social and political context. But the Bank notes, too, barriers to SME entry into certain markets that are familiar to competition authorities—requirements for experience, complex or expensive procedures for registration and tendering, and noncompetitive behavior in markets—so designing appropriate reforms may well be less costly than feared. Much of the IF involves these same markets.

57. Two other observations can be made that suggest that promoting competition in the informal sector may call for a different strategy than that applied in the formal sector. First, competition authorities are typically located in the largest cities in a country. The transport and communications difficulties that cut off rural businesses from markets also work in reverse, cutting off urban competition authorities from the anticompetitive conduct in rural areas. Complaints may not reach the authorities and, if they do, an adequate investigation may be too costly. Second, the enterprises involved in the IF tend to be very small. (The ILO defines a small or micro-enterprise as one involving fewer than 5 or 10 persons.) The small size of enterprises attenuates the deterrence effect of prosecuting a single enterprise under the competition law. In particular, it is rational for competition authorities to use their limited resources on more significant violations and violators. In turn, it is rational for other small enterprises to believe that the competition authority will not devote resources to prosecute a second small enterprise, after a first one has been prosecuted. Indeed, it may take a whole string of prosecutions to change their beliefs. Therefore, prosecuting one small enterprise will not have a deterrence effect on the others. Thus, the small size of IF enterprises may mean they escape competition law enforcement.

58. The informal sector in developing countries presents specific challenges and obstacles to the promotion of competition. The small size of enterprises and markets, combined with their sometimes difficult-to-reach locations, may require different strategies. These alternative strategies might include reform of input markets and reducing barriers to markets for outputs.

2.5. Challenges and obstacles from the adaptation of institutions including the judiciary

59. After the adoption by a society of competition as the organising economic principle, it takes time for institutions to adapt to the new demands. Institutional adaptations imply also adaptation of individuals and of networks of institutions.

60. Often, individuals must learn and adapt. For example, the same persons who once administered price control may now enforce a competition law. Or a judge who once arbitrated disputes between state-owned enterprises under one set of laws in one political-economic system may now decide lawsuits brought by a government competition authority against enterprises under a completely different set of laws.

61. Potentially, institutions adapt with greater difficulty than do individuals. For example, the “institutional memory” and resulting analytical approaches can remain long after all the individuals who participated in the events have departed. For example, where competition authorities had been involved in repeated or permanent price controls, the basic attitudes and analytical approaches have reportedly persisted long after the policy and fundamental purpose of the institution had changed.

62. Different institutions adapting at different speeds may add to the challenges. For example, the laws may have changed but the regulations and procedures still need to catch up. Or the law schools may not have study materials to produce graduates prepared for the new system. Or the competition law may use economic concepts while the judiciary is uncomfortable with economic reasoning. This might be solvable case-by-case if the competition authority could explain the economics of a case before the judge, but lawyers who matured under the old system may be unprepared to make economics arguments. The court rules for witnesses may make it difficult for an economist acting as an expert to make those arguments. And there may be no provision in court practice for economics-savvy “masters” who could work directly for the judge. The result could be that economic arguments are not made in court. This would mean that they would not be explored during a competition investigation, and thus that evidence to support or refute economic arguments would not be sought. In this way, limits on the rate of change of individual institutions may limit the rate of adaptation of networks of institutions.

63. In addition to the difficulties of bringing economics into the judicial reasoning, there may be other ways in which judicial institutions augment the challenges to competition promotion in their role of resolving disputes between enterprises or between enterprises and the competition authority. In particular, courts may be slow and backlogged, so disputes are settled only with a commercially intolerable delay. They may have difficulties in resolving complex disputes such as competition cases. And legal professionals may not have had the exposure to relevant foreign precedents and norms to speed the development of consistent decision-making. [OECD 2000, pp. 187-8]

64. Finally, sub-national government can lag behind changes at the national level. Whereas national institutions and their employees may receive much technical assistance, changing the skills and perspectives of employees of thousands of municipalities may be beyond the capacity even of the most prolific capacity builder.

65. In sum, the pace of adaptation of institutions can impede competition promotion, independent of the strength of a competition culture amongst the politically powerful or public at large. Among these challenges are providing individuals with the resources and incentives to learn. Other challenges are to spur long-lived institutions to adapt, or to replace them with entirely new institutions, and to maintain sufficient coherence and momentum for change as different institutions adapt at different speeds.

* * * * *

66. This section took as its starting point the set of challenges or obstacles to competition promotion that have been identified by competition authorities and other experts. These were organised into four groups of challenges according to their possible fundamental cause. The largest group, and perhaps the most significant, were those attributed to a “lack of a competition culture.” The other groups were those that followed from the characteristics of small developing economies and of the informal sector in developing countries, and the adaptability of institutions. The “lack of a competition culture” was attributed to the self-interest of individuals and groups, to the fact that economic change produces losers and winners, and that competition accelerates economic change. Thus, opponents of competition are presumably those who expect to lose from it, or who are afraid to take the risk that they might lose from it, or who are not aware that they are likely to gain from it. While it is rational for many, even most, individuals and groups to support competition since they are net winners over the longer run, there are circumstances where individuals or groups will rationally oppose competition. Two points follow. First, managing the redistribution that may result from competition can be a key sub-objective of promoting competition in an economy. Second, demonstrating to those who are likely to be net winners that competition will benefit them can be another key sub-objective.

3. Specific examples of challenges or obstacles

67. This section provides some specific examples where competition authorities faced challenges and obstacles to the promotion of competition. These examples are not for discussion as such, but rather are meant to inspire delegates to submit or present other examples of challenges or obstacles to competition promotion at the OECD Global Forum on Competition in February 2004.

68. These examples are organised according to a rough classification of (1) direct effects on competition, (2) competitive neutrality, (3) interfaces with regulation, and (4) government promotion of anti-competitive market structure. Two additional sections are on corruption and on challenges and obstacles faced by the competition authority as an institution. No position is taken on whether anticompetitive actions were inadvertent or deliberate, perhaps due to a political desire to help particular entrepreneurs, or to increase revenues from local government-owned assets, or due to corruption or something else. However, where it seems that there were conflicts of broad public policy objectives, these are noted.

3.1. *Direct effects on competition*

3.1.1. *Government as purchaser*

69. Governments are frequently active in markets. They regularly purchase goods and services or license providers of goods and services that will be sold to its citizens. There are a number of ways buyers can increase or decrease competition by changing their conduct vis-à-vis suppliers. They may hold competitive tenders. They may broaden the range of goods or services they are willing to buy. They may bundle purchases to increase the size and decrease the frequency of purchase. They may change the amount or timing of information competitors have about other firms' offers. Governments have these and other strategies available to promote competition. But they do not always make use of them.

70. Government can harm competition directly: It can eliminate competition by designating monopoly suppliers without holding competitive tenders. Or it can designate more than one supplier without competitive tender. A specific example of choosing a service provider without competitive tender took place in a country in which the Ministry of Privatization owned 40% of one of the stock exchanges. The Ministry chose to sell stock owned by the government through that exchange even though the shares were going to be listed on two exchanges. A complaint was made. The competition authority recommended changes that were accepted by the Ministry.

71. Sometimes, it is indeed more efficient to have only one supplier in a given territory. This is the case, for example, when there are large "economies of density," that is, when the average cost of supplying the service in a given area is lower when there are more customers or when each customer consumes more. Garbage collection is one service that exhibits "economies of density" and is frequently purchased by local government. It is often sensible for a municipality to hold a competitive tender to be the only garbage collector (perhaps in the entire municipality, perhaps only in certain quarters) rather than to allow several collecting firms to compete on each street each day. This is called "competition *for* the market" as distinct from "competition *in* the market." Governments can promote competition by choosing appropriately between "competition *for*" and "competition *in* markets," and in ensuring that subsequent competitive tenders do not advantage incumbents. In one specific example, a national competition authority investigated a complaint about how the contracts for competitive tendering for municipal garbage collection had been designed, that is, the authority investigated whether competitive within the market would be efficient. In this particular decision, it found that competing *for* the market was most appropriate, so the complainant—who had wanted a part of the competitively awarded contract—was disappointed.

72. A competition authority may get involved in promoting competition by recommending governments to write clear rules for competitive tenders. In at least one country, the competition authority has sent a notice to the authorities in the capital city that they must develop and publish rules on competitive tenders. These rules could address a number of issues, such as when tenders need to be held, how they will be publicised, when a tender would be considered invalid (e.g., if there were too few bidders), how winners will be decided, and how the public announcement of the winner will be made both to ensure public oversight against corruption and to ensure that the municipality does not inadvertently help in cartel enforcement.

3.1.2. *Government as cartel member and access denier*

73. Sometimes, government harms competition by joining cartels and at other times it harms competition by charging high access fees to an essential facility, or even joining a group boycott to deny access. The next set of case descriptions--and one "fact situation" since there has been no decision whether any competition law violation has occurred--illustrates, or potentially illustrates, each of these possibilities.

74. In one case, several taxi companies complained to the competition authority that they were discriminated against in taxi regulation. The competition authority investigated and discovered a taxi cartel. The members of a taxi association had drafted an agreement on uniform prices. They then committed to the municipality that they would comply with the price agreement. The competition authority prosecuted the taxi association and its members, but had no jurisdiction over the municipality.

75. That now-finished competition case bears a resemblance to events unfolding in Ireland in 2002-3. There, the association of all the main beef processors, the Beef Industry Development Society, proposed a plan to reduce the number of plants. Owners of plants remaining in business would compensate owners of plants that were closed. Enterprise Ireland, the state agency responsible for indigenous industry, supports the plan. In 2002 the Irish Farmers' Association expressed concern that the consolidation would adversely affect farmers by enabling the processors to manage output and therefore prices. In 2003 the Competition Authority initiated High Court proceedings against the plan, but in late 2003 the dispute remained unresolved.

76. Charging a high access fee may also distort or prevent competition, though in practice competition authorities often find it difficult to determine "how high is too high." This problem is illustrated with two examples.

77. In the first example, the operator of the town dump was a "public utility budgetary entity," not sufficiently separate from the municipality to be a legal person. However, the dump operator—rather than the municipal authorities—set the price of using the dump. A competitor who used the dump complained that the access price was too high. The competition authority recommended to the municipality that the dump operation (a local monopoly) be split off from the garbage collection, which could potentially be performed by several firms. The municipality took the advice.

78. In the second example from a different country, the local governments typically own electricity distribution companies and charge high prices for access to the grid. (They do not deny access.) This distorts competition since more efficient, competing generators cannot make offers below the prices charged by the local company. Also, consumers pay higher prices overall for electricity. The local governments use the funds thus generated to pay for other municipal services. In this instance, there appear to be conflicting policy objectives.

79. This next example is of a group boycott in which a municipality participated. Here, municipalities and garbage collecting companies agreed to limit access to the local dump to members of

their agreement. Eventually, other municipalities in the area contracted with other garbage collecting companies. But when these companies asked to use the dump, the municipality that owned the dump complied with the agreement and did not allow them access. The competition authority ordered the removal of the restriction on who may use the dump.

3.1.3. *Government as competition promoter*

80. Sometimes, local governments actively promote competition. Two examples of this are provided here. In the first, the municipality lowered the cost of inputs that competitors need. In the second, the municipality directly increased competition by modifying the anticompetitive terms of a license it had issued.

81. In the first example, a near-monopoly had inherited, from the Communist era, essentially all the “good” locations currently in use for selling newspapers and magazines. In response, the municipality designated new, additional locations and held competitive tenders to allocate them. This allowed new press distribution companies to get started.

82. In the second example, the municipality promoted competition in cable television by modifying license terms. The municipality had held a public competitive tender to choose a new cable television provider using superior technology. Numerous small cable television companies already supplied consumers in the municipality. Under the terms of the license, the existing suppliers could neither supply municipal-owned housing nor could they expand their services without the consent of the tender winner. Also, no new CATV companies could enter. After investigation, the competition authority suggested that the municipal government amend the CATV license to eliminate those restrictions, thus enabling competition *in* the market to persist.

83. Normally government, whether local or national, is seen as affecting competition in its role as regulator, as the setter or enforcer of rules. However, these cases illustrate that government is often active in markets as a purchaser or as a provider of a necessary input. And in those roles, it can act to help or hurt competition.

3.2. *Competitive neutrality*

84. Government can treat state-owned enterprises more favourably than private enterprises, or enterprises owned by another state. This discrimination harms competition and reduces economic welfare by distorting economic choices. “Competitive neutrality” is when the government ownership of an enterprise does not give it any competitive advantages or disadvantages relative to its private sector competitors simply by virtue of its government ownership. As the examples below illustrate, some competitive neutrality issues shade off into state aid issues.

85. Applying differing licensing rules is one way to discriminate between state- and privately-owned enterprises. In one country, the Cabinet of Ministers decided to require licenses for a particular service. The Cabinet granted exclusive conditions for state enterprises and exempted them from paying license fees for five years. The competition authority found the decree to be discriminatory and to create insuperable barriers to entry for private enterprises. At the time, private enterprises held a cumulative total of 55% of the market, so their exclusion would have had a significant effect. The authority applied to the Cabinet with a request to suspend and reconsider the decree. The Cabinet did so.

86. In a separate case of discriminatory licensing, a private undertaking wished to begin offering waste transport services in the city of Jõhvi in Estonia. But the traffic rules prohibited it from operating heavy trucks on the streets of the city. By contrast, a public utility undertaking in Jõhvi had a permanent traffic permit to operate such trucks. The Competition Board found that conditions for getting traffic

permits to enable enterprises to offer waste transport were unequal and said that all enterprises should be subject to a uniform competition restriction arising from road conditions. Subsequently, the Jõhvi City Council adopted a new regulation on traffic permits for heavy vehicles, establishing a fee. However, the fee could be reduced for transport services financed from the city budget. The Competition Board found this provision to be discriminatory and recommended it not be applied. The City Council repealed the provision, and submitted a draft regulation to the Competition Board for comment. [Estonian Competition Board 1998]

87. Subsidizing commercial services from public funds is another means of discriminating between state- and privately owned enterprises. In the first case described here, the subsidies funded predation. In the next two cases, SOEs were charged substantially less than POEs for identical services.

88. Competitors of the state-owned radio company in one small country alleged that the state company's commercial programme was offering advertising at predatory prices. The competitors alleged, too, that the commercial programme was being subsidised by the parent company, who in turn received allocations from the state. The competition authority found the state-owned radio company to be dominant and found it to have been offering advertising at predatory prices. The authority ordered the state-owned radio company to completely separate the costs and profits of its commercial programme from the rest of the company, and prohibited the commercial programme from further predatory pricing. In the same country, the same state-owned radio company was not required to pay the National Meteorology and Hydrology Institute (NMHI) for weather reports and forecasts, while the private radio companies had to pay. The competition authority found this to be discriminatory and the NMHI changed its pricing practices to eliminate that discrimination.

89. In the final example of price discrimination, a legal monopoly was subject to price-cap regulation when it sold to governmental economic entities but was not regulated when it sold to non-governmental entities. The monopoly subsequently charged non-governmental entities double the regulated price, for the same service. The competition authority found that there was no cost basis for the price difference and noted that charging different prices conflicted with the constitution, which guaranteed no discrimination on the basis of form of ownership. Both the price discrimination and the high prices were found to violate the competition law. During the investigation, the ministry that regulated the monopoly revised its tariff rules to end the violation.

90. Competitive non-neutrality is sometimes alleged when state-owned enterprises expand into markets that are supplied by privately-owned enterprises, or conversely when privately-owned enterprises wish to expand into markets that are supplied by state-owned enterprises. Private enterprises' concern is that SOEs' capital cost advantages and possibly weak requirement to earn a commercial rate of return on investment may be compounded by obscure accounting. Private enterprises are concerned that these factors acting together may allow less efficient SOEs to displace more efficient private enterprises in competition to supply a market. While POEs have their private concern of displacement, the reduction of the efficiency of markets is a public concern.

91. Prohibiting illegal state aid can form part of promoting competitive neutrality. The idea is to prohibit state aid that distorts or threatens to distort competition by favouring certain firms or the production of certain goods. Under the European Union rules, perhaps the most extensive rules on state aid, "state aid" is any aid granted by a Member State or through State resources in any form. Aid can take a variety of forms such as state grants, interest relief, tax relief, state guarantee or holding, and provision by the state of goods and services on preferential terms. The legal status of the aid does not depend on whether the recipient is privately or state-owned.

92. In many countries, complaints about competitive non-neutrality centre on exemption of state-owned enterprises from various taxes, exemption from complying with regulatory oversight, or in having access to lower cost capital due to the (explicit or perceived implicit) guarantee against bankruptcy enjoyed by state-owned enterprises. However, as illustrated above, competitive non-neutrality can take yet more virulent form.

3.3. *Interfaces with regulation*

93. Regulation can contradict, replace, attempt to reproduce or use competition. The emphasis in this section is on instances when regulation contradicts competition. Regulation may serve legitimate public policy purposes. Sometimes, competition is not advisable; it would hinder or prevent the achievement of the public policy goal. In other cases, the competition authority may be able to help identify how to achieve the public policy objectives at lower overall cost using competition. This section includes a discussion of one country's principles for addressing the competition-regulation interface, and then particular examples where the competition-regulation interface could be improved.

94. Some countries have developed general principles of how to approach the interface of competition with regulation. One example is the United States. The federal structure of the country means that competition interfaces differently with regulation at the federal level as compared with regulation at the state level. With respect to the federal level, regulation does not usually displace competition. The exception is when there is "plain repugnancy between the antitrust and the regulatory provisions." This exception has been applied in only a few circumstances. With respect to the state level, the principle of federalism has been given priority. The states are sovereign under the Constitution; only Congress may subtract from their authority. If a state both "clearly articulates" and "actively supervises" conduct, then that conduct cannot be found to violate the antitrust law. (This is the "state action doctrine.") Under a 1984 law, local government cannot be sued for damages under the antitrust law. The OECD has recommended the United States to "Undertake a comprehensive study of the extent and effect of the state action doctrine, in preparation for legislation to reduce its scope or even eliminate it." The OECD explains, "The impact of the state action doctrine, and of anti-competitive state and local legislation, is a matter of concern. State regulation and special legislation impairs competition and may delay reform, not only in professional services and distribution, but also in telecommunications and electric power." [OECD 1999, ABA 2002, pp. 1213-1222] Despite the state action doctrine, the competition authorities make use of public comment opportunities to advocate for better regulation to state and federal regulatory authorities.

95. The following example illustrates a contradiction between the pricing standard in the abuse of dominance provision of the competition law and the pricing standard in electricity regulation. The example is taken from a transition country in the mid-1990s. The Council of Ministers had passed a resolution that changed the way electricity prices were regulated. (Electricity was a monopoly.) Whereas the old method was cost-based, the new method was not. Prices rose to a level significantly higher than what the competition authority felt to be an appropriate measure of cost. The authority therefore found the pricing to constitute an abuse of a dominant position. The authority suggested to the Council of Ministers that it cancel the changes in pricing methodology.

3.3.1. *Regulation unnecessarily excluding substitutes or new suppliers*

96. Governments sometimes exclude competitors by setting regulatory standards that are too high. That is, there may be enough consumers who prefer a lower quality service or good at lower cost, but regulation limits this option. One example is provided by a taxi regulation that required the boot (trunk) to be larger than a certain size. This rule excluded an entire make of cars, cars that had previously been used for taxis. The competition authority asked the municipality to change the regulation in order to allow more competition.

97. In another example of over-specification, one country's school regulations required children to wear a particular design of textile shoe indoors at school. At the time of the competition authority's investigation, only one shoe manufacturer made shoes meeting those specifications, although other domestic manufacturers made other shoes, including other textile shoes. Not long after the investigation, however, other manufacturers have begun supplying shoes meeting the regulation.

98. The next example is of regulation that would have excluded substitutes and prevented new entry, had it remained in place. The Ministry of Trade had introduced new rules prohibiting the sale of a number of products by small-scale retailers. These products included spirits, clothes, footwear where there are no facilities for trying on, precious stones, as well as firearms, medicines, medicinal herbs, poisons and narcotics. The complainants claimed that these new rules limited competition and favoured state-owned entities and those entities in the Ministry's "system." The competition authority learned that the sale of many of these products was licensed by other ministries or executive bodies, and that only the licensors may revoke a license. The antimonopoly authority issued an instruction to the Ministry of Trade to end its violation by repealing or modifying the new rules.

3.3.2. *Regulation harming competition in a related market*

99. Public utility regulation could provide many examples of regulation of an essential facility harming competition in a related market. The example provide here is unusual in the sector—financial services—and audacity.

100. In this example, legislation designated a monopoly in one market and the monopolist tied a competitive service to the monopoly service. Legislation designated the national Savings Bank of a transition country to be the unique entity to offer privatization accounts. More than a hundred other banks and companies were authorized to trade in privatization certificates. The Savings Bank refused to service privatisation accounts if the client wished to trade privatisation certificates with any other company. Since the Savings Bank had a legal monopoly, the competition authority recommended the Minister of Economy to review the licensing regulation.

3.3.3. *Delegating regulatory authority*

101. The delegation of regulatory powers to enterprises that are then in a position to inspect and control their competitors has obvious negative effects on competition: It will be easier for the firm with regulatory powers to disadvantage rivals or even to expel them from the market. However, in a number of instances, local government has in fact delegated its authority.

102. Local governments have delegated regulatory powers to one of several competing enterprises in the following services: urban transport (busses), advertising on signboards, posters, and billboards, and parking in the historical district. In one variation, the inspectors for urban transport (taxis, minibuses, buses), who were state employees, also owned enterprises in the market for which they were inspectors.

103. National governments have occasionally also delegated regulatory authority to competing enterprises. One national government has put one association, to which a minority of enterprises belonged, in charge of certifying entities placing seamen abroad. In another country, the national standards governmental body assigned the same entity both the right to certify products and the unique right to accredit other certifying organisations.

104. Competition authorities have responded to such delegation of regulatory authority by sending suggestions directly to the municipal authorities, even in countries where competition authorities have no power to impose their suggestions. Sometimes the suggestion is as straightforward as to set up regulatory bodies independent of the regulated enterprises, or that they recuperate the authority to regulate.

105. On the other hand, some authorities go beyond straightforward suggestions. In one instance, the competition authority had performed an in-depth investigation of allegations of unfair competition in urban transport in a city. At the end of the investigation, the authority sent comments both to the national transport ministry and to the city council. To the ministry, the authority suggested improvements in the regulations as well as in the employment rules, to prevent inspectors from having interests in the enterprises they inspect. To the city council, the authority sent a request to design an economically-based regulatory scheme for urban transport, along with their own analysis of passenger flows, and a request to improve the design for competitive tenders.

3.4. *Government promotion of anti-competitive market structure*

106. Despite longstanding advice from competition authorities, academic economists, and other pundits not to privatise monopolies or other non-competitive structures, this practice continues. Among outsiders, the presumption has been that national treasuries want their cash immediately and heavily discount consumer benefits from greater competition that would presumably flow from a more competitive structure. Other reasons could be that managers and workers would find adjustment to competition and to smaller enterprises too painful and convince privatisation agencies of their point of view. Or that privatisation is faster and easier if just one enterprise is for sale and not several, perhaps because it may be easier for buyers to perform due diligence on an enterprise with a longer track record.

107. A related issue are instances when ministries or governments take steps to increase concentration in ways that harm competition. A possible example of this was provided earlier, in the Irish beef industry.

3.4.1. *Privatisation of a non-competitive structure*

108. Enterprises engaged in a wide variety of activities have been privatised as monopolies. In addition to utilities such as electricity, natural gas and telecommunications, some countries have privatised or discussed privatising activities such as river steamship services and river port services, movie theatres, technical gases, pharmacy sectors from production through wholesaling to retail pharmacies, and general and food retailers.

109. The structural concerns have been horizontal and vertical. Horizontal concerns have been the creation of a private monopoly or highly dominant firm when economies of scale would have permitted several efficiently-sized competitors. While this might not be too serious in the longer run if barriers to entry had been low, in the time and place where some of these monopolies were privatised, the factor markets, notably land and financial markets, were not yet operating.

110. Vertical concerns have been that some enterprises would not get access to an essential facility because it had been privatised incorporated into a competitor. The classic example is petrol (gasoline) retailers and storage facilities in an isolated region of a vast country. Retailers in the region could get petrol only from local storage facilities: Distances were too great for them to use storage facilities elsewhere. New petrol retailers wanted to enter the market to compete against the incumbent. But the local storage facilities had been privatised along with most of the retail outlets, and that firm refused to rent any storage to the new retailers. In addition, the dominant firm had been vested with the right to license petrol retailers in the region.

111. A second example of vertical integration posing competition problems was the river steamship and port enterprise on a major river, mentioned above. The proposal was to privatise the steamship lines, part of the vessel repair plant, a major river port, and the communication and radio navigation system into a single enterprise. This would have had obvious effects on competition in transport services and the competition authority proposed a more competitive structure.

3.4.2. *Promoting anti-competitive concentration*

112. In one example, a country's sugar beet processing plants had been separated into competing enterprises after the end of Communism. Subsequently, the Ministry of Agriculture issued a directive that the sugar factories must join up (it is unclear whether this was a merger or a tight association). Very high sugar prices resulted. The competition authority ordered the withdrawal from the merger/association of those sugar factories that had been directed to join. It also ordered them to quit coordinating purchase and selling prices. In Poland, a similar consolidation of sugar producers into four holding companies was proposed and the Antimonopoly Office sent a memorandum to the Prime Minister opposing the draft ordinance of the Council of Ministers that would have given effect to the plan. [OECD 1997, p. 501]

113. The Polish competition authority figures in another set of examples spanning the economy. During the early years of the transition, representatives of the competition authority in Poland had participated in teams preparing restructuring and privatization projects for the steel, oil, black coal mining, shipping and rail industries. The authority tried to introduce provisions that would guarantee the emergence of a competitive structure within the industry (restructuring) or deter excessive concentration as a result of privatisation. However, often competition had to give way to other objectives, such as "the necessity of introducing capital to the industry or to the needs of social policy (recession, unemployment)." [OECD 1995, p. 408]

114. It remains unclear why proposals to privatise monopolies continue to be accepted. In particular, it may be useful to identify instances when such proposals were rejected in favour of a more competitive structure and then to identify why a "competition culture" viewpoint won the political argument. It may also be useful to explore whether the public purpose for government-sponsored concentration is always as a means to overcome barriers to exit from a market. And, if so, it could be useful to explore whether less anticompetitive strategies to overcome barriers to exit have been successful.

3.5. *Corruption*

115. Corruption can directly reduce competition in a number of ways. Among them are to bribe the procurement officer to accept a particular bid or to not look too hard for competing bidders, bribe the sales managers of the potential competitors not to act too competitively, bribe the official writing the bid specifications to make them conform to one company's product rather than those that would best match the need, and bribe the official who inspects whether what was actually delivered met the specifications. One series of examples of corruption directly reducing competition is reported by the Parliamentary Accounts Committee in Uganda in 1999. The Committee found that the total net proceeds to the State from privatization were close to zero. The reason was that sales were rigged by collusion between members of the tender board reviewing bids and either one of the bidding companies or the former management team of the para-statal in question. [Transparency International (UK), pp. 14-15] Corruption during periods of privatization can undermine popular support for economic liberalization in general, including economic competition in particular.

116. Causality can also go the other direction. That is, less competition can promote more bribery. One soon-to-be-published study of bribes paid to utilities in 21 transition economies in Eastern Europe and Central Asia found that bribes paid to utilities are higher in countries with greater constraints on utility capacity, lower levels of competition in the utility sector, and where utilities are state-owned. [Clarke and Xu 2003]

117. But corruption can also indirectly reduce competition by raising barriers to entry or by making some competition-promoting arrangements infeasible. A survey carried out by Transparency International in Bangladesh found that about 65% of urban households said that it was almost impossible to get a trade

license without money or influence. [TI(UK), p. 24] The need to fund universal service is sometimes used as a reason to prohibit competition. It is argued that a monopoly is needed in order to generate the excess profits to be used by the same company to also supply uneconomic services. One solution is to require consumers—regardless of their supplier—to pay into a universal service fund which is then used to pay for uneconomic services. But where government cannot ensure that universal service funds will not be embezzled, this sort of arrangement is not feasible.

118. Corruption can seriously undermine competition. It may do this directly through “skewing the playing field.” Or it may undermine competition indirectly by making entry into markets more difficult, or yet more indirectly by undermining popular support for competition more generally.

3.6. Challenges and obstacles faced by the competition authority as an institution

119. A number of challenges and obstacles that have been identified by competition authorities can be classified as institutional weaknesses. These include weak powers, insufficient resources including human resources, and insufficient independence.

3.6.1. Investigatory powers

120. Some competition authorities feel they have insufficient powers to investigate. This includes powers to enter premises to search for and seize or copy documents that may provide evidence of a violation of the competition law. It includes powers to require documents and written responses to questions to be delivered to the competition authority, and powers to require witnesses to answer questions orally. In at least one jurisdiction, the competition authority officials may not enter a business premises without permission from the business. Others have no such powers at all. One issue for some authorities is whether only business premises may be searched, or whether private homes, cars, or even persons may be searched. With respect to documents, if only copies may be taken away from an inspection, then this could entail loss of information—was the same pen used on both of these documents?—and potential difficulty in presenting copies as evidence in court.

3.6.2. Sanctions

121. The lack of powerful sanctions reduces incentives to comply with the competition law. In particular, it could be more profitable for a firm to repeatedly pay low fines, or take the chance that it might one day have to pay a low fine, than to quit illegal anticompetitive behaviour. There is a parallel argument regarding weak sanctions if a person addressed with a mandatory request for information provides an incomplete or untimely response.

122. A “leniency policy” can help promote competition. Once it has been established that violations of the competition law are subject to powerful sanctions and that violations are in fact sanctioned, then providing the competition authority with the capacity to offer lower sanctions in return for evidence to help prove other competition law violations (i.e. a “leniency policy”) can help the authority to promote competition through enforcement.

3.6.3. Independence

123. The “independence” of the competition authority from day-to-day political influence can affect the authority’s capability to promote competition and public confidence in its work. (Clearly, a competition authority must be independent from any enterprises or associations subject to its jurisdiction.) Independence is seen as important for consistent, predictable and transparent enforcement of competition law and advocacy of pro-competition regulatory reform. In part this is due to being able to focus on

competition, rather than having to make tradeoffs internally between conflicting public policy goals. Thus it can enhance the appearance of impartiality.

124. Competition authorities identified “greater independence” most frequently as the step/measure likely to lead to better promotion/attainment of the embraced objectives. In this survey—of competition authorities invited to the OECD Global Forum on Competition in 2003—about one-third of the respondents gave this response. (Note, though, that 50% of the respondents to that questionnaire reported that they consider themselves to be totally independent from political influence, while a further 45% reported that they consider themselves to be highly independent from such influence.) [OECD 2003]

125. On the other hand, some competition authorities regarded as effective are not formally independent. This group includes the Antitrust Division of the United States Department (i.e., Ministry) of Justice and the Bundeskartellamt of Germany. They illustrate the point that the formal law is not as important as the political support of their independence. And the political support depends on the existence of a “competition culture.”

3.6.4. *Resources, including staffing*

126. The influence of size and budget on the effectiveness of competition authorities is not straightforward. More resources typically allow an authority to become more effective. Thus, the OECD Secretariat has recommended increases in the resources of competition institutions in several reviews of its Member countries. But in a small economy with relatively few appropriately educated persons, the effect can be very different. If government jobs are restricted to citizens, then expanding the competition authority could mean that other policy areas are starved of human resources, at least until more people are appropriately educated.

127. Further, as the competition authority becomes more effective, enterprises and associations hire competition experts to assist them in their dealings with the competition authority. These purchasers of competition expertise thus compete for the few experts, and in some countries pay multiples of civil servants’ salaries. These large salary differentials cause rapid staff turnover in the authorities. The high turnover raises the authorities’ training costs. Perhaps more importantly, the high turnover can mean that the authority is routinely represented by relatively less experienced personnel than those experts representing enterprises.

128. Resource constraints are not the entire story, however. Sometimes a very small competition authority can be very effective. For example, when there was a real probability that banking would be exempt from competition law, the four-person Albanian competition authority teamed-up with the central bank and won the political battle to make banks fully subject to the competition law.

4. **Questions for discussion**

129. Competition authorities face a number of challenges or obstacles when they promote competition. This paper has suggested that the “lack of a competition culture” is the fundamental cause of the largest group, and perhaps the most significant group, of such challenges. It has attributed the “lack of a competition culture” to the self-interest of individuals and groups who oppose the economic change that competition produces. But there are other challenges which are attributed to the characteristics of small developing economies, of the informal sector in developing countries, and to the adaptability of institutions.

130. In small developing economies, some challenges were attributed to scale economies in non-traded goods and services, and to the displacement of smaller scale technologies by newer larger scale

technologies. Others were attributed to the small size of the business and political elites, or small GDP, or to asymmetric bargaining positions vis-à-vis large multinational enterprises.

131. In large informal sectors, the challenges were attributed to the often rural and typically small size of enterprises. They are difficult to reach, and the markets they supply are typically very small.

132. The specific examples of challenges or objectives illustrated government's various effects on market competition. There seemed to be more examples from local government. While this may be a statistical fluke, it may also be due to national governments possibly having broader public policy perspectives than local governments.

133. Delegates are invited to consider:

- *What challenges and obstacles are important in their own country or economy?*
 - *Is the absence of a "competition culture" the root cause of impediments to competition?*
 - *Are there impediments specific to small developing countries?*
 - *Are there impediments specific to the informal sector?*
 - *Are institutional impediments significant?*
- *What are effective responses to these challenges and obstacles, perhaps based on their own experiences? Can some profound causes be addressed directly?*
- *What other lessons can be learned, e.g., mistakes to be avoided, from the experience in their country or economy?*

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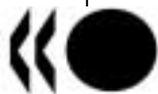
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**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

Forum mondial de l'OCDE sur la concurrence

**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

Note du Secrétariat

-- Session II --

Cette note du Secrétariat complète la note de référence relative à la Session II. Elle est soumise POUR DISCUSSION au titre de la Session II du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

JT00157901

LES DÉFIS ET OBSTACLES RENCONTRÉS PAR LES AUTORITÉS DE LA CONCURRENCE POUR ACCROÎTRE LE DÉVELOPPEMENT ÉCONOMIQUE EN PROMOUVANT LA CONCURRENCE

-- Note complémentaire du Secrétariat --

1. Cette note est destinée à compléter la note de référence du Secrétariat relative à la session II. Dans un premier temps, elle examine de manière générale la portée et les implications des correspondances entre les types d'obstacles cernés dans la note du Secrétariat et ceux mis en exergue dans les contributions soumises (au 21 janvier). Dans un second temps, elle présente un très bref résumé analytique de ces contributions.

1. Analyse des obstacles rencontrés en général et dans des cas particuliers

2. La note de référence se divise en deux grandes parties. Dans la première, elle définit et examine quatre catégories d'obstacles au renforcement de la croissance économique *via* la politique de la concurrence. La première catégorie correspond aux obstacles résultant du manque de culture de la concurrence, définie par la note comme l'existence d'un soutien politique à l'utilisation de la concurrence sur les marchés en tant que moyen par défaut ou « normal » d'organiser les activités économiques, se traduisant par le fait que la concurrence devient effectivement ce principe organisateur par défaut ou « normal ». Il s'agit de la catégorie la plus vaste ; en un sens, il s'agit d'une catégorie « fourre-tout » qui regroupe tous les obstacles autres que les entraves spécifiquement liées : (a) aux petites économies en développement ; (b) aux secteurs informels et (c) à l'adaptation des institutions à l'introduction de lois et de pratiques favorisant la concurrence.

3. Dans la seconde partie, la note de référence¹ fournit de brefs exemples de mesures prises par les autorités de la concurrence de toutes sortes de pays pour traiter divers problèmes particuliers ou types de problèmes. Outre le fait qu'elle contenait des exemples pouvant être examinés dans le cadre du Forum mondial sur la concurrence, cette partie était destinée à encourager les participants au Forum à présenter et examiner d'autres exemples fondés sur leur propre expérience.

4. A la lumière des contributions soumises, il est clair que certains participants ont jugé utile la classification du Secrétariat. Dans le même temps, ces contributions montrent que d'autres catégories quelque peu différentes pourraient être tout aussi utiles, sinon davantage. Ainsi, la Chine² évoque les problèmes auxquels se heurte l'État lorsqu'il tente de mettre un terme aux pratiques anticoncurrentielles des autorités régionales et locales. Des problèmes très similaires se posent au Canada, en Indonésie³, au Mexique⁴, en Russie⁵, aux États-Unis, ainsi que dans l'Union européenne (UE), et ces difficultés pourraient être considérées comme spécifiques aux *grandes* économies. En revanche, les obstacles mis en avant par la Jamaïque semblent davantage liés à son niveau de développement qu'à sa taille, et certains de ces obstacles sont également mentionnés par des économies beaucoup moins petites au sens classique du terme. On peut donc se demander s'il ne serait pas plus utile, par exemple, d'avoir une catégorie réunissant les pays en développement, divisée en deux sous-groupes correspondant aux « grandes » et aux « petites » économies.

5. En tout état de cause, les catégories définies dans la note de référence peuvent assurément être mises à profit pour atteindre son principal objectif : alimenter les échanges de vues et faciliter l'organisation des débats sur les obstacles auxquels se heurtent les autorités de la concurrence lorsqu'elles utilisent le droit et la politique de la concurrence pour stimuler la croissance économique. A cet égard, il est notable que les contributions offrent une multitude d'informations sur la manière dont les autorités de la concurrence tentent de résoudre des problèmes de ressources ainsi que des difficultés juridiques et

économiques, alors qu'elles contiennent peu d'exemples précis de situations dans lesquelles ces autorités se soient trouvées confrontées à des mesures prises par d'autres entités publiques en vue d'entraver l'instauration de la concurrence. Ainsi, la note du Secrétariat fait référence à divers cas particuliers (notamment aux paragraphes 74 à 79, 81-82, 85-86 et 88-89). Puisque les participants au Forum mondial sur la concurrence ont indiqué qu'ils estimaient généralement plus utile d'examiner les problèmes de concurrence en se fondant sur des exemples concrets plutôt que sur des idées générales, peut-être serait-il judicieux que ceux qui prendront part à la réunion de février réfléchissent aux exemples qu'ils pourraient présenter à cet égard.

6. Dans le cadre de cette session, les participants peuvent souhaiter discuter si le Secrétariat devrait étudier ces questions dans un nouveau document qui : (a) intégrerait les arguments avancés pendant la réunion ; et/ou (b) tiendrait compte des contributions complémentaires des participants. Deux types de questions pourraient être étudiés. En premier lieu, le Secrétariat pourrait se pencher de manière plus approfondie sur le système de classification. En second lieu, si les participants sont disposés à soumettre des contributions complémentaires décrivant des situations précises dans lesquelles ils ont été confrontés à des mesures prises par d'autres entités publiques en vue d'entraver l'instauration de la concurrence, le Secrétariat pourrait s'employer à constituer un recueil de cas pouvant être utile. Ainsi, la contribution de la Chine indique qu'en tant qu'entité créée par l'État, une autorité de la concurrence n'est guère en mesure de faire face aux interventions anticoncurrentielles de l'État. Tel est peut-être effectivement le cas en Chine, mais il serait peut-être bon que les responsables chinois sachent, par exemple, que l'autorité russe de la concurrence peut engager des procédures afin de mettre un terme aux pratiques anticoncurrentielles des autres Ministères, et qu'elle use de cette prérogative.

2. Aperçu des contributions reçues

7. Bien qu'elle fasse référence aux difficultés soulevées par sa situation économique, la contribution de la Russie⁶ est centrée sur des problèmes liés à sa législation. Malgré l'adoption en 2002 de nouvelles dispositions qui ont multiplié par deux le montant d'actifs à partir duquel s'applique l'obligation de notification préalable des fusions, le Ministère de la politique antimonopoles a été mis à rude épreuve – et contraint à une mauvaise affectation de ses ressources – par la nécessité d'examiner quelque 10 000 notifications en 2003. Une centaine de transactions ont été rejetées, tandis que de nombreuses autres ont été avalisées à des conditions inhabituelles, qui sont peut-être elles-mêmes un reflet de l'histoire économique russe. Les conditions mentionnées dans la contribution résident dans l'obligation pour l'entreprise issue de la fusion soit : (a) d'informer le Ministère de la politique antimonopoles de son volume de production et de son volume de ventes, en justifiant leurs changements ; soit (b) d'informer le Ministère à l'avance de tout projet de modification de sa politique en matière de production et de ventes.

8. La contribution de la Jamaïque⁷ commence par une évocation des problèmes spécifiques aux « petits pays en développement », qui résident selon le document dans des ressources limitées et des problèmes sociaux urgents. Il est intéressant de noter que cette description, de même que le reste de la note, est axée sur des difficultés liées au fait que la Jamaïque est une économie en développement et non à sa petite taille. Ainsi, le document n'évoque aucun problème spécifiquement lié aux difficultés des entreprises à réaliser des économies d'échelle. Les facteurs économiques mentionnés avec le plus d'insistance concernent le poids historique du protectionnisme et du contrôle étatique, qui contribue apparemment à la persistance de tendances protectionnistes et à la réticence des consommateurs à faire jouer la concurrence. Le document met en exergue les graves problèmes de ressources auxquels se heurte l'autorité de la concurrence, mais il présente les lacunes de la législation comme l'obstacle majeur qui se dresse sur sa route. À l'origine, le droit jamaïcain de la concurrence avait créé une commission similaire aux structures en place dans de nombreux autres pays. La *Court of Appeal* (Cour d'appel) jamaïcaine a cependant paralysé ce système en statuant que son fonctionnement était contraire aux droits de la défense, dans la mesure où la Commission exerçait à la fois des fonctions d'investigation et de jugement.

9. Comme la Jamaïque, l'Afrique du Sud⁸ met en exergue les pratiques protectionnistes du passé, mais les nouvelles dispositions législatives et institutions sud-africaines ont bénéficié d'un soutien significatif de la part de l'opinion publique, dans la mesure où elles s'inscrivaient dans le cadre général des réformes résolument engagées dans divers domaines par le gouvernement élu en 1994. La contribution de l'Afrique du Sud met l'accent sur la nécessité dans laquelle se trouvaient les autorités de la concurrence d'exercer leurs fonctions de manière à gagner le respect de milieux d'affaires sceptiques, tout en injectant une dose de réalisme dans les attentes de la population. Elles ont poursuivi ce double objectif avec un certain succès, en maximisant leur transparence et leur facilité d'accès. En outre, dans certains pays, les nouvelles autorités de la concurrence estiment que les efforts qu'elles déploient pour faire appliquer le droit de la concurrence sont contrecarrés par des juges qui appréhendent mal les concepts de cette branche de droit, et n'y adhèrent peut-être guère. En Afrique du Sud, en revanche, la juridiction indépendante que constitue le Tribunal de la concurrence dispose des compétences requises et joue un rôle utile dans le système de concurrence, tout en contribuant à la réputation méritée d'équité et de respect des formes régulières du système judiciaire.

10. La contribution de la Roumanie⁹ indique tout d'abord que la principale difficulté à surmonter réside dans l'attitude de résistance de ceux qui s'attendent à sortir perdants des changements économiques et administratifs. Le document distingue ensuite deux types d'obstacles résultant de cette résistance : ceux qui sont liés à l'environnement extérieur et ceux qui relèvent de questions internes, propres aux organisations. Les obstacles externes tiennent, par exemple, à la nécessité de nouer des relations avec d'autres entités publiques, telles que le Parlement, et de modifier la Loi sur la concurrence et la Loi sur les aides d'État. Les obstacles internes sont liés au manque de ressources financières et humaines, ainsi qu'à l'insuffisance des informations disponibles, tant pour les travaux de recherche que pour les procédures judiciaires.

11. Le rapport du Kenya¹⁰ mentionne divers obstacles juridiques, économiques et culturels. Ainsi, le tribunal kenyan spécialisé dans les questions de concurrence, le *Restrictive Trade Practices Tribunal*, n'est pas très actif, apparemment parce que le système judiciaire est considéré comme lent et incertain. En cas de plainte, il est fréquent que les litiges soient réglés à l'amiable sous une forme ou une autre par les parties. Ces règlements peuvent constituer un moyen efficace de mettre fin à des comportements illicites, mais ils débouchent parfois sur des solutions qui sont davantage conformes aux intérêts des parties qu'à l'intérêt général. En outre, compte tenu du manque de capitaux d'investissement au Kenya, les entreprises qui se voient ordonner de céder des actifs sont parfois dans l'incapacité de trouver des acquéreurs. La contribution souligne également que certains parlementaires kenyans estimaient que la loi devrait être appliquée pour réduire la prédominance économique d'un certain groupe de Kenyans par rapport à la population considérée comme autochtone. Cela semble illustrer « le phénomène d'une minorité dominant le marché » évoqué par une étude citée dans la note du Secrétariat. (En Indonésie¹¹ également, certains partisans du droit de la concurrence considéraient apparemment qu'il devrait être appliqué pour réduire l'influence d'une minorité, et non uniquement pour mettre fin aux pratiques commerciales abusives. Il serait intéressant d'en savoir davantage sur les pressions auxquelles ont pu être soumises les autorités de la concurrence dans ce type de situation, et sur la manière dont elles ont réagi.)

12. La contribution de la Tunisie¹² porte essentiellement sur les problèmes juridiques auxquels son Conseil de la concurrence s'est trouvé confronté. Compte tenu de la réalité économique du pays et de diverses considérations socio-économiques, la loi excluait à l'origine du régime de liberté des prix les biens, produits et services « de première nécessité », ou afférents à des secteurs ou zones où la concurrence était limitée du fait d'une situation de monopole ou pour d'autres raisons. Le Conseil de la concurrence s'est efforcé d'apaiser les craintes concernant les risques d'incompatibilité entre les règles du droit de la concurrence et d'autres principes de l'action publique, en soulignant que la concurrence n'était pas une fin en soi, mais un moyen d'assurer la satisfaction du consommateur. Le Conseil de la concurrence a également fait preuve de créativité face aux diverses lacunes et ambiguïtés des textes juridiques ; il a

notamment jugé que les personnes de droit public étaient soumises aux règles de la concurrence au même titre que les personnes de droit privé chaque fois qu'elles exerçaient une activité économique, pris des mesures pour faire connaître son action, et renforcé sa capacité à protéger l'intérêt général malgré le fait qu'il n'est pas habilité à engager des procédures de sa propre initiative.

13. La longue contribution du Brésil¹³ aborde une multitude de thèmes, parmi lesquelles la rareté des ressources disponibles et l'inefficacité de la structure institutionnelle. S'agissant de l'application des règles contre les ententes, la contribution évoque le fait que l'autorité de la concurrence ne peut infliger des sanctions pénales, ainsi qu'une tradition nationale de tolérance à l'égard des ententes. Il s'agit de problèmes courants et l'accent mis par la contribution sur l'importance de la coopération internationale correspond à une position consensuelle, mais l'affirmation selon laquelle les ententes sont généralement de nature internationale mériterait des éclaircissements. La contribution fait également référence aux résultats d'une récente réunion au cours de laquelle des participants issus essentiellement du secteur privé ont estimé que les trois conditions de l'amélioration de la compétitivité brésilienne résidaient dans le renforcement du système judiciaire dans son ensemble, la simplification des règles et des procédures administratives, et l'amélioration des infrastructures. Dans une partie consacrée à l'équilibre à trouver entre les différents objectifs de l'action publique pour le développement économique, la contribution indique que pendant une période de deux ans, l'autorité de la concurrence a fait parvenir au Ministre du travail une estimation du nombre d'emplois menacés par chaque fusion, et qu'il s'est avéré au fil du temps que les fusions s'étaient traduites par une progression de l'emploi. La contribution met également en évidence la préoccupation manifeste que suscitent les « dénationalisations », définie comme les prises de participation dans le cadre desquelles une entreprise étrangère acquiert la majorité du capital d'une société nationale. S'il ne fait aucun doute que les investissements étrangers peuvent revêtir dans certaines circonstances un caractère anticoncurrentiel, on ne saisit pas très bien quel est le point de vue de l'autorité brésilienne de la concurrence sur les dénationalisations en tant que telles.

14. La contribution de la Chine¹⁴ évoque un certain nombre d'obstacles étroitement liés. Elle commence par souligner que malgré les récentes mesures de libéralisation, l'État a tendance à trop intervenir sur les marchés. Il s'agit d'un problème courant, mais comparée à celles d'autres pays en transition, les autorités chinoises de la concurrence semblent se considérer comme totalement démunies face à cette situation. Il est effectivement possible qu'elles demeurent relativement désarmées face aux interventions anticoncurrentielles de l'État, dans la mesure où tous les agents et organismes publics doivent se plier aux instructions de l'autorité supérieure dont ils relèvent, comme le souligne ensuite la contribution. D'un autre côté, la Russie et d'autres pays en transition ont expressément habilité leurs autorités de la concurrence à empêcher les ministères et autres entités publiques de prendre certains types de mesures anticoncurrentielles, et la Chine pourrait tirer parti de leur expérience. Par ailleurs, il convient de noter que sur les deux interventions de l'État décrites dans la contribution chinoise, il s'avère que la première – une réorganisation du secteur pétrolier par le Conseil d'État – serait juridiquement inattaquable dans la quasi-totalité des systèmes de concurrence, tandis que la seconde – une entente sur les prix facilitée par une mise en garde du gouvernement, invalidée par la suite, contre la facturation de prix inférieurs au coût moyen de production dans le secteur considéré – serait illégale dans la plupart des systèmes de concurrence. La contribution de la Chine fait également référence aux problèmes que posent les initiatives anticoncurrentielles prises par les autorités locales et régionales, initiatives qui sont actuellement proscrites par la Loi sur la concurrence déloyale mais qui se poursuivent sans entrave dans une large mesure, la seule voie de recours consistant à signaler les faits au service administratif dont relève l'entité ou l'agent en infraction. Divers autres pays appliquent de véritables sanctions aux agents publics et aux entités publiques locales ou régionales qui enfreignent les règles de la concurrence, et il pourrait être intéressant de déterminer si leur expérience peut être utile à la Chine, et si oui dans quelle mesure.

15. La contribution du Pakistan¹⁵ illustre plusieurs des observations faites au cours des précédentes éditions du Forum mondial sur la concurrence concernant l'application des principes de la concurrence dans les pays en développement. Ainsi, elle mentionne la tendance des pouvoirs publics à prendre des mesures axées sur la recherche d'avantages immédiats – tendance qui peut correspondre soit à une politique à courte vue, soit à une véritable nécessité d'alléger des souffrances humaines. La contribution indique également que même après un processus de privatisation, la réglementation des marchés par l'État peut fausser la concurrence, et elle relève en particulier une tendance des États à favoriser la sous-évaluation de leur monnaie, ce qui facilite les exportations mais réduit la concurrence interne pouvant découler d'un renforcement des importations. La contribution pakistanaise offre également un aperçu intéressant des problèmes de ressources auxquels se heurtent la plupart des nouvelles autorités de la concurrence, et souligne que leur manque de moyens financiers les affaiblit à tel point qu'il leur est difficile d'afficher les résultats positifs qui permettraient de démontrer les vertus de la concurrence.

16. La contribution du Service de la concurrence de l'Albanie¹⁶ aborde des obstacles entrant dans chacune des quatre catégories identifiées dans la note de référence du Secrétariat. Le manque de culture de la concurrence est présenté comme le principal obstacle, qui transparait notamment dans une législation inadaptée. La contribution évoque également des problèmes propres aux petites économies, la présence d'un secteur informel substantiel et la lenteur avec laquelle certaines institutions s'adaptent aux principes de la concurrence. Le Service de la concurrence a pâti d'un manque criant d'effectifs durant de nombreuses années, qui a entravé l'application effective du droit de la concurrence, mais elle a fait la preuve de son utilité en tant que gardienne de la concurrence. Comme s'en souviendront peut-être ceux qui ont participé à la deuxième édition du Forum mondial sur la concurrence, en 2001, le Service de la concurrence albanais, qui ne comptait alors que deux employés, avait réussi à faire rejeter une proposition ministérielle de réduction de la concurrence dans le secteur bancaire, en persuadant la Banque centrale de s'y opposer. Une nouvelle loi sur la concurrence est entrée en vigueur le 1^{er} décembre 2003, et des efforts sont déployés actuellement afin de renforcer le poids de la politique de la concurrence dans l'approche albanaise des questions économiques.

NOTES

1. Note de référence du Secrétariat, CCNM/GF/COMP(2003)6.
2. Contribution from China, CCNM/GF/COMP/WD(2004)16.
3. Contribution from Indonesia, CCNM/GF/COMP/WD(2004)22.
4. Contribution from Mexico, CCNM/GF/COMP/WD(2004)24.
5. Contribution from the Russian Federation, CCNM/GF/COMP/WD(2004)2.
6. Contribution from Russian Federation (cf. note 5).
7. Contribution from Jamaica, CCNM/GF/COMP/WD(2004)9.
8. Contribution from South Africa, CCNM/GF/COMP/WD(2004)10.
9. Contribution from Romania, CCNM/GF/COMP/WD(2004)6.
10. Contribution from Kenya, CCNM/GF/COMP/WD(2004)8.
11. Contribution from Indonesia (cf. note 3).
12. Contribution de la Tunisie, CCNM/GF/COMP/WD(2004)15.
13. Contribution from Brazil (CADE), CCNM/GF/COMP/WD(2004)4.
14. Contribution from China (cf. note 2).
15. Contribution from Pakistan, CCNM/GF/COMP/WD(2004)17.
16. Contribution from Albania, CCNM/GF/COMP/WD(2004)20.



**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

Note by the Secretariat

-- Session II --

This postscript note by the Secretariat supplements the Background Note for Session II. It is submitted FOR DISCUSSION under Session II of the Global Forum on Competition to be held on 12-13 February 2004.

JT00157281

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

-- *Postscript Secretariat Note* --

1. This Note is intended to serve as a “postscript” to the Secretariat’s Background Note for Session II. First, it discusses in general terms the extent and the implications of the correspondence between the kinds of obstacles identified in the Secretariat Note and those in the contributions that have been submitted as of 21st January. Second, it sets forth a very brief analytical summary of each of the individual contributions.

1. Analysing obstacles in general and in specific fact situations

2. The Background Note contains two main parts. First, it proposes and discusses four categories of obstacles to achieving economic growth through competition policy. Its first category is obstacles resulting from the lack of competition culture, which the note defines as political support for, and the use of, competition policy as the “default” or “normal” way of organising economic activity. This is the broadest of the categories – in a sense the “default” category that contains all obstacles other than certain additional obstacles that are specific to (a) small developing economies, (b) informal sectors, and (c) institutional adaptation to the introduction of pro-competition laws and policies.

3. Second, the Background Note¹ provides brief examples of how competition authorities in all kinds of countries have dealt with a variety of specific problems or types of problems. In addition to providing examples that could be discussed at the GFC meeting, that discussion was intended to encourage GFC participants to provide and discuss additional examples from their own experience.

4. The contributions submitted make clear that some participants found the Secretariat’s categorisation useful. At the same time, the submissions also show that additional, somewhat different categories may be as or more useful. For example, China² describes problems in halting anticompetitive action by regional and local governments. Very similar problems have been experienced in Canada, Indonesia³, Mexico⁴, Russia⁵, the United States, and (within Europe) the European Union and these might be deemed specific to *large* economies. By contrast, the obstacles discussed by Jamaica appear to relate more to its degree of development than to its size, and some of the same obstacles are also discussed by economies that are much less small in a conventional sense. This raises the question whether it might be more useful, for example, to have a category of developing economies with “large” and “small” subcategories.

5. In any event, the Background Note’s categories can certainly serve the main purpose of the note – to stimulate and help organise the discussion of the obstacles competition authorities have faced in using competition law and policy to promote economic growth. In this regard, it is noteworthy that while the contributions contain a wealth of information on how competition authorities have sought to deal with resource issues and legal and economic problems, they do not contain many specific examples of their experience in dealing with specific attempts by other government agencies to prevent the introduction of competition in particular situations. For example, the Secretariat note refers to a variety of specific fact situations (*e.g.*, paragraphs 74-79, 81-82, 85-86, and 88-89). Since GFC participants have said that they tend to find it more useful to discuss competition issues using concrete examples than general propositions, it may be useful for those who will attend the February meeting to consider what examples along these lines they may be able to share.

6. As part of the discussion during this session, participants may wish to consider whether the Secretariat should pursue these issues through a further paper that (a) incorporates points made during the meeting and/or (b) reflects additional, follow-up contributions by participants. Two kinds of issues might be pursued. First, the Secretariat might give additional consideration to the categorisation system. Second, if participants are prepared to submit additional contributions describing specific instances in which they have had to deal with attempts by other government entities to thwart the introduction of competition, the Secretariat might seek to compile a collection of “stories” that might be useful. For example, China’s submission states that as a state-created entity, a competition authority has little ability to deal with anticompetitive state intervention. This may in fact be the case in China, but it might be useful to Chinese officials to know, for example, that the Russian competition authority can and does bring cases to halt anticompetitive intervention by Government Ministries.

2. Contributions received

7. While referring to challenges created by economic conditions, Russia’s⁶ contribution focuses on problems it has had with its law. Despite a 2002 amendment that doubled the assets threshold that triggers a merger pre-notification requirement, the Ministry’s resources were stretched – and misallocated – by the need to review about 10,000 notifications in 2003. About 100 transactions were rejected, and many more were approved with unusual conditions that may themselves be a reflection of Russia’s economic history. The conditions mentioned in the contribution are requirements that the merged firm either (a) inform MAP concerning its production and sales levels, with justifications for changes in those levels, or (b) inform MAP in advance concerning any plan to change its production and sales policies.

8. Jamaica⁷ begins its contribution by referring to the special problems faced by “small developing economies,” which it describes as limited resources and pressing social problems. Interestingly, both this description and the note itself focus on problems associated with the developing aspect of its economy rather than with its small size. There is no discussion, for example, of specific problems relating to the difficulty of firms being able to achieve economies of scale. The economic factors given most emphasis concern the history of protectionism and state control, which apparently contribute to continuing protectionist tendencies and to an unwillingness of consumers to shop around. The contribution emphasizes the serious resources issues that face the competition authority, but it regards deficient legislation as its biggest obstacle. Jamaica’s initial competition law created a commission structure similar to that used in many other countries and its Supreme Court struck down the system as contrary to natural justice because the Commission acted as investigator and adjudicator.

9. Like Jamaica, South Africa⁸ notes past policies of protectionism, but South Africa’s new law and institutions had significant public support because they were created as part of a broad-based commitment to reform on a variety of fronts. Its contribution focuses on the competition institutions’ need to operate in a manner that would earn the respect of a skeptical business community and injecting a measure of realism into the expectations of the public. It has pursued these goals with some success by maximising transparency and accessibility. Also, whereas some new competition authorities countries find that their attempts to implement an enforcement programme are frustrated by judges who lack understanding and perhaps sympathy with competition law concepts, South Africa’s independent Tribunal has both expertise and a useful stake in the competition system while at the same time contributing to the perception and reality for fairness and due process.

10. Romania’s⁹ contribution starts with the basic proposition that the source of the main challenge is the attitude of resistance that exists among those who expect to lose from economic and administrative change. The contribution divides the challenges into two categories – those relating to the external environment and those relating to internal, intra-organisational matters. External challenges relate, for example, to the need to create relationships with other public authorities, including the Parliament, and to

amend the Competition Law and the Law on State Aid. Internal challenges relate to the shortage of financial and human resources, as well as the lack of information for both research and cases.

11. The report by Kenya¹⁰ touches upon a variety of legal, economic, and cultural obstacles. For example, Kenya's Tribunal has not been very busy, apparently because the court system is seen as slow and uncertain. When complaints are made, they are often settled through some sort of agreement among the parties. Such settlements can be efficient ways to end illegal conduct, but they may sometimes resolve matters in ways that serve the interests of the parties rather than those of the public. Also, Kenya's shortage of investment capital sometimes means that firms ordered to divest assets may not be able to find buyers. The report also notes that some members of Kenya's Parliament thought that the law should be applied to curtail the economic predominance of a certain group of Kenyans in relation to another group that was deemed to be indigenous. This appears to be an example of what scholars cited in the Secretariat note as "the phenomenon of the market-dominant minority." (Indonesia¹¹ is another country in which some proponents of competition law apparently thought that it should be to reduce the power of a minority, not merely to end market abuses. It would be interesting to know more about what pressures competition authorities in this situation have faced, and how they have dealt with them).

12. Tunisia's¹² contribution focuses mostly on legal problems its "Conseil de la Concurrence" has faced. Due to Tunisia's economic conditions and desire to take into account various socio-economic considerations, the law originally exempted products and services "de première nécessité" and in sectors where price competition was limited due to monopoly or other reasons. The Conseil has sought to reduce concern about the potential conflict between competition law and other public goals by stressing that competition is not an end in itself, but a means of promoting consumer welfare. The Conseil has also dealt in a creative way with various gaps and ambiguities in the law, for example by finding the law applicable to public entities when they engage in economic activity, promoting knowledge about the law, and expanding its ability to protect the public interest even though it lacks the authority to bring competition cases on its own.

13. Brazil's¹³ lengthy contribution addresses a multitude of topics, including scarce resources and an inefficient institutional structure. With respect to anti-cartel enforcement, the note refers to the competition authority's inability to impose criminal sanctions and to a national tradition of tolerating cartels. These are common problems, and the contribution's stress on the importance of international co-operation is a consensus position, but its statement that cartels are usually international could use some clarification. The contribution also mentions the results of a recent meeting at which mostly private-sector participants identified the three requirements for increased Brazilian competitiveness as strengthening the legal system as a whole, simplifying bureaucratic rules and procedures, and improving infrastructure. In a section devoted to balancing public policy goals for economic development, the contribution explains that for a two-year period the competition authority sent the Secretary of Labour an estimate of the number of jobs threatened by each merger, and over time it has been shown that mergers have increased employment. It also discloses an apparent concern over the "denationalisation" that occurs when a foreign enterprise obtains a majority interest in a domestic enterprise. While it is clearly correct that foreign investment can in some circumstances be anticompetitive, it is unclear how Brazil's competition authority regards denationalisation in and of itself.

14. The report by China¹⁴ discusses a number of interrelated obstacles. It begins by noting that despite recent liberalisation, there is a tendency for the state to intervene too much in markets. This is a common problem, but compared to some other transition countries, China seems to regard itself as powerless to deal with this situation. It may be true that competition authorities in China will remain relatively powerless to halt anticompetitive state intervention, because the report later points out that all officials and agencies must accept guidance from higher authority. On the other hand, Russia and some other transition countries have given their competition agencies specific authority to prevent Ministries and

other government bodies from taking certain types of anticompetitive action, and that experience might be useful to China. Moreover, it is noteworthy that of the two state interventions described in China's report, it appears that the first – a reorganisation of the petroleum sector by the State Council – would be exempt from challenge under all or most competition laws, whereas the second – a price fixing arrangement facilitated by a subsequently invalidated government warning against charging less than average industry cost – would be illegal under most competition systems. China also refers to the problems it has with anticompetitive action by regional and local governments – conduct that is currently banned by the Unfair Competition Law but remains largely unchecked because the only remedy is to make a report to the administrative department that supervises the offending entity or official. Various other countries apply real sanctions to offending officials or local/regional government entities, and it could be interesting to discuss whether and to what extent their experience could be useful to China.

15. Pakistan's¹⁵ contribution exemplifies several of the points made in previous GFC meetings concerning the application of competition principles in developing countries. For example, it mentions the tendency of government policies to seek immediate benefits – a tendency that can reflect either short-sightedness or a real need to alleviate human suffering. It also discusses how even after privatisation, state regulation of markets can distort competition, and it notes in particular a tendency to undervalue currencies, thereby facilitating exports but reducing the domestic competition that greater imports could produce. The contribution also offers an interesting insight into the resource problems that face most new competition authorities, noting that the weakness resulting from under-funding makes it difficult to demonstrate the kind of beneficial impact that would demonstrate the value of competition.

16. The contribution of Albania's¹⁶ Competition Department addresses obstacles in each of the four categories identified in the Secretariat's Background Note. The lack of a competition culture is described as the most fundamental obstacle, manifested in deficient legislation among other things. In addition, the contribution notes "small economy" problems, the presence of a substantial informal sector, and slow adaptation by some institutions to the principles of competition. The Department had little or no staff for many years, but although this precluded implementation of a law enforcement programme, the Department has proved itself a useful competition advocate. As those who attended the second GFC meeting may recall, in 2001 the 2-person Competition Department staff was able to defeat a Ministry proposal to reduce competition in the banking sector by persuading the Central Bank to oppose the proposal. A new competition law went into effect on 1 December 2003, and work is underway to make competition policy a more prominent aspect of Albania's approach to economic issues.

NOTES

1. Background note by the Secretariat, CCNM/GF/COMP(2003)7.
2. Contribution from China, CCNM/GF/COMP/WD(2004)16.
3. Contribution from Indonesia, CCNM/GF/COMP/WD(2004)22.
4. Contribution from Mexico, CCNM/GF/COMP/WD(2004)24.
5. Contribution from the Russian Federation, CCNM/GF/COMP/WD(2004)12.
6. Contribution from Russian Federation (cf. note 5).
7. Contribution from Jamaica, CCNM/GF/COMP/WD(2004)9.
8. Contribution from South Africa, CCNM/GF/COMP/WD(2004)10.
9. Contribution from Romania, CCNM/GF/COMP/WD(2004)6.
10. Contribution from Kenya, CCNM/GF/COMP/WD(2004)8.
11. Contribution from Indonesia (cf. note 3).
12. Contribution de la Tunisie, CCNM/GF/COMP/WD(2004)15.
13. Contribution from Brazil (CADE), CCNM/GF/COMP/WD(2004)4.
14. Contribution from China (cf. note 2).
15. Contribution from Pakistan, CCNM/GF/COMP/WD(2004)17.
16. Contribution from Albania, CCNM/GF/COMP/WD(2004)20.

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Albania

-- Session II --

This contribution is submitted by Albania under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION¹

1. Overview on competition policy and competition law in general

1. An effective competitive policy is an indispensable element for the efficient activity of the market economy and in the nowadays framework of markets globalisation and deregulation, the importance of that policy is becoming ever-growing.

2. The main objective of the competition policy is to keep and encourage competition, in order to promote efficient usage of the resources protecting the freedom of economic activity of different participants in the market. Improvement of the entry access and opening of the markets through deregulation, privatisation, tariff reduction, or quotas licences removal has been particularly considered as important objectives in the administration of the competition policy. This means that the competition authority can have influence on supporting solutions determined by the market, through active participation in the development of public policies and by giving comments and intervening in regulation procedures.

3. As far as competition law is concerned, it is usually a law with a general action: it is applicable on all sectors of economic activity, with exception of the cases where it has been foreseen differently. In this context, there are very complex relationships between competition policy and other economic policies, such as commercial policies, including tariffs, quotas, subsidies, antidumping actions, internal regulations, export restrictions, industrial policies, of regional development, industrial property, privatisation, scientific and technologic development, investments and taxes-relationships which are reflected in the respective legislation. This factor has a direct influence on which level the objectives of competition law can be achieved, without being constrained of restricting or contradicting objectives of other public policies.

2. Challenges and obstacles

4. In our view point, the absence of competition culture in Albania constitutes the root cause of impediments to competition. After the approval of the law no. 8044 (7 December 1995) "On Competition", the competition structure has been established within the Ministry of Economic Co-operation and Trade. But from year 1995 to 2001, there has been no consistency in maintaining this structure in charge of enforcing the competition law.

5. The very specific weaknesses of this competition structure include:

1. lack of an appropriate legal framework;
2. lack of an independent institution;
3. lack of sufficient and qualified staff;
4. lack of financial resources in conducting surveys for market data collection.

6. In particular, in regard to the lack of appropriate legal framework: the law no. 8044 (7 December 1995) "On Competition" didn't provide adequate powers in investigating and imposing sanctions. According to this law, an investigation could be opened by the Competition Department only on the basis of a formal complain. There was no specific provision in the law where Competition Department

could open a case under its own initiative. Also, it was not empowered to enter into premises during an investigative procedure, could not seize documents to be accepted as evidence for the case, could not compel witnesses to testify or to require the production of documents or written responses to questions, or could not impose sanctions either for the timely and complete provision of documents. Finally, there were very insignificant fines for antitrust infringements.

7. Regarding the legal framework, we have to add also the non application of the competition law to some important economic activities. The articles on prohibition of horizontal and vertical agreements, or on price fixing of the law no. 8044 (7 December 1995) “*On Competition*”, did not apply to companies in public services or to some specific sectors of the economy, such as agriculture or forestry.

8. As a small country in transition, one of the main challenges for the competition authority is also related to the small size of the population. There are few major businesses and thus the explicit collusion is easier to hide and the tacit collusion is easier to occur. Furthermore, the links between political and business classes may complicate the situation.

9. Having regard to the continuous changes of the Albanian Competition Structure reflected also by a very limited staff members, the challenge related to small GDP is also identified. A small country as Albania can only afford competition authority of a small size.

10. According to statistics, the informal sector in Albania represents about 30% of the economy. There is a concern that this figure is higher, and as such, its repercussions in competition enforcement are worthier to be considered. Despite some positive effects, the informal sectors have in transitional or emerging economies, such as reducing unemployment, in these informal markets a set of anticompetitive practices can be verified, such as refusal to deal. Also, Competition Department had to face limited access to the information on these markets. Furthermore, the informal sector has manifested its negative impact also on the formal sector. Several unfair competition-related complaints, due to the activities in the informal sector, have been submitted to the Competition Department.

11. Another challenge for the competition structure has also been to develop other institutions awareness and adaptation with the competition rules. After the first law on competition has been adopted, time has been needed for all institutions to be aware of and to comply with the competition rules. These government or non-government based institutions sometimes have taken actions that undermined competition, in particular as regard to regulatory, procurement, strategic sectors and privatisation policies. There has not been a legally-based co-operation amongst regulatory entities and the Competition Department, and there have been several cases where the state-owned companies have been privileged as compared to the private ones in the procurement procedures.

12. It is worthy to put emphasis on the links between privatization and liberalization of important economic sectors from one side, and the establishment of regulatory entities and competition authorities on the other side. From our experience it is very important that market openness be accompanied with a complete regulatory reform, including an adequate legal framework and strong institutions to implement it. If the process of privatisation, from small to the large scale, takes place before these institutions have been set up, the results of an intended efficient economic reform would be far from those expected.

3. Responses to challenges and obstacles

13. The law no. 8044 (7 December 1995) “*On Competition*” has constituted the very first step in dealing with issues concerning monopolies, dominant position or unfair competition, even though not in thorough way.

14. However, the application of this law, as mentioned before, has encountered lots of problems in resolving the cases of the existing transformed economic situation. In particular, the privatisation and liberalisation of strategic sectors has made indispensable compiling the anti-trust law approximated with the European one. Also, some of the provisions of this law, as those dealing with condemning the dominant position *per se*, rather than the abuse of dominant position, did not comply with the European competition legislation.

15. So, considering problematic issues raised by this law and to better respond to the new needs and developments in the Albanian economy, a new antitrust law has been compiled by the Competition Department, with the assistance of GTZ, being harmonised with “*acquis communautaire*”. The new law no. 9121 (28 July 2003) “*On the Protection of Competition*” has been enacted by the Parliament of Albania and has entered into force by 1st December 2003.

16. As in all European competition legislation, the pillars of this law are agreements, abuses of dominant position and concentrations. It stipulates the establishment of an independent competition authority, compound of the competition commission, as a decision-taking body being elected by the Parliament and the Secretariat as an investigative body. The competition authority decisions are only appealed to the First Instance Court of Tirana District. It has foreseen also all due procedures to effectively investigate upon the cases, fines categorised according to serious or not serious infringements, leniency-related provisions, and also specific provisions on co-operation between competition authority and other public institutions.

17. In this way the lack of appropriate legal framework has been successfully addressed with this new law. It still needs to be accompanied with proper regulations, which for the time being, have been drafted and will be enacted soon by the Competition Commission, to be elected by the Parliament.

18. With the intention that the new law can be adapted easily by all institutions, the new law purposely has been discussed with about 60 different institutions, directly or indirectly related with the competition issues. The law, in its discussion phase, has been sent for comments to all align ministries, regulatory entities, Business Consultative Council, legal bureaus, research institutions and so on. In this way, these structures will get more easily adapted with the new competition rules and will be co-responsible for their effective application.

19. Being committed to fulfil successfully its mission, with due persistence, the Competition Department has had an active attitude also on decisions and different administrative practices, which influence the normal functioning of the market. The Competition Department has given its comments for liberalisation reforms or for the privatisation of undertakings in strategic sectors of the Albanian economy, which could be accompanied with non-competitive effects, such as in the case of privatisation of Savings Bank, Albtelecom, INSIG; etc, aiming at giving proposals for alternative solutions for opening to competition even these markets.

20. In conclusion, in order for the competition policies to have their own place, it is necessary that effective actions of Competition Authority be combined with an effective implementation of the law by courts and a progressive conscientiousness of the competition legal framework. Only in this way, we can prohibit cartels agreements and concerted practices, the abuses of dominant position and monopolists’ practices or we can have an influence in minimising actions of different structures in supporting, by public funds and on non-transparent basis, undertakings or particular sectors of economy.

21. Organisation of roundtables, workshops, and also continuous information of media on conceptual problems, as well as discussions of concrete cases will be effective instruments, through which the Competition Authority should fulfil this objective.

NOTE

1. This report has been prepared by the Competition Department and does not necessarily express the views of the Albanian Government.



**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

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Forum mondial de l'OCDE sur la concurrence

**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT ECONOMIQUE EN
PROMOUVANT LA CONCURRENCE**

Contribution de l'Algérie

-- Session II --

Cette contribution est soumise par l'Algérie au titre de la Session II du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

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LEGISLATION ET POLITIQUE DE LA CONCURRENCE EN ALGERIE

Introduction

1. Les premières règles de la concurrence ont été contenues dans la loi relative aux prix de 1989. Pour la première fois, des notions nouvelles d'ententes et d'abus de position dominante entraînent dans le jargon juridique à la faveur des réformes économiques dont l'objectif était de faire basculer l'économie algérienne, jusqu'alors totalement centralisée et administrée, dans l'économie de marché et de la libre entreprise.

2. La loi de 1989 dont le souci majeur était d'organiser la libéralisation progressive des prix des produits et services a été abrogée par l'ordonnance de 1995 qui consacrait entièrement les règles et mécanismes de la concurrence comme instrument de conduite de l'économie.

3. L'aspect le plus important de l'ordonnance porte sur la création d'une autorité de la concurrence chargée de faire respecter les règles de la concurrence et la transparence du marché. Depuis cette date, l'administration est déchargée du rôle d'arbitre de la compétition économique et son pouvoir de sanction a été transféré au Conseil de la concurrence.

4. Face aux résultats tout a fait modestes obtenus depuis 1995, la législation sur la concurrence a fait l'objet d'une nouvelle ordonnance entrée en vigueur depuis juillet 2003.

1. Contexte général

5. La mise en œuvre de la politique de concurrence a été accompagnée d'une modification profonde des caractéristiques de l'économie algérienne et en particulier :

- la libéralisation quasi totale des prix, à l'exception de quelques produits et services essentiels, et la suppression du contrôle des prix par l'administration, qui a permis aux entreprises de se réapproprier un instrument puissant d'allocation des ressources ;
- l'effet immédiat de cette libéralisation s'est traduit par une hausse générale et soutenue des prix à des niveaux faisant grimper le taux d'inflation jusqu'à 30 % de 1994 à 1997. A cette période, la concurrence par les prix ne pouvait pas encore jouer ;
- l'ouverture du marché algérien et la libéralisation du commerce extérieur ainsi que la suppression de toute barrière administrative aux importations autre que le tarif douanier ont provoqué une forte concurrence des produits importés par rapport aux produits locaux. Là aussi, la concurrence a plus joué sur le terrain de la qualité et de la disponibilité des produits que sur celui des prix ;
- le désengagement de l'Etat de la sphère économique au profit des agents économiques totalement réhabilités dans la décision d'allocation optimale des ressources sans implication de l'administration autre que celle prévoyant les mécanismes d'encouragement de l'investissement. Il a été mis en place un vaste programme de privatisation des actifs détenus par l'Etat et ouvert aux entreprises nationales et étrangères sans discrimination.

Cependant, en dehors des secteurs des hydrocarbures et des télécommunications, ce programme ne donne pas encore les résultats escomptés ;

- au cours des dernières années, les lois réglementant les secteurs en réseaux ont été promulguées et les activités de ces secteurs ont été ouvertes à la concurrence. Il s'agit en l'occurrence des services de transport aérien et maritime, des télécommunications, de la distribution de l'électricité et du gaz, des services bancaires et financiers, dont l'objectif est de favoriser la concurrence dans les secteurs pour lesquels des autorités de régulation ont été créées.

6. Si l'application de la politique de la concurrence a eu un effet positif sur la libération des énergies et l'émergence de l'esprit d'initiative et de la libre entreprise, en revanche, le comportement des entreprises n'a pas eu l'effet souhaité dans la propulsion et l'entretien du processus concurrentiel. Ainsi, on a observé la constitution de monopoles privés en remplacement des anciens monopoles d'Etat, surtout dans le secteur des importations. Le recours abusif aux contrats d'achat exclusifs et au partage des marchés et des zones d'approvisionnement indique clairement le choix des entreprises en faveur de comportements éloignés de la compétition économique et des incertitudes et contraintes imposées par la transparence du marché.

2 Bilan concurrentiel et obstacles à la concurrence

7. Quel est le bilan concurrentiel de la période 1995-2002 et quel est l'impact de la mise en œuvre du droit de la concurrence dans l'ancrage de l'économie de marché et les enseignements que nous pouvons tirer de ce bilan ?

8. L'analyse statistique de l'activité du Conseil de la concurrence fait ressortir un faible contentieux concurrentiel de 1995 à 2002. Sur un nombre total de 80 saisines tout au long de cette période, seulement une dizaine concerne des pratiques restrictives de concurrence. Le reste représente des saisines au titre de pratiques déloyales pour lesquelles le Conseil de la concurrence n'a aucune compétence, dès lors qu'elles relèvent des juridictions ordinaires, ou des saisines pour avis sur les prix des produits ou services ne relevant pas du régime de la liberté des prix.

9. Des enseignements utiles peuvent être tirés du constat relatif à la faiblesse du nombre de saisines sur des pratiques restrictives de concurrence. Ils représentent autant d'obstacles à un exercice effectif des principes de la concurrence.

10. Le premier d'entre eux renvoie à la prise de conscience sur le chemin à parcourir pour faire émerger une véritable culture de la concurrence, non seulement au niveau des entreprises mais comme « mode de vie » y compris dans le comportement du consommateur. Le contexte juridique et institutionnel est profondément modifié par l'adoption de l'économie de marché comme mode de gouvernance et indique clairement le chemin à suivre tant par les individus que par les entreprises. Cependant, nous percevons encore la persistance d'un état d'esprit de dépendance à l'égard de l'Etat et des comportements d'hésitation et d'incertitude.

11. Le paradoxe est que la compétition économique semble toujours jouer entre le secteur privé et le secteur public et non à l'intérieur d'un même secteur. Le bilan révèle que l'ensemble des pratiques dénoncées relève de la pratique d'abus de position dominante par des entreprises du secteur public. Cela peut paraître paradoxal lorsqu'on observe aujourd'hui que 80% de la valeur ajoutée du pays provient du secteur privé.

12. Le deuxième aspect est relatif au poids du marché informel dans l'économie nationale. Depuis la libéralisation du commerce extérieur de l'Algérie, le marché informel qui occupait jusqu'alors un rôle

économique marginal de subsistance pour une fraction négligeable de la population, s'est développé dans une proportion inquiétante estimée aujourd'hui à 30% de la valeur du PIB. De plus, ce marché qui a investi des sphères de plus en plus larges de la production et du commerce, exerce, au moyen de pratiques déloyales, une pression qui empêchent le libre jeu de la concurrence et compromettent la transparence du marché.

13. Il en résulte pour les autorités de concurrence une réelle difficulté de cerner le degré de fonctionnement concurrentiel des marchés et le comportement des entreprises dans chaque marché. L'opacité des relations commerciales induites par le marché informel perturbe le marché et annule le rôle régulateur et arbitral des autorités de concurrence.

14. Le troisième aspect concerne l'activité même du Conseil de la concurrence. En dépit des pouvoirs que lui confère la loi, le Conseil n'a pas trouvé le chemin pour devenir l'autorité incontestable sur le marché. Les rares sanctions prononcées par le Conseil n'ont pas eu l'effet d'accélérateur de concurrence souhaité ni l'effet structurant du marché en général. Le consommateur, quant à lui, attend toujours de bénéficier des bienfaits de la concurrence.

3. Objectifs et contenu de la loi

15. Le droit de la concurrence en Algérie est très largement inspiré de la législation et de la doctrine européennes de la concurrence. L'ensemble des principes et règles universels en matière de pratiques restrictives de concurrence est repris dans la législation algérienne.

16. Ainsi, la loi interdit les ententes faussant les règles de la concurrence, les abus de position dominante et la pratique de prix abusivement bas. Les concentrations économiques qui sont de nature à acquérir ou à renforcer une position de force sur le marché sont soumises à autorisation du Conseil de la concurrence.

17. La loi s'applique à toutes les activités de production de distribution ou de services. Les personnes publiques n'échappent pas à l'application de la loi. La loi n'est pas applicable si les accords et pratiques favorisent le progrès technique ou économique.

18. Toutes les pratiques indiquées ci-dessus ne sont pas punissables *per se* mais uniquement lorsqu'elles ont pour effet ou pour objet de restreindre ou d'empêcher le bon fonctionnement du marché. Le marché constitue le point d'attaque à partir duquel sont appréhendées les pratiques pour lesquelles le Conseil de la concurrence est saisi.

19. Le Conseil de la concurrence est investi par la loi d'une compétence générale de protection de la concurrence et de sanction des pratiques restrictives de concurrence. Il a également des attributions consultatives sur la réglementation qui peut avoir un effet sur la concurrence. Son avis peut être requis à la demande de différentes institutions et associations professionnelles ou de consommateurs.

20. Il peut prononcer des injonctions et des amendes pouvant aller jusqu'à 7% du chiffre d'affaires des entreprises convaincues de pratiques restrictives. Il peut également autoriser ou rejeter les projets de concentrations d'entreprises ou les autoriser sous réserve de réunir certaines conditions favorables à la concurrence ou aux consommateurs.

4. Les perspectives d'avenir

21. En raison de la faiblesse des résultats obtenus dans l'application des règles de la concurrence depuis 1995 et dans l'objectif de corriger les insuffisances mises en évidence, un nouveau texte vient d'être adopté. Ce texte s'appuie sur deux éléments importants.

22. Le premier d'entre eux porte sur l'exigence fondamentale de familiariser et d'ancrer dans les entreprises les comportements et les réflexes d'une économie de marché. L'effort de développement d'une culture de la concurrence est de première importance pour une application efficace de la loi. Dans cette optique, le nouveau texte atténue, de manière substantielle, le côté répressif du dispositif antérieur. Il prévoit des mécanismes de clémence à l'effet d'éviter aux entreprises une sanction financière lourde lorsqu'elles s'engagent à ne plus commettre de pratiques restrictives de concurrence.

23. D'autre part, les entreprises dont les comportements sont susceptibles d'entrer dans le champ d'application des pratiques restrictives peuvent demander au Conseil de la concurrence le bénéfice d'une attestation négative. L'attestation négative permet aux entreprises de vérifier si le Conseil de la concurrence autorise ou rejette les comportements projetés.

24. Le deuxième élément concerne le renforcement des capacités du Conseil de la concurrence et de ses attributions.

25. En plus d'une compétence générale d'avis et de décision de nature à assurer une plus grande transparence du marché dans le domaine des pratiques restrictives de concurrence, la loi accorde au Conseil des compétences d'autorité sur les concentrations économiques dès lors qu'elles ont pour effet de restreindre ou d'empêcher la concurrence. Les auteurs de la concentration doivent recueillir l'autorisation du Conseil.

26. Dans son domaine de compétence, le Conseil de la concurrence est appelé à développer la coopération et la coordination avec les autorités de régulation chargées des services publics en réseau. Le texte organise la coopération et la prise de décision en commun entre le Conseil de la concurrence et les autorités de régulation, à chaque fois qu'une pratique restrictive de concurrence affecte un secteur relevant d'une autorité de régulation.

27. Le Conseil de la concurrence est également appelé à développer des relations de coopération et de collaboration avec les autorités étrangères de la concurrence dans le domaine de l'échange d'informations et dans le domaine des enquêtes liées aux pratiques restrictives de concurrence qui affectent les relations commerciales entre pays.



**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

Contribution from Algeria

-- Session II --

This contribution is submitted by Algeria under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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COMPETITION LAW AND POLICY IN ALGERIA

Introduction

1. Algeria's first regulations on competition were contained in its 1989 Act on Prices. For the first time, new concepts of cartels and abuse of dominant position entered the legal language through economic reforms which were aimed at transforming the Algerian economy, until that point a centrally controlled economy, into a free-market economy.
2. The 1989 Act, the main aim of which was to provide for the gradual liberalisation of prices of products and services, was repealed by a 1995 Ordinance which set forth in detail the regulations and mechanisms for competition as an economic policy instrument.
3. The most important feature of the Ordinance was the creation of a competition authority responsible for enforcing compliance with competition regulations and market transparency. Since 1995, the Government's role as final arbiter in matters of economic competition and its powers to impose sanctions have been devolved to the Competition Council.
4. Given the rather uninspiring results achieved since 1995, a new Ordinance was added to the legislation on competition and came into force in July 2003.

1. General background

5. The implementation of competition policy was accompanied by a radical change in the characteristics of the Algerian economy, as outlined below.
 - Virtually total price liberalisation, with the exception of a few essential services and products, and the removal of government price controls, which enabled firms to take back possession of a powerful means of resource allocation.
 - The immediate effect of price liberalisation was a widespread, steady increase in prices to levels that pushed the inflation rate up to 30 per cent during the period 1994 to 1997. At this stage, price competition was still unable to come into play.
 - The opening up of the Algerian market and the liberalisation of external trade as well as the elimination of all administrative barriers to imports other than customs duties, stimulated stiff competition between imported products and local ones. Here again, competition was more in the area of quality and product availability than in the area of prices.
 - The Government's withdrawal from the economic sphere, which it transferred to economic agents who were again fully authorised to decide on the optimal allocation of resources without reference to the administration other than as provided under investment promotion mechanisms. A vast privatisation programme of state-held assets was begun and was open equally to domestic and foreign firms on a non-discriminatory basis. However, apart from the hydrocarbons and telecommunications sectors, this programme is not yet delivering the results that had been expected.

- In the course of the past few years, legislation regulating the network sectors has been introduced and the activities of these sectors have been opened up to competition. They include air and maritime transport, telecommunications, electricity and gas distribution, and banking and financial services, the goal being to promote competition in these sectors for which regulatory authorities have been set up.

6. Although the implementation of competition policy had a positive impact on freeing up energy and promoting initiative and free enterprise, the behaviour of firms, on the other hand, did not have the desired effect in stimulating and maintaining the competitive process. Thus, private monopolies replaced the old government monopolies, especially in the imports sector. The abusive use of exclusive purchase contracts and share-outs of the market and procurement zones clearly shows that the behaviour of firms was far from removed from economic competition and the uncertainties and constraints imposed by market transparency.

2. State of competition and barriers to it

7. How can we assess competition during the period 1995 to 2002. What impact has the implementation of competition law had on securing a market economy and what lessons can we learn from our assessment?

8. Statistical analysis of the activity of the Competition Council shows that the number of claims related to competition was low during the period 1995 to 2002. Of a total of 80 referrals to the Council over the entire period, only around 10 related to restrictive practices. The others related to unfair practice - - which is not within the jurisdiction of the Council but of the ordinary courts -- or were referrals for an opinion on the prices of products or services that did not come under the free pricing regulations.

9. Useful lessons can be gleaned from the fact that there were so few referrals on restrictive practices, as such practices are barriers to the effective implementation of the principles of competition.

10. The first of these relates to the gradual realisation of the long way still to go until a genuine culture of competition emerges, not only among firms but as a 'way of life', that includes consumer behaviour, too. The legal and institutional context has been radically changed by the adoption of a market economy as a method of governance and clearly shows the path to be followed both by private individuals and firms. However, we still note the persistence of a mentality of dependence on the State along with hesitant behaviour and uncertainty.

11. Paradoxically, economic competition still seems to pertain between the private sector and the public sector, but not within either sector itself. The results show that all of the practices that gave rise to complaints related to the abuse of dominant position by public sector firms. This may seem paradoxical when, today, 80 per cent of the country's added-value is generated by the private sector.

12. The second relates to the share of the informal market in the domestic economy. Since the liberalisation of Algeria's external trade, the informal market, which had played only a marginal, subsistence-level economic role for a negligible percentage of the population has now acquired alarming proportions -- an estimated 30 per cent of GDP. Furthermore, this market which has taken over larger and larger spheres of production and trade, uses unfair practices to exert pressure that prevents the free play of competition and compromises the transparency of the market.

13. The result is that the competition authorities are having real difficulty in trying to establish the extent to which competition is really operating in the market and how enterprises are behaving in each

market. The opaque commercial relations that result from the informal market disrupt the market and undermine the regulatory and decision-making role of the competition authorities.

14. The third point relates to the very activities of the Competition Council. In spite of the powers that the law confers on it, the Council has not managed to find a way to become the unquestioned authority on the market. The rare sanctions it imposes have not provided the desired impetus for competition and have not had a structuring effect on the market in general. Consumers, for their part, are still waiting to see the benefits of competition.

3. Aims and substance of the law

15. Competition law in Algeria is very largely inspired by European legislation and jurisprudence. The entire body of universal guidelines and regulations on restrictive practices is embodied in Algerian legislation.

16. For instance, the law prohibits cartels that distort competition, the abuse of dominant position and the practice of predatory pricing. Economic concentrations likely to give or increase a strong position on the market are subject to the authorisation of the Competition Council.

17. The law applies to all production, distribution and service activities. The law also applies to public entities. The law is not applicable where agreements and practices promote technical or economic progress.

18. None of the practices referred to above is punishable *per se* but only if the effect or purpose of such a practice is to restrict or prevent the proper functioning of the market. The market is the yardstick against which such practices reported to the Competition Council are assessed.

19. The law has vested the Competition Council with general powers to protect competition and to sanction practices that restrict competition. Part of the Council's role is also to advise on regulations that may have an impact on competition. Its opinion may be sought at the request of various institutions and professional or consumer associations.

20. It can issue injunctions and impose fines of up to 7 per cent of the turnover of firms found guilty of restrictive practices. It can also authorise or refuse authorisation for plans to concentrate firms, or authorise them provided that they meet certain conditions to the advantage of competition or consumers.

4. Future outlook

21. In view of the poor results obtained in implementing competition rules since 1995 and for the purposes of correcting the shortcomings that had become apparent, a new Act has just been passed. It is based on two major planks.

22. The first of these concerns the basic need to familiarise and instil firms with the behaviours and reflexes of the market economy. The effort to develop a culture of competition is primordial for the effective application of the law. With this in mind, the new text reduces, quite substantially, the repressive side of the former legislation. It provides for leniency mechanisms so that firms can avoid heavy financial penalties if they undertake never again to have recourse to practices that restrict competition.

23. Furthermore, firms whose behaviour may fall within the scope of restrictive practices can request the Competition Council to issue them a clearance certificate. This certificate enables firms to check whether the Competition Council authorises or rejects the planned behaviour.

24. The second plank is to build up the capacities and functions of the Competition Council.

25. As well as general advisory and decision-making powers to ensure greater market transparency as regards restrictive practices, the Act grants the Council authority over economic consolidation where the effect would be to restrict or prevent competition. Those wishing to effect concentration are required to seek authorisation from the Council.

26. Within its own jurisdiction, the Competition Council is responsible for developing co-operation and co-ordination with the regulatory authorities in charge of public network services. The Act covers co-operation and joint decision-making by the Competition Council and the regulatory authorities whenever a restrictive practice affects a sector that is under the supervision of a regulatory authority.

27. The Competition Council is also called upon to develop co-operative and collaborative relationships with foreign competition authorities with respect to the free exchange of information and inquiries relating to restrictive practices that affect trade relations between countries.

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

CONTRIBUTION FROM BRAZIL (CADE)

-- Session II --

This contribution is submitted by Brazil (CADE) under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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English text only

CHALLENGES/OBSTACLES FACED BY THE BRAZILIAN COMPETITION DEFENCE SYSTEM FOR THE ATTAINMENT OF GREATER ECONOMIC DEVELOPMENT THROUGH COMPETITION

I. Introduction

1. This paper seeks to provide a general overview of national competition policy promotion and the related challenges faced by Brazil in furthering economic development. A brief description in section II of how competition is situated within the government's overall economic development goals will be complemented in a later section by noting the need for balancing of other public policy goals. Also included is a discussion of institutional obstacles, detailing challenges both within the competition defence system as well as within the general macroeconomic and political policy framework. Progress on implementing effective competition promotion is highlighted in a final section addressing challenges and progress in fostering creation of a "competition culture".

II. Competition promotion and the pluriannual plan 2004-2007

2. The Pluriannual Plan 2004-2007 (PPA)¹ attributes a key role for competition promotion in the government's policy planning goals as evidenced by the objective: "To promote the increase of supply and the price reduction of prices of goods and services for popular consumption". It more specifically targets competition challenges in: "Another set of actions must be directed to the search for the reduction of the damages caused by the elevated degree of market oligopolization, which makes difficult the transference of productivity gains to prices and wages, to protect the citizen from abusive practices, in addition to developing responsible behaviours on the part of companies, in the production of adequate goods and services for the necessities of citizens." Amongst the measures proscribed for the achieving of this objective is the specific reference "to fight, effectively, the formation of cartels and monopolistic practices".

3. Furthermore, Mega objective II of the Pluriannual Plan seeks: "Growth with the generation of jobs and income, environmentally sustainable, and with reduction of social inequalities", this to be obtained by ... "coordinating productive investment and increasing of productivity with the objective of reducing external vulnerability". Undoubtedly competition promotion has a fundamental role to play in stimulating the propensity for investment and innovation in the economy. One of the key guidelines of the PPA for the Ministry of Justice (to which CADE is linked) is to improve the control of enterprise concentrations, with emphasis on the speed and transparency in these actions.

4. One of the perverse aspects of the history of Brazilian economic development has been the resultant inequality in several dimensions - social, sectorial and regional. Within the long-term development strategy of the new government, competition policy is an important element for the attainment of the social inclusion objective, given that competition reduces prices, creates chances for the realization of new investments and, consequently, the generation of greater social welfare.

¹ Objective included in "Mega Objective I: Social Inclusion and the Reduction of Inequalities" of the Pluriannual Plan. The Pluriannual Plan is available on the website: < <http://www.planobrasil.gov.br> >.

III. Institutional obstacles/ challenges

5. Although in the government's pluriannual plan competition policy has an important role for Brazil's long-term development strategy, the full consolidation of the role of CADE in guarantying the right to competition and contributing to the country's further economic development and efficiency depends on the overcoming of various fundamental challenges. There are both internal obstacles in the sense of structural and resource problems as well as legal and coordination issues within the Brazilian Competition Defence System, and also larger issues related to the overall macroeconomic and political environment within which competition policy must operate.

Resource and Structural Constraints

6. A critical limitation to competition promotion in Brazil is the low number of employees involved in promoting competition, particularly in relation to the number of cases considered. Especially serious is the lack of adequate personnel in the administrative tribunal for competition (CADE). For example, in 2001, excluding the administrative area, CADE had 52 employees for a total of 711 cases (including 584 mergers). To make a comparison, the two North American competition agencies, FTC² and DOJ³, had, in the same period, 1,010 and 400 employees, respectively, for 275 cases. Despite the Brazilian Competition Defence System being made up of three entities (in addition to CADE, the agencies SEAE -Secretariat for Economic Accompaniment of the Finance Ministry, and SDE – Secretariat for Economic Law of the Justice Ministry), it is clear that the competition promotion structure requires a larger number of employees, considering the number of cases which are handled.

7. Another problem is the inexistence of a specific career track for public servants involved in competition work, despite the fact that the current competition law has envisaged such a defined career since its passage in 1994⁴. The lack of a career perspective discourages the permanence of employees staying over a long period of time. Additionally, there are quite low wages and the further reduced availability of commissioned government positions, both factors unfortunately a result of the severe budgetary restrictions that the Brazilian public sector faces. Optimal efficiency is further hampered by the frequent turnover at the highest levels of CADE, where the President, Commissioners and Attorney General remain for a very brief period in the agency, due to their short mandates (two years which can be politically renewed for another two years).

8. An interim solution for staff limitations, which was recently promulgated, is the edition of the Provisional Order n° 136, of 17.11.2003, which authorizes CADE to contract new technicians for a determined time (up to two years). Although this measure is important, there is still the necessity to create a permanent career staff, with wages reasonably compatible with those supplied by the private sector, a vital condition for the retention of employees inside of the government in order to enhance the technical expertise in competition in the public sector.

9. A major obstacle to effective competition policy promotion as an effective instrument of economic development is its historically low budgetary appropriation. In illustration, the box below presents the evolution of the available budget for the CADE since 1998, a period of intensive growth in competition promotion activity.

² Federal Trade Commission website: < <http://www.ftc.gov> >

³ United States Department of Justice website: < <http://www.us.doj.gov> >.

⁴ Section 81 of the Law n° 8.884/94: “ Executive, in the stated period of sixty days, will send to Congress, a bill regarding on the permanent staff of the new Autonomous Authority, as well as on the nature and the remuneration of the positions of President, Council members and Attorney General of CADE”.

Box - Budgetary Resources - Evolution (in millions of Reais - R\$)⁵

1998	1999	2000	2001	2002	2003
2.8	9.8	7.4	12.8	15.7'	14.7

10. Fortunately, the promulgation of Law n° 9.781/99 was an important advance in the last few years, given that it establishes the procedural and services fees allotted to CADE. These fees are related to the costs of the rendering of public services relevant to the analysis of mergers and consultations. The result has been a significant growth in the level of budgetary resources available to CADE since 1999.

11. Nevertheless, considering the strategic importance of CADE's role in judging competition cases, its budget continues to be very low, particularly if compared with the budgets and caseload levels of other countries. For example, in 2002, the U.S. Federal Trade Commission (FTC) had at its disposal a budget of around US\$ 160 million dollars or 32 times the CADE budget (more or less 5 million dollars). And finally, there are serious lacks in all three agencies of the Brazilian competition system in their informatics structures, furniture and equipment allotments, physical space, and also archives of materials and resources available for research, all which can compromise the productivity of employees in the work of the competition defence system.

Legal and Procedural Aspects

12. The advent of Law n° 8.884 of June 11, 1994 was essential for increasing the effectiveness of antitrust policy in Brazil, which had been essentially inoperative since the initial law promulgated in 1962. With the new law, CADE was transformed into an independent authority, linked to the Ministry of Justice, thus acquiring functional autonomy and extended authority, including being able to veto or create restrictions to the operations of merger and acquisitions considered as anticompetitive.

13. However, with the passage of Law n° 8.884/94 the number of cases entering the Brazilian Competition Defence System also grew exponentially. In response to the unprecedented increase of workload, the three agencies comprising the Competition System have undertaken several actions in the few last years in order to speed the analysis process. Significant contributions to this effort included CADE's resolution n° 15/98 which created various instruments simplifying the procedures for merger analysis and also new guidelines for the two investigative agencies to coordinate joint analysis of mergers (SEAE/SDE n° 50/2001). In February of 2003, SEAE and SDE also created a new "fast-track" procedure for processing merger cases in 15 days, which significantly reduces delays.

14. Until 1999, the average time for merger analysis required by the combined efforts of the three competition entities was almost two years. Following the various efforts mentioned above, the average time diminished by more than 50%. Nonetheless, the existing delays in the total processing time still, in many cases, extend beyond the 120 days defined in the law.

⁵ Average exchange rate (reais per 1USD\$) according to Boletim do Banco Central do Brasil, September 2003

1998 - 1.16 2001 - 2.35
 1999 - 1.82 2002 - 3.16
 2000 - 1.83 2003 - 3.18 (January-July)

15. In Brazil, the notifications of merger and acquisition operations follow two criteria: participation of the company (or group of companies) in 20% or more of the relevant market or the fact of any of the participants having registered an annual gross in the last balance sheet corresponding to an equivalent of R\$ 400 million (about US\$ 133 million). The invoicing criterion offers a measure of objective nature, in contrast of the criterion of market-share. However, this value is considered excessively low. The local jurisprudence has therefore defined that the invoicing is of the entire group, thus in effect, its worldwide operations. Consequently, the agency spends too much time with many operations involving companies with little participation in local sales and which do not involve effects of a horizontal or vertical nature.

16. One of the most common criticisms of the system refers to the low number of condemned cartels. The major problem in Brazil - which is also common in other jurisdictions - resides in the difficulty of getting material evidences of the behaviour. Law n° 8.884/94, when promulgated, it did not provide sufficient powers to the competition authorities for the adequate realization of efficient investigations. The result is that, between 1994 and 2000, CADE has condemned only one case of a cartel, involving the metallurgical sector. In 2000, the Provisional Order n° 2055/00, later, transformed into Law n° 10.149/00, supplied greater powers of investigations to SEAE and SDE, and additionally instituted the possibility of granting leniency, a measure inspired by the success of the leniency program of United States. Nevertheless, between 2000 and 2003, only two cartels, involving gas stations, have been condemned.

17. Clearly, major efficiency in the combat of cartels depends, beyond the development of legal instruments for investigation and for imposing sanctions (by both the competition agencies and the Public Prosecutor's Office), on the creation of effective mechanisms for cooperation among competition authorities of different jurisdictions, since cartels are usually international in nature, and therefore demand a greater amount of human and budgetary resources. It is commonly held that the most efficient way to discourage cartels is through the application of severe criminal punishments, but although the constitution of a cartel is a crime in Brazil, CADE can only apply penalties of administrative nature. A complicating factor is the tradition of tolerating cartels - which has historical and cultural origins - and which is an obstacle to the success of the Brazilian program of leniency, as the company does not have an incentive to leave the cartel and to collaborate with the authority, preferring a legal battle which, without defections among cartel members, rarely produces definitive evidence for condemnations.

18. However, it should be noted that the competition authorities have signed technical cooperation agreements with various regulatory agencies and also the public prosecutor's office, which have assisted in investigations of cartels currently being undertaken. More effective participation in international fora on competition policy have also allowed the exchanges of experiences and information and contributed to the pursuit of some cases, such as in the cartel of vitamins and lysine, which has already been judged in the United States.

19. Perhaps ultimately, a key weakness of the system is also related to the relative newness of jurisprudence in this area. Although competition law has existed since 1962, the demand for antitrust activity only effectively began to appear from 1994 onwards with the passage of law 8.884. The low level of existing jurisprudence to date does not currently allow the consistent formularization of objective criteria in the application of diverse situations. The problem is evident from observing the lack of an appropriate method of calculations the level of fines applied by CADE. However, institutions must inevitably pass through learning processes - which implies some trial and error - and the accumulated experience and knowledge gained are slowly improving the system. Undoubtedly, additional resources and incentives for individuals to continue deepening their learning and experience are essential.

Coordination and Cooperation within the Competition Defence System

20. The traditional division of the Brazilian merger analysis process among the three entities of the competition system has unfortunately generated a certain duplicity in tasks and often unnecessary delays. A further complication has often arisen in more complex cases as the agencies do not necessarily agree on the analysis of the operation's effects and sometimes tend to proceed individually on different tracks, which further delays the investigations. However, as mentioned earlier, there is increasingly a joint effort to harmonize and coordinate the agencies procedures.

21. Another area of coordination needed is between the competition authorities and the regulatory agencies. While the decentralization and privatization of the economy has led to a less monolithic decision-making process, the advent of a dispersed regulatory framework necessitates the rethinking of the structure and relationship of competition and regulation in the economy. Often lack of clearly defined boundaries or overlapping jurisdictions of regulatory agencies can impede governmental and economic efficiency and may create the risk of regulatory capture by dominant players in industrial groups. There is undoubtedly a need for reconciling varying objectives and procedures as well as formulation of agreements on technical cooperation and integrated training on regulatory techniques and competition policy.

22. One of the key challenges is to establish an appropriate balance between regulation policies, in particular, regarding situations where the *ex-ante* regulation is necessary, and when the *ex-post* regulation (of competition) would be socially more efficient. When they concern essential services (telecommunications, electric energy, etc), the two types of regulation apparently seem to generate conflicts of objectives, in particular: 1) competition versus universalisation of the services, and 2) verticalisation versus deverticalisation⁶.

23. In the few last years, there has been increasing approximation between regulation and competition authorities. CADE has undertaken dialogue seeking closer coordination with regulatory agencies (mainly telecommunications, electric energy and oil and derivatives) with the intent of creating rules, procedures and criteria, which aim to accelerate control and antitrust promotion. Beyond the institutional cooperation, new legal instruments have been formulated, making possible better coordination between the two areas. The inclusion of competition promotion and forms of cooperation with competition authorities with the objective of the verification of anticompetitive behaviours and of economic concentrations effects is present to a greater or lesser degree in the legislation of the regulating agencies, in particular, of ANATEL⁷ and ANEEL⁸. Such measures have begun to help clarify responsibilities and contributed to reducing conflicting objectives.

24. Coordination with other areas, especially with the banking sector, have still created impasses and this lack of clarity concerning the authority of the sectorial regulation in relation to competition promotion, has not infrequently led to problems of jurisdictional conflict. There is currently a new bill under discussion in the Brazilian Congress on the subject. According to the details of the bill, the competition authorities would gain clear jurisdiction to act in the banking sector, while respecting the macroeconomic objectives of the Central Banking regarding overall liquidity and stability in the economy.

⁶ The verticalisation generates productive efficiencies and often coordination, which is desirable of the point of view of the direct regulation, but also generates market power, which is undesirable from the competition point of view.

⁷ National Agency of Telecommunication.

⁸ National Agency of Electric Energy.

25. There is also a need to have better interaction with the Federal Police and the Independent Federal and State Prosecutors Office, particularly in order to help SDE and SEAE get proofs for administrative and potential criminal condemnation of cartels.

Macroeconomic and Political Considerations

26. Undoubtedly the functioning of the Brazilian Competition Defence System is also impacted by political, legal, and financial considerations relevant to the functioning of a stable macroeconomic environment. At a recent meeting on Competitiveness held in Sao Paulo⁹, the three major elements identified by mostly private sector participants as being essential to Brazilian competitiveness were the strengthening of the legal system as a whole, the simplifying of bureaucratic rules and procedures, and overcoming critical lacks in infrastructure. However, there was also extensive discussion of the need for education, promotion and dissemination of R&D, and the lacking of a culture for internationalization, increasingly vital in a globalized economy.

27. According to the Brazil Cost Project¹⁰ being undertaken by the National Confederation of Industry¹¹, policy reforms are urgently needed in the area of taxes, the cost of capital, better training of the labour force and more responsive health services, considerations critical to optimizing economic efficiency, and which have clear impacts on the objectives being sought by competition policy. The project reflected very serious concerns about the immediacy of tackling the high level of interest rates, which is seen as a major competitive disadvantage.

28. Nonetheless, it can be said that overall, the renewed and strengthened commitment of the new government to maintaining price stability and fiscal discipline in its first year of office has significantly calmed nervous international financial markets and preserved necessary conditions for economic development and growth of competitiveness

IV. Balancing public policy goals for economic development

29. As posited in the previous section, the optimal functioning of competition promotion relies on a conjuncture of public policies in other areas. Currently, the new Brazilian government is reviewing a number of key reforms, which will impact on competitiveness, including fiscal, pension and labour legislation. There is no doubt that Brazil in recent years has instituted privatization and deregulation policies as part of a major structural change from its previous experience with an active and largely protectionist industrial policy (which included State-owned monopolistic practices), to a clearly market open economy.

30. Nonetheless, there continue to exist grounds for supporting the promotion of some type of industrial policy as part of an economic development strategy. It should be recognized that competition

⁹ See the report "Brazil Competitiveness Meeting 2003: Brazil Agenda Monitor" prepared by World Economic Forum. Available online at:

< <http://www.weforum.org/site/homepublic.nsf/Content/Brazil+Competitiveness+Meeting+2003> >.

¹⁰ See "Brazil Cost: How to Develop and Promote a Competitiveness Agenda", José Augusto C. Fernandes.

Available online at: < <http://www.cipe.org/publications/fs/articles/article9c8a.htm> >.

¹¹ The Brazilian Confederation of Industries has mounted an aggressive campaign geared toward the business community as well as Congress to raise awareness about the relationship of burdensome costs, regulations, and bureaucracy to the economic competitiveness of the national industry.

policy does not necessarily have to be in conflict with industrial policy¹² as the application of competition enforcement measures often deal with short-term and mainly static efficiency concerns while industrial policy tries to find mechanisms to contribute to the improvement of dynamic efficiencies in the long run in selected sectors. Therefore competition policies may often co-exist and compliment industrial policies in order to optimize overall dynamic efficiencies for long run economic development goals.

31. The challenges of balancing public policy goals and reconciling various legal imperatives is apparent within the working of the Brazilian Competition Defence System as illustrated by a brief example from CADE's experience with enforcement of competition law. In the Brazilian Constitution, revised in 1988, one of the principle aspects defining the economic order is full employment. At the same time, Paragraph 1 of Section 58 of the Brazilian competition law underlines that performance commitments assumed by the interested parts submitting acts for review pursuant to article 54¹³ have to take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

32. In order to minimize unemployment effects from mergers, in 1997, CADE and the Secretary of Labour signed an agreement in which one of the objectives was the exchange of information about the numbers of workers that could be fired during the implementation of the mergers. Subsequently, during approximately 2 years CADE sent to the Secretary of Labour the estimated number of workers that could lose their jobs after each merger presented to the competition agency. The main objective was to provide advance warning to the Secretary in order to allow for timely creation of measures to avoid the negative social effects of the mergers, through training and reallocation of workers.

33. During this period, the CADE Commissioners approved some mergers with the condition that the companies implement reallocation programs for the workers fired because of the merger. An important example was the privatization of the state owned company Ultrafértil¹⁴, which had much market power in the fertilizers sector. CADE stated as a condition for the approval of the acquisition that the company should implement an extensive program of retraining and reallocation of workers. Reports submitted by the company after 5 years showed that the number of workers of the company had increased to a much larger number than the level immediately following the privatization. Although the effects of these types of measures on employment have not been fully evaluated as of yet, some analysis has been made on the basis of the available data and information collected.

34. Usually, the immediate impact of a merger has been a reduction in the number of employees, especially those in the administrative areas, particularly employees in divisions which were duplicated after merger. However, in several cases, the effects of mergers in the long run have tended to produce an increase of the number of workers. In the cases in which CADE imposed a "compromisso de desempenho" (consent decree) including a retraining or a reallocation program, most of the data sent by the companies to CADE seems to indicate that the number of employees had increased at the end of the period (usually 5 years).

35. In general, these results are to be expected due to a reason associated with the proper objective of competition policy. If a merger does not increase market power, it has to be approved without any other

¹² Alves, Roberto Teixeira. "Considerations of Potential Conflicts between Industrial Policy and Competition Policy".

¹³ Section 54 of Law n° 8.884 of June 11, 1994: "Any act that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review".

¹⁴ Merger Act n° 02/94 Ultrafértil/Fosfértil.

consideration. However, if it increases market power, it has to be reviewed by the competition agency, which seeks to prevent that increase of market power, or to verify if the efficiencies produced are sufficient to compensate the harm to competition. In either case, the agency review tends to promote a better environment for competitors in order to realize optimal strategies of growth in a free market. A company involved in a merger with large effects on market concentration, usually has an extensive program aimed at expanding and consolidating its position. The implementation of this program not only tends to create new opportunities for investments within the company in the long run, but also stimulates other competitors to innovate and increase the rivalry. Thus on balance the overall effects of a merger reviewed by the competition agency has tended to provide a better environment for the investment programs of companies, with beneficial impacts on the general level of employment.

36. A recent report by the International Competition Network (ICN) agrees that competition policy often accommodates other public policy goals and reconciles varying objectives: “The fact that a sector or a firm is partly subsidized or is protected for industrial policy reasons does not mean that competition law cannot, as a matter of principle, be applicable to this sector or this firm. Competition law can be applied to practices which go beyond what is allowed by public authorities unless all aspects of business strategies in the sector are regulated, which is rare”¹⁵

37. Some studies have shown that unfettered competition may not be appropriate for developing countries as too much competition may lead to price wars and ruinous rivalry, which can be harmful for future investments. Instead, as Singh¹⁶ suggests, what may be required by developing economies is ...“ an optimal degree of competition which would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the microeconomic level, but not so much competition that it would deter the propensity to invest.”

38. However, the basic point, which must be reiterated, is that the promotion of competition in itself stimulates and is fundamental to economic development. This affirmation is less obvious than it seems because many people confuse the defence of competition policy with the defence of one determined paradigm of market structure, known as perfect competition. Perfect competition supposes that markets are atomized, which discourages economic development, although from a static point of view, the social welfare is maximized. Schumpeter¹⁷ reminds us that markets are dynamic, in a permanent process of “creative destruction”, and the social profits derivative of this process are underestimated by only focusing a static analysis.

39. What is clear is that the promotion of competition must continue to contribute to innovation and growth in order to be compatible with the reality of the globalized economy. From the perspective of furthering economic development, competition promotion cannot defend the fragmentation of markets, but rather focus on the stimulation of rivalry between companies, only possible in oligopolized markets, which assumes strong competition authorities, capable of effectively inhibiting predatory behaviours, cartel formations and other strategies of monopolization.

40. Although this paper will not enter into discussions of the relationship of international trade policy to competition policy, this subject and the following section dealing with links between foreign investments and competition policy are also clearly important aspects of balancing public policies. Perhaps an essential perspective to keep in mind when seeking to balance and complement competition promotion

¹⁵ ICN report: *Capacity building and technical assistance: Building credible competition authorities in developing and transition economies.*

¹⁶ Singh, Ajit: *Competition Policy, Development and Developing Countries.*

¹⁷ Schumpeter, Joseph: *Capitalism, Socialism and Democracy.*

with other public policy goals, as UNCTAD has summarized in a recent note¹⁸, is that the competitiveness of developing country firms to integrate into the world economy depends to a large extent on seeking to acquire the necessary capabilities to apply available technologies and innovate, as well as on the domestic availability of competitive supporting infrastructure (including human and financial resources and services). “This implies policy measures beyond trade liberalization to address (i) supply capacities at the systemic level (ii) concentration of market power, which is both an outcome of global competition and a threat to global competition; and (iii) the consequent need for the strengthened application of competition principles”.

V. Defense of competition and foreign investments

41. The 1990’s were characterized by a rapid process of liberalization, especially in the developing countries. The tendency of governments in facilitating flows of foreign direct investments reflected significant changes in their regulatory structures, in the opening of industries previously closed for foreign investments and in the rapid growth of bilateral investments treaties. In Latin America, the economic reforms implemented by great number of countries since the mid 80s meant the radical change of the predominant type of traditional development strategy in the region - the model of import substitution - for a process of insertion into the global economy.

42. The relationship between competition promotion and foreign direct investment (FDI) can be examined from two points of view:

a) *Competition promotion and the access of FDI*

43. According to a study done by Oliveira¹⁹, in a sample of 66 countries, there does not exist a simple causal effect relationship between the degree of competition promotion and the volume of FDI. Each country studied was classified in one determined level of institutional development (seven levels is all), considering determined institutional elements such as, for example, the existence or not of competition law and of a specific competition agency, the control of mergers and acquisitions or cooperation agreements between regulation agencies and the competition authority. The sample of countries was selected in accordance with the availability of data related to direct investment in the World Investment Report of 1998. The statistical studies demonstrated the slight positive correlation between the two variables. But it is important to reiterate that the study demonstrates the lack of a negative correlation between competition promotion and direct investment, which militates against the argument that very severe competition legislation would inhibit the entrance of investments.

44. However, it is necessary to understand that the determinants of FDI are multiple and complex. Nonetheless, competition policy is one of the necessary components for what is called “regulatory credibility”. The capacity to attract private investments and to generate efficiency depends on the capacity of the country to restrict arbitrary administrative action²⁰, a condition that exceeds competition policy and more broadly depends on the institutional environment of the country that receives investments.

¹⁸ Note UNCTAD secretariat. *The Relationship between Competition, Competitiveness and Development*.

¹⁹ Oliveira, Gesner: *Defesa da Concorrência e Investimento Direto: Evidências Empíricas e Hipóteses Conceituais*.

²⁰ Levy, Brian and Spiller, Pablo T: *A Framework for Resolving the Regulatory Problem*.

b) FDI raises economic concentration and abusive behaviours

45. The conclusion of lack of conflict between competition promotion policy and the entry of FDI is important, therefore, if on the one hand such investments can represent new entries and greater contestability of the domestic markets, on the other hand, can imply economic concentration and anticompetitive practices, which generate negative effects on the economic development.

46. Most of the FDI entering in Brazil occurs through mergers and acquisitions. In accordance with a study analyzing mergers evaluated by CADE²¹ on the impacts of FDI on market structures, 32% of the acts evaluated in 2000 had resulted in denationalization²². Although quantitatively the denationalization cases represent a minority share of the mergers submitted to CADE, these are the acts which present greatest impact on market structures. Cases that usually do not involve foreign participation are approved without restrictions. The Brazilian case supports the position of UNCTAD²³ regarding the impact of the entrance of the FDI, which under certain conditions, can generate anticompetitive practices and negatively affect the markets' performance.

47. The process of worldwide economic liberalization, which resulted in a greater flow of FDI in the last years, was also accompanied, in accordance with data provided by UNCTAD, by a wave of dissemination of competition laws around the world. Even in Brazil, which already has competition legislation and a competition agency since 1962, the last 10 years have been characterized by increasing activism and commitment to continual improvements in the legislation. In the past few years, there has been an increasing understanding in Brazil that public policy cannot neglect competition considerations without risking, reduction in investments over the long terms.

48. However, there continues to be a lively debate over the future course of balancing competition and foreign investment considerations. A current project on Investment for Development²⁴ at the University of Campinas suggests that efforts for attracting foreign investors should be very selective and that it is important to insure that foreign investors and locally owned companies should have access to the same type of incentives. Furthermore, the study calls for preferential treatment for investment projects involving the creation of employment and qualification of workers as well as to those involving long run commitments in order to establish linkages with the national system of innovation, including public and private research institutions.

VI. Challenges and progress in the fostering of a brazilian competition culture

49. The building of a "culture of competition" is clearly both a long-term and multi-faceted task. However, it is also undoubtedly the best way to garner both popular/societal support as well as increasing budgetary allocations needed to both promote and defend competition policy in the economy. Although it often seems a frustrating process to change attitudes and inculcate new values, there is much evidence to support the clearly growing recognition of the importance of competition in the Brazilian society. Not only has the Brazilian Competition Defence System become increasingly activist, better known and respected through proactive advocacy efforts, but the emergence of competition discussion in the media, Congress and business as well as consumer groups testifies to successful diffusion of the proposition that competition offers a positive contribution to the social welfare.

²¹ Oliveira, Gesner; Goldbaum, Sérgio e Santana, José Ricardo. *Desnacionalização e Defesa da Concorrência no Brasil: Implicações do Comportamento do Investimento Estrangeiro Direto*.

²² Situation which a foreign enterprise acquires a majority participation in a national enterprise.

²³ UNCTAD. World Investment Report 2000.

²⁴ University of Campinas (UNICAMP). "Investment for Development Project Process Report: Brazil".

50. Increasingly high profile actions by competition authorities, including the intensive media coverage given to the conduct of the first “dawn raid” in relation to a suspected cartel recently led by officials from the SDE, as well as recently proposed new initiative regarding a type of “ISO anti-trust” to recognize companies in compliance with the national competition legislation, have become useful tools in the campaign to alert citizens to the importance of competition defence and the efforts being made on the part of the competition authorities to combat abuses which often ultimately harm the consumer in their anti-competitive effects. Also the recently launched internet site of the Brazilian Competition Defence System not only promotes greater transparency and public access to information, but allows the public to accompany the progress of recent cases and provides information on how to better interact with competition authorities.

51. Less obvious perhaps but just as crucial is the steady work being undertaken to educate the media and the public through articles, speeches, interviews, congressional contacts and formal testimony, as well as networking through conferences and meetings and the building of coalitions to support the work of the competition authorities. At the international level, there continues to be increasing participation on the part of competition authorities in presentation of papers and networking at multinational forums such as the OECD (where Brazil was an initial non-member to formally support the Recommendation on Cartels), UNCTAD, and the ICN, as well as active leadership at FTAA, Mercosul and other regional fora, highlighting the importance of competition promotion. Brazilian competition officials are also working closely with these organizations and others to promote conferences and various training opportunities to share experiences, technical expertise and advances in international competition promotion.

52. On the academic front, particularly with an eye to training future competition advocates to deal with evolving issues in the field, CADE has annually sponsored a well-publicized conference and prize for the best paper on competition written by a university student. CADE also has an active internship program to acquaint university students with the functioning of the administrative tribunal which enforces competition laws, while also giving practical experience for both future specialists in the field as well as broader knowledge of competition issues to students in other areas. Within the educational curricula of Brazilian universities, Economic Law has gradually been incorporated into the legal studies at Law Schools in the last three decades, and as competition and regulation issues]] have become a new area of specialization within Economics Departments of universities, the field is growing in popular appeal and recognition as being fundamental for the nurturing of modern economies.

53. Although it remains difficult to measure or quantify results of competition promotion activities, there is no doubt that advocacy efforts and the diffusion of information about the importance of competition to the public is critical in building a constituency of support which helps the government to defend competition policy from powerful business as well as political special interests which might seek to undermine it. In addition to a growing perception of improvement in competition enforcement through notices such as the much reported improvement of the system in the latest Global Competition Review ranking²⁵, perhaps the greatest testament to its advancement and success is the multiplying number of fora, in business, consumer and political circles which are increasingly addressing the importance of competition defence and promotion in Brazil today.

²⁵ Global Competition Review. Volume 6, issue 6, June 2003.
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**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
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Forum mondial de l'OCDE sur la concurrence

**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROÎTRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

CONTRIBUTION DU CAMEROUN

-- Session II --

Cette contribution est soumise par le Cameroun au titre de la Session II du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

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Texte français seulement

1. Le droit et la politique de la concurrence ont pratiquement été imposés aux pays en voie de développement, de façon assez brusque et sans autre alternative, par les réalités économiques mondiales actuelles.

2. En effet, la marche vers un cadre multilatéral de la concurrence est inéluctable. Si les pays d'Afrique n'imposent pas la prise en compte de leur droit à des traitements spéciaux leur permettant de renforcer leur potentiel industriel encore embryonnaire, d'asseoir une politique fiable de protection de leurs consommateurs et de leur espace écologique, ils se retrouveront de plus en plus marginalisés.

3. Les défis à relever et les obstacles à surmonter pour accroître le développement économique par le biais du renforcement du droit et de la politique de la concurrence sont très nombreux et peuvent être comparés « aux travaux d'Hercule ». Leur analyse s'articulera ainsi qu'il suit :

1. Les défis à relever :

- Elaboration et mise en application de la concurrence;
- Renforcement des capacités de tous les acteurs impliqués et vulgarisation de la culture de la concurrence dans l'opinion publique.

2. Les obstacles à affronter :

- Interaction entre politique industrielle et politique commerciale ;
- Gouvernance concurrentielle du marché ;
- Droit de la concurrence nationale et pratiques transnationales anticoncurrentielles ;
- Pratiques transnationales anticoncurrentielles et commerce international ;
- Coopération internationale en matière de concurrence ;
- Pratiques internationales anticoncurrentielles et réalités des pays en voie de développement.

1. Défis à relever par les Autorités de la concurrence

1.1 Elaboration et mise en application de la concurrence

4. A l'unanimité, les experts conviennent qu'une approche universelle n'existe pas dans le domaine de l'élaboration et de la mise en application de la concurrence dans un pays. Il faut simplement que les décisions prises en la matière soient appliquées, car sinon, les bonnes lois et les personnes les plus qualifiées ne serviront à rien. En outre, il faudrait tenir compte :

- (i) du cadre juridique du pays et des tutelles possibles de l'organe de concurrence, des associations et de la politique de défense des droits des consommateurs ;
- (ii) de l'intérêt public, des coutumes, du niveau de développement, des dérogations, exemptions et exceptions nécessaires aux objectifs et cadres du milieu ;
- (iii) de la compétitivité des entreprises, de leur rôle et du niveau de bien être qu'elles apportent aux populations ;
- (iv) du rôle des pouvoirs publics qui doivent être associés à toutes les étapes d'élaboration et de mise en place de la politique et du droit de la concurrence.
- (v) du développement d'une culture de la concurrence.

5. Ainsi, la loi sur la concurrence devrait être élaborée et adoptée en une fois. Seule son application doit être graduelle et doit s'adapter aux réalités du moment avec pour objectif d'arriver à une efficacité significative. En adoptant une loi sur la concurrence, il faudrait modifier en conséquence toutes les lois contenant des éléments pouvant influencer sur son application. De toutes les façons, il est indispensable de créer une structure institutionnelle qui doit avoir :

- (i) une personnalité juridique autonome ;
- (ii) un budget suffisant pour les missions assignées ;
- (iii) un personnel qualifié et en nombre suffisant ;
- (iv) une loi appropriée.

1.2 Renforcement des capacités de tous les acteurs impliqués et vulgarisation de la culture de la concurrence dans l'opinion publique

6. Toute politique économique d'un pays devrait avoir pour objectif premier le bien être de ses populations, qu'ils soient consommateurs ou opérateurs économiques. Elle est en général en symbiose avec les tendances environnementales du moment ou avec les prévisions des événements futures.

7. Dans beaucoup de pays en voie de développement, la politique de la concurrence et son rôle dans l'économie ne sont pas encore bien perçus et assimilés. Elle n'est donc pas encore une priorité dans les programmes et options économiques.

8. Le rythme accéléré de la déréglementation des économies et de la libéralisation des prix n'a pas permis l'assimilation de la culture de concurrence, ce qui amène les opérateurs économiques à confondre la notion de libéralisation à celle d'anarchie.

9. La mise en place d'une politique de la concurrence, conjuguée aux pressions de la globalisation de l'économie mondiale, fait penser que les pouvoirs publics peuvent perdre leur souveraineté sur la maîtrise des mécanismes économiques de leur pays.

10. Les remarques précédentes ne militent pas pour la mise en œuvre rapide de politiques efficaces et efficientes de la concurrence dans des pays craignant la détérioration de leurs environnements écologiques et économiques.

11. C'est ainsi qu'au Cameroun, par exemple, la loi sur la concurrence, promulguée depuis le 14 juillet 1998, ne connaît pas encore une mise en œuvre réelle du fait de la non-signature du texte d'application organisant la Commission Nationale de la Concurrence, organe central et indispensable à la mise en place de ladite politique ; la loi relative au dumping et à la commercialisation des produits d'importation subventionnés, qui était censée assurer des mesures compensatoires portant sur la concurrence déloyale et les traitements spéciaux par une sorte de protection du tissu industriel national, connaît la même situation que la loi sur la concurrence qui d'ailleurs a été promulguée le même jour qu'elle ; la privatisation des monopoles d'état a amené la création de multiples agences de régulation des secteurs concernés, sous tutelles de certains ministères, dont les attributions se confondent à celle prévues pour la Commission Nationale de la Concurrence qui n'a jamais été mise en place.

12. Au-delà de tout cela, la politique de la concurrence reste un processus qui évolue malgré les blocages qui sont surtout d'ordre psychologique. Il est donc indispensable d'accompagner ce nouveau courant en :

- (i) organisant des séminaires d'information et de sensibilisation à l'intention des autorités politiques, de la société civile et des hauts fonctionnaires pour asseoir la culture de la concurrence ;
- (ii) renforçant les capacités des cadres de l'administration chargés de la concurrence ;
- (iii) appuyant les institutions chargées de la mise en œuvre de la politique de la concurrence ;
- (iv) mettant à la disposition du public, une documentation complète sur la concurrence.

2. Les obstacles à affronter par les autorités de la concurrence

2.1 Interaction entre politique industrielle et politique commerciale

13. Les débats sur l'interaction entre la politique de la concurrence et la politique industrielle tournent souvent sur la primauté entre la politique industrielle et la politique de la concurrence.

14. En se basant sur les exemples des pays développés (UE, USA, Canada) on a relevé que, bien que la politique de la concurrence ait existé depuis très longtemps dans ces pays, sa mise en œuvre est très récente, ce qui a permis de mener tout d'abord une politique industrielle qui a promu une croissance stable et favorisé un développement rapide. Ceci est conforté par l'histoire économique du Japon dont la croissance accélérée s'expliquerait par le fait que la politique industrielle ait primé pendant longtemps sur la politique de la concurrence.

15. Toutefois, en tenant compte de l'environnement économique mondial actuel, il est indispensable de développer en symbiose les deux politiques, à condition que la politique industrielle qui a plusieurs variantes, ne soit pas qu'interventionniste et que les protections qu'elle met en place soient limitées dans le temps.

2.2 Gouvernance concurrentielle du marché

16. L'importance croissante de la logique de marché tant au niveau national qu'international pose le problème de la gestion de la concurrence sur ces marchés.

17. En effet, il faut relever la complexité de la maîtrise des règles sur les marchés internationaux sur deux plans :

- (i) la juxtaposition d'ordres juridiques nationaux n'est pas de nature à assurer une réglementation effective des marchés internationaux ;
- (ii) l'existence d'acteurs opérant au plan transnational sur les marchés mondiaux est de nature à rendre inefficace le respect des règles au niveau des marchés nationaux.

2.3 Droit de la concurrence national et pratiques transnationales anticoncurrentielles

- (i) on observe un fossé de plus en plus large entre les contours géographiques des marchés économiquement pertinents et le champ de compétence des lois et autorités de la concurrence, limité territorialement ;

- (ii) d'autre part, les autorités nationales de concurrence ne peuvent utiliser leurs pouvoirs d'enquête sur des pratiques mises en œuvre à l'étranger mais affectant leurs marchés nationaux ;
- (iii) en conclusion, on peut affirmer que la globalisation économique entraîne inexorablement la perte de souveraineté opérationnelle pour les autorités nationales de la concurrence.

2.4 *Pratiques transnationales anticoncurrentielles et commerce international*

18. Ces pratiques peuvent :

- (i) empêcher la libéralisation du commerce par la constitution de cartels à l'importation ou internationaux, les restrictions verticales et les abus de position dominante ;
- (ii) confisquer les bénéfices du commerce international par le biais des cartels à l'exportation et des concentrations transnationales par exemple ;
- (iii) infliger des coûts importants aux demandeurs par la pratique des surprix qui sont stabilisés du fait de la longue durée de vie des cartels qui peut atteindre jusqu'à 40 ans ;
- (iv) affecter de très nombreux secteurs et donc gangrener une économie entière.

2.5 *Pratiques internationales anticoncurrentielles et réalités des pays en voie de développement*

- (i) elles ont souvent pour objectifs ou conséquence d'empêcher l'émergence d'industries locales, d'imposer les conditions commerciales en contrariant en conséquence les politiques gouvernementales ;
- (ii) elles font le plus de dommages dans les pays en voie de développement, qui n'ont pas de droit de la concurrence ou qui ne l'appliquent pas, et dont les économies, dépendant fortement des importations(ou exportations), ont des secteurs industriels fragiles.

19. De toutes les façons, les pays développés ont le devoir de promouvoir une politique de concurrence qui sera favorable au développement des pays les plus pauvres s'ils veulent arrêter les flux d'immigrants clandestins qui sont prêt à tout pour fuir la misère et profiter de leurs richesses.

20. De leur côté, les pays les moins avancés et en voie de développement sont condamnés à admettre que les réformes économiques n'ont de sens dans le contexte mondial actuel que dans un environnement national concurrentiel qui favoriserait :

- (i) l'assainissement de l'économie par la disparition des entreprises non efficaces ;
- (ii) l'amélioration de la compétitivité ;
- (iii) le développement de l'initiative privé des nationaux ;
- (iv) le bien être du consommateur à travers une meilleure offre des biens et services.

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Cameroon

-- Session II --

This contribution is submitted by Cameroon under Session II of the Global Forum on Competition to be held on 12-13 February 2004.

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English - Or. English

Introduction

1. Competition law and competition policy have been virtually forced on the developing countries, fairly brusquely and with no alternative, by today's global economic realities.

1. Indeed, the move to a multilateral framework for competition is inescapable. If the countries of Africa fail to demand their right to special treatment they need to bolster their still-embryonic industrial potential and establish reliable policies for consumer and environmental protection, they will find themselves increasingly left on the sidelines.

2. The challenges to be met and the obstacles to be overcome in achieving greater economic development through the promotion of competition law and policy are legion, and they could well be likened to the "labours of Hercules". These challenges and obstacles will be analysed as follows:

1. Challenges to be met:

- Laying the groundwork and implementing competition;
- Boosting the capabilities of all parties involved and attuning public opinion to a culture of competition.

2. Obstacles to be confronted:

- Interaction between industrial policy and trade policy;
- Competitive market governance;
- National competition law and anticompetitive transnational practices;
- Anticompetitive transnational practices and international trade;
- International co-operation in the realm of competition;
- Anticompetitive international practices and realities in the developing countries.

1. Challenges to be met by the competition authorities

1.1 Laying the groundwork and implementing competition

3. Experts unanimously agree that there is no universally applicable approach to preparing a country for and implementing competition. It must simply be ensured that the decisions taken are enforced, because if they are not, then even the right laws and the most highly qualified people will serve no purpose. Other factors that need to be taken into account include:

1. The country's legal framework, supervisory options for the competition body and consumer protection associations and policy;
2. The public interest, customs, the level of development, and the derogations, exemptions and exceptions needed to achieve objectives and accommodate local circumstances;
3. The competitiveness of businesses, their roles and the level of welfare they provide for the population;
4. The role of the public authorities, which must be included at all stages of the formulation and implementation of competition policy and law;
5. The development of a competition culture.

4. All of a country's basic competition legislation should be formulated and adopted at the same time. Only its implementation should be gradual, tailored to current realities with an objective of achieving

significant effectiveness. When competition legislation is adopted, all other laws containing elements that could affect its enforcement need to be amended accordingly. In any event, it is vital to create an institutional structure that has:

1. Autonomous legal personality;
2. A budget sufficient for assigned tasks;
3. An adequate number of qualified staff;
4. Appropriate supporting legislation.

1.2 Boosting the capabilities of all parties involved and attuning public opinion to a culture of competition

5. The prime objective of any country's economic policy should be to promote the welfare of its people, be they consumers or economic operators. That policy is generally in tune with prevalent environmental trends or forecasts of future events.

6. In many developing countries, competition policy and its role in the economy are not yet perceived clearly or on a wide scale. It is therefore not yet a priority in economic programmes and options.

7. The faster pace of economic deregulation and price liberalisation has impeded assimilation of a competition culture, prompting economic operators to confuse the notion of liberalisation with that of anarchy.

8. Implementation of a competition policy, combined with the pressures of globalisation of the world economy, would suggest that governments could lose sovereign control over their countries' economic mechanisms.

9. The above remarks do not militate for swift implementation of effective and efficient competition policies in countries that fear a deterioration of their ecological and economic environments.

10. In Cameroon, for example, the Competition Act, which has been on the books since 14 July 1998, has not yet been truly implemented, because the measure instituting the National Competition Commission—a central body vital to enforcement of competition policy—has not yet been signed. Legislation on dumping and the marketing of subsidised imports, which was supposed to ensure compensation for unfair competition and special treatment via a sort of protection for the national industrial fabric, is in the same position as the Competition Act, which happened to enter into force the very same day. The privatisation of State monopolies has led to the creation of multiple regulatory agencies for the sectors concerned, under the aegis of certain ministries whose powers overlap those to be taken on by the National Competition Commission, which has never been set up.

11. Apart from all this, competition policy is an evolving process, despite the blockages, which are mainly psychological. It is therefore indispensable to move in tune with the new trends by:

1. Holding information and awareness seminars for political authorities, civil society and senior officials, to lay a solid foundation for the competition culture;
2. Strengthening the capacities of competition agency officials;
3. Backing the institutions responsible for enforcing competition policy;
4. Making comprehensive documentation about competition available to the public.

2. Obstacles facing the competition authorities

2.1 *Interaction between industrial policy and trade policy*

12. Discussions of the interaction between competition policy and industrial policy often centre on primacy between the two policies.

13. Examples from developed countries (e.g., EU, USA, Canada) show that although competition policy has existed there for a very long time, its implementation has been very recent; as a result, the initial emphasis was on an industrial policy that promoted stable growth and fostered rapid development. This is further illustrated by the economic history of Japan, whose faster growth has been attributed to the fact that for a long time industrial policy took precedence over competition policy.

14. Nevertheless, given today's world economic environment, it is crucial to develop both policies symbiotically, provided that industrial policy, which has a number of variants, is not solely interventionist, and that the protections it puts in place are limited in time.

2.2 *Competitive market governance*

15. The growing importance of a market-driven approach, at both the national and international levels, poses the problem of how to manage competition in these markets.

16. Clearly, the complexity of the rules prevailing in international markets must be grasped on two levels:

1. The parallel operation of different national legal systems is not conducive to effective regulation of international markets.
2. The existence of operators dealing on a transnational level in world markets tends to render compliance with domestic-market rules ineffective.

2.3 *National competition law and anticompetitive transnational practices*

1. There is an ever wider gap between the geographic contours of economically relevant markets and the scope of application of laws and competition authorities, which is subject to territorial limits.
2. Moreover, national competition authorities cannot deploy their investigative powers in respect of practices that are undertaken abroad, but that affect domestic markets.
3. In conclusion, it can be affirmed that economic globalisation leads inevitably to a loss of operational sovereignty for national competition authorities.

2.4 *Anticompetitive transnational practices and international trade*

17. Such practices can:

1. Impede liberalisation of trade through the constitution of import or international cartels, vertical restrictions and abuses of dominant position;
2. Confiscate the benefits of international trade through export cartels and transnational concentration, for example;
3. Inflict substantial costs on buyers through the practice of overpricing, which becomes entrenched on account of the longevity of cartels, which can last as long as 40 years;
4. Affect a great many sectors and thus poison an entire economy.

2.5 *Anticompetitive international practices and the realities of developing countries*

1. In many cases, the purpose or effect of such practices is to impede the emergence of local industries and to impose terms of trade, thus thwarting government policies;
2. They inflict the most damage in developing countries that have no competition law, or that do not enforce it, and whose economies, which are heavily dependent on imports (or exports), have shaky industrial sectors.

18. In any event, the developed countries are obliged to promote competition policies conducive to the development of the poorest countries if they wish to stem flows of illegal immigrants prepared to do anything to flee destitution and share in their wealth.

19. For their part, the least advanced and developing countries have no choice in the current world context but to accept that economic reforms are meaningful only in a competitive national environment conducive to:

1. Economic consolidation, through the elimination of inefficient businesses;
2. Enhanced competitiveness;
3. Development of the private initiative of nationals;
4. Consumer welfare, through an improved supply of goods and services.

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from China

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

*By Mr. Xue Zheng Wang
(State Administration for Industry and Commerce – SAIC)*

1. The drafting of antitrust law of Peoples Republic of China has almost been finished and would soon be submitted to the State Council for reviewing before it goes to the legislature according to the legislative procedure in China. As I see it, big challenges to the enforcement of it would be expected if it becomes a law eventually, among which the following ones could be outstanding.

1. State intervening too much in markets

2. Antitrust law is supposed to be against private anticompetitive conduct and is not supposed to be applied to the markets that are controlled or regulated by government, as it is shown in economies in which an antitrust law has been introduced. Wherever government steps in, antitrust law would play little role in it, for the competition authority that is responsible to enforce antitrust law, as a part of the government, would barely be able to deny other government agencies' actions. Therefore the significance of antitrust law would be more identified in a free market economy than it was in a regulated or controlled economy.

3. China economy is regulated or controlled by government in many aspects although it has made a big jump toward free market economy in the past twenty years. By now, China economy is still called a government-guided-type one. That is to say, government remains powerful and active in various markets that should be free from intervening. Sometimes the government even gives direct orders to state-owned enterprises. For instances, the State Council restructured the petrol industry by combining state-owned oil enterprises into two groups of corporate in 1998. After the reshuffling, China National Petroleum Corporation (CNPC) monopolised the production of petrol in 12 provinces in northern China, as well as the downstream business like refining and retailing, while China Petroleum & Chemical Corporation (CPCC) 19 provinces in southern China. Lots of small-and-middle-sized private oil companies went out of the business because of the monopolisation of the two groups. In the same year, so-called "self-disciplined price" took place in industries like steel, chemical, farmer-using truck and building material. The price was actually done through the combining effort of large state-owned enterprises and trade unions and two government organisations which are identified as regulators of the industries above. The government organisations believed that destructive competition is carrying on in these industries and thus the government must step in.

4. Certainly the situation of market in China will be improved for the government is making great effort to keep itself from intervening on the market too much. However, it will have a long way to go. It would be naïve to expect that the government would withdraw completely and quickly from the areas that it used to occupy. Therefore, it would still be a big challenge for successful enforcement of the future's antitrust law in China.

2. The protection of local government for enterprises located in their jurisdiction

5. Local government in China inclines to block products that are competitive with the ones that are produced in its own jurisdiction from entering the market. This problem has been bothering China for a long time. The causes of it are various, among which, as I see it, Chinese tax system plays an important role because the revenue collected on products is shared to certain proportion by central government and local government. The more products sold by the local enterprises, the more benefit that received by local government.

6. China central government tried to solve the problem through various ways, including incorporating an article in China Countering Unfair Competition Law which was promulgated in 1993. The Law forbids local government and its agencies from blocking or set up obstacles against products that are not made by local enterprises. It entrusts the higher authority of the incumbent to correct any actions that run counter to the provision and give punishment to responsible officials.

7. The Law has not, however, been enforced effectively yet. The higher authority of the incumbent usually does not pay seriously attention to the violating actions, partly because that they have the same interest in it. It is hard for us to find a successful case that a higher authority performed actively to correct a violating action of a local government, say nothing of punishing responsible officials.

8. Therefore, considering the failure of Countering Unfair Competition Law, it is reasonable for us to expect that the actions of eliminating competition carried by local government would still be a big challenge to enforce antitrust law in the future. A competition authority would be hard to correct or punish the actions of local government.

3. Factors associated with human resources of the competition authority

9. From the experience of western countries, we learn that the competition authority must be neutral or non-political and professional so that the value of competition would be maintained or promoted. If the competition authority were influenced by politics too much, the goal of competition would be possible to be sacrificed to other values like employment or short-term economic booming. If the competition authority is not skilful enough to decide whether the business practices are really anticompetitive, the efficiency of the market could be hurt.

10. A totally neutral or independent competition authority is, however, hard to imagine in China because of the current political system. All officials or authorities, except the State Council, must accept the leadership or guidance from their higher authority, so does the competition authority. The higher authority of the competition authority would possibly put other values on top of competition value in some occasions. Therefore, when it has conflict with other values, the value of competition would possibly be given up. Thus the antitrust law would not be properly enforced sometimes.

11. Antitrust experts are also critical for a competition authority to properly enforce antitrust law for it has to do lots of balancing or economic analysis work when deciding a case. Therefore, the competition authority must have plenty of talents, both on economics and on laws. In China, however, these kinds of talents are not well provided. A few law schools in China just get started to offer antitrust course, but not an independent one. It is usually included in a general business law course. On the other hand, students who study economics usually do not have sound mathematical and statistics background. And what's more, economics students have rarely been hired in my agency since the organisation took place. Therefore we have lots of capacity building work to do for enforcing the antitrust law in the future, which would be another big challenge that we will face.

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION COMPETITION

Contribution from Indonesia

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION¹

By Didik Rachbini, Commissioner, KPPU, Indonesia

1. Before competition law (Liberalisation 1983-1999 for Greater Economic Development)

1.1 Trade Reform

- Trade deregulation was started in the beginning 1980's, by removing entry barrier from bureaucracy.
- Export orientation policy needs more effective support from bureaucracy, especially custom.
- In 1985: government privatised custom office & replaced by SGS (Switzerland).
- In 1985: system procedure in shipment was improved & handling system in harbour was simplified.
- This policy reduced inefficiency in export and import activities.
 - Tariff system was slowly harmonised too and reduced significantly to make more competition.
 - It was continuously done to get more positive effect of the market and more competition.
 - In 1987, import license was also improved by reducing bureaucratic procedure.
- Import quota was reduced significantly to get more participants and more competition in this business.
- Many import licenses had been given to monopolists, then deregulated by opening these activities for any investors.
- Trade reform further to medical industry and animal husbandry, by removing tariff and non-tariff barriers.

1.2 Reform on Investment

- In 1985: an economic policy package to simplify the application for FDI.
- Reform for promoting investment in bureaucracy and its regulatory system.

1. Outline of a presentation Powerpoint

- The objective of this reform was to support more inflow of investment and more foreign investors coming to Indonesia.
- The impact was to limit the document involved in the process & an increasing investment application to Indonesia from abroad.
- In 1985: the government opened more areas in investment activities, opened to foreign investors in retail and distribution system in Indonesia.
- The impact was increase in activities of foreign investor in national trading system.
- Reform was continued by simplifying custom procedure & to free an entrance visa for 29 countries.
- In this year tax for capital good imported from other countries was removed for the purpose of more export orientation activities.
- In 1988: shipping industry was further deregulated by inviting foreign investor.
- Before 1988, this industry was closed to only state owned companies.
- More deregulation, joint venture company was allowed to distribute the product in local market.
- Distribution system was opened to foreign investor, especially to distribute their own products.
- The impact, increased competition in domestic market.
- More negative investment lists were reduced to allow more investors.
- More state owned companies were listed in stock market which meant more control from the public and more transparent.
- In 1989: the government allowed maximum 49 percent of non-banking companies in stock market.
- SOE's further included in the reform in 1989 to increase their efficiency level, especially 75 SOE's.
- In 1990: more investments areas were opened to the domestic and foreign investors.
- About 75 negative lists of investment were reduced to only 60.
- License for land use was also allowed to foreign investors (Presidential Decree 32/1992).

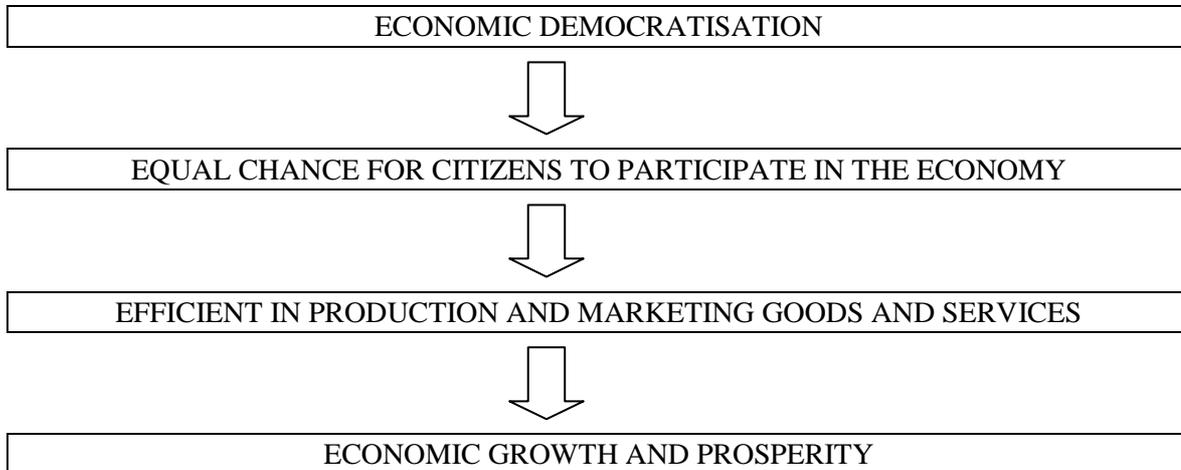
2. Competition law and obstacles in promoting competition policy for greater economic development

- In 1999, Indonesia has started to implement new law, called competition law.
- The commission was able to demolish cartel system in air transport. Airline is in full competition which makes ticket price decrease radically to almost 35 percent level.

2.1 Main Objectives:

1. To increase efficiency in the national economy efficiency & the people's welfare.
2. To improve the business climate through fair competition & to treat equal business opportunity for large & sme.
3. To prevent monopolistic & unfair business competition caused by business actors.
4. To create effectiveness & efficiency in business.

2.2 Reasons of enacting Law No 5/1999:



3. Challenges

3.1 *Handling Cases*

- Removing obstacles in obtaining public trust and confidence in the institution has been achieved.
- The initial cases were handled carefully from the choice of cases to the final stage of process.
- Cases selected were considering the direct benefit for the public.
- However, further step of legal process in court was misunderstood.
- Many strategic cases were mishandled by the court.
- Major challenges are court system.
- KPPU started to have cooperation with supreme court to train judge in competition law to minimize such obstacles.

3.2 *Policy Advice*

- KPPU is an independent institution outside the executive body (government).
- To promote economic development in line with competition policy, KPPU has a policy instrument, i.e. policy advice (formal).
- The obstacles are many different perception as well as misunderstanding in promoting competition policy.
- There are many policy launched by the government in contradictory with competition policy.
- Previous government was initiator of anticompetitive policy.
- Many sectors in the economic system are still under monopolistic and oligopolistic structure.

3.3 *Obstacles in Strategic Alliance*

- This is handled through Communication Program in order to get support of the public and to develop alliances with potential strategic allies.
- It is important be able to alleviate the monopoly and unfair business practices issues in competition with current main issues such as macroeconomic restoration and political issues both in media and at decision-making level.
- The main obstacles are level of consciousness of the media and journalists.

- Competition policy is a new issue in the country that is frequently misunderstood by the public.
- For instance, the existing dominance position is directly recognised as guilty which is then forced by the press to be punished by KPPU.

3.4 *Institutional Development*

- KPPU is a new institution with many weaknesses (human resources, organisation, system, etc).
- This obstacle is tried to be solved with capitalisation of the office, development of protocols and procedures, flow of information, recruitment and:
- To strength the standard process, training, career planning, development of further legislation required, and operational guidelines.

3.5 *Bureaucratic Culture*

- The culture of the organisation in the government as a whole in one of obstacles in promoting competition policy.
- Team work is weak, too much bureaucratisation, as well as problem of leadership in the government.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution of Jamaica

-- Session II --

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT
THROUGH THE PROMOTION OF COMPETITION**

(Contribution from the Fair Trading Commission, Jamaica's competition agency)

Introduction

1. It is widely accepted that competition authorities in developed and developing countries alike encounter challenges and obstacles in their effort to promote competition and enforce their various competition laws. While the challenges faced are similar in nature their degrees vary across countries. Some challenges however are unique to small developing countries which have limited resources and pressing social problems which require immediate attention. Developing countries do not generally place the implementation and administration of competition law on their priority lists. With the changing global landscape, trade barriers being removed and markets becoming more integrated, developing countries find themselves in the situation in which they now have no choice but to institute the relevant legislation. The implementation of institutional reform that the developed countries took several decades to accomplish is now being thrust upon developing countries which do not have the luxury of time, the requisite skill or the resources. The developing world is just not equipped to deal effectively with all the issues of a global market place and all the relevant institutions, which come with them.

2. The Fair Trading Commission (FTC), Jamaica's competition agency, which was established in 1993, during a period of trade liberalisation, privatisation and deregulation, faces numerous challenges as it strives to carry out its mandate under the Fair Competition Act (FCA). The FCA requires that the FTC promote competition and enforce the competition law. Given the limitations faced by the Commission, however, these two tasks are not executed in an optimal manner, thus reducing the possible impact on the economy and the general population. The major challenges which impede the work of the FTC most profoundly relate to the absence of a competition culture; the history and the structure of the economy; resource constraints of the competition agency; and a deficient legislation. These challenges are discussed in detail below.

1. Major challenges

1.1 Absence of a competition culture

3. Competition culture refers to the awareness of the general public, including the business community, politicians and civil servants about competition law and the benefits of competition. This is woefully lacking in Jamaica. Although Jamaica's competition law has been in force for over ten years, it is apparent that there is still a wide section of the society which does not know about the law and the agency. Even among some individuals who are aware of the FTC and the FCA, there is a disconnect between knowing of the existence of the institution and the benefits which can arise from competition. There is currently strong anticompetition sentiments arising regarding the cement industry, as important voices within the society are giving support to protectionist sentiments under the guise of promoting Jamaican businesses and workers.

4. Prior to the passing of the law the private sector lobbied against the inclusion of merger control provisions (MCP). Similarly the law does not contain any prohibition against interlocking directorship. The arguments against MCP indicate that there was either a lack of understanding of how mergers are dealt with in other jurisdiction or plain self-interest. One argument against the inclusion of MCP in the

Jamaican competition law is that as a small economy companies may need to merge to be more competitive in the global market. This argument however does not apply to sectors for non-traded goods. As regards interlocking directorship it was recognised and accepted that given the size of the country (a population of 2.7 million) it would be impossible to avoid the situation in which any one person would sit on various boards. It was believed that the provisions addressing abuse of dominance are sufficiently able to deal with any potential abuse by directors. Under the abuse of dominance provisions, however, only exclusionary abusive conduct is prohibited, exploitative conduct by a dominant firm is not prohibited.

5. The FTC in its formative years has faced challenges regarding its jurisdiction. There are two instances in which the jurisdiction of the FTC has been successfully challenged in the Courts. One case involved the General Legal Council, the regulatory body governing the legal profession in Jamaica, and the other involved the Jamaica Stock Exchange. The General Legal Council is governed by the Legal Profession Act and its subsidiary rules, while the Jamaica Stock exchange is governed by the Securities Act which, incidentally, was passed on the same date as the Fair Competition Act was. Both institutions challenged the FTC claiming that the FCA does not apply to them as they are governed by their respective legislation. The Courts ruled in favour of both institutions.

6. The lack of competition culture is manifested also in consumer attitude. Consumers are generally unwilling to “shop around” in search of the best deals. They often complain about the relatively high prices being charged by some stores in competitive markets, but are unwilling to shop at a store with comparable lower prices. They expect the agency to address the issue of high prices. Against this background the agency has embarked on a number of outreach programs aimed at educating consumers about their rights and obligations.

1.2 History of the country and structure of economy

7. Jamaica is an island economy in the Caribbean, with a GDP in 2002 of US\$8,365.2 million; a per capita income of US\$2645.43; and average growth rate of 0.71 per cent over the ten year period to 2002. Jamaica was essentially a heavily regulated economy with the government controlling most of the island’s leading industries. Jamaica’s trade regime was characterised by high tariff and non-tariff barriers. The market place then comprised protected monopolies and was governed mainly by Government Regulations. During that era a significant institution was the Prices Commission, which regulated the prices of goods and services offered by the miniscule private sector. Various Commodity Boards played a significant role, primarily in foreign trade, but sometimes also affecting the local market. These Commodity Boards determined which producers could export and import, and what prices local exporters would receive for their products. In some instances the commodity boards could determine who was allowed to produce.

8. Decisions about the allocation of economic resources were often made by the Government, whether directly through state-owned companies or indirectly through the various Government agencies. Firms generally co-operated with each other in the delivery of goods and services. This co-operation was facilitated through the various government regulations, which fostered co-operation instead of competition. The various regulations promoted such anticompetitive practices as market sharing, price-fixing, and exclusive dealing. The concept of competition was alien.

9. Then came the period of liberalisation in the 1980’s and early 1990’s, when the structure of the economy witnessed significant changes, which required that the private sector become the main actor in the economy and market forces would determine the prices of goods and services. With the reduction of trade barriers entered foreign competition; firms were expected to compete with each other to gain market share. This type of open market environment was expected to result in economic efficiency and hence economic growth, with consumers benefiting from lower prices, better products and wider choices.

10. Unfortunately, the long history of protectionism, co-operation among firms and the standard prices and services are embedded in the culture and therefore policy makers and the business community are influenced accordingly. Some government regulations which are clearly anticompetitive are still in place; and efforts to have them amended are met with resistance. Even when there is no resistance the process of amendment can be quite protracted.¹ The competition agency was successful in lobbying a government agency to amend a 1975 Regulation, which granted exclusivity to one taxi company to operate at the island's two international airports. The FTC recommended that the regulation should be amended to allow for competition *for* the market and/or competition *in* the market. The process took over three years. The FTC's efforts to have the various regulations relating to the Commodity Boards amended have been met with great resistance.

11. Almost every industry in Jamaica has an association. The bankers, bakers, general insurers, petroleum retailers, used car dealers and all the professions have associations. While these types of associations are the norm, they are conducive to collusive activities. The FCA does not apply, however, to activities of professional associations, designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public.

1.3 Resources of the competition agency

12. The Jamaican competition agency deals with both competition matters and consumer protection. While this arrangement might be suitable for other developing countries with limited resources, it is not optimal in Jamaica's case given that there are at least two other agencies which deal with consumer protection.² The agency's resource problem is a combination of a relatively small staff complement, lack of requisite technical skills and limited finances.

13. The human resources of the agency comprise five part-time Commissioners, who could be considered adjudicators and the Staff, who carries out the investigations. The Commissioners comprise one economist, two lawyers and two accountants. The Staff, which is headed by the Executive Director, comprises two economists, three lawyers, three complaints officers and one research officer. The post of senior economist has been vacant for more than a year. The Staff, under the guidance of the Executive Director investigates the complaints submitted by consumers and businesses. Almost all competition-related complaints, which span a number of industries, are handled by the two economists with the assistance of the research officer. The consumer protection related complaints are generally dealt with by the lawyers and complaints officers.

14. With the agency concentrating on both consumer protection and competition matters, taking into consideration the staff complement, the work output suffers gravely. The volume and nature of the complaints require much more human resources; it could be said that the agency is operating below the minimum efficient scale.

15. Competition enforcement requires expertise in competition law. The leading tertiary institutions in Jamaica which are responsible for training lawyers and economists do not offer courses specific to competition law and its enforcement. The result is that neither the Staff nor the majority of Commissioners have had any formal academic training in these areas. We have benefited however from short term courses in competition law and enforcement aimed at correcting this deficiency. The Staff has also invested a considerable amount of time in trying to learn by doing and in educating themselves.

16. Complaints relating to abuse of dominance and agreements which lessen competition are often technical and require time intensive investigation and research which require a high degree of technical skills. Some investigations are best carried out by a team of lawyers and economists. These investigations are often in respect of complaints against multinationals or companies with vast amounts of financial

resources to hire the best competition experts. In one case involving the local subsidiary of an international company, the Respondent actually hired consultants from NERA Economic Consulting, an international firm of economists, which specializes in market analysis. The Commission is unable to match skills and expertise.

17. The lack of resources makes it difficult for the agency to perform efficiently and therefore to be successful. The agency's image is undermined by the limitations in its ability to carry out investigations.

1.4 Deficient legislation

18. The Fair Trading Commission is established under Section 4 of the Fair Competition Act, as a body corporate. The Act defines the Commission as the five Commissioners who are appointed by the Minister of Commerce, Science and Technology. Section 5 of the FCA authorizes the Commission to carry out investigations in relation to the conduct of business in Jamaica to enable it to determine whether the Act is being breached. Accordingly, the Commission is authorised to summon and examine witnesses, administer oaths and hear evidence. The Act therefore gives the Commission the power to act as both investigator and adjudicator. It must be noted, however, that decisions by the Commission are appealable to a Judge of the Supreme Court sitting in Chambers.

19. This structure and the legislation are probably the biggest obstacle being faced by the agency. This weakness became apparent when the Staff of the Commission undertook an investigation involving the Jamaica Stock Exchange, in March 1994, less than a year into the operation of the Commission. The Staff having concluded that the Exchange's actions constituted a breach of Sections 17 and 20 of the FCA which render void agreements which lessen competition; and prohibit abuse of dominance, respectively, filed a complaint with the Commissioners. The Exchange having been informed of the Staff's conclusion and the filing of the complaint with the Commissioners filed an application in the Supreme Court seeking declaration that, among other things, the action of the Commission whereby it is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void. The trial commenced in June 1996 and judgement was handed down in favour of the Commission in July 1997. The Judge found, *inter alia*, that there has been no breach of natural justice. The Exchange appealed the ruling of the Supreme Court. The appeal began in the Court of Appeal in February 1998 and judgement was handed down in favour of the Exchange in January 2001. Specifically the Court held that the Commission's functions as adjudicator and complainant are a breach of the rules of Natural Justice. The Court stated that the FCA does not clearly distinguish between the function of investigating and the function of adjudicating upon matters which are the subject of complaints, as it merges the judicial function into the investigative function. Further, the Court stated that there is no general provision for the delegation of the investigative functions of the Commission to the Staff or other agencies to be administered independently of the Commission. The FCA is currently being amended to rectify, among other things, the problem of breach of natural justice. What is being proposed is that the FCA recognize the Staff, led by the Executive Director, as the Investigator and the Commissioners as adjudicators.

20. The implication of this ruling is far reaching and has greatly affected the substantive work of the agency. The FCA mandates that matters relating to agreements which lessen competition, abuse of dominance, exclusive dealing, market restriction and tied selling be adjudicated by the Commission. The Staff therefore in their investigation of these cases hope that where a breach is found that Respondent, (i.e. the offending party) will agree to enter into a Consent Agreement with the Commission. In one case however, after the investigation was completed by the Staff and the Staff's finding was presented to the Respondent, the attorney acting on the Respondent's behalf reminded the Staff of the ruling of the Court of Appeal. The Staff had no choice but to discontinue the matter.

2. Conclusion

21. Both the Commissioners and the Staff recognize the challenges faced by the institution and are committed to overcoming them. Notwithstanding the deficiency in the legislation, the agency has been functioning fairly effectively in relation to consumer protection. In recent times we have found that not only are consumers complaining about false and misleading advertising but also competitors, which points to the fact that firms are becoming more aware of the work of the agency and also of how seemingly simple actions by their competitors can affect their businesses.

22. While the limitations of the legislation have significantly impeded the effectiveness of the FTC, many companies have been anxious not to violate the spirit of the FCA. It is not uncommon for companies to seek the opinion of the FTC as to whether proposed changes in their operations would offend competition.

23. Ground is slowly being won in the struggle to establish a competition culture in Jamaica. The progress made in the telecommunications industry is a manifestation that competition has a positive effect on consumer welfare and the economy. It is anticipated that when the FCA is amended the agency will be more poised to effectively carry out the mandate of the law and to demonstrate the benefits of competition in other industries; and this should contribute to the building of a competition culture in Jamaica.

NOTES

1. The process of amending most legislation is usually protracted.
2. The Consumer Affairs Commission (CAC) deals exclusively with consumer protection, while the Office of Utilities Regulation has a department which deals with consumer protection with regard to utilities. CAC is not yet supported by a law.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION COMPETITION

Contribution from Japan

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Introduction

1. According to an opinion survey conducted by a government agency in February 2001, more than 70 percent of respondents had a “positive” image toward competition. As to the activities concerning the elimination of cartels and bid riggings on the other hand, approximately 60 percent of respondents replied “insufficient”. These figures clearly show that the general public, throughout the prolonged recession in Japan, supports the principle of competition and looks forward to active actions by the competition authority.

2. Viewed from a historical perspective however, competition culture is not widespread among the general public, even though the Japanese economy has long been based on a market economy. One conceivable reason is that administrative policy, which inclined to build up industries and encourage harmonious cooperation among entrepreneurs, had received general support even after the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act) was enacted as part of post-World War II economic democratisation policy.

3. Various ground-breaking events followed that led to the above survey results showing greater understanding by the general public toward competition law and policy. On the occasion of the sudden rise in prices caused by the oil crisis and other opportunities for example, the Japan Fair Trade Commission (JFTC) revealed the damages caused by anticompetitive conduct through investigating cases which had serious impacts on the national economy, and brought clarification of the standard on the application of competition law. One characteristic of the JFTC’s activities was against not only cartels, which took advantage of a general rise in prices and large-scale mergers in key industries, but also misleading representations on daily goods. Action toward consumer problems in terms of competition policy may also have boosted public understanding of the JFTC’s work.

4. This paper describes how understanding of competition policy has spread throughout Japan. It introduces typical experiences of the JFTC, which is the competition authority in Japan, since the competition law was enacted in 1947 and the general public was not familiar with competition.

1. Enactment of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act) (1947)

5. In 1947 the Antimonopoly Act, Japanese competition law, was enacted and the Japan Fair Trade Commission was established as an independent commission.

6. As is well known, the modernisation of almost all aspects of Japan started at the time of the Meiji restoration, which took place 130 years ago. Japan's economic system since the Meiji era had been basically market-oriented; however, there were no laws regulating cartel, trust and market concentration before the end of World War II. Further, a small number of families gained control over a lot of companies in various industries under a holding company owned by each family. Such groups of companies were called “*zaibatsu*”, and from the Great Depression in the early 1930s until the end of World War II, the Japanese government resorted to extensive control over the economy, through mainly trade associations, in order to mobilize all national resources for military purposes.

7. After World War II and under the occupation by allied powers, drastic democratisation measures were introduced in all spheres of Japanese life. Industrial democratisation policy which was a part of economic democratisation policy consisted of one-time cease-and-desist measures of the former

anticompetitive system such as dissolution of the Zaibatsu, elimination of the concentration of economic power and removal of private controlling groups and permanent measures concerning the means of future competition policy such as the enactment of the Antimonopoly Act. These measures had the same objectives of establishing a competitive economic system based on a market economy.

8. As described above, competition law and policy in Japan were introduced quickly and drastically. However, the concept of competition policy and economic development through competition did not take root rapidly, and did not turn the controlled economic policy of Japan into competition policy at that time.

2. “Dark Ages of the Antimonopoly Act” (1950s)

9. The immediate issue for Japan after the occupying forces had left was to achieve economic independence. Government policy therefore focused on fostering and strengthening domestic industries to earn foreign exchange. This led to the enactment of various laws exempting a wide range of industries from the Antimonopoly Act, mainly with the objective of easing cartel regulations, which was a major legislative step backward in competition policy.

10. In the field of administration, anticompetitive administrative measures, which were incompatible with antimonopoly policy, have been implemented in many industries during recessions in order to prevent excessive competition or stabilize the market, thus restricting the application of the Antimonopoly Act by the JFTC.

11. Against such moves toward easing of antimonopoly policy, the JFTC firmly supported the principle of the Antimonopoly Act, and strictly acted against unfair trade practices mainly related to medium and small sized enterprises, which are often disadvantaged by competition and trade, such as the regulation against delays in paying subcontractors, regulation against abuse of dominant bargaining position by department stores, etc. These efforts to act against unfair trade practices even during tough times promoted public understanding and support toward antimonopoly policy.

3. Approach to consumer policy from the standpoint of competition policy and addressing large-scale mergers (1960s)

3.1 Approach to large-scale mergers and acquisitions

12. The deregulation of trade, foreign exchange and capital led to the fundamental framework of the Japanese economy during this period. At this time the Japanese economy became internationalised through such measures and more closely connected with world markets both in the import of raw materials and export of manufactured products. Through these events the Japanese economy came to be considered forming a link in the chain of the international economy and competition among entrepreneurs was to be taken hold on an international scale.

13. With these deregulations as a turning point, discussions on industrial reorganisation through mergers and integration of enterprises, and concentration of production and grouping of companies have proceeded, led mainly by industrial policy authorities, as the small scale of Japanese entrepreneurs was thought to lead to excessive competition. As a result, an increase in large-scale mergers of enterprises followed in key industrial fields. The so-called “theory of excessive competition” proposed that too many small enterprises in Japan compared to international standards were engaged in excessive competition through small-lot production of many kinds, leading to unsound financial conditions like insufficient stockholders’ equity accumulation.

14. One typical large-scale merger during this period was a merger between two major steel companies, Yawata and Fuji, the largest post-war merger in Japan at that time and also a merger of the 1st

and 2nd largest entrepreneurs in the key steel industry. It can be said that the merger had a serious influence on the national economy as the new entrepreneur's market share would exceed 30 percent in more than 20 products, causing problems in terms of competition policy. Some supported the merger as necessary for promoting industrial reorganisation under the deregulated economic system, but others believed it would strongly affect the national economy. Hence, JFTC's decision was viewed with great interest, and intense discussions ensued among academics and the mass media. The JFTC had initiated a hearing procedure to investigate the case, and eventually approved it while demanding various remedies.

15. Although the Antimonopoly Act did not necessarily function satisfactorily during this period of concentration of economic power through mergers among entrepreneurs, this merger of Yawata and Fuji marked a turning point, and discussions on the role of the Antimonopoly Act became more active. It was also made clear that approval for large-scale mergers would not be easy to obtain.

3.2 Approach to consumer policy from the standpoint of competition policy

16. Another distinctive event during this period was the appearance of a new attitude toward protecting consumers' interest in conjunction with an increase in salaried workers brought about by the mass production system resulting from technological innovation, coupled with changing economic conditions and the rise in income (called the "income revolution"). Whereas consumer problems also arose, such as false and exaggerated advertising due to stiff competition, defective products accompanying new product development, and existence of toxic substances in foodstuffs and other dangerous products, etc.

17. Under these circumstances, in 1960 the "false canned beef case" occurred, when it was found that canned beef mostly consisted of whale meat or horsemeat despite the label picturing cattle. This incident fuelled a consumer movement that called for the control of such deceptive trade practices. However, no suitable regulatory laws existed to address such problems; therefore, the JFTC issued a cease-and-desist order against this deceptive trade practice as deceptive customer inducement under the Antimonopoly Act. The linkage between deceptive representations and competition policy started with this "false canned beef case", and with this as a turning point, the role of the JFTC as one of the main agencies for consumer protection was recognised.

18. In 1962, the Act Against Unjustifiable Premiums and Misleading Representations (Premiums and Representations Act) to control unfair representations and premiums from the standpoint of competition policy was enacted to supplement the Antimonopoly Act. The enactment and enforcement of this act raised public awareness of the JFTC.

4. Greater awareness of competition policy through cease-and-desist measures against anti-competition activities that affect the whole national economy (1970s)

19. During this period, the international monetary crisis and oil crisis shocked the Japanese economy. It was feared that the economy, which was already in recession at the time, would deteriorate further by the decline in exports engineered by the so-called "Nixon Shock" in 1971. A series of applications for recession cartels, which are exempted from application of the Antimonopoly Act, were filed.

20. As the economy recovered, there was an unusual rise in prices. The JFTC, concluding that "me-too" price rises were being made taking advantage of the rapid rise in general prices, acted firmly. Speculative trade practices by trading companies was a major problem during this process of unusual inflation, so the JFTC clarified the problems under competition policy by surveying such practices of trading companies twice.

21. Unusual inflation psychology followed the oil crisis in 1973, leading to skyrocketing prices. Many suppliers such as manufacturers rushed to form illegal cartels in order to raise prices in advance before costs rose, as price increases of raw materials could not be determined. The JFTC uncovered illegal cartels one by one and rendered cease-and-desist orders. In February 1974 the JFTC finally accused those concerned in various cartel companies engaged in the wholesaling of oil, restricting the disposal volume of crude oil for oil products, to the Public Prosecutor General based on the Antimonopoly Act. This was the first time that the JFTC had accused somebody in a cartel, and criminal sanctions became an effective and strict measure for eliminating cartels.

22. This oil cartel case presented two other issues. First, despite the application of cease-and-desist orders by the JFTC and criminal sanctions, it was thought that the tendency believing cartels were better than doing nothing was still difficult to eliminate in this situation. The second issue was that administrative guidance was involved in this cartel. The issue of administrative guidance and cartels had been discussed for many years, and the JFTC had consistently adopted the position that cartels, even those concluded under administrative guidance, were violations of the Antimonopoly Act. The prosecution in this case and a guilty verdict in the Supreme Court marked a turning point of past practices to restrict competition by administrative guidance.

5. Expansion of the scope of application of the competition law through deregulation and reduction in exemptions (1980–90s)

23. One of the distinctive features of competition policy through this period was regulatory reform. In the latter half of the 1980s, deregulation was enacted to open the Japanese economy and boost imports in order to mitigate trade friction caused by Japan's enormous trade surplus. In the 1990s, the yen's appreciation led to calls for structural reform, as it exposed the price differential within and outside the country. Further, the appreciation encouraged enterprises to shift overseas and caused the hollowing-out of industry and employment instability.

24. The JFTC, based on the recommendations of the OECD in 1979 etc., has addressed structural reforms in conjunction with the agency concerned since the early 1980s. During this period deregulation was not accepted by society as a whole, but in the 1990s, the clear price differential between Japan and other countries showed the importance of deregulation. The focus on deregulation in the 1990s shifted from reducing the burden on the public, simplification and rationalisation of administrative procedures and utilisation of private resources, to an emphasis on improving quality of life, reducing the price difference within and outside the country, improving access to markets, international harmonisation of systems and frameworks, revamping the industrial structure, encouraging new entry, etc., and these were compatible with the competition policy.

25. Furthermore, in the 1990s, the system of exemptions from the Antimonopoly Act was overhauled. Many of the stipulations concerning such exemptions were rooted in various industries in the late 1940s to 1950s in order to stabilize and rationalize enterprise management for the purpose of strengthening industry and improving international competitiveness.

26. However, the need for such exemptions changed in the same way as the need for government regulation, as the economic environment improved, Japan became a world economic power, companies' financial conditions strengthened and lifestyles diversified. The exemption system, which was likely to protect industry incumbents and weaken management, which in turn may impair the interest of consumers, was therefore reviewed.

6. Strengthening the enforcement power of the Antimonopoly Act (ongoing)

27. As described above, public awareness of competition policy has permeated in Japan. Viewing the Japanese economy today, entrepreneurs in many industries that face stiff international competition are making efforts to improve industrial technology and productivity, and are competing actively in the domestic market as well. However, the Antimonopoly Act was enacted over 50 years ago and strengthened 25 years ago and the Japanese economy has changed a lot during these years. As a result, it is necessary to examine whether the Antimonopoly Act is working satisfactorily, and whether the antimonopoly legal system is adequate from an international standard for example, as a satisfactory deterrent against violation of the law and anti-monopoly/oligopoly regulations.

7. Conclusion

28. When Japan's Antimonopoly Act was enacted in 1947, our society believed in harmonious cooperation among businesses over competition. There was also a period in which economic policy was inclined to consider industrial policy. And both systems and the implementation of competition policy were confronted with considerable constraints. There was also a time of what is popularly referred to as the "Dark Ages of the Antimonopoly Act." But after the passage of long years, competition policy has now taken a premier position.

29. One of the reasons why it took such a long time to gain understanding of competition law and policy is that government policy was inclined to foster industries and encourage harmonious cooperation among entrepreneurs even after the introduction of competition law and policy, in order to build the Japanese economy quickly, which is now the second-largest in the world. Regulations to protect specific industries or entrepreneurs through industrial policy temporarily bring about a certain level of growth and maintenance of the economy. However, on a long-term basis, as the creative initiatives of entrepreneurs do not function sufficiently, diverse resources are not utilised efficiently. Therefore, autonomous economic structural transition does not occur smoothly and results in hindering continuous economic growth. The Japanese public's understanding of competition law and policy has deepened through the Japanese economic system itself shifting toward greater competition in the process of gradual development and the experience of deregulation of trade and capital. Therefore, in Japan today, there is broad support and awareness of the need to implement structural changes and to reinforce competition policy as a key component in the overall program for structural change. Thus, in recent years, the market mechanism has come to occupy a far more important role in Japan than in the past.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Kenya

-- Session II --

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT
THROUGH THE PROMOTION OF COMPETITION - THE KENYAN EXPERIENCE**

*by Peter Muchoki Njoroge
(Monopolies and Prices Commission)*

1. Kenya operationalised its competition law on 1st February 1989. The law has six principal parts as follows:

- Part I - This part deals with interpretation and establishes the Monopolies and Prices Commission.
- Part II - This part contains provisions germane to Restrictive Trade Practices.
- Part III - This part contains provisions apposite to Control of Monopolies and Concentrations of Economic Power.
- Part IV - This part has provisions relating to the Control and Display of Prices. It has been of no practical value for many years as Kenya consigned price controls to the dustbin in 1994.
- Part V - This part establishes the Restrictive Trade Practices Tribunal.
- Part VI - This part contains miscellaneous provisions. Nothing more will be said regarding this part.

1. Restrictive Trade Practices

2. The Kenya law on restrictive trade practices is intended to cover a very wide area. It covers acts intended to reduce or eliminate the participation of legal and natural persons in economic activities. Offended persons can complain to the Commission or the Commission may initiate an investigation *ex proprio motu*. The Commission has wide powers including powers to require the offending persons to cease and desist. This is done through Consent Agreements which the Commissioner is required to Gazette. Where there are no Consent Agreements, a hearing is held after which the Minister makes requisite orders. The orders to desist may require the offender to take positive steps to assist existing or potential suppliers, competitors or customers, in order to compensate for the past effects of the offending practices. There are rights of Appeal to the Tribunal and to the High Court.

3. The Kenya experience has been that many people against whom complaints are made tend to reach some sort of an agreement with the complainants. At that point most complainants just vanish into thin air. They thus make the investigation process very difficult. We should however not be surprised. Businesses by nature are selfish and will see no point in wasting more money and time when the desired result has been achieved. To the extent that the suspected offenders desist from continuing to break the law, we can opine that the mere existence of a competition Authority, to which complaints are made, is

beneficial to the economy. Even without completing investigations, the Competition Authority, through fortuitous defaults brought about by recalcitrant Complainants, has been performing an important role in prohibiting Restrictive Trade Practices.

4. Regarding investigations initiated *ex proprio motu* by the Commission, the Kenyan experience is that even where the suspected offenders deny wrong-doing, the offensive practices cease. The surveillance function of the Competition Authority is, thus, beneficial to the national economy.

5. It may be important to point out that developing countries have substantial informal sectors. This has the effect that the capture of restrictive trade practices in these sectors is made very difficult.

2. Control of Monopolies and Concentrations of Economic Power

(a) *Mergers and Takeovers*

6. Horizontal mergers and takeovers between two or more independent enterprises are prohibited *per se* unless they are authorised in accordance with the law. This compulsory notification and authorisation procedure has, of necessity, ensured that the Commission is very active in the mergers/takeovers area.

7. The Commission is of the view that some sort of a threshold should be introduced. Otherwise the Commission is quite effective in this area.

8. It should be pointed out that when the merger or takeover is being approved, a condition may be imposed that certain steps be taken to reduce the negative effects of the merger or takeover on competition.

(b) *Control of unwarranted concentrations of economic power*

9. The competition law requires the Minister to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution.

10. The Competition Authority undertakes sectoral studies in a bid to consummate this legal mandate. Where necessary the Minister may make an order directing any person whom he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or the supply of services as the exigency of the situation may deem necessary to remove the unwarranted concentration.

11. In developing countries, cognisance should be taken of the reality that there is a general dearth of investable capital due to a general lack of capacity to make adequate savings. This means that enterprises against which divestiture orders are made may be unable to find investors willing or able to purchase their holdings. With such eventualities, Competition Authorities will find it difficult to enforce the law. A situation in which the law cannot be enforced is no better than a situation in which there is no law at all and should be avoided at all costs.

12. It is also possible for enterprises being subjected to divestiture orders to collude with potential investors so that subject properties are not bought at all. Divestiture Orders, also, have the possibilities of being subjected to constitutional challenges in courts of law as they pose dangers to the sanctity of private property.

3. Control and Display of Prices

13. The existence of this part is veritably superfluous. Kenya has abolished price controls since October, 1994. It is hoped that the whole part will be repealed soon.

4. The Restrictive Trade Practices Tribunal

14. The Restrictive Trade Practices Tribunal consists of a Chairman, who must be an advocate of the High Court of Kenya qualified to be appointed a High Court Judge, and four other members appointed by the Minister.

15. The Tribunal has not been very busy. It is, however, known that Kenyans are averse to litigation of whatever nature. The majority of the people view situations where they may end up in courts of law with trepidation. Some people have argued that our courts system is user unfriendly and egregiously slow. As businesses abhor situations which may lead to uncertainty regarding not only the time taken in resolving disputes but also what the decisions will be eventually, they tend to eschew the litigation system. In any case, time and some degree of certainty are of essence to business.

5. Other Apposite Issues in the Enforcement of Competition Law and Policy

(i) Lack of a competition culture

- (i) Competition is a fairly new phenomenon in developing countries. As long as there are competing manufacturers, wholesalers, retailers etc., many people will think that there is adequate competition. As a new phenomenon, competition has not been understood well. For example, when the Kenyan Law was being debated in Parliament some members of Parliament thought that competition law and policy should be applied to curtail the preponderance in business by a certain group of Kenyans vis-à-vis those deemed to be indigenous¹. Yet another member of Parliament felt that competition law should be applied to prohibit the practice of requiring new entrepreneurs to pay goodwill².

If law makers did not understand the law they were promulgating, then the common citizenry is obviously less informed.

- (ii) Lack of support by the policy makers, public and the business community

Policy makers do not accord Competition Authorities required support. This may be because competition is a new phenomenon. Recently, in Kenya, two members of Parliament wanted to reintroduce price controls in the areas of Banking and Petroleum. The amount of support they got from Parliament, the public and the unaffected sectors of the business community was phenomenal.

At a recent meeting³ of competition practitioners, it was decried that although competition was one of the new issues being discussed in Doha in November, 2002, most

1. Kenya National Assembly, 3rd November, 1988.

2. Ibid.

3. The meeting was held in Pretoria, South Africa, to launch the Southern and Eastern Africa Competition Forum on 16th November, 2002. During the Cancun meeting [2003], Kenyan, Zambian & South African competition authorities were represented.

of the competition authorities were excluded from government delegations. This cogently demonstrates that full acceptance of competition by national authorities is yet to be attained.

Businesses only support the idea of competition when they are affected negatively. In many developing countries, policy makers are often the owners of key businesses. This reality poses veritable challenges to the enforcement of competition policy and law. Quite often the law makers promulgating competition law own the businesses which may require regulation. Possibilities of conflicts of interests are legion.

(iii) The judiciary

The judicial systems in developing countries are not very active in the area of competition. It is necessary that the judiciary is brought on board through requisite education and advocacy programmes.

(iv) Lack of adequate financial resources

In developing countries such as Kenya, Competition Authorities are not accorded adequate financial resources. This may be understood when we juxtapose the requirements of competition authorities with more mundane needs such as clean water, health, roads, education etc. Even these supposedly more immediate needs do not receive adequate funds as the funds are not there in the first place.

(v) Lack of adequate human resources

Almost all competition authorities in the developing countries lack adequate human power. To a politician, it does not make sense to train one highly qualified competition expert abroad when the same resources could be expended in training many health workers etc. There is need to sensitise policy makers on the need to have qualified practitioners.

The private sector has contributed a lot to lack of qualified personnel. In many instances, the private sector has poached from the competition authorities employees who have been highly trained. This is because the private sector offers better salaries.

(vi) Lack of legal and financial ability to delve into the areas of education and advocacy.

For Kenya, although the Commission has an independent legal mandate to police competition issues, in other areas it is merely a department of the Treasury. As a result, education and advocacy issues have to be handled by another Treasury unit. Since competition matters are a fairly new phenomenon, there is need for the law to be reviewed so that the competition authority gets autonomy. This will allow the authority to handle education and advocacy matters. This area is currently being addressed.

Regarding inadequacy of financial resources, it is hoped that effective advocacy will facilitate the increase of the competition authority's budget. Autonomy will also have a positive effect in this area as the competition authority can impose fees to cover costs of its services in areas such as mergers and takeovers.

(vii) Exemptions

Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act exempts from the provisions of the law some trade practices. This is not a desirable situation. These exemptions have the ability to lessen competition in the economy. The exemptions will cover some statutory authorities and also embrace the licensing of members of professional societies such as the Law Society, Medical Doctors, Engineers, Architects, Accountants etc.

(viii) Sector regulators

Sector regulators in Kenya are created by separate pieces of legislation. Quite often, the law creating a sector regulator contains a portion dealing with competition in the sector. There should be deliberate harmonisation of sectoral laws with the competition law. If found expedient, the competition authority should have concurrent jurisdiction with sector regulators in all matters spawning competition issues.

Recent experience has shown that sector regulators are increasingly consulting with Kenya's competition authority. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the Monopolies and Prices Commission. The Civil Aviation Board has been liaising with us in the area of restrictive trade practices. The Communications Commission of Kenya has also been cooperating with the competition authority in the investigation of restrictive trade practices and in the area of mergers and takeovers.

(ix) Prosecution of offenders

The Restrictive Trade Practices, Monopolies and Price Control Act has provided for offences and penalties under Sections 21 (Restrictive Trade Practices) and 26 (control of monopolies and concentrations of economic power). The prosecution of the offenders is, however, not done by the competition authority. This has to be executed by the national police force and/or the Attorney General's office. Requisite autonomy will improve the Competition Authority's role in this area.

(x) Difficult economic realities

In the area of mergers and takeovers, developing countries sometimes find themselves between the rock and the hard place. For example, a company will be placed under receivership. Eventually a proposal will be forwarded to the competition authority for its takeover by a competitor. The Competition Authority may find that no other competitor was interested in the failed firm due to a dearth of investable capital. This will also apply in the takeover of businesses and assets of foreign companies divesting from developing countries.

(xi) Access to redress by members of the public

Interested members of the public and not just litigants should be accorded opportunities to seek legal address in appropriate cases.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Introduction

1. Competition policy in Mexico began in June 1993, when the Federal Law of Economic Competition (FLEC) entered into force and the Federal Competition Commission (FCC) was created as the authority responsible for its enforcement. After ten years of implementation, competition policy has registered substantial achievements in promoting economic development and enhancing consumer welfare. However, it also faces important problems and challenges that need to be addressed in order to allow competition policy to play a central role in promoting economic development in the future. This document presents a brief summary for the main challenges the FCC faces in promoting competition in Mexico.

1. Competition Policy as State Policy

2. One of the most important challenges in promoting competition in Mexico is to convert competition policy into a state policy, such that competition and efficiency principles are included in all relevant economic and regulatory government decisions.

3. Economic regulations and industry specific policies must be designed not as an alternative to competition, but as a complement in promoting market efficiency. However, in Mexico many policy makers still see competition and regulatory policies as rivals. Many regulations and policies are designed not as instruments to promote competition and enhance efficiency, but to achieve certain desired results and to protect the industry from market forces. Many still believe that barriers to entry and subsidies must be used in favour of domestic enterprises to enhance the competitiveness of Mexican firms. This road is clearly against competition and efficiency principles.

4. The FCC would promote competition more effectively if all relevant economic and regulatory decisions by the government were consistent with competition principles. This goal would be achieved if the FCC was empowered to issue binding opinion regarding competition aspects of the legal framework and policies proposed or issued by the government.

2. Culture of Competition

5. Another major obstacle in promoting competition in Mexico is the lack of competition culture. Competition is far from becoming the normal way of organizing national life. Obtaining and keeping privileges granted by the state at the expense of public budget or special provisions in laws and policies is still embedded in the Mexican business culture.

6. Competition increases efficiency and economic welfare, but it also implies the loss of privileges, which creates opposition. This opposition can only be offset if the winners are aware of the benefits brought by competition. Unfortunately, the role of competition in achieving efficiency and promoting economic development is still unknown for many in Mexico. One of the main reasons for this unawareness is that competition is absent in substantial aspects of national life: health care, education, electricity, oil, etc.

7. The FCC has undertaken efforts to promote competition, but better results would definitely be reached if the FCC had more allies in these efforts.

3. Excessive Litigation and lack of Economic Expertise in the Judicial System

8. The effectiveness of enforcing competition law has been injured by excessive litigation. The FCC has dedicated significant effort and resources to defending its resolutions in different instances offered by the Mexican judiciary system. Most of FCC decisions that do not favour economic agents are challenged at the courts, thus delaying resolutions and their implementation.

9. Economic agents unsatisfied with the FCC's decisions have two forms of proceeding to challenge these decisions in the judiciary system: they can file an "*amparo*" in the federal district court against unconstitutional acts by the FCC and an appeal in the Court of Fiscal and Administrative Justice against FCC's resolutions that impose fines. This section addresses the situation of *amparo* proceedings.

10. The number of *amparo* proceedings filed has increased significantly during last few years: 15 in 1997; 33 in 1998; 63 in 1999; 83 in 2000; 124 in 2001; 117 in 2002; and 164 in 2003. By the end of 2003, 273 of these cases were pending resolution by the courts. These figures illustrate the magnitude of the delays that litigation introduces in enforcing competition law. *Amparo* actions have been filed against requirements of information, writs of alleged responsibility, decisions to admit or reject evidence, preliminary orders, fines imposed for failure to comply with discovery orders, and final resolutions.

11. The FCC recognizes that *amparo* actions constitute a crucial instrument to protect the right of individuals. However, the excessive number of actions has become a serious problem for promoting competition, not only because they consume a substantive portion of FCC's resources, but also, and more importantly, because they delay justice and leave the public interest unprotected.

12. There are several problems with the current *amparo* system. First, while cases are litigated, agents committing monopolistic practices continue collecting the benefits of such practices. Therefore, they have incentives to file *amparo* suits and delay final resolutions, even if they know that they will eventually lose the case. Second, often different *amparo* suits are filed against the same FCC case and processed by different judges who, at times, issue contradictory rulings. Third, most court resolutions imply that CFC's procedures must be redone, however when the procedures are redone and the FCC issues a new resolution, the involved parties can file another *amparo* proceeding dealing with the substance of the case.

13. Another important problem in enforcing the competition law in Mexico is associated with the lack of economic expertise in the judicial system. The implementation of competition legislation requires specialised expertise and resources, because it involves the understanding of complicated economic concepts which are unfamiliar to most courts. After ten years of competition policy in Mexico, courts have not yet developed this expertise, and therefore their attention is biased towards procedural issues rather than substantive competition issues.

14. A recent report prepared by the OECD on Mexico's competition policy summarizes this situation as follows:

- "The district courts are unfamiliar with, and probably uncomfortable about, substantive antitrust issues. Further, Mexico employs a civil law system that has traditionally involved detailed legislative enactments, and courts are unused to dealing with a statute as short and non-specific as the LFCE. By ruling adversely on a procedural point, the court can send the case back to the CFC and avoids resolving the antitrust question.

- In a few Commission *amparo* cases, parties challenging the Commission's action have proffered testimony by economic experts. The district courts have no rule barring economic experts, but the applicable rules of procedure in *amparo* cases require that the court retain its own expert if the court determines to admit testimony by a party's expert. This poses yet another problem, because the judiciary's budget for services of this kind is limited, and the pool of capable antitrust economists is quite small. Thus, the expert ultimately retained by the judge may not have expertise suitable for a CFC case. Nonetheless, the procedural rules require that the judge, in deciding the merits of the case, must rely on the expert retained by the court in preference to the expert retained by a party.
- The problems presented by the *amparo* process are difficult to resolve. The passage of time may ultimately produce a decrease in case volume as issues reach the Supreme Court for resolution. In the meantime, the right to judicial review can be constrained only by amending the constitution, and altering the constitutional scheme of checks and balances is rightly disfavoured. There has sometimes been mention of establishing a specialised *amparo* court with economic expertise to hear cases from the CFC and the other agencies that deal with economic issues, but no action to advance such a proposal has been undertaken."¹

15. The actions of the FCC would be more effective if courts, specially in the administrative field, simplified their procedures and developed economic expertise.

4. Ineffectiveness of Fines

16. Another important problem in enforcing competition law is the small proportion of fines that are collected. By the end of 2002, the FCC had imposed an equivalent of \$30 million USD in fines, of this amount, only 9.5 percent were collected, while 18.5 percent were revoked by the courts, and 72 percent were pending for execution because the respective cases were in litigation or in some later stage of the procedure. Such a small proportion of fines collected is due to two main problems.

17. First, there are many opportunities to challenge fines so that their collection is tremendously delayed: the affected individual can first file a review procedure before the FCC, it can then file an appeal proceeding before the Court of Fiscal and Administrative Justice, which also has a review procedure and finally, the party can initiate an *amparo* action.

18. Like the *amparo* proceedings, the number of appellate actions in the Court of Fiscal and Administrative Justice has also increased: only 3 cases were filed during the period 1993-1997, this number increased to 6 in 1998, 9 in 1999, 14 in 2000, 13 in 2001; 43 in 2002, and went back down to 6 in 2003.

19. Second, even if a fine survives all these review proceedings and becomes final, it still needs to be collected. The collections of fines is a responsibility of the treasury of the municipality in which the party resides. If the fine is not paid voluntarily, the municipality has to initiate an administrative proceeding to issue an order of execution against the debtor's assets, and this proceeding is itself subject to *amparo* review.

20. The FCC would better face this challenge if it had the power to collect the fines by itself.

5. Legal limitations

21. The FCC faces some legal limitations to sanction certain anticompetitive practices and undertake more effective investigations. The most important limitations are summarised below:

- The FCC is not empowered to stop or sanction the abuse of market power through excessive pricing or other commercial conditions, which limits FCC's ability to promote efficiency in non regulated sectors with barriers to entry. The FLEC prohibits and sanctions anticompetitive practices that limit free competition. In most markets this is enough to prevent the abuse of market power through excessive pricing or other terms and conditions, because new entrants can offset attempts of incumbents to obtain extraordinary rents. However, there may be markets with significant entry barriers that are not subject to sector specific regulation in which incumbents endowed with substantial market power do not incur in anticompetitive practices against competitors, but can still abuse their market power and extract monopolistic rents by setting excessive commercial or pricing conditions. In Mexico, there have been cases where the FCC has not found any illegal anticompetitive practices, however domestic prices are unjustifiably above international prices because high investment requirements inhibit the entrance of new participants. In these cases, the FCC is not empowered to offset the abuse of market power that injures consumer welfare.
- Although monopolies are illegal *per se*, the FCC is not empowered to impose structural remedies on them, and hence its ability to deter anticompetitive practices is diminished. The FCC is empowered to sanction anticompetitive practices that undermine the competitive process and free entrance. Nevertheless, when there is a serious harm to efficiency and consumer welfare, economic sanctions may not be enough to deter anticompetitive practices. In such cases, for example, extraordinary rents obtained by monopolies through anticompetitive practices would justify the payment of any sanction imposed. Under these situations, competition can only be promoted by imposing structural remedies, like the divestment of the monopoly. Obviously, this power should be only used in exceptional circumstances, to remedy serious harm on consumer welfare or recurrent anticompetitive practices.
- Another important limitation faced by the FCC in promoting competition, is that the FLEC does not give the FCC the power to order suspension of anticompetitive practices pending resolution. The lack of this faculty provides incentives to delay investigations and to challenge FCC resolutions as much as possible, because the agent incurring in anticompetitive practices collects the benefits of these practices as long as a final order to stop such practices is not issued and implemented.
- The FCC is not empowered to undertake on-site investigations. Currently, information obtained by the FCC depends on whatever the enterprise under investigation voluntarily declares, on the statements of other enterprises or individuals involved and any other information provided by other authorities or public sources. The foregoing significantly limits the effectiveness of the Commission to carry out investigations, particularly investigations on its own initiative.
- The FCC is not empowered to carry out leniency programs, which have proved to be a powerful tool to prosecute cartels in other countries. The FCC believes that gathering information against hard core cartels would be greatly enhanced if this type of programs were implemented.

22. Overcoming these legal limitations would significantly enhance the power of the FCC to prevent and sanction anticompetitive practices.

6. Conclusions

23. The main challenges faced by the FCC in promoting competition in Mexico, can be grouped in the following categories: 1) Lack of an integral competition policy; 2) Lack of competition culture; 3) Excessive litigation and lack of economic expertise in the judicial system; 4) Ineffectiveness of fines imposed by the FCC; and 5) Legal limitation to sanction certain anticompetitive practices and to undertake more effective investigations.

NOTE

1. OECD, Competition Law and Policy, Review of Mexico, DAFNE/COMP(2004)1

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Pakistan

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Introduction

1. A dynamic competitive environment supported by effective competition policy and law is considered to be an essential element of a successful market economy. Many developing and transition economies that have undertaken significant market-based reforms - trade liberalisation, privatisation and deregulation – are also recognising the need to implement rules to safeguard competition. The reason being primarily to get the benefits that flow from competition i.e., increased economic efficiency, innovation and consumer welfare.

2. Competition policy involves continuous efforts to reduce barriers to market entry and exit, to reform anticompetitive regulations and to expose government-owned businesses to competitive market forces in a competitively neutral manner. Competition reforms also offer a further means to reduce market inefficiencies – principally through a comprehensive regulatory reform program. However, competition policy is a relatively new area for most developing countries; for instance, since 90s over 40 developing and transition market economies have enacted or substantially revised existing competition laws including most of the former centrally planned countries/republics in central and Eastern Europe and the former Soviet Union. Industrialised economies too have recently revamped and began to vigorously apply their competition laws, for instance Canada, European Union, New Zealand and the United States. Notwithstanding these developments, the majority of countries have yet to adopt the competition law, even in the South Asian region: out of seven countries, four do not have competition law in place.

3. In this background, this paper is an effort to look at the competition process from a purely developing country perspective – to find out the factors restraining competition and expansion of competition policy as a developmental tool. Scheme of the paper is such that Point I looks into the restraining factors – and concludes that major reasons are embodied into the very design of economic policy and management of the developing countries. Some other constraints are discussed in Point II.

1. Restraining factors: The design of economic management policies

4. In most developing countries, there seems to be a conflict between competition policy (CP), on the one hand, and trade policy, industrial policy etc. on the other hand. These policies are characterised by a tendency of state intervention that is not in line with the principles of competition policy. Such policies are not bad *per se*, however, the main problem is in striking the right balance so that the dynamic force of competition is not paralysed. In case of developing countries, the governmental policies are continually shrivelled with the temptation to react with *ad-hoc* interventions, individual problems and to achieve immediate results. The objectives of competition policy are best achieved with public support and deep-rooted competition culture in a long time period.

5. For economic management, the governments rely on several policy tools e.g., trade policy, FDI policy and regulatory policy, to ensure competitiveness in the markets and optimal allocation of resources. These policy tools comprise of rules and regulations that serve purposes other than maintaining competition, with a view to fostering efficiency. CP, on the other hand, relates specifically to rules and regulations implemented by competition agencies (CAs) with respect to arrangements among firms/suppliers and the conduct of individual firms/suppliers. The concept of competition policy includes competition laws in addition to other measures promoting competition, such as sectoral regulations and privatisation policies.

6. Firstly, in most developing countries, competition is restrained by industrial policy as it tends to reduce the impact of competition through government's desire to enhance international competitiveness of specific sectors/enterprises, especially by subsidising the so-called "national champions", or to protect the labour force against the risks of dismissal in the case of failing industries¹. These subsidies to specific industrial sectors cannot be condemned *per se*. They may, and will sometimes, have positive effects for a short-term period. But in the long run, the negative repercussions will however, prevail. Businesses cannot be competitive on international markets if they are not exposed to competition in national markets.

7. Secondly, until late seventies, nationalisation and public sector ownership was seen as the best way of preventing concentration of wealth and other practices that were perceived to act against public interest. The state-owned enterprises were found to be the major borrowers in domestic and world credit markets; and commanded a sizeable share in the budget. However, in many developing countries, this performance did not meet the set standards. Inefficiency started creeping in the performance of the public sector enterprises which got manifested in the form of declining productivity, overstaffing/reduced profitability as well as losses. Investments that were expected to spur growth and provide profits/tax revenues to the governments became a drag on the economy and drain on the treasury. It was realised around the world that privatisation can create market discipline without running the risk of concentrating ownership. Concerns grew that through the use of newly developed capital market methodologies, State Owned Enterprises (SOEs) can be sold to small investors and employees. The attention was diverted from expanding the role of SOEs and improving their performance, to identifying the ways and means to tap private managerial and financial resources to accomplish public ends. Out of these concerns came a rising interest in the divestiture of state enterprises, as well as their rehabilitation and reform.

8. The policy of privatisation leading to transfer of assets held by the State gradually became a hallmark of large number of countries. However, government's intervention as a regulator of industries still reduces/hampers the dynamic forces of competition mainly due to 'regulatory capture'. Therefore, in developing countries that previously relied on the state ownership, direct control over production and pricing decisions, the development of a regulatory system is difficult but essential.

9. Equally related with privatisation are the inherent conflict between sectoral regulators (SR) and the CAs. The issue is the appropriate demarcation of jurisdiction between the two so as to eliminate instances of overlapping or conflict, while assuring efficient functioning of the markets. There are essentially four tasks faced by the developing countries, during and after transition from government ownership to greater reliance on market forces - these are firstly, "competition protection" i.e., controlling anticompetitive conduct; secondly, "access regulation" i.e., ensuring non-discriminatory access to necessary inputs (e.g. network infrastructure); thirdly, 'economic regulation' i.e., adopting cost based measures to control monopoly pricing; and lastly, "technical regulation" i.e., setting and monitoring standards ensuring compatibility and to address safety and environmental protection concerns.

10. CAs has expertise in eradicating market power which, if left unchecked, would greatly reduce benefits of regulatory reform itself. However, things are not so clear when it comes to access regulation, where the objective is to promote/protect competition in situations where access to a portion of a vertically integrated company's assets is needed for satisfactory level of competition. On one hand, because of experience with abuse of dominance cases, competition agencies are better suited to perform this task than are sectoral regulators. On the other hand, ensuring a level playing field requires processing a large volume of technical data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms- these are functions that seem more in tune with what SRs could do better. Consistent application of competition policy balanced with sectoral interests and vice versa require: reduced risk of regulatory capture and well defined areas of expertise - this is one of the challenges being faced by the CA.

11. Thirdly, one of the restraints are the governmental activities, where the government does not act at the same level as that of a private natural/legal person but as a superior. The State may also restrain/distort competition when it acts commercially, as a seller or buyer of goods and services sometimes as a monopolist and sometimes competing with other sellers or buyers. A prevailing example is government acting as a seller, and thereby - unfairly discouraging, competition is government holding a legal monopoly - say in telecommunications- and extending its activities beyond the legal limits of this monopoly in new other related activities, and by subsidising this market entry from its monopoly income.

12. Fourthly, monetary policies and distortions in exchange rates have remained common phenomena in most developing countries - that essentially affects competition in a major way. It is understandable that as a government follows policies leading to under-valuation of currency it facilitates exports. Overvaluation of currency, on the other hand, enhances import competition thereby increasing competitive pressure on domestic enterprises.

13. Next, structural policies pursued by the developing countries have easily restrained and distorted effective competition, for instance, by encouraging concentration favouring big enterprises in order to strengthen the competitiveness of those enterprises in international markets. Other policies may also strengthen such trends, e.g. regional policies which may favour an inefficient and marginal part of a certain sector of the economy and, thereby, discourage an efficient part of the same sector located in another area.

2. Other factors: Obstacles faced by competition authorities in the developing countries

14. Apart from conflicts with various policy objectives, competition policy and law in most developing countries face several general constraints affecting the overall environment within which the competition rules operate. Some of these are: an overall lack of awareness regarding benefits of 'competition culture' on part of governments, consumers and businesses; competition does not fall in the 'priority list' of those responsible for economic management of the countries; small size of market as compared to investment requirements to achieve economies of scale; and 'starvation' for investment thereby having a loose control over business activities. Then, there are specific constraints i.e., those relating to a CA include: deficiencies in competition legislation/impediments in amendments; non-involvement of stakeholders in the enforcement and 'voluntary compliance'; lack of financial resources with the competition agencies; lack of human resource development/training.

15. These constraints create a situation whereby competition legislation/enforcement in most developing countries remain weak enough to make a difference at the market place – this in turn serves as a major impediment to receive any priority either for budgetary grants or else to introduce changes to make the law effective. The budgets of the CAs are generally low in absolute terms. A major component is the salaries of employees leaving very low or negligible amounts for the research/training activities. This is combined with a higher ratio of administrative/support staff as compared to technical/professionals (lawyers, economists, accountants). Low comparative salaries cannot attract high caliber staff so as to ensure high quality of investigations, enforcement and compliance.

16. To elaborate, some South Asian case studies are illustrated in the paragraphs to follow. To start with, Bangladesh has a pre-dominantly agricultural economy with a few big industries like fertiliser, gas, electricity, water supply, shipping, airlines, cement, sugar and ready-made garments. A situation of state monopoly of industries originated when the government nationalised all big industries in 1970s. During the last decade or so denationalisation is taking place for some of above mentioned sectors. As far as policy frictions are concerned, it is interesting to note that the Bangladesh Tax Policy provides newly established industries to enjoy tax holidays initially for a period of 6 to 9 years. As a result, it is more profitable for the investors to go for establishing new industrial units rather than going for take-over and cartels. State monopoly of big industries, on the other hand was considered a blessing since consumers benefited

through subsidies/low prices of gas, airlines, electricity, fertilizer and telephone. However, as long as the subsidies were financed by external grants it was acceptable. With the drying up of foreign aid, the cost of the subsidies will fall on other sectors of the economy thereby increasing the costs. In this background, the need for anti-monopoly law was not felt deeply in Bangladesh. However, the situation changed during the last decade due to the substantial liberalisation trade/finance in Bangladesh. In the face of globalisation, the need for anti-monopoly laws is being felt to ensure fair competition and protection of consumers' interest.

17. Secondly, Bhutan is a landlocked country depending on agriculture and mainly electricity. There is no competition framework and consumer protection policy. However, the Ministry of Trade and Industry (MTI) and some other government departments take steps to protect the interests of the consumers in their respective spheres. Government has monopoly in the supply of basic amenities and essential services to the people e.g., telecommunication, power, health, financial services and other civic amenities. Thus small size of economy did not call for a need of competition rules. However, later it was felt that market abusive practices (like under-measurement, charging excess price, sale of defective goods, collective price fixation in some products and unfair trade practices) are prevailing. This resulted into the desire to have a competition and consumer protection legislation in the form of 'Bhutan Consumer Protection Bill, 2001'².

18. In case of Maldives, it is only due to recent developments in the trade and financial sector that the need for the competition rules is being felt. The law on fair-trading until recently was in the process of drafting. Throughout the phase of economic development, the Government's objective has been to restrict its involvement in commercial activities to necessary interventions in the public interests and to ensure such operations are conducted on a strictly commercial basis. Still there are publicly owned commercial enterprises: in electricity, industrial fisheries and State Trading Organisation.

19. These specific instances relate to small developing countries that are feeling the need to have competition frameworks. The situation however has been somewhat different in case of India and Pakistan. Both the countries have established competition laws dating back to 1969 and 1970, respectively. In India, it was noted that the provisions of the Monopolies Act were not sufficient to deal with the anticompetitive practices and the consumers' grievances at large. The government of India set up a High Level Committee (Raghavan Committee) to propose a modern competition law after an examination of the MRTPA. The Report of the Committee pointed out that due to WTO regime, introduction of a domestic competition law would prevent international cartels from indulging in ACPs in India³. The new Competition regime covers all types of enterprises and persons and all areas of commercial activity including professionals. It establishes a Competition Commission to prevent practices that may have adverse effect on competition.

20. In case of Pakistan, by the time the law became operative in 1972, the 'phenomenon' that the competition law was to regulate, entered a state of fundamental change. Beginning early in 1972, there followed the widespread nationalisation of the 1970s. However, in the late 1980s, a pro-market shift in the stance of economic policy became manifest and three significant components of this shift were: firstly, the privatisation of state-controlled units, secondly, the deregulation and liberalisation, thirdly opening up of economy for foreign investment. These policies of the Government gave boost to the private sector again and, hence, the need to have strong regulatory framework was felt. As a result, the amendments in the Law are under consideration.

21. This shows that developing countries have specific reasons for not having competition law or its inadequate application. However, most are now recognising to have rules and to modify them to be used effectively towards economic development.

NOTES

1. Same is true even for developed countries, the US safeguard measures on import of steel is a classic example.
2. The Bill recognizes the rights of consumers including the right to basic goods and services, which guarantee dignified living – food, clothing, health care, drinking water and sanitation, shelter, education, energy and transport.
3. Report of the High Level Committee on Competition Policy, Vol.1, May, 2000.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Poland

-- Session II --

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CHALLENGES AND OBSTACLES FACED BY THE COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Introduction

1. During the past thirteen years of the Polish economic transformation, the sole existence of the competition culture has never been endangered. This is due to the fact that competition policy itself was always ranked as one of the top priorities in the governmental economic policy, since it was perceived as an indispensable pillar of the Polish transition from the central-planning economy to the system based on the principle of the free market.

2. The utter importance of both competition policy and competition culture has been confirmed by the relevant Articles of the Constitution of the Republic of Poland, which has been enacted in 1997. The Article 20 of the aforementioned Act introduces an economic model, which among others assigns a prominent role to the competition culture. The Article in question states that *“social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland”*. Further on, the role of competition policy in the Polish economic life has been explicitly safeguarded by virtue of the Article 76 of the Constitution of the RP, saying, that *“the public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute”*.

3. The aim of this note is to analyze the past and present challenges and obstacles faced by the Office for Competition and Consumers’ Protection (‘OCCP’, ‘Office’) in performance of its duties, in order to answer the following questions:

- What factors contribute to the establishment of the successful competition culture?
- What challenges or obstacles are associated with those factors, and how they can be solved?

1. Economic transformation in Poland and the enforcement of competition policy

4. Economic transformation of the early 1990s, along changing the ownership structure of the Polish economy, introduced new types of business organisation and increased awareness of market players, thus enhancing market competition in Poland. The reformatory “Balcerowicz Plan”¹ implied, among others, the creation of competitive economy. With regard to competition policy, the reforms, while closely following European standards, were still tailored to the specific conditions of a country under transformation.

5. The processes of liberalisation, privatisation and restructuring bore various challenges and obstacles. Many of the former State monopolies, which have undergone the process of liberalisation tended to retain their significant market power, after the privatisation (e.g. telecommunications’ sector). Under the Polish law, the significant or even dominant position wielded by the undertaking on the market is not considered *per se* as an anticompetitive behavior. Nevertheless, the undertakings holding such position have far greater capacity to abuse the competition on their respective markets, than the undertakings operating in the fully competitive environment.

6. During the thirteen years of its activities, the OCCP utilised two approaches for protecting the competition in the sectors described above.

7. The effective enforcement of competition policy is one of the most efficient tools of influencing the process of forming the proper competitive relations in the privatised sphere of the Polish economy. This has been achieved by counteraction of any anticompetitive behaviors of the aforementioned former state monopolies, as well as by the effective control of concentration level of the Polish economy.

8. Additionally, in order to prevent the transformation of state monopolies into the private ones, in sectors structurally competitive, the OCCP actively influenced the process of privatisation of State assets. This was possible due to the broad consultative competences available to the Office from the very beginning of its existence. The crucial role in the process of promoting the principles of competition in the process of privatisation played the OCCP's power to opine, on *ex-ante* bases, every privatisation transaction. This tool has been very effectively used by the Office in the first half of the nineties, when the privatisation of the State assets was at its peak. Between 1990 and 1995, the OCCP issued 1500 opinions in the discussed area, which usually were taken into account by the Treasury Ministry (i.e. the Ministry relevant for supervising the privatisation process).

9. Summarising, the activities of the OCCP in this respect allowed for introduction of competition in many sectors, which at the beginning of the transformation process were deemed as structurally uncompetitive.

2. Polish economic transformation and the implementation of the legal framework of competition policy

10. The process of economic transformation implied certain challenges also in the area of developing the necessary legislative framework. The rapid liberalisation of the Polish economy required the adoption of entirely new legal setup, more responsive to the changing needs of both the undertakings and the consumers. In addition, the transformation of the legal environment has been further enhanced by the incorporation into the Polish legal system of the provisions of the EU *acquis communautaire*, stemming from the Poland's preparation for accession to the European Union.

11. In the area of competition policy the above translated into enactment by Poland of the competition law in 1990² ('1990 Act'). The abovementioned Act contained all core elements of the modern competition policy. It defined the anticompetitive practices and abuse of dominant position. It has also set-up the merger control system, introduced legal exclusions and relevant sanctions. However, the discussed law contained certain exceptional provisions addressing the specific needs of Polish economy, which by then was in its early years of transition.

12. In the second half of the nineties, as the Polish markets became more mature, and the timetable for EU enlargement became clearer, the need for the new competition law has arisen. The main idea behind the new competition act was to align the Polish competition policy with the requirements of EU *acquis communautaire*. Additionally, the works on the new law provided an excellent opportunity for enhancement of various procedural and substantial provisions based on the operational experiences in implementation of the 1990 Act gained by the policy enforcers in the past years. Due to the above, on 15th December 2000, the Polish Parliament adopted the Act on Competition and Consumers' Protection, which from that time on, provides legal framework for the enforcement of the competition policy in Poland.

13. Summarising, in Poland, the process of implementing the legal framework relevant for enforcement of the competition policy could be roughly divided into two stages. Firstly, at the very beginning of the transformation period, the competition law has been enacted. The law in question, on one

hand followed the generally accepted standards of the modern competition policy, while on the other took into account the special needs of the economy in transition. During the second stage, which lasted throughout the nineties, all those special measures aiming at facilitating the economic transformation have been gradually eradicated (as the economic transition progressed). This allowed for evolutionary implementation of the competition law, without compromising on its core elements.

3. Enhancing the competition culture via the advocacy activities

14. The lack of social and political support to the cause of free and unrestrained competition is generally perceived as a significant setback to its effective implementation. Therefore, the advocacy activities of the OCCP are exercised in two dimensions, i.e. relations between the OCCP and other public administration bodies; and activities aiming at rising the public awareness of the benefits deriving from the implementation of competition policy.

15. In regard to the former of the dimensions mentioned, the Office has a broad range of consultative powers, which it actively employs in order to promote the principles of competition policy among the policy-makers. Among others, those are: the right of the OCCP's President to attend all meetings of the Council of Ministers having competition policy issues on their agenda (even though the President himself is not the member of the cabinet); OCCP's power to opine drafts of legal acts prepared by other governmental bodies; Office's right to participate in the activities of various governmental and parliamentary working groups and committees etc.

16. In case of the second of the aforementioned advocacy priorities, the OCCP aims at increasing the awareness of economic units and the whole society in regard to the benefits stemming from competition. From a broader perspective, competition advocacy serves as a means to prepare Polish society for the participation in the Single Market of the European Union, both in terms of exercising consumer rights and fair competition rules. To intensify activities advocating competition, in March 2002, the President of the OCCP established the Department of Information and Communication,³ whose tasks include coordination of educational and information activities at the central and regional level. To this end, the Office employs various methods, e.g., trainings, mass media relations and publications. Recent information campaigns dealt with financial and telecommunications issues, advertising, electronic trade and education of young consumers. The Office elaborates also the guidelines for the entrepreneurs, concerning various aspects of the policies implemented by the Office.

17. In addition, the OCCP enhances the competition culture via the activities of Council for Competition and Consumers' Protection, which has been set up by the Office, as consultative and advisory body.⁴ The aim of the Council is to intensify co-operation between parties representing consumers and entrepreneurs. The initiative responds to the present trends of integrating business environments and non-governmental organisations in the face of social and economic problems and challenges.

18. One of the Council's initiatives is preparing codes of good practice voluntarily adopted by entrepreneurs in selected industries or sectors of economy. It proves particularly efficient in sectors of economy which are difficult to supervise, e.g., the construction sector, sales of used cars, travel agencies, real estate agencies and direct marketing. Codes stand a good chance of becoming a foundation of proper relations between consumers and entrepreneurs which should help reduce negative market phenomena.

19. Summarising, the lack of effective competition advocacy may result in the absence of social and political support to the cause of unrestrained competition, thus inhibiting its effective implementation, and negatively affecting the economic development. On one hand, the advocacy policy has to address different target groups (i.e. policy makers, consumers, undertakings), while on the other, it has to safeguard coherence of activities carried out with respect to each one of those groups.

4. International cooperation and the competition culture

20. As the international economic interactions intensify, new obstacles or challenges arise in the local and international markets. This necessitates international co-operation of governments engaged in the development of competition policy and consumer protection, in order to counteract possible problems. In case of the OCCP, active participation in the regional and multilateral debate on competition and consumer protection facilitates the formulation, adoption and implementation of fully-fledged competition and consumer protection policies.

21. The international cooperation either within the EU accession preparations, or along the transformation process, namely the assistance of the OECD and other international organisations, contribute to further enhancement of the competition culture in Poland.

22. Monitoring of the economic developments in Poland by the OECD helped to pinpoint areas requiring further efforts and preparations in order to comply with the international standards and to improve the effectiveness of competition protection. The recommendations of the OECD in the area of competition led to improvement of the policy enforcement and decisional status of the Office. Among others, in order to enhance the methodology of the competition cases, the OCCP established Market Analyses Department, which supports the enforcement departments in performance of their tasks. Other improvements in competition enforcement concern the human and procedural aspects in functioning of the Court for Competition and Consumer Protection (e.g. trainings and seminars for judges).

23. The European Commission recommendations have also great impact on the development of the competition culture in Poland. In the last Commission's report on the preparations of Poland for the EU membership (5th November, 2003), it is stated that Poland has adopted legislation containing the main principles of the Community antitrust rules and state aid. According to that report, the emphasis shall be put on the law enforcement and correct application. The most important challenge ahead of the OCCP is linked with the participation in the European Competition Network due to its legislative and institutional requirements. Successful cooperation within the ECN will path the way towards more active and decisive enforcement of the policy in Poland.

24. Summarising, the international cooperation plays vital role in the process of enhancing the competition culture. In case of Poland, the international cooperation by stimulating the exchange of expertise and ideas enhanced the Office's capacity to deal with various obstacles faced in the process of competition policy enforcement, as well as developing the indispensable competition culture. On more general level, by allowing in certain situations for joint enforcement, the international cooperation generates significant economies of scale in the effectiveness of the competition policy in the cooperating countries (e.g. ECN).

5. Conclusions

25. During the nineties, the nature of the challenges and obstacles faced by OCCP in its competition enforcement activities changed in correlation with the progress of the economic transformation. The relevant institutional and legal framework has been established already at the beginning of the transformation process (i.e. 1990). This provided firm bases for the elaboration of sound competition culture. The main obstacles faced by the Office in the early nineties stemmed directly from the process of economic transformation, i.e. the Office had to prevent the transformation of state-owned monopolies into the private ones in sectors structurally competitive. The Office successfully overcame those obstacles by effectively enforcing competition policy, as well as by applying its broad consultative powers.

26. From the very beginning of its existence, the Office relays on extensive advocacy activities as an avenue for promoting the competition culture and maintaining the public support to the principles of competition policy. The main target groups addressed by the OCCP are: the policy makers and the society. Additionally, based on its previous experiences, the Office would like to underline the importance of foreign cooperation as a tool for enhancing the capacity of competition policy enforcers to deal with obstacles and to face the challenges stemming from the enforcement of competition policy.

NOTES

1. "Balcerowicz Plan" was a programme containing a set of measures which were to rapidly transform Polish economy into the system based on the principle of free and competitive market, elaborated by one of the leading Polish economists, and then Finance Minister – Mr. Leszek Balcerowicz.
2. The Act of 24th December 1990, on combating of the anti-monopolistic practices.
3. At present, the Department of International Relations and Communication.
4. The Council consists of business representatives, NGOs, and distinguished experts in the area of competition and consumer protection.

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OECD Global Forum on Competition

**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

CONTRIBUTION FROM ROMANIA

-- Session II --

This contribution is submitted by Romania under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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**CHALLENGES/ OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT
THROUGH THE PROMOTION OF COMPETITION**

*(by Theodor Valentin Purcărea, PhD.
President of the Competition Council of Romania)*

“The challenge is becoming an opportunity: an opportunity for more effective enforcement of competition policy in the benefit of the consumer; an opportunity to contribute through competition policy instruments to foster market oriented reforms and to improve the capabilities for sustainable growth.”¹ Mario Monti, European Commissioner for competition policy

1. The context – the first challenge

1. Romania – developing country, building an efficient and real functioning market economy – is characterised by a fast changing economic environment (from a centralised system to market economy). Passing the Romanian economy to a market economy, compulsory condition for Accession to the European Union, has represented for our country the tandem enforcement of the privatisation and competition policy for the industrial sector.

2. Our efforts are focused on the creation of an appropriate correlation between the manifestation of private property, competition, market price establishment mechanism, economic and financial basic key factors, on one hand, and elaborated legislative norms, on the other hand. The market economy cannot assure the advantages it includes if a strict competition discipline is lacking, discipline which is not self creative, but which must be created and applied efficiently. The freedom of competition is a public freedom. The aim of the competition policy is to maintain and develop an effective state of competition, acting on the markets’ structures and actors’ behaviour. By requesting undertakings to compete each other, the innovation is supported, the production costs are reduced, the economic efficiency is growing and consequently the economic competitiveness is strengthened. Thus, it may be explained how undertakings are stimulated through competition to offer competitive products and services in terms of price and quality.

3. The strategy of the Competition Council, single autonomous administrative authority in Romania having the responsibility of Chapter 6 “Competition Policy” within the negotiations for the accession to the European Union focused on the fulfilment of Copenhagen criteria: the transposition of the EU acquis on competition and State aid field, the effective enforcement of the acquis and the strengthening of the administrative capacity. All these objectives are linked with the promotion of the competition through a direct and biunivocal relation:

- setting up the rules of the game through the legislative framework will be supported by, and will influence the development of the competition culture;
- the enforcement of the law is supported by and it is encouraging, in the same time, a mature competition culture;

¹ Mario Monti, “EU competition policy after May 2004”, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003.

- a strong competition authority can function properly only framing a stable, mature competition environment.

4. To create an authority is only the starting point of building, on its own activity, its legitimacy: the recognition of its role on protecting, maintaining and stimulating the competition and a normal, competitive environment, with a view towards promoting consumers' interests.

5. The provisions of Article 134 (1) of the Law no. 429/23.10.2003 related to the revision of the Romanian Constitution underline that „Romania is a market economy, founded on free initiative and competition”, the private ownership being guaranteed and inviolable. This is an unequivocal restatement of the commitment to free and undistorted competition as an objective of the Romanian economic policy.

6. It is true that stipulating the role of the competition within the fundamental law of a State is not a compulsory condition in order to apply its rules, but it is the sign of a real political will. It is the guarantee that the competition principles are the roots of economic policies.

7. It is a unanimous thinking that a political decision not necessarily against the promotion of competition principles but establishing some rules that could permit anti-competitive behaviour of private or public economic agents represents a very serious obstacle for any competition authority. I wish to underline here that “*any governance mechanism can only be as strong as its weakest link*”, as recently concluded Mr. Philip Lowe, the General Director for Competition within the European Commission.

2. Obstacles or challenges? Transforming it in opportunities

8. The approach of the competition advocacy has two components: the first one consists of activities targeting the authorities that have regulatory competencies, and the second one has in view all the components of the society (i.e. judicial system, undertakings, etc.) and is targeted toward their raising awareness on the benefits which could be brought by competition and on the role that competition policy might play in the promotion and protection of a normal competitive environment.

9. I think that it is more challenging to talk about challenges and about the response of the Competition Council of Romania to some of them.

10. As the main challenge I could note the mentalities, the attitude of those who expect to loose from economic and administrative change. It is reflected by all following challenges.

11. I could identify some environmental challenges (maturity of the public administration and maturity of the business environment) and also internal, intra-organisational challenges (lack of resources, lack of access to information).

2.1 Environmental challenges

2.1.1 Maturity of the public administration

12. As a young body, emanated from the Romanian economic reforms process, the Competition Council had not to fight so much with internal evils, with refractory behaviours and opposite to the reforms. We have a lot of very young experts, open minded and preoccupied to increase their personal acknowledge and skills fast and seriously.

13. A real challenge was to create the proper relations with the other public authorities and to establish a real and constructive inter-institutional dialog. It was a permanent preoccupation of the Competition Council to develop and adapt the competition and state aid rules to the dynamic if economic

environment and to promote them. The inherent difficulties of the beginning have been surpassed and we could talk now about a network of experts on competition among the ministries which are members of the sectoral group for accession to the EU for Chapter 6 "Competition Policy" and also about lasting contact points among other ministries and agencies.

14. Through several actions (conferences, seminars, workshops organised in Romania or in the EU Member States within two twinning programmes) we aim to permanently improve knowledge and skills of the judges from the Bucharest Court of Appeal and the Supreme Court of Justice, in order to ensure a unitary approach of competition and state aid cases, according to EU standards.

15. Our actions on promoting the competition culture refer also to the representatives of the Parliament. Here it is a big challenge: to increase the awareness of the political environment on effective enforcement of the competition and state aid policy and on the rank of the competition authority within the economic institutional system.

16. We could note as a positive result the draft proposals for amending the Competition Law as regards the criteria for restructuring the Competition Council, free from any political influence.

17. From this point of view, 2003 was the starting year of the reforms on the institutional framework on competition and state aid in Romania. With a view to complete harmonisation with relevant community provisions, as well as to reinforcing the administrative capacity for implementation of the legislation in the competition field, the Competition Law and the Law on State Aid are in amending process, taking over the remarks of the European Commission. They have been approved by the Government of Romania and have been sent to the Romanian Parliament.

Amendments to the Competition Law aim to:

- abolish the obligation to notify to the Competition Council in order to obtain a block exemption, notification that created both supplementary costs for the involved companies and administrative crowding of the mentioned authority;
- eliminate the existing overlapping of competencies, generated by the existence of two institutions (the Competition Council, as autonomous authority, and, respectively, the Competition Office, as governmental body), achieved by preserving only the Competition Council. Thus, the Government of Romania is giving up its previous powers, in this field, leaving the entire responsibility to a sole institution, powerful and autonomous, politically unsubsordinated;
- empower the Competition Council to give a compulsory advice on drafts of normative acts that could have an anti-competitive impact and to recommend the necessary improvement changes of those provisions. Thus, the prevalence of the competition legislation over any other legislation which could include anti-competitive provisions will be ensured.

The main amendments to the Law on State Aid consist on:

- introducing the possibility, for the Competition Council, to control the State aids granted through provisions of laws, government ordinances, governmental decrees, etc.;
- eliminating the provisions which had given the possibility to authorise state aids based on a subjective assessment, balancing the positive and negative effects, rather than taking into account the criteria and conditions provided in the acquis communautaire;

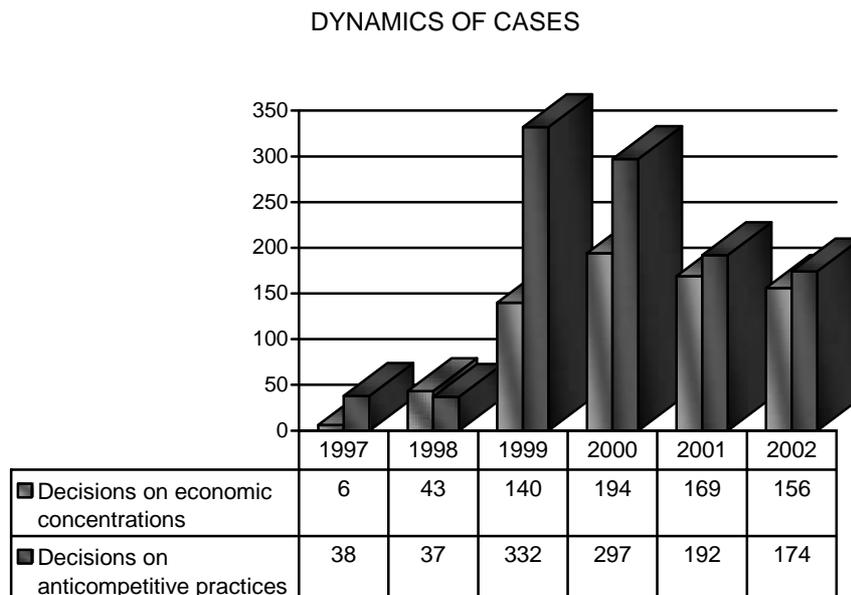
- Competition Council remains the sole authority in this field, having all the competencies in this respect, i.e.: authorising, monitoring and controlling, inventorying and reporting State aids.

18. Implementing this modernisation reform is certainly a challenge, but also an opportunity: the opportunity to consolidate the role of the Competition Council as promoter of the rules of the effective market economy.

2.1.2 *Maturity of the business environment*

19. Competition policy is protecting competition as most efficient resources allocation system of the society and it is not protecting competitors. The maturity of the business environment depends on the maturity and level of the economic development of the country. Talking about the promotion of the competition principles or about the increase of awareness on the importance of competition enforcement by the economic agents or about the long term benefits both for private business and the general economic growth, we must analyse the dynamic of the activity of the Competition Council for each category of cases.

20. The following graphic presents the evolution of the Competition Council's decisions on anticompetitive practices and economic concentrations issued in the period 1997-2002:



21. It could be noticed the constant evolution of the economic concentration which shows that the undertakings tend to regroup themselves, to search ways to strengthen their position which do not distort competition but which allow them to continue or develop their activity. The decrease in the number of anticompetitive practices confirms the understanding by the business community of the fact that the competition is the engine of their affairs.

22. For ensuring the opening to competition of the regulated markets and the continuation of privatisation process, the competition authority is getting involved in the design of privatisation schemes for finding solutions to minimise the restraints on competition and to facilitate new entries as soon as possible.

23. The competition authority intensified its actions to systematically identify and analyse the restrictions on competition and the market barriers in all economic sectors, and to propose concrete steps to eliminate or attenuate the distorting effects of these restrictions. Thus the competition authority will play an effective check-up function vis-à-vis the regulatory authorities.

24. A dynamic business environment, ensuring that competition sets incentives to innovate and foster productivity growth, induces firms to enhance their efficiency and thus enable them to better prepare to compete on national and international markets.

2.2 Internal, intra-organisational challenges

2.2.1 Lack of resources

25. It is about financial and human resources, which are strongly related together: the number of personnel can increase at an optimal level only if sufficient resources can be allocated for its proper work (offices, technical equipments) and for ensuring the conditions of the continuous acknowledgment.

26. Even functioning under optimal capacity, in a same extent the Competition Council surpassed the problems of staff training and improved its endowment through Phare technical assistance (1 investment program and 2 twinning programmes, one of them being on going). The seminars and conferences organised in Romania and abroad, training stages within competition authorities in Germany and Italy, as well as within European Commission, have contributed to the increase of knowledge and skills of the specialised staff of Competition Council. Representatives of the ministries granting state aids, of the business community and of the academic environment have been invited to attend these events.

1.3.2 Lack of access to information both for research and to prosecute cases

27. This challenge is directly linked with the previous ones: the maturity of the business environment, on the one hand and the lack of resources, on the other hand.

28. After seven years of enforcement of the competition rules in Romania the economic agents are more open to offer the relevant and significant data and information in specific cases.

29. An agreement signed with the Chamber for Trade and Industry of Romania and the relationships established within the sectoral group provide us also very useful information but a lot of actions remain to be enforced in order to attend a proper level of market research.

3. Conclusion

30. The economic progress depends in a significant extent on our ability to create and protect effective markets by advocating pro-competitive policies.

31. To pursue advocacy role, the competition authority can educate all the actors concerned: ministries (industrial ministries and Ministry of Finance), sectoral regulators, politicians (lawmakers and their counsellors), judges and lawyers and make them understand the benefits of competition. Moreover, the public should be aware of the benefits of competition through competition authority's communication activities.

32. The methods used by Competition Council in order to promote competition culture are diverse:

- *seminars and workshops* for the representatives of business environment, for the experts in the regulating authorities, for lawyers and judges, for representatives of the academic

environment (organised with the research institutes within the Romanian Academy – i.e. the Prognosis Institute, with EU and American experts, and the Centre promoting competition in the Institute of World Economy);

- *press releases* on issues of major importance included on the Competition Council agenda;
- publishing the Annual Report and the newsletter “Profil: Concurența”;
- the web page;
- publishing several *guidelines or view points*, aiming to clarify the approaching manner used by Competition Council in certain cases (i.e. „Guidelines relative to the application of the competition rules on agreements aiming the access in the electronic communication sector – general framework, relevant markets and principles”, or “Guidelines on defining the relevant market in order to establish the significant market share).

33. These activities have as a result the *increase of transparency* of the competition protection policy, *the rise of credibility and persuasion* of the involved institutions. They have, also, as an effect, to build up the “*competition advocacy*”, materialised in awareness of the undertakings, and of the public on the competition rules.

34. I wish to stress again that the main challenge is to transform challenges in opportunities.

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from the Russian Federation

-- Session II --

This contribution is submitted by the Russian Federation under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

(Ministry for Antimonopoly Policy and Support of Entrepreneurship)

1. The current stage of increasing globalisation process is characterised by the growth of international trade, foreign investments, fast development and integration of financial markets.
2. Competition policy is playing in these processes a substantial role, promoting world economic progress by effecting economic concentration control on a market, suppression of abuses by the companies dominating on market, prohibition of anti competitive agreements of economic entities.
3. The effectiveness of competition law system applied in the country is now used as a criteria for determination of national economy' integration into the world economic system.
4. The world statistics show that the ratio of world foreign direct investments (FDI) inflows to GDP (Gross Domestic Product) increased dramatically in recent years while the ratio of foreign trade to GDP remained the same. Thus the conclusion is made that in the last time the global integration is undertaken rather through FDI than through foreign trade. The decisive role in the growth of FDI belongs to transnational corporations (TNCs) which are considered as the principal drivers of international production. According to the UNCTAD World Investment Report, the foreign affiliates of the top 100 TNCs employ over 6 million persons, and their foreign sales are of the order of \$2 trillion.
5. The economy development of the Russian Federation within the last four years is characterised by the solid growth of the basic macro-economical indicators. GDP's growth last year exceeded 6 per cent. Industrial production, investment activity index, Bank's of Russian reserves have increased. The State debt's indexes have been optimised. All of this contributed into the national currency rate exchange stabilisation, allowed to slow down inflation processes, decrease of percentage in economics, that was favourable in respect to financing industry sector and agriculture, support of liquidity of financial and credit sector. Official statistics also fixe the increase of direct foreign investments.
6. These developments also pose new challenges for Russia's national economic policy in general and its competition policy in particular. Action is needed to make the regulation of competition more effective, to introduce new approaches in light of globalisation, to simplify and simultaneously increase the effectiveness of the system of antimonopoly control, and to move to new forms of international collaboration that will ensure cooperation between competition authorities when investigating breaches of antimonopoly legislation having transnational effects. The attainment of these objectives will require specific changes in the legislative, methodological, enforcement and international activities of Russia's competition authority, the Ministry of the Russian Federation for Antimonopoly Policy and Support for Entrepreneurship (MAP).

7. Last years there was a strong trend in Russian Federation of the very active capital redistribution, especially in the ferrous and non-ferrous metallurgy, chemical and oil-chemical complexes, the machine-building branch, the pulp and paper industry, in the agricultural complex, in particular, in the markets of grain, meat and products of its processing, sugar, etc. The process of concentrations in the aluminium-, copper ore industries through consolidation of shares in the hands of one group of owners could serve as the examples.

8. The aim of the transactions on buying share of the largest plants is formation of large vertically integrated structures.

9. Meanwhile some of the transactions may have negative consequences for competition, for example when a company acquires its competitor creating dominant position on the market or when two or several competitors are merging and such transaction strengthen a market position of the new company.

10. There are only few cases in the Russian antimonopoly practice where MAP rejected the transaction. In 2003 about 100 notifications were rejected including only two with participation of foreign companies. But the most part of consents to the transactions (both national and international) is granted by MAP subject to certain remedies.

11. Among such remedies the following could be mentioned:

- regular informing MAP on volumes of production and sales of the goods with justification of changes in these volumes;
- advance informing MAP on intentions to change the policy on supply and sales, etc.

12. In 2002 the Russian antimonopoly legislation was improved by the adoption of the amendments to the Federal Law on Competition and Restriction of Monopolistic Activity on Commodity Markets (hereon after the Law on Competition), which two times increased the total balance value of assets threshold¹ for transactions and other actions of economic entities, which require preliminary consent of the antimonopoly bodies up to articles 17&18 of the Law on Competition.

13. But the fact is that the total number of notifications last year was still about 10 000 and this cannot be considered to be normal as we are overloaded by revision of the smallest transactions wasting limited resources of 75 Territorial offices acting in 88 subjects of the Russian Federation as well as the central office staff.

14. Further optimisation of the national merger control system is required, which on the one hand prevents the emergence or strengthening of a dominant position of economic entities on product and financial markets leading to restriction of competition and on the other hand supports the policy of reasonable economic concentration to provide stability of Russian companies and competitiveness of their goods on the world market.

15. There are no special provisions in the Russian Antimonopoly Law concerning the control of multinational mergers – the same rules are applied to all companies both national and foreign based on the principle of national treatment.

¹ The threshold was doubled up to 200,000 minimum wages. "Minimum wages" is a unit of measurement in Russia, and its current rate is [100] roubles = 1 minimum wage. Two hundred thousand minimum wages is equivalent to approximately 20,000,000 roubles

16. MAP Russia has no broad experience in that field though the Dealogic's database includes more than 400 largest cross-border Mergers & Acquisitions transactions worldwide. The only case examined in 2003 was the approval of BP-TNK merger.

17. Therefore we appreciate the recommendations on multinational mergers elaborated within the ICN Merger Notification and Procedures Subgroup presented at the Second ICN Conference in Merida.

18. While the recent changes have been welcome, current trends in the development of Russia's economy and antimonopoly standards adopted by the international community mean that Russia must further improve its competition laws in order, among other things, to bring them more closely into line with international principles.

19. One area where competition law can be improved is the regulation and control of agreements or concerted actions of commercial entities that restrict competition. This area is closely monitored by the antimonopoly authorities of developed countries and of international organisations in order to uncover so-called "hard-core cartels", which are regarded as the most damaging form of anticompetitive practice.

20. In Russia, the problem of curbing agreements and concerted actions of commercial entities that restrict competition continues to be extremely complex, not least because of the difficulty of obtaining evidence. Experience shows that anticompetitive agreements are generally found in sectors characterised by a high degree of concentration of capital and production capacity, which include the natural monopolies. Traditionally, many of the complaints considered by antimonopoly authorities involve companies in the fuel and energy sector (for example, the light petroleum products market), where the major violations relate to price fixing. But concerted actions are not limited to a single sector and often extend to the whole production cycle of a product and its sale.

21. While the negative effect of cartel agreements on competition in a given market is understood, the Russian antimonopoly authorities experience considerable difficulties in identifying, curbing and proving the existence of concerted actions. This is because current legislation is incomplete and especially because the powers of the antimonopoly authorities are not wide enough.

22. A number of amendments to the Law on Competition and Restriction of Monopolistic Activities on Commodity Markets were adopted in 2002 in order to tighten control over anticompetitive agreements and make the detection and proof of their existence more effective. For example, the law now imposes a direct ban on the conclusion of agreements between competitors, irrespective of their position in the market, if the implementation of those agreements could lead to the establishment (or maintenance) of price[-fixing], discounts, mark-ups surcharges, the splitting-up of markets along geographical lines, or a refusal to enter into agreements with particular vendors or buyers (clients).

23. The amendments adopted in 2002 also provided for a system of advance monitoring by the antimonopoly authorities of draft agreements to determine whether they might restrict competition if implemented. It should be pointed out that the notification of agreements by commercial entities to the antimonopoly authority is voluntary. At the same time, if an agreement is not submitted in advance to the antimonopoly authority for approval and is subsequently found to restrict competition, the agreement is automatically deemed to be a breach of antimonopoly law, and no account is taken of any positive effect that might arise from its implementation. Consequently, advance notification of agreements allows commercial entities to be certain that their agreements comply with the antimonopoly law and will not be subjected to scrutiny by the antimonopoly authorities in the future. In this respect, Russian legislation is in harmony with that of European countries. However, further improvement of the antimonopoly regulation system is required in order to strengthen the powers of the antimonopoly authorities to investigate, and obtain evidence of, anticompetitive agreements.

24. Yet another aspect of Russia's competition regulatory system that requires improvement is enforcement, which needs to be made more effective by increasing the severity of penalties for violations of antimonopoly law. Penalties are much lower in Russia than in developed countries. The lower penalties in Russia are an obstacle to effective application of antimonopoly regulations, which in turn discourages the inflow of foreign investment and hampers the development of competition in Russia's goods markets.



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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

Contribution from South Africa

-- Session II --

This note is submitted by the Competition Tribunal of South Africa under Session II of the Global Forum on Competition, to be held on 12 and 13 February 2004.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Submitted by the Competition Tribunal of South Africa

Introduction

1. This note will comment selectively on several of the aspects of this question that are raised in the discussion note prepared by the Secretariat for the Global Forum on Competition. In particular, the note will examine, *from the perspective of the adjudicative/decision making body*, South African experience pertinent to the large questions of competition culture and institutional adaptability.

1. Background

2. South Africa established a new competition enforcement regime little over four years ago. This new order comprises a statute – the Competition Act – and three institutions, namely, the Competition Commission, the investigative and prosecutorial authority; the Competition Tribunal, an administrative Tribunal which is the decision making body in respect of all allegations of anticompetitive conduct and in respect of all mergers above a certain threshold; and the Competition Appeal Court, a special division of the High Court which hears appeals from the decisions of the Tribunal.

3. In common with many other competition regimes, the jurisdiction of the South African competition authorities extends over all mergers above a designated threshold and over anticompetitive conduct. Anticompetitive conduct consists of a range of horizontal and vertical agreements and abuses perpetrated by a dominant firm. The Commission is able, under highly specified circumstances, to exempt certain otherwise anticompetitive conduct although this decision may be appealed to the Tribunal.

2. Competition Culture

4. In 1994, South Africa's first democratic government inherited an economic structure characterised by high levels of market concentration and ownership centralisation. Although a competition statute had been in existence for several decades, the enforcement agency (a division of a government department) was poorly resourced and its formal powers were, for the most part, limited to advising government. Government had publicly ignored several important recommendations from the competition authority – for example, the decision by government to permit a merger that effectively divided the alcoholic products market between a beer monopoly and a wine and spirits monopoly – with consequences that continue to determine the structure of important markets. It was widely assumed that anticompetitive conduct was rife, although in the previous act's 25 years of existence there had not been a single successful prosecution of anticompetitive conduct.

5. The newly elected government was, for its part, determined to confront this state of affairs. It understood that generations of South African consumers had been fleeced by any number of private and public monopolies. It also clearly perceived robust competition laws to be a vital component of liberalisation. It also recognised that private concentrations of power did not augur well for democratic governance, the more so when these concentrations were composed of the members of a single ethnic minority. Hence, in order to deepen the fledgling democracy, the government was determined to ease entry into the private economy.

6. In summary, South African business was firmly inserted into an environment characterised by protection from international competition by means of extensive trade barriers; from domestic competition by weak competition law and, more important, by the apartheid framework that, in a variety of ways, severely limited new entry. However, the newly elected South African government was, in the name of an efficient, accessible economy, prepared to challenge this and competition law was perceived to be an important element of this challenge.

7. This makes for a complex culture surrounding competition enforcement. The business sector, dominated by large, domestically-owned conglomerates and steeped in protectionism was intensely suspicious of the intentions underlying the introduction of robust competition enforcement although the less coherent small business sector, as with the broader South African public, welcomed it, albeit often with exaggerated and skewed expectations of its promise. Government, for its part, was an enthusiastic proponent of competition law although it, too, was careful to insert broader social goals (for example, employment creation and Black economic empowerment) into the objectives of the Competition Act.

8. It is the Competition Commission – the investigative and prosecutorial wing of the competition authorities – that is statutorily responsible for competition advocacy. As the independent adjudicative body, with decision-making (rather than appellate) responsibilities in respect of all large mergers and allegations of anticompetitive conduct, the Tribunal's engagement in public debate and advocacy is largely centred around its decision making process and, of course, the outcomes of that process. The Tribunal thus determined, at an early stage, that its principal role in improving the competition culture in South Africa resided in maximising transparency in the decision making process, the better to inculcate a realistic appreciation of the goals and instruments of competition law. In this way we hoped to earn the respect (if not necessarily the love) of a sceptical business community; and to inject a measure of realism into the expectations of the public. This naturally had to be achieved while adhering to the letter and spirit of the statute drafted by the executive and passed into law by the legislature.

9. Our approach is most clearly manifest on three fronts:

10. Firstly, the Competition Act enjoins the Tribunal to conduct itself *informally*. It specifically frees the Tribunal from some of the more constraining elements of high court rules as regards the preparation of pleadings and the admissibility of evidence. In what is, without significant exception, a classically adversarial legal system, the Tribunal is accorded (undefined) '*inquisitorial*' powers. The legislature clearly intended these procedural features to reduce the burden on poorly resourced complainants in part by enabling the Tribunal itself to actively intervene in its own proceedings. While this has undoubtedly lent a more 'human' and accessible style to Tribunal proceeding, the degree of informality and the extent of the inquisitorial powers that are exercised is, in reality, constrained by the provisions of the Constitution and general administrative law standards of fairness and due process. Certainly, informality and Tribunal intervention is effective in merger hearings but less so in restrictive practices hearings that ineluctably take on many of the features of a high court trial.

11. Secondly, the Tribunal has sought to encourage *participation* by interested stakeholders in its procedures. When merging parties file a notice with the Commission of their intention to merge, they are required simultaneously to notify the Minister of Trade and Industry and the trade unions representatives of employees in the merging parties. These parties – the Minister and the unions – are entitled, as of right, to 'intervene', that is to submit evidence and argument, at any stage of the investigation and adjudication of the intended transaction.

12. Interested parties are also entitled to apply to intervene in proceedings before the Tribunal. While there is no automatically granted right of intervention – the would be interveners must establish their interest and their application may be (and frequently is) opposed - the Tribunal has considerable discretion

in deciding an application to intervene and it has tended to take a liberal view in granting these applications. One high-profile application to intervene in a merger hearing by the Industrial Development Corporation, a state-owned industrial development finance institution, was strongly opposed by the Anglo-American Corporation, the acquiring party and South Africa's largest company. The Tribunal's decision to allow intervention was upheld on appeal to the Competition Appeal Court which also confirmed the Tribunal's use of its inquisitorial powers.

13. It is the Tribunal's view that permitting wide-ranging participation in its proceedings – which, of course, does not exclude denying vexatious or frivolous applications to intervene – serves the dual objective of improving the quality and breadth of evidence and argument placed before the Tribunal and assists in establishing a reputation for transparency and accessibility.

14. The Tribunal's commitment to *transparency* extends significantly beyond the question of intervention. All hearings are accessible to the public and regularly announced in the media. While due regard is given to the requirement for confidentiality in merger hearings, claims for confidentiality must meet the standards of the Act and are not granted as of right. All decisions of the Tribunal are fully reasoned and publicly available on its website. Considerable effort is made to ensure that decisions are clearly drafted with a minimum use of complex legal and economic jargon. Summaries are regularly prepared for media consumption.

15. The *news media* are an important part of the Tribunal's strategy for improving the competition culture. Representatives of the media are invited to each hearing of the Tribunal and attend regularly. Considerable effort is made to ensure that decisions are understood and widely publicised. It appears that the media has come to appreciate that, beyond the competition issues at stake, hearings before the Tribunal provide an opportunity for deepening understanding of a particular firm and of the dynamics of a sector of the economy. On occasion international competition experts who are brought in for the purpose of training Tribunal members and staff are made available to the media.

16. In our view, the Tribunal's decision to maximise transparency and accessibility has reaped handsome dividends. While it has certainly not immunised Tribunal decisions from criticism – this was never the intention – it has raised the level of understanding of competition matters and has contributed to a growing reputation for fairness and professionalism. As such it has improved the climate and culture surrounding competition enforcement.

3. Institutional Adaptability

17. The note prepared by the Secretariat makes much of institutional adaptability and refers particularly to the Judiciary which many national competition agencies find particularly inflexible and unhelpful in the enforcement of competition law. Common grievances are that generalist judges do not understand competition law – particularly its complex economic underpinnings – and that they set excessively high store on procedural rectitude.

18. As already briefly noted, the South African Competition Act established two adjudicative bodies. These are, firstly, the Competition Tribunal, which is an administrative tribunal composed of 'lay-persons' (effectively non-judges) comprising principally lawyers and economists. The Tribunal enjoys considerable powers of remedy, including the prohibition of mergers, the imposition of injunctive relief, the levying of administrative penalties and, in particular cases, the ordering of divestiture.

19. Secondly, there is the Competition Appeal Court, which is a specialist division of the high court, composed of sitting members of the various provincial benches. The judges of the Competition Appeal Court volunteer to serve on this court because of particular interest in competition law. In order to secure

appointment to the Competition Appeal Court – on which they serve in addition to their normal generalist duties on the provincial benches - they are required to submit to full hearings before the Judicial Services Commission, the body responsible for nominating judicial appointments to the President.

20. This structure has served the South African competition regime very well. In the Tribunal, we have an expert decision making body composed of representatives of the disciplines – notably law and economics but also potentially chartered accountants – that contribute to the make up of this unusual branch of law and economics. The strict separation between the Tribunal – the decision-making body – and the Commission – the investigative and prosecutorial body – helps shelter the system from administrative and constitutional challenge. As important it assures merging parties or targets of restrictive practices investigations of a fair, public hearing before an independent and expert body.

21. The presence of the Competition Appeal Court naturally contributes to this environment of fairness and due process. It is, we repeat, a fully-fledged court populated by serving high court judges. Unlike in many other jurisdictions, the specialist nature of the court means that the pool of judges are hearing a relatively large number of competition cases. They experience sufficient ‘critical mass’ in the practice of competition law and are able to develop a working familiarity with this unusual, dynamic field of the law. Moreover, the judges have a stake in the competition system. They want it to work well. They set high standards for the Tribunal and Commission below them and, simultaneously, are in sufficient touch with the peculiarities of competition law to develop discerning regard for the expertise of the lay bodies. They have become effective ‘ambassadors’ for competition law among the judiciary and the higher reaches of the legal profession generally. It is, in short, a system which has established the special nature of competition law, without attempting to deny the traditions and unique contributions of the judiciary and, to this extent, has engendered the required degree of institutional adaptability.

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Tanzania

-- Session II --

This contribution is submitted by Tanzania under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

(A paper by G. Mkocha, Commissioner, Fair Competition Commission, Tanzania)

Introduction

1. This paper is divided into five parts, namely; the current state of affairs of competition policy and law in Tanzania, the challenges of competition authorities with regard to the need of such institutions, the challenges of competition authorities with regard to the design and implementation of competition policy and law, the challenges with regard to implementation of the law and the conclusion.

1. The Competition Policy and Law state of affairs in Tanzania

2. Tanzania is in her early stages of attempting to establish an appropriate and possibly an effective competition policy and law. The summary below outlines the stages which the current law is undergoing:

- The Act was passed by Parliament on April 2, 2003¹.
- The President assented to it on May 23, 2003.
- The President's Office is in the process of assigning Ministerial responsibility for the Fair Competition Commission and Fair Competition Tribunal after which that decision will have to be published in the official government gazette.
- Once the Minister responsible for the institutions has been appointed, the Minister is required to publish in the government gazette the date on which the Fair Competition Act shall start to be used.
- After the Fair Competition Act operational date has been published in the government gazette, full recruitment of members of Commission and Tribunal, and their staff shall begin.
- Training of Commissioners, Members of the Tribunal and senior staff will follow after which the Commission and Tribunal should be launched.

3. Since ordinarily, there may be no time that a country should not be guided by law, the Fair Competition Act of 1994 (as amended)² remains operational until the new one is legally established by the above listed procedures.

2. Challenges and obstacles with regard to the need for competition policy and law in Tanzania

2.1 The genesis of competition policy and law in Tanzania

4. In 1986, Tanzania decided that market forces would be the main determinants in the economy. Thereafter, the government embarked on a process of repealing most of the laws that had been put in place to administer the planned economy.

5. In 1993 the government was presenting the Bill to repeal the Price Control Act, 1973 when the parliamentarians requested the government to find out how the market economy could be fettered. The request was prompted by what was construed by the public as a “chaotic situation” due to the fact that nobody appeared to be accountable for anything which was taking place in what they called “free market” in the country.

6. The government agreed to the request and set up a task force to find out what legal frameworks and institutions were operating in developed market economies and whether Tanzania could adopt such mechanisms. The task force did its job and in 1994, the Fair Trade Practices Act, 1994 was passed by parliament. This law has recently been repealed and replaced by the Fair Competition Act of 2003.

2.2 *The challenges for starting a competition policy and law*

7. The playing ground for any competition policy and law is the market economy. In developed market economies, competition policy and laws are more than 100 years old. In Canada it was enacted in 1879 and in the USA it was done in 1889. In the developing world, especially in countries which were under centrally planned economies, there is no in-depth knowledge and experience of how the market economy works and how it is fettered in order for the market economy to bring about benefits to a wider society. Therefore, the knowledge, appreciation and experience gap between societies in developed market economy and ours is a huge challenge.

8. Tanzania has still an underdeveloped market. The challenges of developing the market are mainly four:

- Liberalisation of trade.
- Privatisation of State monopolies.
- Deregulation.
- Creation of a viable and dynamic national private sector.

9. Market economy is not necessarily an ideological concept. Done properly, it is a means for decentralizing economic decision making by giving chance to as many players as possible to participate in a particular economy. The societal wisdom of favouring market economy and political pluralism are based on the same logic and right of self-determination and choice. This is both a political and a conceptual challenge.

10. Competition policy and law aims at making sure the liberalisation process is not used to achieve negative results in society. Competition institutions can legally challenge in a transparent manner and check the privatisation process from being tools of simply transferring the power of former state monopolies to private monopolies. This is also a political as well as pure conflict of interests challenge.

11. Typically, competition authorities are referees between three important players namely: the producers of goods and services in the economy, the consumer, and the Government. The relevancy of governments as factors in competition issues is particularly in relation to introducing laws, regulations or conduct which may be anticompetitive. Of the three players, the consumer is the least developed and organised in Tanzania. This is an advocacy challenge.

12. The scenario where the societal collective will to implement competition policy and law is lacking was once ably termed by an expert on competition from Brazil as “political market failure”³.

2.3 *Challenges and obstacles with regard to the design and implementation of an appropriate competition policy and law in Tanzania*

13. The requirements of a proper design and implementation of competition policy and law institutions i.e. independence, due process, accountability and transparency assume a high level of commitment to good governance on the part of Government itself. If the Government cannot appreciate the need for proper functioning and the insulation of such organisations from improper conduct, that is, if the Government itself is not up to the mark, it is unlikely to supervise the creation of appropriate and effective competition institutions. This is a good governance challenge.

14. The long term nature of institutions building sometimes hides their import. The level of understanding and appreciation on the part of the authorities with regard to the role of institutions in the development of the particular society is crucial. Competition institutions are amongst market support institutions. Obviously if institutions are taken for granted, then care and time in developing the law, institutions and the appropriate attitude to competition issues cannot be guaranteed.

15. Since the capacity for designing the law is hardly available in developing countries, it would require some commitment from some leader in the developing country, especially political leadership, in order for the proposals by external experts to get both the political and bureaucratic attention and support required for the proposals to be accepted, adopted and made into a law that makes sense in the particular country's context. An example of what happens when the above aspects are lacking can be seen from what happened in the previous Fair Competition Act in Tanzania.

16. The previous Act was passed by Parliament in 1994 but had a lot of weaknesses and hence its repeal and replacement by the current Act. Some of the weaknesses of the previous Act that have been overcome by the new Act are as follows:

- The Act had both the powers of controlling monopolies and supervising competition issues which were deemed contradictory.
- The Act had stipulated that there would be a Trade Practices Commissioner, but it did not specify how he was going to be appointed and by whom (Section 3).
- The provisions against restrictive business practices were so broad that they could catch pro-competitive conduct and/or cover micro enterprises. (Part III).
- The Minister was allowed to order a successful trader to divest part of his operations without providing in the Act for protection of legitimate and successful competitors. (Part IV).
- The Minister was given powers to fix prices, which was the subject matter of the previous Price Control Act, 1973. (Part V).
- The merger provisions were too much dependent on the discretion of the Minister.
- The independence, accountability, and transparency requirements for competition policy and law implementing institutions were not clearly specified by the Act.

2.4 Challenges and obstacles with regard to the implementation of the policy and law in Tanzania

17. Such organisations require resources. When the Government has been made to keep away from running businesses, it makes good investment sense for the Government to allocate appropriate resources to the regulatory system. This is both a resource and good governance challenge.
18. It may be difficult to get the minimum critical mass of people to manage the institutions especially in an area where the Universities do not provide education on competition issues.
19. Lack of political pressure due to ignorance or lack of confidence of the general public that they have the power to influence policy and implementation of policies the majority may wish to pursue.
20. Lack of understanding of the proper interaction with other economic policies. It is sometimes difficult to convince even Ministers that some of trade policies are anti competitive and in the long run may be even detrimental to the economic interests they wish to pursue.
21. The intervention of interest groups. For example, where some of the senior officials are members of the boards of monopolistic partly state owned companies, it is possible for such officers being deliberately obstructive in making necessary provisions for the new Act to be operational.
22. Lack of one focal point with political determination to implement competition issues. In countries where there is no particular Ministry with a mandate for economic reconstruction or privatisation, the special interest group battles translate into lack of collective interest to implement the Act promptly.
23. Deliberate amnesia by powerful external opinion makers to recommend proper sequencing of trade liberalisation and privatisation processes and the creation of economic regulatory and competition institutions. The excuse is that it is difficult to get the required competence in place without delaying the privatisation agenda.

3. Conclusion

24. In Tanzania we have just managed to get the Act which, in our opinion, is clearer and has most of the generic features of any competition law. But a good Act alone is not enough. We are at the moment involved in capacity building. We expect to recruit staff both from the public institutions and the private sector and provide on the job in-house training, give them study tours to learn from developed competition authorities.
25. After getting the minimum critical mass for carrying out key competition analyses, we expect to launch a general public education exercise through seminars and public lectures and media on the need for competition policy and law and how it is expected to operate.
26. We have so far got support in various forms from the UK/DFID, sida/Sweden and WB/FIAS/IFC. The DFID paid for the costs of hiring an expatriate to draft the first version of the Fair Competition Bill and also paid for stakeholders' meetings before the Bill went through the government process. Ida is currently paying for the capacity building which involves preparation of manuals and training in the procedures, analysis and code of conduct for the Commission and appellate Tribunal senior officials⁴. The WB/FIAS/IFC financed a study in Tanzania to establish the link between competition policy and law with foreign direct investment⁵. Through this study we were given practical guidance on how sub-sector economic analysis could be carried out. WB study also made some useful suggestions on how best the new Act could be designed.

27. We are of the opinion that a market system without appropriate market support institutions will lead eventually to the market system itself being socially discredited. We are aiming at a properly started competition authority from the beginning. Tanzania would welcome any constructive ideas and practical assistance to this endeavor.

NOTES

1. The current Act is the Fair Competition Act (No.8) of 2003
2. The previous Act was known as the Fair Trade Practices Act (No. 4.) of 1994 which in 2001 was amended and renamed the Fair Competition Act (No. 4.) of 1994
3. Oliveira, Gesner, Building a Culture of Competition in Developing Countries: Discussion Points at the Competition Meeting sponsored by DFID, London, in 2000.
4. The capacity building project financed by Sida is being carried out by Adam Smith Institute of London who won the international tender for the Sida capacity building project
5. The WB/FIAS/IFC Study document is titled, Tanzania Foreign Direct Investment and Competition Policy: Issues and Recommendations

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Thailand

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

-- THE PRIORITY OF COMPETITION POLICY IN THAILAND --

1. It's quite obviously that the mission of economic and social aspect of Modern State has many matters to implement. Then the government has to protect and decrease the conflict in social. Moreover, the government has to create the mature in social aspect and economic aspect in the same time. The strategy and policy of government base on the foundation of the country including economic, social, politic affairs. Thereby the government set the policy and implements the policy in order to achieve the mission.

2. Mention to the policy of Thai government, the government set the importance policy namely Urgent policies, Economic Policy, Income Creation Policy, Commercial and International Economic Policies, Social Policy, National Security, Education, Religion and Cultural Policy, Public Administration Policy, Science and Technology Policy, Labour Development Policy, Communication Policy, Natural Resources and Environment Policy, Foreign Policy, Energy Policy, Public Safety and Policy for Development of Regions of the Country and Bangkok Metropolis. The competition policy is only part of Commercial and International Economic Policies

3. Focus on the Urgent Government Policies, there are: 1) Grant a grace period for both interest and principal payments for 3 years for the individual small farmers to relieve their debt.; 2) Establish the Village and Urban Revolving Fund and promote a "One Village One Product"; 3) Establish a People's Bank to ensure better and improved access to banking facilities and resources for low-income citizens; 4) Establish the Bank for small and medium enterprise in order to promote existing and increasing the number of entrepreneurs in a systematic manner; 5) Establish a National Asset Management Corporation in order to solve the problem of Non-Performing Loans (NPLs) in the commercial banking system; 6) Privatisation Policy; 7) Provide 30 baht health insurance in order to ensure that all Thai people will be equal access to a nationally acceptable standard of health care; 8) Accelerate efforts to establish drug rehabilitation centers concurrently with implementing effective drug suppression and prevention measures; 9) Encourage full and open public participation in the prevention and suppression of corruption.

4. Government realises the importance of Privatisation Policy is the urgent policy in order to encourage the competitive environment and enhance the free and fair competition in domestic market.

5. The government give priority on the implementing the social policy such as 30 Baht health care, Homing for the less income people, 1 Baht less premium insurance, Village Fund, Debt moratorium, Drug suppression & prevention education etc.

6. The first question is whether the government implements the Competition Policy. The answer is yes. Privatisation Policy is the evidence because State-Owned Enterprises (SOEs) was privatised to be public company such as Thai Airways International Public Company, Airports of Thailand Public Company, Aeronautical Radio of Thailand Limited, The Communications Authority of Thailand Telecom Public Company and Thailand Post. Furthermore, there are many SOEs under the privatisation process such as public utility in transportation and electricity aspect.

7. The second question is whether the government gives priority on Competition Policy. The answer is yes. But the urgency of implementing competition policy is not outstanding because the government has resources and equipment limited and Competition Policy is not the urgent implementation when compare with the social policy. Then competition policy is not the prior priority for government to implement.

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Forum mondial de l'OCDE sur la concurrence

**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

Contribution de la Tunisie

-- Session II --

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**LES ENTRAVES RENCONTRÉES
PAR LE CONSEIL DE LA CONCURRENCE
DANS L'ACCOMPLISSEMENT DE SA MISSION¹**

(par M. Ghazi JERIBI)²

1. Jusqu'à la moitié des années 80 l'économie tunisienne était caractérisée par le modèle dirigiste. L'Etat, omniprésent, assurait :

- La prise en charge directe des secteurs économiques stratégiques (hydrocarbures, sidérurgie, transport, énergie...).
- Le contrôle, à travers les offices de la commercialisation des produits de base (huile, sucre, céréales...).
- Le contrôle du niveau des prix par la fixation des prix des produits de première nécessité et le plafonnement des marges bénéficiaires pour les autres produits.

2. A travers le mécanisme des agréments et des autorisations préalables, l'Etat contrôlait les investissements privés (secteurs d'activités et implantations géographiques), réglementait les activités de commerce et de distribution (gros et détail) et limitait les importations.

3. Révélant ses limites, ce modèle s'est trouvé dans l'incapacité de hisser l'économie du pays à un niveau supérieur et à améliorer les conditions de vie des citoyens.

4. Pour ces raisons, la Tunisie s'engage, à partir de 1986 dans un programme de libéralisation et d'ajustement structurel, qui vise à instaurer progressivement les mécanismes d'une économie de marché, instituer la liberté du commerce intérieur et extérieur et encourager l'initiative privée, dans la perspective d'aboutir à l'horizon de l'année 2007 à la création d'une zone de libre échange avec l'Union Européenne.

5. Cette nouvelle politique cherche à créer une véritable dynamique de la concurrence quasi-inexistante jusque là, et surmonter les handicaps créés par les monopoles et oligopoles issus du dirigisme économique suivi durant les années 70-80.

6. Pour se faire, l'Etat tunisien se dote de nouveaux outils³ et édicte un certain nombre de mesures qui doivent lui permettre d'assurer l'équilibre nécessaire entre la liberté et l'ordre public économique⁴.

7. Cette nouvelle politique fondée sur l'économie de marché implique nécessairement la création d'une autorité chargée de veiller au respect des règles de la libre concurrence et de lutter contre toutes les pratiques anticoncurrentielles.

8. La création du Conseil de la concurrence s'est accompagnée de la mise en place du premier noyau du droit tunisien de la concurrence. Ce droit, inspiré du droit français et européen, n'a pas empêché le Conseil de la concurrence, pour faire face à certaines difficultés inhérentes à l'environnement tunisien, de l'adapter aux exigences imposées par une économie en transition.

1. La nécessaire adaptation du droit de la concurrence à l'environnement socio-économique du pays

9. La loi n° 91-64 sur la concurrence et les prix, est un ensemble de règles générales largement inspirées du droit européen, qui laissent une grande marge d'interprétation à l'autorité chargée de la

concurrence. Mais, puisque l'application du droit de la concurrence est en étroite relation avec la politique de développement, le Conseil de la concurrence est appelé à tenir compte de la période transitoire que traverse l'économie tunisienne qui justifie la progressivité et la flexibilité dans l'adoption des règles de la concurrence, mais également le respect des impératifs socio-économiques du pays.

1.1 Au niveau des règles établies

10. Le désengagement de l'Etat en matière économique, n'est pas toujours relayé par des forces économiques capables de prendre en charge les activités économiques qu'il délaisse ou choisit de transférer au secteur privé.

11. Dans ces conditions, l'ouverture brusque du marché local et l'adoption rapide de l'ensemble des règles de la concurrence peuvent représenter un véritable danger pour les économies encore fragiles, si toutes les précautions qui s'imposent ne sont pas prises.

12. Ainsi tout en reproduisant les principes et les règles du droit de la concurrence consacrés et généralement admis par les principales instances internationales, la législation tunisienne prévoit plusieurs exceptions dues aux particularités de la réalité économique du pays, mais aussi à des considérations sociopolitiques qui imposent une certaine graduation et une part de souplesse dans l'adoption des règles de la concurrence. L'exemple le plus significatif est l'interdiction des contrats d'exclusivité et des contrats de concession, sauf s'ils présentent un progrès technique ou économique procurant une partie équitable du profit aux utilisateurs.

13. De même, la loi tunisienne sur la concurrence pose dans son article 2 le principe de la libre concurrence en énonçant que : « les prix des biens, produits et services sont librement déterminés par le jeu de la concurrence ». Toutefois, l'article 3 de cette loi ajoute que « sont exclus du régime de la liberté des prix visé à l'article 2 ci-dessus, les biens, produits et services de première nécessité ou afférents à des secteurs ou zones où la concurrence par les prix est limitée, soit en raison d'une situation de monopole ou de difficultés durables d'approvisionnement, soit par l'effet de dispositions législatives ou réglementaires. La liste de ces biens, produits et services, ainsi que les conditions et modalités de fixation de leur prix de revient et vente, sont déterminés par décret ».

14. S'inspirant de ces dispositions, le Conseil de la concurrence tunisien a affirmé à plusieurs reprises le principe selon lequel la concurrence n'est pas une fin en soi et trouve ses limites dans les impératifs du progrès technique, économique ou social et dans l'intérêt du consommateur qui reste la finalité de toute politique économique (Avis n° 2267 du 12/12/2002).

15. Il est à noter que la législation Tunisienne en matière de concurrence a été modifiée à plusieurs reprises et en moyenne tous les trois ans, la dernière en date a eu lieu en novembre 2003 et ce, afin de s'adapter aux évolutions économiques du pays et répondre aux nombreux engagements internationaux pris par l'Etat tunisien.

16. S'il est largement admis, à la lumière de ces différentes dispositions, que la compétition entre les entreprises est un élément fondamental de l'efficacité économique, néanmoins entre la non concurrence et la concurrence totale et absolue, il y a lieu de choisir entre plusieurs paliers appropriés aux besoins du pays et selon le degré de son développement. Il appartient donc au Conseil de la concurrence de veiller au respect de cette équation.

1.2 Au niveau de l'application pratique

17. Dans un avis daté du 10 Janvier 2002⁵, relatif à un projet de loi concernant l'élevage et les produits animaliers, le Conseil de la concurrence a considéré que la prolifération des textes et leur enchevêtrement conduisent à une inégalité entre les entreprises en matière d'accès à l'information, que la pluralité des instances chargées de leur application limite la transparence des transactions et

constitue un obstacle indirect à la liberté de la concurrence, et que cette dernière ne constitue pas une fin en soi, mais un moyen de réaliser l'efficacité économique et la satisfaction des consommateurs.

18. Il a par ailleurs consacré le principe selon lequel les objectifs sociaux peuvent justifier des exceptions conjoncturelles à la concurrence⁶, et qu'il est tout à fait possible de répondre aux exigences de santé et de sécurité publiques, sans pour autant porter atteinte aux règles de la libre concurrence⁷. Le Conseil de la concurrence a insisté à maintes reprises sur le fait que les règles de la concurrence ne s'opposent pas aux principes du service public. Néanmoins l'application graduelle des règles de la concurrence suppose de garantir aux opérateurs privés l'accès au marché, ce qui exige d'opérer une distinction claire entre l'administration puissance publique et l'administration- opérateur économique, et une séparation entre les fonctions de gestion administrative, fourniture de services et de contrôle et régulation.

19. Toutefois, l'application des règles de la concurrence ne doit pas avoir pour conséquence de mettre les entreprises publiques opérant sur le marché, dans une situation moins favorable que celle des opérateurs privés, ce qui nécessite de soumettre tous les intervenants, publics et privés, au principe de la continuité du service public et au respect du principe d'égalité, qui permet aux usagers de se prévaloir des mêmes droits⁸.

20. Selon cette même logique, l'administration doit s'abstenir lors de l'exercice de ses attributions administratives, de mettre une entreprise donnée dans une situation d'abus de position dominante sur le marché⁹, même si la consolidation de la compétitivité des entreprises nationales face à la concurrence internationale constitue l'un des éléments à prendre en considération lors de l'examen des demandes d'autorisation des opérations de concentration¹⁰.

21. Dans son activité contentieuse, et à l'occasion de l'affaire n°2/2001 du 19 Décembre 2002, le Conseil de la concurrence a considéré que les personnes de droit public, sont soumises aux règles de la concurrence, au même titre que les personnes de droit privé, chaque fois qu'elles exercent une activité économique. Il a même condamné une organisation professionnelle pour pratiques anticoncurrentielles, dès lors qu'il a été prouvé qu'elle avait pris part à une entente sur les prix entre entreprises¹¹.

2. La crédibilité du Conseil de la concurrence est tributaire de sa propre action

22. Dans la plupart des économies en transition, outre l'insuffisance de moyens matériels, financiers et humains, c'est surtout l'absence de culture de la concurrence et parfois même l'ambiguïté et les lacunes des textes juridiques relatifs à la concurrence, auxquels vient s'ajouter une carence documentaire et de données économiques, qui s'érigent en obstacles.

23. Le Conseil de la concurrence s'est servi de tous les outils disponibles, pour accomplir au mieux la tâche qui lui est dévolue dans la régulation du marché, et en tant qu'appui indispensable de la politique de développement. Les obstacles d'ordre législatif, matériel ou humain ne l'ont pas empêché d'entreprendre toutes les actions possibles pour s'affirmer comme le garant de la libre concurrence dont dépend l'efficacité de l'économie.

2.1 Accroître son rayonnement pour servir sa mission

24. Il ressort du rapport d'activité du Conseil de la concurrence pour l'année 2001, que la première décennie ayant suivi sa création a révélé les limites de la fonction contentieuse, conséquence directe de la méconnaissance des différents acteurs économiques du rôle et des prérogatives de cette institution.

25. C'est pour cette raison, que le Conseil de la concurrence a pris l'initiative de se faire connaître auprès de tous les intervenants sur la scène économique. Trois axes ont été choisis : les acteurs économiques, l'université et experts en la matière, et le grand public. Il s'agit notamment

d'utiliser les médias, en répondant à toutes leurs sollicitations: radios, télévisions et presse écrite, et saisir toutes les occasions comme la révision de la loi ou la présentation du rapport annuel au président de la république, pour expliquer les missions du conseil et démontrer son efficacité.

26. Pour toucher le milieu universitaire, le conseil a choisi d'organiser des séminaires et colloques dans les universités, écoles et instituts spécialisés, soutenir les efforts de recherche effectués par les universitaires et les étudiants de 3ème cycle, organiser des tables rondes au sein du conseil ou dans les régions en collaboration avec les chambres de commerce et de l'industrie auxquelles sont invités les opérateurs économiques, les différentes organisations professionnelles et sectorielles ou de défense des consommateurs, les avocats, juges et différents conseillers des entreprises.

27. En outre, le conseil a introduit dans le dispositif de ses dernières décisions, une injonction enjoignant à la partie condamnée de publier le dispositif de la décision, à ses frais, dans deux journaux de la presse nationale¹².

28. Cet effort soutenu s'est traduit par une augmentation du nombre d'affaires jugées, qui a doublé en 2002 par rapport à l'année 2001, et triplée en 2003 par rapport à la même année.

2.2 User de la procédure pour élargir le champ de son intervention

29. Le Conseil de la concurrence ne possède pas le droit de s'autosaisir des infractions à la concurrence. La qualité pour agir appartient uniquement au ministre chargé du commerce, aux entreprises, aux organisations professionnelles ou syndicales, aux organismes de défense des consommateurs et aux chambres de commerce et d'industrie. Néanmoins le Conseil peut se saisir d'une affaire en cas de désistement de l'une des parties et lorsque les investigations dans une affaire portée devant lui révèlent des pratiques anticoncurrentielles sur un marché connexe.

30. Afin d'atténuer cet obstacle, le Conseil de la concurrence a posé un principe jurisprudentiel, selon lequel le conseil est saisi du marché dans sa globalité. Par conséquent il n'est lié, ni par les demandes ou les moyens des requérants, ni par les parties désignées dans la requête. Il peut donc étendre le litige à d'autres faits ou personnes, ou requalifier les faits¹³.

2.3 Affirmer la plénitude de sa compétence en tant que gardien de la libre concurrence

31. Au moment où l'activité économique évolue et se diversifie à un rythme très rapide, et les pratiques anticoncurrentielles prennent des formes et des aspects nouveaux, souvent non prévus par les textes, le Conseil de la concurrence doit pouvoir jouer un rôle plus actif, dynamique et précurseur, pour justifier son statut de défenseur de la concurrence dans tous ses aspects.

32. Ce rôle est assumé par le Conseil dans sa fonction consultative, qui lui permet d'anticiper sur le futur, mais aussi à travers sa fonction contentieuse.

33. Bien que la loi tunisienne sur la concurrence n'ait pas indiqué si elle était applicable ou non aux personnes publiques, le Conseil a consacré le principe de leur soumission au droit de la concurrence, chaque fois qu'elles exercent une activité économique dans le domaine de la production ou de la distribution ou des services. Néanmoins, les actes unilatéraux révélant l'exercice par l'administration de prérogatives de puissance publique demeurent du ressort du juge administratif statuant en excès de pouvoir¹⁴.

34. En outre, le Conseil a eu l'occasion, en 2002, de lever la confusion qui existait chez les requérants entre les pratiques anti-concurrentielles et la concurrence déloyale¹⁵, et qui était à l'origine d'un nombre très élevé de cas d'incompétence.

35. D'autre part, la jurisprudence du Conseil a joué un rôle précurseur, lorsqu'elle a affirmé que les contrevenants qui collaborent avec les enquêteurs ou qui procurent au conseil des documents ou

des preuves déterminants, peuvent être dispensés partiellement ou totalement de la sanction pécuniaire¹⁶. Cette jurisprudence a été récemment consacrée par le législateur¹⁷, cependant l'absence d'intention de nuire à la libre concurrence, n'est pas de nature à dispenser l'entreprise incriminée de la sanction¹⁸.

36. Le Conseil de la concurrence, confronté à certaines lacunes législatives, a usé de son rôle créateur pour sauvegarder la liberté de la concurrence sur le marché. En effet, devant l'étroitesse de la définition de la vente à perte, il a par exemple été amené à s'inspirer du droit comparé, pour adopter la notion de prix abusivement bas, ce qui lui a permis de faire face à certaines pratiques émanant d'une entreprise publique au stade de la production¹⁹, et à suggérer au ministre chargé du commerce, de poursuivre certaines pratiques constatées dans le domaine de l'hôtellerie, sur la base de cette notion²⁰, puisque la revente à perte prévue dans la loi tunisienne n'est pas applicable aux services.

37. Enfin, le Conseil de la concurrence aura certainement, à faire face à plusieurs défis futurs, dont le développement de certaines pratiques transfrontalières, qui peuvent menacer la concurrence et rendent par la même la recherche d'un cadre multilatéral de coopération indispensable.

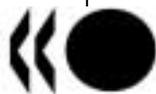
NOTES

1. Les points de vue exprimés dans la présente communication n'engagent que leur auteur, et ne relatent en aucun cas les positions du gouvernement Tunisien.
2. Ghazi JERIBI, Président du Conseil de la concurrence tunisien
3. Un vaste plan d'assistance aux entreprises a été mis en place pour leur permettre d'améliorer leurs performances à tous les niveaux, il s'agit surtout de la mise à niveau, du fonds de développement de la compétitivité, du fonds de promotion des exportations et du fonds d'insertion et d'adaptation professionnelle
4. Ces réformes ont porté principalement sur les domaines suivants :
 - La libéralisation de l'investissement dans le cadre du code des investissements de 1993. En effet l'agrément préalable a été remplacé par un système d'incitation fiscale en faveur de certains secteurs prioritaires et certaines régions défavorisées.
 - La libéralisation progressive à partir de 1994 d'environ 80% des importations des produits étrangers.
 - Le démantèlement tarifaire graduel par la baisse progressive du niveau des droits de douane des produits importés.
 - La libéralisation du commerce de distribution en 1991 et la substitution de l'autorisation préalable par un cahier des charges.
 - L'instauration du principe de la liberté des prix en 1991, à l'exception d'une liste de produits de première nécessité et dans certains secteurs économiques connaissant des dysfonctionnements ou des perturbations conjoncturelles graves.
 - Le recentrage des activités de la Caisse Générale de Compensation pour limiter son intervention aux produits de première nécessité consommés par les catégories sociales les plus démunies et l'élimination de la préférence accordée aux entreprises tunisiennes lors de l'octroi des marchés publics.
 - La privatisation progressive des entreprises publiques.
5. Avis n° 13/2001 du 10 Janvier 2002
6. Avis n° 2259 du 7 Mars 2002 relatif aux tickets de repas
7. Avis n° 2264 du 16 Mai 2002 relatif à un projet de loi organisant le secteur des engrais
8. Avis n° 2268 du 21 Novembre 2002 relatif à un projet de loi concernant l'organisation du transport terrestre
9. Avis n° 2262 du 25 Avril 2002 concernant un appel d'offre relatif à l'action d'une concession
10. Avis n° 2266 du 24 Septembre 2002 relatif à une opération de concentration économique :
 - les opérations de concentrations sont soumises à autorisation du Ministre chargé du commerce, selon certaines conditions, sur avis facultatif du conseil de la concurrence. Mais la décision d'octroi ou de refus de l'autorisation constitue un acte administratif susceptible de recours devant le juge de l'excès de pouvoir.

11. Affaire n° 2137 du 27 Mars 2003
12. Bien que la loi ne prévoit pas explicitement cette possibilité, le Conseil de la concurrence l'a utilisé dans plusieurs affaires, notamment l'affaire n° 2136 du 17 Juillet 2003
13. Affaire n° 2001/1 du 6 Novembre 2002 et affaire n° 2136 du 17 Juillet 2003
14. Affaire n° 2001/2 du 19 Décembre 2002
15. Affaire n° 9/93 du 25 Septembre 2002 et affaire n° 2143 du 25 Octobre 2003
16. Affaire n° 2136 du 17 Juillet 2003
17. Loi n° 74/2003 du 11 Novembre 2003 (art 19)
18. Affaire 1/2000 du 06 Novembre 2002
19. Affaire .précédente (Janvier 2002)
20. Avis n° 3282 du 17 Juillet 2003

Unclassified

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Thailand

-- Session II --

This contribution is submitted by Thailand under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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English - Or. English

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

-- THE PRIORITY OF COMPETITION POLICY IN THAILAND --

1. It's quite obviously that the mission of economic and social aspect of Modern State has many matters to implement. Then the government has to protect and decrease the conflict in social. Moreover, the government has to create the mature in social aspect and economic aspect in the same time. The strategy and policy of government base on the foundation of the country including economic, social, politic affairs. Thereby the government set the policy and implements the policy in order to achieve the mission.

2. Mention to the policy of Thai government, the government set the importance policy namely Urgent policies, Economic Policy, Income Creation Policy, Commercial and International Economic Policies, Social Policy, National Security, Education, Religion and Cultural Policy, Public Administration Policy, Science and Technology Policy, Labour Development Policy, Communication Policy, Natural Resources and Environment Policy, Foreign Policy, Energy Policy, Public Safety and Policy for Development of Regions of the Country and Bangkok Metropolis. The competition policy is only part of Commercial and International Economic Policies

3. Focus on the Urgent Government Policies, there are: 1) Grant a grace period for both interest and principal payments for 3 years for the individual small farmers to relieve their debt.; 2) Establish the Village and Urban Revolving Fund and promote a "One Village One Product"; 3) Establish a People's Bank to ensure better and improved access to banking facilities and resources for low-income citizens; 4) Establish the Bank for small and medium enterprise in order to promote existing and increasing the number of entrepreneurs in a systematic manner; 5) Establish a National Asset Management Corporation in order to solve the problem of Non-Performing Loans (NPLs) in the commercial banking system; 6) Privatisation Policy; 7) Provide 30 baht health insurance in order to ensure that all Thai people will be equal access to a nationally acceptable standard of health care; 8) Accelerate efforts to establish drug rehabilitation centers concurrently with implementing effective drug suppression and prevention measures; 9) Encourage full and open public participation in the prevention and suppression of corruption.

4. Government realises the importance of Privatisation Policy is the urgent policy in order to encourage the competitive environment and enhance the free and fair competition in domestic market.

5. The government give priority on the implementing the social policy such as 30 Baht health care, Homing for the less income people, 1 Baht less premium insurance, Village Fund, Debt moratorium, Drug suppression & prevention education etc.

6. The first question is whether the government implements the Competition Policy. The answer is yes. Privatisation Policy is the evidence because State-Owned Enterprises (SOEs) was privatised to be public company such as Thai Airways International Public Company, Airports of Thailand Public Company, Aeronautical Radio of Thailand Limited, The Communications Authority of Thailand Telecom Public Company and Thailand Post. Furthermore, there are many SOEs under the privatisation process such as public utility in transportation and electricity aspect.

7. The second question is whether the government gives priority on Competition Policy. The answer is yes. But the urgency of implementing competition policy is not outstanding because the government has resources and equipment limited and Competition Policy is not the urgent implementation when compare with the social policy. Then competition policy is not the prior priority for government to implement.

Unclassified

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Tunisia

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OBSTACLES ENCOUNTERED BY THE TUNISIAN COMPETITION COUNCIL IN FULFILLING ITS MISSION¹

(Mr Ghazi JERIBI)²

1. Until the mid-1980s, the Tunisian economy was based on the centrally planned model in which an omnipresent State assumed:

- Direct responsibility for strategic economic sectors (petroleum products, iron and steel, transport, energy, etc.).
- Control over essential products through its marketing offices (oil, sugar, cereals).
- Control over prices by setting prices for essential products and by specifying profit margins for other products.

2. Through a system of prior approval and authorisation, the State controlled private investment (sectors of activity and geographical location), regulated the distributive trades (wholesale and retail), and limited imports.

3. After demonstrating its limitations, this model proved to be incapable of driving the economy to a higher level or of improving the living conditions of the population.

4. For these reasons, from 1986 onwards Tunisia committed itself to a programme of liberalisation and structural adjustment aimed at gradually introducing market economy mechanisms, liberalising domestic and foreign trade and encouraging private initiative, with a view to creating a free-trade zone with the European Union by the year 2007.

5. This new policy sought to create a genuinely competitive environment, which had been non-existent prior to 1986, and to overcome the handicaps created by the monopolies and oligopolies that emerged from the economic dirigisme pursued during the 1970s and 1980s.

6. To achieve this, the Tunisian State has put in place new instruments³ and introduced a number of measures that should allow it strike the necessary balance between freedom and economic public order⁴.

7. This new policy based on the market economy necessarily involved the creation of a body responsible for monitoring compliance with the rules of competition and for combating anticompetitive practices.

8. The creation of the Competition Council was accompanied by the introduction of the first core of Tunisian competition law, which drew heavily on French and European law. When faced with certain problems inherent in Tunisia's socio-economic environment, however, the Competition Council has not hesitated to adapt the provisions of this legislation to meet the requirements of an economy in transition.

1. The need to adjust competition law to the socio-economic environment of the country

9. Law No. 91-64 on competition and prices consists in a set of general rules that are largely based on European law and that leave the competition authority with a great deal of leeway in their interpretation. However, since the application of competition law goes hand in glove with development policy, the

Competition Council is called upon to take account of the transitional period in which the Tunisian economy currently finds itself and which justifies a gradual and flexible adoption of competition rules, as well as respect for the socio-economic imperatives of the country.

1.1 Rules already in place

10. The withdrawal of the State from the economy is not always replaced by economic forces capable of taking over the economic activities the State abandons or chooses to transfer to the private sector.

11. Under these conditions, unless the requisite precautions are taken beforehand, the sudden opening of the local market and swift adoption of the entire corpus of competition rules can pose a genuine threat to as yet still fragile economies.

12. Consequently, while reiterating the principles and rules of competition law that have been enshrined and generally accepted by the main international bodies, Tunisian legislation provides for a number of derogations relating to the particularities of the economic situation in Tunisia, and also to socio-political considerations that require an incremental and flexible approach to the adoption of the competition rules. The most significant example is the ban on exclusive distribution contracts and franchises, except in cases where they represent a technical or economic advance offering a fair share of the profits to users.

13. Similarly, Article 2 of the Tunisian Competition Act establishes the principle of free competition by stating that "the prices of goods, products and services shall be determined by the free play of competition". However, Article 3 of the same Act adds that "the free price regime set out in the foregoing Article 2 shall not apply to goods classified as essential or relating to sectors or areas where price competition is limited either because of a monopoly or long-standing procurement problems, on the one hand, or because of legislative or regulatory requirements on the other. The list of such goods, products and services, as well as the conditions and procedures for setting their purchase and retail prices, shall be published by decree."

14. Drawing on these provisions, the Tunisian Competition Council has affirmed on several occasions its adherence to the principle that competition is not an end in itself and that it is limited by the demands of technical, economic or social progress, and by consumer interests which are the ultimate goal of any economic policy (Opinion No. 2267 of 12 December 2002).

15. It should be noted that Tunisian competition legislation has been amended on a number of occasions and on average every three years, the latest amendment being in November 2003 to adjust to economic developments in the country and to honour numerous international commitments entered into by the Tunisian State.

16. While it is largely acknowledged, in the light of these various provisions, that competition between enterprises is a basic factor in economic efficiency, between non-competition and total and absolute competition a choice nonetheless needs to be made between a number of levels that are appropriate to the needs of the country and commensurate with the stage reached in its development. It is therefore the task of the Competition Council to ensure that an appropriate match is made.

1.2 Implementation in practice

17. In an opinion issued on 10 January 2002⁵, relating to a draft Law on livestock rearing and animal products, the Competition Council considered that the profusion of overlapping legislative texts created inequalities between enterprises in terms of access to information, that the number of bodies responsible

for implementing those texts restricted the transparency of transactions and was an indirect obstacle to freedom of competition, and that the latter was not an end in itself but a means of achieving economic efficiency and satisfying consumers.

18. This opinion also enshrined the principle that social objectives can justify economic exceptions to competition⁶, and that it is perfectly feasible to meet health and public security imperatives without necessarily infringing on the rules of free competition⁷. The Competition Council has repeatedly stated that the rules of competition do not conflict with the principles of public service. Nonetheless, the gradual implementation of competition rules entails guaranteeing market access to private operators, which will require a clear distinction to be drawn between the administration as a public authority and the administration as an economic operator, and a separation of the respective functions of administrative management, supply of services and control and regulation.

19. However, the application of competition rules must not have the result of placing public enterprises operating in the market in a less favourable position compared to private operators, which would mean making all operators, both public and private, subject to the requirement to respect the principle of continuity of public service, as well as the principle of equality whereby all users enjoy the same rights⁸.

20. By the same token, when the administration exercises its administrative functions, it must refrain from creating a situation in which a given enterprise can abuse a dominant market position⁹, even though consolidating the competitiveness of national enterprises in relation to international competition is one of the elements to be taken into consideration when reviewing requests for the authorisation of concentration operations¹⁰.

21. In its litigation activity, in particular Case No. 2/2001 of 19 December 2002, the Competition Council considered that public legal persons, whenever they pursue an economic activity, are subject to the rules of competition in the same way as private legal persons. It even found a professional organisation to be guilty of anticompetitive practices once it had been proved that the organisation had colluded in illegal price-fixing between enterprises¹¹.

2. The credibility of the Competition Council depends upon its own actions

22. In most transition economies, besides the lack of material, financial and human resources, it is primarily the lack of a competition culture and even, in some cases, the ambiguity and gaps in the legal texts relating to competition, compounded by a lack of documentation and economic data, which create obstacles.

23. The Competition Council has availed itself of all the instruments at its disposal to fulfil, to the best of its ability, the task it has been assigned of regulating the market and providing an essential support for development policy. Obstacles of a legislative, material or human nature have not prevented it from undertaking all actions possible to establish itself as the guardian of the free competition on which economic efficiency depends.

2.1 *Expanding its sphere of action to fulfil its mission*

24. The Competition Council's Annual Report for 2001 shows that the first ten years of operation revealed the limits to the Council's litigation functions, a direct outcome of the ignorance of economic actors regarding the precise role and prerogatives of this institution.

25. In view of this, the Competition Council took the initiative to make itself better known to all actors on the economic scene. Three target audiences were selected: economic actors, academics and

experts in the field, and the general public. The aim in particular was to make use of the media – radio, television and the written press – by answering all their requests for information, and to seize every opportunity, such as amendment of the legislation or presentation of the Annual Report to the President of the Republic, to explain the remit of the Council and demonstrate its effectiveness.

26. To reach out to the academic world, the Council decided to organise seminars and symposia in universities, schools and specialised institutes, to support research carried out by academics and doctoral students, and to organise Round Tables hosted by the Council or organised in the regions, in collaboration with Chambers of Commerce and Industry, to which economic operators, professional and sectoral or consumer protection organisations, lawyers, judges and business advisors would be invited.

27. In addition, the latest judgements handed down by the Council have included an injunction compelling the party losing a case to publish the Council's judgement, at his own expense, in two national newspapers¹².

28. This sustained drive has led to an increase in the number of cases judged which, in comparison with 2001, doubled in 2002 and tripled in 2003.

2.2 *Using procedure to extend its scope of action*

29. The Competition Council does not have the right to instigate its own proceedings for infringements of competition rules. Proceedings may only be initiated by the Minister responsible for Trade, enterprises, professional or trade union organisations, consumer protection organisations and chambers of commerce and industry. Nevertheless, the Council can instigate proceedings in cases where one of the parties has withdrawn and where the investigations in a case brought before it reveals anticompetitive practices in a related market.

30. In order to overcome this problem, the Competition Council has established the jurisprudential principle whereby a case brought before the Council is held to apply to the market as a whole. As a result, the Council is bound neither by the petitions or means of claimants, nor by the parties named in the petition. It can therefore extend a case to other facts or persons, and can also restate the facts¹³.

2.3 *Asserting full jurisdictional competence as the guardian of free competition*

31. At a time when economic activity is developing and diversifying at an extremely rapid pace, and anticompetitive practices are assuming new forms and aspects often not foreseen in the legislation, the Competition Council must play an increasingly active, dynamic and pioneering role in order to justify its status as the champion of competition in all its guises.

32. The Council assumes this role through its advisory function, which allows it to stay ahead of developments, and also through its litigation function.

33. Although the Tunisian Competition Act does not specify whether or not it applies to public persons, the Council has enshrined the principle that they are indeed subject to competition law every time they exercise an economic activity in the production, distribution or service sectors. Nevertheless, unilateral acts arising from the exercise by the administration of the prerogatives of public power remain within the jurisdiction of the administrative judge responsible for ruling on action *ultra vires*¹⁴.

34. In addition, the Council had an opportunity in 2002 to dispel the confusion that existed in the minds of claimants regarding the difference between anticompetitive practices and unfair competition¹⁵, which had led to a very large number of cases being brought before the Council over which the latter had no jurisdiction.

35. Moreover, the Council's jurisprudence played a pioneering role in ruling that offenders who collaborate with investigators, or who provide the Council with determining documents or evidence, can be partially or totally exempted from fines¹⁶. This jurisprudence was recently enshrined in law¹⁷, although the lack of any intention to hinder free competition does not constitute grounds for exempting from sanction the enterprise found guilty¹⁸.

36. The Competition Council, when faced with certain gaps in the legislation, has used its innovatory role to safeguard the freedom of competition in the market. Faced with the narrowness of the definition of dumping, for example, the Council was prompted to draw on comparative law from which it adopted the concept of abusively low pricing, which allowed it to combat certain practices by a public enterprise during the production stage¹⁹ and to suggest to the Minister responsible for Trade that he should make similar use of this new concept²⁰ to prosecute certain practices observed in the hotel industry in view of the fact that, under Tunisian law, the concept of resale at a loss could not be applied to services.

37. In conclusion, the Competition Council will undoubtedly have to face a number of challenges in the future, one of which being the development of certain cross-border practices, which may pose a threat to competition and which, because of that, make it essential to seek a multilateral framework for co-operation.

NOTES

1. The opinions expressed in this paper are those of the author alone and do not in any way reflect the views of the Tunisian government.
2. Gharzi Jeribi is Chairman of the Tunisian Competition Council.
3. A vast enterprise aid programme has been put in place to help firms improve their performance at all levels. This programme is aimed above all at bringing firms up to the requisite level and its main components are a competitiveness development fund, an export promotion fund and a vocational training and employment fund.
4. These reforms have mainly addressed the following areas:
 - Liberalisation of investment within the framework of the 1993 investment code. The system of prior approval was replaced by a system of fiscal incentives in favour of certain priority sectors and economically disadvantaged regions;
 - Progressive liberalisation from 1994 onwards of approximately 80% of imports of foreign goods;
 - Gradual dismantling of tariffs through the steady lowering of customs duties on imported goods;
 - Liberalisation of the distributive trades in 1991 and replacement of administrative authorisation by compliance with specifications;
 - Adoption of free pricing in 1991, except for a list of essential products and in certain economic sectors experiencing severe dysfunctions or disturbance;
 - Refocusing the activities of the General Compensation Fund to limit its scope of intervention to essential products consumed by the most disadvantaged social categories and elimination of the priority given to Tunisian firms in the award of public contracts;
 - Gradual privatisation of public enterprises.
5. Opinion No. 13/2001 of 10 January 2002.
6. Opinion No. 2259 of 7 March 2002 on meal tickets.
7. Opinion No. 2264 of 16 May 2002 on draft legislation relating to the fertiliser sector.
8. Opinion No. 2268 of 21 November 2002 on draft legislation regarding the organisation of inland transport.
9. Opinion No. 2262 of 25 April 2002 on a call for bids relating to a franchise operation.
10. Opinion No. 2266 of 24 September regarding an economic concentration operation – concentration operations are subject to approval from the Minister responsible for trade in accordance with certain conditions and subject to an optional opinion by the Competition Council. However, the decision to approve or withhold the authorisation is an administrative act that can be appealed against in the courts on the grounds of action *ultra vires*.
11. Case No. 2137 of 27 March 2003.

12. Although the Act does not provide for this action specifically, the Competition Council has used it in a number of cases and notably Case No. 2136 of 17 July 2003.
13. Case No. 2001/1 of 6 November 2002 and Case No. 2136 of 17 July 2003.
14. Case No. 2001/2 of 19 December 2002.
15. Case No. 9/93 of 25 September 2002 and Case No. 2143 of 25 October 2003.
16. Case No. 2136 of 17 July 2003.
17. Law No. 74/2003 of 11 November 2003 (Article 19).
18. Case No. 1/2000 of 6 November 2002.
19. Previous Case (1/2000).
20. Opinion No. 3282 of 17 July 2003.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from the United States

-- Session II --

This contribution is submitted by the United States under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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English - Or. English

**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING
GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**

**THE ROLE OF RESEARCH IN THE DESIGN AND IMPLEMENTATION
OF COMPETITION POLICY**

Executive Summary

1. Experience in a number of jurisdictions has shown that research can play an important role in improving the design of competition policy systems and the implementation of competition policy programs. In the period leading to the adoption of a competition policy system, research concerning the jurisdiction's initial conditions can assist in diagnosing barriers to competition and selecting a set of substantive legal commands and institutions that are most likely to promote the attainment of competition policy objectives. Once a competition policy system is established, a research program can inform the competition agency's judgment about how to apply its resources and, particularly in carrying out advocacy functions, can marshal analytical and empirical support that documents the costs of private practices and government policies that restrict competition and suggests how a jurisdiction can improve economic performance by adopting pro-competition policies. For countries that only recently have established competition systems, and for nations that are considering the enactment of competition laws, technical assistance programs should support research that improves the design and operation of competition regimes and enhances the indigenous intellectual infrastructure – particularly graduate university programs in economics and law – upon which most competition systems draw heavily for their success.

1. Introduction

2. In its Background Note of 27 October 2003,¹ the OECD Secretariat invited delegates to address challenges and obstacles that competition policy² authorities face in promoting competition. In particular, the Background Note asked delegates to discuss how a competition policy system might overcome efforts by interests, both public and private, that benefit from restrictions upon competition and seek to retard the development of a “competition culture.”³

3. This paper considers one element of the mix of approaches that a country can take to reduce barriers to competition and to establish a competition culture. It focuses upon the role that research can play in designing and implementing competition policy and, more generally, in encouraging the development of a competition culture. The paper suggests that research – especially empirical analysis – concerning the economy of a country and the institutional arrangements that influence economic activity is a valuable tool for diagnosing obstacles to competition, making visible the costs associated with public policies and private behaviour that suppress competition, and illuminating ways to remove barriers to competition.

4. The discussion of how research can contribute to building a competition culture is organized as follows. Part 2 summarizes private and public barriers to competition. Part 3 describes sources of resistance that a country faces in pursuing policies to remove barriers to competition. Part 4 reviews how research can document the obstacles to competition and can demonstrate the benefits to a nation of adopting pro-competition policies. Part 5 lays out the institutional means by which a country can undertake research relating to competition policy. Part 6 considers how technical assistance programs can assist emerging market economies to build the requisite research capability.

2. Barriers to Competition

5. Barriers to competition take a number of forms in most countries.⁴ This section provides a summary of significant barriers to competition as a way to provide a frame of reference for considering, in later sections of the paper, how research can facilitate the development of pro-competition policies that increase economic growth. The discussion includes selected citations to and illustrations of modern research that has assisted in documenting the existence of specific barriers to competition and understanding their cost.

2.1 *Conduct of Private Parties*

6. Private entities, acting alone or in concert, can take a number of measures to suppress competition. These measures fall generally into one of two categories: *collusionary* behaviour by which rival firms agree to pursue a common course in setting output, prices, quality, or other terms of trade, and *exclusionary* behaviour, by which a firm, acting alone or in concert with others, seeks to deny a rival access to the market entirely or to some input necessary to compete effectively.⁵ A horizontal price-fixing cartel is the best-known example of conduct with anticompetitive collusionary effects, whereas an abuse of dominance – say, for example, the adoption by a dominant firm of exclusive dealing contracts that deny a rival access to downstream distribution channels without offsetting efficiency justifications – is one illustration of conduct with anticompetitive exclusionary effects.

7. With some variation, the competition laws of most jurisdictions condemn both forms of anticompetitive conduct.⁶ The principle concern of this paper is the pursuit of research activities that give priority to addressing the most serious restraints upon competition. As suggested below, collusion by direct rivals and government-imposed barriers to entry and expansion ordinarily will supply an appropriate starting point.

2.1.1 *Contributions of Research to Understanding Private Anticompetitive Conduct: The Case of Supplier or Purchaser Cartels*

8. Research has played a major role in increasing the understanding in a wide range of economic settings of how cartels operate and how they adversely affect economic performance.⁷ Modern research has provided informative insights about how cartels, old and new, have solved problems of organization, coordination, and internal discipline and about the actual economic effects of cartels.⁸ Another line of research has examined, at the national level, how specific forms of producer coordination take place within individual commercial sectors.⁹

2.1.2 *Links between Policies to Challenge Private and Public Restraints*

9. Relatively few competition policy systems limit themselves to the treatment of purely private behaviour. Most systems contain provisions that give the national competition agency, either through law enforcement or through various forms of advocacy, authority to oppose actions by public instrumentalities that reduce competition.¹⁰ The dual approach of addressing public and private restrictions on competition is widely recognized today as essential to effective policy making.¹¹ Effective enforcement against private anticompetitive conduct creates incentives for private economic actors to persuade the state to take measures that the law forbids private parties to undertake. A competition system that focuses solely on private misconduct runs a serious risk of channelling impulses to suppress rivalry toward eliciting public intervention and, in doing so, solves only half of the problem of competitive restraints.¹²

2.2 *Conduct of Public Bodies*

10. Government authorities adopt a number of policies that establish barriers to competition. Competitive distortions introduced by public intervention take the following forms.

2.2.1 *Policies that Directly Restrain Competition*

11. The most commonly discussed measures by which public intervention limits competition consist of *direct* restraints upon the competitive process – measures that restrict entry, set prices, establish unnecessarily restrictive quality specifications, or provide subsidies or other advantages that permit state-owned enterprises to surpass private competitors.

2.2.2 *Policies that Indirectly Restrain Competition*

12. The literature on competition policy accords less attention to a wide array of other policies by which government intervention adversely affects the competitive process. Governments restrict competition by various *indirect* means that might not immediately appear to be related to competition policy. An incomplete list of policies that indirectly can restrict competition would include the following examples derived from case studies in transition economies.¹³

- *Employment Law.* Employment laws that ban enterprises from laying off employees can impede entry or expansion. Existing firms or potential entrepreneurs may be reluctant to add workers, even to accommodate increasing demand for their products, if the decision to hire creates, in effect, permanent positions that cannot be reduced if demand for the product were to fall in the future.
- *Incorporation and Business Registration Law.* A company law can impede entry by imposing burdensome registration requirements or permitting licensing authorities to deny registration because they dislike the applicant's business plan or fear that the applicant will add "redundant" capacity to the sector it seeks to enter.
- *Securities Laws.* Securities laws can discourage the capital formation that firms need to enter or expand by forbidding them to issue stock or by requiring government approval for measures that would adjust the firm's capitalization.
- *Secured Transactions Law.* The absence of an efficient system for secured lending can impede the ability of firms to enter or grow by pledging assets or revenues as a means for obtaining credit.
- *Property Law.* Poorly-specified or enforced protections for tangible or intangible property can deter enterprises from making certain categories of investments that permit them to compete more effectively by, for example, developing new products or realizing cost reductions by increasing plant size. Weak mechanisms for registering or transferring property rights also can slow the process by which firms acquire assets needed to expand operations.
- *Commercial Law.* Ineffective mechanisms for executing commercial transactions and enforcing contracts can reduce the speed and scope of trade by causing firms to rely on costly surrogates for judicial enforcement of contracts. Contract law in some countries also obstructs beneficial exchanges by requiring government approval for certain routine categories of transactions, such as an agreement to license a patent.

- *Consumer Protection.* Broad prohibitions upon advertising and related forms of marketing practices can deny entrepreneurs useful means to publicize their products and expand their client base.
- *Bankruptcy Law.* The lack of effective measures for dealing with bankrupt or insolvent enterprises can discourage entry by increasing the risks associated with exiting the market.
- *Social Insurance Programs.* Social policies that make state-owned firms responsible for providing housing, education, food, and other social services can spur the creation of massive publicly-owned conglomerate enterprises that the state, in order to ensure the provision of key services, feels compelled to protect from entry.
- *Housing Policy.* Housing policies that severely control rents or limit the construction of private housing stock can impede the fluid movement of workers from one area to another and cause government officials to forestall competition that would change the status quo of employment in any single region of the country.
- *Procurement Law.* Procurement laws can restrict rivalry by unnecessarily limiting the universe of potential bidders for specific projects or by employing techniques that inadvertently facilitate collusion by private suppliers.
- Careful pre-reform study of the operation of these and other public policies is an indispensable necessary element of the larger process of understanding the institutional arrangements that determine the level of competition and economic growth in any country.¹⁴ Research that identifies the path to improving these institutional arrangements has strong potential to contribute to economic growth, especially in poor countries in which the requisite arrangements often are badly lacking.¹⁵

2.2.3 *Regulatory Complexity as a Barrier to Entry*

13. The operation of various forms of government intervention can impose other costs on the competitive process. Each time a jurisdiction establishes a regulatory “gate” through which actual or potential entrepreneurs must pass, it creates an opportunity for corruption. As the system of public regulation becomes more complex, the number of regulatory gates and gatekeeper’s rises, thus increasing possibilities for corruption.¹⁶ The risk of actual corruption varies according to the effectiveness of the safeguards that individual jurisdictions establish to ensure integrity in public administration. Even in countries with strong public integrity safeguards, more complex regulatory regimes are likely to be more vulnerable to corruption than less complex regimes because the more complex regimes generate more opportunities for corruption.

14. Even if there were no corruption, regulatory complexity itself can be a barrier to entry. The resources committed to understanding a regulatory system and navigating its requirements are a tax that larger firms – especially incumbents with significant experience in the industry – can bear with lesser strain than smaller firms or new entrants. As the number and complexity of regulatory requirements that an entrepreneur must satisfy grows, the costs associated with entry also grow.¹⁷

15. To this point, we have been discussing respects in which government policies can retard competition directly or indirectly. We should note that there are important instances in which the government can improve competition by making public investments that ordinarily might not be associated with competition policy. In some countries, the poor quality of vital infrastructure assets makes it difficult for firms to transport goods into, out of, or across the country. A public program to improve roads, for

example, can permit producers in one part of the country to sell goods into a region that otherwise would be dominated by one or a few local suppliers.

2.2.4 Value of In-Country Research: Example of Tax Policy

16. Many competitive distortions arising from government policies are observable only through careful study of local conditions. One noteworthy area in which researchers have identified roadblocks to competition involves tax policy.¹⁸ Taxation regimes can discourage competition in several ways. In some countries, tax policies discourage inter-regional transfers of goods by allowing political subunits to assess taxes upon goods in transit from one part of the country to another. Allowing local or regional governments to impose such taxes can discourage the movement of goods throughout the country and insulate local producers from competition from more distant suppliers.

17. A more general problem stems from the promulgation of highly complex codes and the delegation of broad authority to individual inspectors to enforce code provisions. In some countries, the details of the codes are not made widely available to affected business operators. Enforcement of these measures sometimes is delegated to public officials who use broad enforcement discretion to "discover" violations and gather bribes under the guise of "settling" tax claims. Taxpayers rarely have recourse to any form of appeals mechanism, much less a system of review that affords a swift, impartial analysis of tax claims.

18. Arbitrary, corruptly enforced tax codes can deter entry and expansion by business operators. The likelihood that commercial success will attract scrutiny (and, perhaps, extortion) by tax authorities discourages some prospective entrepreneurs from entering markets and may lead incumbent operators to forego new investments that could increase revenues. Some firms will spend substantial sums on attorneys and other advisors to decipher opaque and fast-changing tax codes and to oppose frivolous audits or assessments. Others simply will attempt to evade the tax system by hiding or under-reporting income. The combination of corrupt enforcement and massive evasion obstructs accomplishment of the government's legitimate revenue collection objectives. Weaknesses in the system of tax collection, in turn, can cause governments to rely more heavily than they would otherwise on state-owned enterprises to meet revenue requirements, with attendant pressures to shield state-owned firms from entry by private firms.

3. Sources of Resistance to Competition Policy and Countervailing Forces

19. The introduction of competition into a commercial sector, or an entire economy, that has been governed by extensive controls on entry, pricing, and output can create considerable upheaval in the nation's political economy. The process of designing and implementing competition reforms requires the perspective and insights of a political scientist to anticipate sources of opposition to and support for such reforms. Political adroitness in mapping the landscape of existing interests, in blunting opposition, and mobilizing support is no less important to the success of competition policy reforms than technical proficiency in drafting substantive commands or designing a competition authority.

3.1 Potential Sources of Resistance

20. Opposition to pro-competition law reform, either through the implementation of a competition law or through collateral measures that improve the competitive process, can come from essentially four groups.

3.1.1 Private Recipients of Monopoly Rents

21. Private economic actors who derive monopoly rents from the absence of competition can be expected to oppose the adoption or implementation of pro-competition policies, or to seek legislative or

regulatory dispensations from rules promoting competition. In seeking to oppose pro-competition policies, the beneficiaries of the status quo enjoy an advantage identified by public choice scholars. The benefits of suppressing rivalry are realized by a comparatively small number of actors who fully understand the importance of restricting competition; by contrast, the costs of restricting competition tend to be spread broadly across a large number of individuals (consumers), each of whom suffers a comparatively modest penalty compared to the relatively substantial gain realized by incumbent producers.¹⁹ The phenomenon of highly focused benefits and broadly distributed costs gives producers a greater incentive to organize political resources needed to preserve the status quo.

3.1.2 Public Bodies That Benefit from Restrictions upon Competition

22. A variety of public instrumentalities may have a strong interest in defeating policy reforms that would increase competition. These include state-owned enterprises that enjoy protection against entry or expansion by private firms; government ministries that derive economic or political power by reason of their oversight of specific state-owned enterprises; and legislators whose base of political support includes state-owned firms and the ministries that oversee them. Public officials who benefit from restrictions upon competition may have incentives to organize to defeat pro-competition reforms that are no less strong than the incentives that motivate private recipients of monopoly rents to protect the status quo.²⁰

3.1.3 Constituencies Concerned About the Loss of National Autonomy

23. Resistance to pro-competition policy reforms may come from domestic constituencies that perceive such reforms to be a step toward surrendering national control over vital elements of economic policy to foreign interests. Models developed in comparatively wealthy nations have deeply influenced the adoption of competition policy reforms in transition economies as one part of the move toward greater reliance on a market economy.²¹ In some transition economies, concerns have been raised that well-established market economies promote competition policy mainly to improve the position of their own companies and not to spur growth in transition environments.

3.1.4 Opposition Rooted in Social Cleavages

24. Opposition to competition policy reforms sometimes stems from concerns about how competition will affect the distribution of wealth across various social groups. In some countries, disfavoured ethnic minorities account for a substantial amount of commerce in specific sectors, but their opportunities to expand operations are limited by a variety of regulatory controls. In such settings, the relaxation of central controls on entry or expansion by business enterprises may be opposed because such measures are perceived by the majority social groups as enabling disfavoured minorities to increase their prominence in the economy. In another scenario, reliance on market-based processes might be seen as an abandonment of social policies that are designed to give historically disadvantaged groups greater access to the economy.

3.1.5 The Common Case: A Complex Nexus of Influences

25. In the typical case, resistance to reform does not stem from a single source but will result from a convergence of impulses. Understanding the full array of factors that press toward preserving the status quo is the necessary first step to anticipating and addressing opposition to reform. The case of natural monopoly reform illustrates the point.

26. Many formerly communist and socialist countries employ a broad conception of "natural monopoly" to withdraw assets from the private sector and sustain expansive levels of state ownership. Experience with Ukraine's efforts in the 1990s to draft a new law for the regulation of natural monopolies illustrates the point.²² As Ukraine expanded its privatization program in the mid-1990s, natural monopoly

entities were exempt from privatization. This exemption placed a premium on the ability of the natural monopoly law drafting group to devise (and gain acceptance for) a working definition of "natural monopoly" that properly limits the activities subject to natural monopoly oversight. This problem had two dimensions. The first was to identify industry sectors that today have natural monopoly traits and to provide a mechanism for adjustment that takes account of changes in technology and competitive circumstances. The second was to address the conglomerate, integrated structure of firms that engage in natural monopoly activities.

27. During the era of central planning, the absence of strong markets for intermediate inputs and the government's desire to use firms as engines of social policy caused state-owned enterprises to pursue self-sufficiency. Thus, the state pipeline company owned not only natural gas pipelines, compressor stations, and scheduling facilities, but also owned the housing in which its workers live, the retail stores in which they shopped, the construction company that serviced the pipeline and other purchasers of building services, and the farms that produced the food consumed by the pipeline company's employees.

28. Ministries responsible for specific economic sectors in Ukraine had a strong interest in seeing that the concept of "natural monopoly" was defined and interpreted broadly, to increase the number of sectors exempt from privatization and to prevent the privatization of business entities that are affiliated by the natural monopoly firm but do not perform functions that could be called natural monopoly activities. A narrow definition of natural monopoly, and the de-conglomeratization of firms holding natural monopoly assets, promised to reduce significantly the ministries' base of economic and political power.

3.2 Countervailing Interests: Potential Sources of Support for Competition Reforms

29. In most countries, it is possible to identify potential sources of support for reforms that will increase reliance on market mechanisms to govern the economy. When engaged in the process of pursuing competition policy reforms, such groups can provide an important counterweight to the opposition interests identified above.

3.2.1 Incumbent Firms that Suffer from Monopoly Overcharges

30. It may be possible to identify industry groups whose opportunities for growth suffer from the absence of competition. One group of candidates consists of firms whose costs increase because they purchase inputs at supracompetitive prices set by a cartel or a dominant firm. Suppose that a domestic producer of decorative flowers exports its output in competition with growers located in other countries. The domestic producer can suffer a serious competitive disadvantage, and will lose sales, if it must purchase transportation services from a single-firm monopolist or a cartel.²³

31. Another group of enterprises that might support pro-competition reforms consists of service providers who do not buy inputs from a cartel or a monopolist but whose operations nonetheless depend on the prices charged and quality of service provided by the cartel or monopolist. Consider the example of hotel owners whose facilities serve foreign tourists. The hotels may lose customers if the government dedicates all domestic air transport service to a single state-owned enterprise that charges monopoly prices for domestic service to tourism destinations. A lack of price competition for the domestic leg of the tourist's journey may result in a cost for the entire tour package that leads the tourist to consider other destinations. It could be the case that economic and social policies designed to sustain employment or revenues for one sector (the domestic airline industry) deny the country the opportunity to realize still greater growth in employment and GDP by stifling growth in another sector (hotel and related tourism services).

3.2.2 *Government Authorities with a Stake in Promoting Economic Growth*

32. Some ministries of government might perceive how policies that suppress competition can diminish opportunities for economic growth. We can turn again to the examples mentioned above. The agriculture or foreign commerce ministries might be willing to oppose the transport ministry if greater competition in the transport sector would reduce the cost of exporting agricultural goods and increase export sales. The ministry responsible for tourism might oppose the transport ministry if adding a second domestic air carrier would depress domestic airline fares and attract more tourists to destinations within the country.

3.2.3 *Socially Disadvantaged Groups*

33. Complex regulatory regimes that increase the cost and difficulty of forming a new business enterprise fall particularly heavily on impoverished individuals or groups.²⁴ Competition policies that reduce artificial entry barriers can facilitate small business development and give previously excluded individuals new economic opportunities. Eliminating artificial regulatory barriers also can induce informal operators to participate in the formal sector. This gives the operators the protections available to formal sector participants (e.g., recourse to legal process, such as to enforce contracts) and gives the state the benefit of tax payments that informal operators do not provide.

3.2.4 *Consumer Organizations*

34. In a number of countries, consumer organizations are a valuable source of political support for pro-competition reforms. By publicizing the costs of policies that suppress business rivalry and informing the public about the benefits of competition, consumer organizations provide a vehicle for overcoming the collective action problems associated with accomplishing economic reforms.

4. **Role of Research in Diagnosing Obstacles, Identifying Solutions, and Understanding the Reform Process**

35. The principal theme of this paper is that research is an important ingredient of the combination of measures a country must take in order to design and successfully introduce competition policy reforms. This section discusses how the capacity to conduct research in several disciplines – most notably empirical work in microeconomics, but also studies in law, political science, and sociology – can make important contributions toward the establishment of a competition culture and toward overcoming resistance to pro-competition measures.

4.1 *Analyzing Initial Conditions*

36. The first, indispensable research task relating to competition reforms is to perform a careful study of the country's pre-reform conditions.²⁵ This task involves examining the economic, legal, political, and social context in which reforms might be pursued.²⁶ Enormous challenges and subtleties can accompany the application of generally applicable precepts of institutional design to any individual national context.²⁷ An accurate pre-reform diagnosis of initial conditions serves several important objectives.

4.1.1 *Understanding Types and Causes of Competition-Relevant Phenomena*

37. A basic aim of pre-reform research is to determine which types of private behaviour and public policies retard growth by diminishing competition and to understand the origins of the practices in question. The drafting of specific reforms should follow efforts to study the major sources of market failure and to identify distinctive institutional conditions that affect the choice of strategies for correcting such failures.²⁸ Preparation for drafting should include case studies of specific industries and interviews

with academics, consumers, government officials, legal practitioners, and business managers. The case studies serve to identify problems on which antitrust and consumer protection reforms should focus, to assess the institutional capabilities of the host country, and evaluate needed adjustments in institutions.

38. Ideally, pre-reform research should involve a collaboration between indigenous specialists and external technical advisors.²⁹ A cooperative effort to perform case studies and interviews gives indigenous experts the benefit of experience and theoretical insights from external advisors, and ensures that external advisors are alert to distinctive circumstances of the host country. The participation by external advisors in pre-reform analysis, law drafting, and implementation will be most constructive when technical advisory bodies have a continuing, long-term, in-country presence.

39. One of the most important functions of pre-reform research is to illuminate conditions that affect the design of competition-oriented measures. Even in an environment of comprehensive regulation or centralized planning, business managers and individual entrepreneurs develop customs and institutions that promote efficient resource allocation and can provide valuable foundations for carrying out economic activity in the post-reform era. These market-relevant customs emerge in several ways. In one setting, customs and institutions take root in the "informal" sector of a heavily regulated economy. In the "informal" sector, economic actors operate at the fringe of legality or in defiance of existing legal commands.³⁰ Participants in the informal sector often devise market-oriented customs and institutions that can illuminate paths for transforming the heavily regulated "formal sector."

40. Pre-reform commercial customs and institutions can have important implications for the design of legal reforms. First, commercial actors (especially private entrepreneurs in the formal and informal sectors) can provide a base of political support for economic liberalization, including measures to promote competition. Second, individuals who have gained some experience with market processes can be a source of new entry and expansion in the post-reform economy. Third, private actors in the formal and informal sectors rarely enjoyed effective recourse to a well-established, judicially-enforced system of rules governing commercial behaviour. Such firms often devised private customs or institutions to define property rights and govern their transactions. With economic liberalization, these informal customs can supply a useful basis for establishing formal principles of law.

4.1.2 Identifying Relevant Interest Groups

41. A predicate for undertaking competition policy reforms is to identify constituencies that are likely to oppose or support such measures. Careful pre-reform research helps prepare accurate predictions of which public and private actors will resist pro-competition measures and helps spotlight public and private actors who might support reforms.

4.1.3 Learning from the Existing Institutional Framework

42. The third objective of pre-reform study is to identify existing institutions that the country might employ or adapt to execute pro-competition reforms.³¹ For example, an existing social network might supply a means for communicating information about the operation of a new competition policy system and might assist in educating various groups about the system's rationale and requirements.³² Existing indigenous organizations might assist in alerting government officials about deviations from competition law commands.

4.1.4 Synthesis: Law Drafting and Institutional Design

43. The fourth aim, closely related to the first three, is to inform the actual drafting of a competition law or the design of related competition policy reforms. Serious efforts to study initial conditions can help

avoid problems that sometimes arise when transition economy laws are modelled too closely upon off-the-rack variants of statutes or institutions developed in older market economies.³³

4.2 *Demonstrating the Costs of Policies that Restrict Competition*

44. Research can play a valuable role in the reform process by identifying and measuring the costs of private behaviour and public policies that suppress competition. Confronting defenders of the status quo with such costs cannot be expected, by itself, to induce them to relent. Documentation of costs nonetheless makes it more difficult for opponents of reform to make the case for inertia. Good empirical work can perform a valuable educational function by making clear what a country pays by limiting competition.

45. Sound research might be considered to be the equivalent in economics of a legal precedent. “Economic precedents” provide justifications that can be used repeatedly, by the host country and by other jurisdictions, to establish the value of policy reforms. These “precedents” can have considerable impact across jurisdictions. For example, in the late 1980s and early 1990s, the U.S. Federal Communications Commission and the public service commissions of many state governments modelled price cap reform measures on methods recommended by researchers in the United Kingdom and tested by U.K regulatory authorities.³⁴ The academic theoretical research and studies of actual reform experience in the United Kingdom provided government officials in the United States with some assurance that price caps entailed fewer administrative costs and provided superior incentives to improve productivity than traditional rate of return regulation. In this and other settings, cross-sectoral and inter-jurisdictional comparisons have become increasingly important tools for the analysis of regulatory policies and institutions.

4.3 *Identifying the Possible Process and Content of Reforms*

46. Research can serve at least two functions in the design and implementation of reforms. First, research can help explain the combination of circumstances within an individual jurisdiction that are likely to prove most supportive of reform efforts. In some instances, the costs of regimes that suppress competition are so massive that, when convincingly documented, they begin to collapse of their own weight.³⁵ In other cases, technological change undermines existing regulatory structures and provides an opportunity to promote pro-competition policies as better suited to deal with the technologically-driven reconfiguration of the industry.³⁶ Researchers also have highlighted the crucial role played by the political adroitness of public officials entrusted with administering the transition from one governance structure to another.³⁷ By close study of various developments in the country’s economy and political environment, research helps to identify conditions suitable for reform, to spot the optimal timing for pursuing specific reforms, and to indicate ways to develop a coalition to support reforms.

47. Second, research can inform judgments about how to cure problems rooted in a lack of competition. For a competition agency, research can help illuminate possible law enforcement projects or opportunities for advocacy before other government bodies. Research also might uncover other policy adjustments – such as the reform of taxation systems – that influence the competitive process and might warrant adoption.

4.4 *Illustration: Modern U.S. Deregulation Experience*

48. One particularly difficult challenge in studying economic regulation in any jurisdiction is to understand how reforms come to pass. The modern literature on public choice economics has provided a useful perspective on why certain regulatory regimes come into being and persist over time. As noted above in Section 3.1, economic regulation that restricts competition often generates benefits to a well-defined set of public or private actors. These beneficiaries have strong incentives to organize themselves and press government policy makers to maintain regulatory controls that, for example, prevent new entry.

In many instances, the costs of regulation fall upon a large, diffuse body of actors, each of whom would realize comparatively small gains from regulatory reform and who collectively would incur substantial costs in forming a coalition to pursue reform. The combination of highly focused benefits and widely dispersed costs creates a substantial obstacle to reform.

49. Despite the power of regulatory restrictions on competition to endure, public policy in the United States since the mid-1970s has featured important episodes of pro-consumer regulatory reform. Regulatory structures that shielded incumbent service providers from competition have toppled or undergone dramatic retrenchment in the commercial airline, electric power, trucking, railroad, and telecommunications sectors. What once might have seemed to be immutable controls on entry and pricing gave way to liberalized regimes that rely heavily on competition as the means for governing economic activity.

50. Researchers played an important part in understanding the timing of these deregulatory measures and in fostering an intellectual environment supportive of reform. One contribution was to identify the costs of existing regulatory controls and to underscore the feasibility of reforms. Experience with airline deregulation provides an important example. By the mid-1970s, several empirical studies had shown that intrastate airline routes in California and Texas had much lower fares than interstate routes of comparable distance and showed that intrastate carriers operated profitably and safely.³⁸ Such studies provided crucial intellectual support later in the decade for efforts to abandon limits on entry and pricing for domestic carriers.³⁹

51. This experience underscores the value of research in unmasking faulty theoretical assertions and empirical assumptions that support the regulatory status quo.⁴⁰ Formulating an alternative intellectual vision can help stimulate institutional change by fostering a debate about existing policies and supplying advocates of change in the political arena with tools to justify reform measures.

4.5 *Evaluating the Effects of Past Competition Policy Interventions*

52. As a nation implements a competition policy program, the competition agency should dedicate some of its research agenda to evaluating the effects of its interventions. Analyzing the effects of completed cases, advocacy initiatives, or other forms of activity helps the competition agency determine how to use its resources in the future and helps establish a norm of empirical inquiry as a means of analyzing the consequences of its interventions.⁴¹

5. Institutional Foundations

53. The importance of research in creating a competition culture has several institutional implications.

5.1 *The Competition Authority*

54. The availability of research is particularly significant to the operation of the competition authority. The competition authority can obtain research from one of three principal sources, depending upon its own institutional characteristics and the design of its government institutions. First, a competition agency can develop an internal research capability. Although the amount of resources that competition agencies invest in this function varies, maintaining at least some internal capability is likely to prove highly valuable.⁴² The second approach is to contract outside the agency for experts to perform research on its behalf. Many competition authorities rely, at least to some extent, on academics and other external consultants to conduct research for the agency. The third approach is to use research results generated by or on behalf of other institutions, including other competition agencies. One benefit of cooperation among competition authorities is to create a pool of “economic precedents” that can be shared and adapted across

jurisdictions. The essential point is that, without a strong research base that is developed internally or derived from external sources, it will be difficult for the competition agency to make sound judgments about how to deploy its resources for enforcement or advocacy.⁴³

55. Performing case studies can help a competition agency, particularly new authorities, achieve important methodological and substantive objectives. Performing studies can enrich the agency's understanding of market phenomena that it must analyze and address in applying its enforcement powers. Case studies also serve important methodological ends. A study can be seen as an opportunity for the agency's staff to develop skills that are instrumental in investigating possible violations of the law and building cases.

56. Collaboration between the agency and foreign advisors can be effective elements of the agency's training program. In performing case studies, the agency's professional staff can acquire familiarity with the analytical tools and information-gathering methodologies that will be needed to enforce the competition law.⁴⁴ Case studies, in turn, can provide valuable material for devising training programs that use hypothetical examples and role-playing exercises based on economic circumstances true to the experience of new competition authorities.⁴⁵

5.2 *An Indigenous Intellectual Infrastructure*

57. Successful competition policy systems rely heavily on collateral institutions to develop technical skills and perform studies that are the essential foundations of good research.⁴⁶ The intellectual infrastructure that supports the development of competition policy in many countries has several discrete elements.

58. First and perhaps most important is the system of higher education. Countries with well-established competition systems rely heavily on universities to train students in the fundamentals of the law and economics of competition policy.⁴⁷ Key components of higher education are law schools that teach sophisticated courses in antitrust and economics departments or business schools that teach undergraduate and graduate courses dealing with microeconomics and industrial organization. For example, in the United States, professors who teach such courses can choose from a multitude of instructional materials that incorporate the latest developments in analytical techniques and policy. The U.S. competition agencies recruit numerous entry-level attorneys and economists from these programs.

59. In a number of countries, universities also generate substantial amounts of research and commentary that address phenomena relevant to competition policy. Supplementing the work of universities are countless institutes and think tanks. Some think tanks are located in government ministries, others are affiliated with universities, and still others are private institutions that perform research for public or private bodies on a fee basis. Numerous scholarly journals publish papers on antitrust and industrial organization topics, and such journals are widely accessible to government officials and practitioners. The academic community is the equivalent of a large network of competition policy research and development laboratories that supply the antitrust system.

5.3 *The Transmission Grid: The Media, Professional Societies, Trade Associations, and Consumer Groups*

60. Media organizations, trade associations, professional societies, and consumer groups provide useful networks for distributing the results of research relating to competition policy.⁴⁸ Collectively, they constitute the transmission grid for ideas concerning competition reform. Competition agencies and other bodies with an interest in promoting competition reforms tend to be proficient in using all three types of networks to make the case for competition policy.

61. In many competition policy systems, the results of research performed by government competition bodies or by external researchers are distributed through a variety of information conduits, including an expanding array of media organizations. In some countries, specialized media organizations regularly report on developments in competition policy and other forms of business regulation. These organizations provide means for various external constituencies, such as other government agencies and the business community, to obtain the results of competition policy research. The activities of media organizations can inject an important element of transparency and accountability into the operation of competition policy agencies.

62. Professional societies, trade associations, and consumer groups provide important links between competition agencies and external communities. These groups can perform a valuable function in a competition policy system by disseminating the results of research concerning impediments to competition and possible solutions to competitive obstacles. Such groups also facilitate a continuing process of critical discourse about competition policy that makes the rationale and effects of government enforcement decisions more transparent.

5.4 *An Integrated Approach: The Example of Peru in the 1990s*

63. Under the leadership of Beatriz Boza, Peru's competition policy agency (INDECOPI) undertook an ambitious program in the 1990s to establish a strong internal research capability, to foster the development of a strong supporting intellectual infrastructure in Peru, and to encourage the acceptance of a norm of regular self-assessment.⁴⁹ One of the chief manifestations of this effort is what Boza called the "academic audit" – a program of review in which internal and external researchers prepared papers analyzing various features of the performance of INDECOPI. The results of the academic audit were published to permit public dissemination of the research and to stimulate public debate about INDECOPI's activities.⁵⁰

6. Conclusion: Implications for Institutional Design and Technical Assistance

64. The importance of research in promoting the development of a competition culture has major implications for the design of competition policy institutions in most jurisdictions and for the structuring of technical assistance programs in countries that recently have adopted competition laws or are considering doing so.

6.1 *General Observations*

65. Good research is important to older and newer systems, alike. In each case, research can play a valuable role in demonstrating the benefits of competition and documenting the costs of private and public measures that restrict competition. Successful competition systems invest resources in performing relevant research themselves or retaining experts to conduct inquiries. Effective systems also form what amount to loose partnerships with universities to obtain access to graduating students and to help inform the research agendas of academics with an interest in competition policy.

6.2 *Technical Assistance Considerations*

66. A weakness of foreign technical assistance programs for competition policy is their tendency to invest relatively few resources in efforts to diagnose the obstacles to competition in the host country before a competition law is drafted and passed. More generally, in an unfortunate number of instances, reform programs involving a variety of economic regulatory statutes have imported off-the-rack substantive commands and enforcement mechanisms from Western experience without adequately considering the institutional context in which such commands and mechanisms will operate. The following research-related activities are designed to overcome these limitations.⁵¹

- *Pre-Reform Study.* The design of new competition policy systems ought to proceed from a careful pre-reform analysis of the host country's initial conditions. Making such research a component of the technical assistance life-cycle helps ensure that the drafting of a new statute and creation of implementing institutions rests upon a sound understanding of local economic phenomena, the political landscape, and institutions whose operation will influence the application of competition policy.
- *Research as an Element of the Competition Agency's Mandate.* The new competition agency should have authority to perform research related to its functions or to contract with third parties to carry out such work. Depending on the legal customs and practices of each country, it may be useful to make this authority an express element of the agency's charter.
- *Investments in Building the Jurisdiction's Intellectual Infrastructure.* Technical assistance programs should contain a component for enhancing the host country's intellectual infrastructure, particularly its university programs in economics and law.⁵² Two key aims of this process are to train specialists who will work in the competition policy community and to build indigenous capability to perform research relevant to the development and implementation of competition policy.
- *Regional Cooperation.* Technical assistance programs should promote forms of regional cooperation that enable individual countries to collect and use research developed in other jurisdictions, to develop analytical skills, and to conduct joint products that might be beyond the reach of any single jurisdiction.

NOTES

1. Organization for Economic Co-operation and Development, OECD Global Forum on Competition, Secretariat Background Note, *Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition* (CCNM/GF/COMP(2003)6; 27 October 2003) (hereinafter *Background Note*).
2. This paper uses the term “competition policy” to encompass advocacy, law enforcement, research, publicity, and related tools by which a competition authority seeks to encourage reliance on competition as the means for organizing the economy. See William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 *Chicago-Kent Law Review* 265, 281-86 (2001) (hereinafter *Institutional Foundations*) (discussing various tools by which public competition authorities seek to promote reliance on competition).
3. The Background Note defines “competition culture” to mean “there is political support to use competition in markets as the default or ‘normal’ way to organise economic activities outside the family, government bureaucracies and single economic entities (or single enterprises) and that this support is translated into competition actually being the default or ‘normal’ organising principle.” *Background Note*, at Paragraph 14 (emphasis in original). The importance of building and sustaining a competition culture, and a discussion of strategies for achieving these ends, are presented in Ignacio De Leon, *Latin American Competition Law and Policy: A Policy in Search of Identity* (2001).
4. See Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 *Antitrust Bulletin* 105 (1998); Luis Tineo, *Competition Policy & Law in Latin America: From Distributive Regulations to Market Efficiency* 8-9 (Monterey Institute, Center for Trade & Commercial Diplomacy, Working Paper No. 4, February 1997) (hereinafter *Competition Policy*).
5. This classification scheme is elaborated in Andrew I. Gavil et al., *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2002).
6. See, e.g., Roger Alan Boner, *Competition Policy and Institutions in Reforming Economies, in Regulatory Policies and Reform: A Comparative Perspective* 38, 42-48 (Claudio R. Frischtak, ed., The World Bank, 1996) (describing main elements of transition economy competition laws); Roger W. Mastalir, *Regulation of Competition in the "New" Free Markets of Eastern Europe: A Comparative Study of Antitrust Laws in Poland, Hungary, Czech and Slovak Republics, and their Models*, 19 *North Carolina Journal of International Law & Commercial Regulation* 61 (1993). Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, 26 *International Lawyer* 485, 487-502 (1992) (describing substantive prohibitions in Central and Eastern European antitrust laws); Tineo, *Competition Policy*, at 15-23 (describing substantive provisions of Latin American antitrust laws).
7. Recent noteworthy examples include John M. Connor, *Global Price Fixing: Our Customers Are the Enemy* (2001); Simon J. Evenett et al., *International Cartel Enforcement Lessons from the 1990s*, *World Economy* (Sept. 2001). See also William J. Kolasky, Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, *Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks* (Apr. 24, 2002) (Presentation Before the ABA Section of Antitrust Law Spring Meeting, Washington, D.C.) (reviewing economic literature on common characteristics of price-fixing cartels and discussing implications for merger enforcement), available at <http://www.usdoj.gov/art/public/speeches/11050.htm>.
8. Important recent contributions include Margaret Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, in *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (Peter Grossman ed.) (forthcoming); David Genesove & Wallace P. Mullin, *Rules, Communication and Collusion: Narrative Evidence from the Sugar Institute Case*, 91 *American Economic Review* 379 (2001); Robert Marshall et al., “Cartel Price Announcements: The Vitamins Industry” (May 2003).

9. See William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 *Antitrust Law Journal* 253, 260 (1992) (discussing role of trade associations in cartelizing construction industry).
10. The importance of advocacy as a component of competition policy is examined in International Competition Network, Advocacy Working Group, *Advocacy and Competition Policy* (Sept. 2002).
11. See World Bank & Organization for Economic Cooperation and Development, *A Framework for the Design and Implementation of Competition Law and Policy* 93-100 (1999) (advocating establishment of competition advocacy function as element of competition law systems).
12. See Timothy J. Muris, Chairman, U.S. Federal Trade Commission, *State Intervention/State Action: A U.S. Perspective* (Oct. 24, 2003) (presentation before the Fordham Annual Conference on International Antitrust Law and Policy, New York) (discussing need for competition policy to develop comprehensive program to challenge private and public restraints on competition), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.
13. For excellent surveys of these and other policies, see Asian Development Bank, *Secured Transactions Law Reform in Asia: Unleashing the Potential of Collateral*, II Law and Policy Reform at the Asian Development Bank (2000 Edition) (presented results of study in five Asian countries of importance of secured transactions law reform in promoting new business development and growth); World Bank, *World Development Report 2002: Building Institutions for Markets* 133-49 (2002) (reviewing wide array of government policies that affect competitive process); Report on Recommendations on Building and Improving Economic Legal Framework (Mar. 1998) (Report of United Nations Development Program VIE/94/003, *Strengthening the Legal Capacity of Vietnam*) (hereinafter *Economic Legal Framework*) (reviewing legal impediments to economic growth in Vietnam); Regulatory Policies and Reform: A Comparative Perspective (Claudio R. Frischtak ed., Dec. 1995) (discussing various means of government intervention that affect competitive process, including competition law, trade law, consumer protection, bankruptcy, labor law, real property law, and regulatory controls affecting infrastructure sectors such as energy, telecommunications, and transportation).
14. See Mancur Olson, *The Hidden Path to a Successful Economy*, in *The Emergence of Market Economies in Eastern Europe* 35, 49 (Christopher Clague & Gordon C. Rausser eds., 1992) (“To realise all the gains from trade, . . . there has to be a legal system and political order that enforces contracts, protects property rights, carries out mortgage agreements, provides for limited liability corporations, and facilitates a lasting and widely used capital market that makes the investments and loans more liquid than they would otherwise be.”); Steven Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 *Economics and Policy* 207 (1995) (documenting connection between quality of institutions and economic growth in emerging markets); Joseph E. Stiglitz, *Knowledge for Development: Economic Science, Economic Policy, and Economic Advice*, in *Annual World Bank Conference on Development Economics 1998*, at 9, 10 (Boris Pleskovic & Joseph E. Stiglitz eds., 1999) (observing that economic reform proposals for transition economies sometimes are flawed owing to “the lack of emphasis on institutional infrastructure, including not only competition policy, but also legal structures that enforce contracts, implement bankruptcy, and ensure sound financial institutions”).
15. World Bank, *Assessing Aid: What Works, What Doesn't, and Why* 3 (1998) (“Improvements in economic institutions and policies in the developing world are the key to a quantum leap in poverty reduction.”).
16. See Susan Rose-Ackerman, *Corruption and Government* 117 (1999) (discussing how the creation of complex regulatory regimes can facilitate corruption).
17. See William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 *Policy Sciences* 29 (1992) (discussing how complexity of rules governing public procurement can discourage entry to compete for government contracts).

18. See Gary Goodpaster & David Ray, "Competition Policy and Decentralization" (Partnership for Economic Growth: May 2000) (discussing impact of tax policy upon competition in Indonesia) (hereinafter *Decentralization*).
19. For an articulation of the concept and its application to institutional reform in transition economies, see Mancur Olson, *The Hidden Path To a Successful Economy*, in *The Emergence of Market Economies in Eastern Europe* 55 (Christopher Clague & Gordon C. Rausser eds., 1992). The possible lessons of public choice theory for economic law reform are summarised in Thomas S. Ulen, *Law's Contribution to Economic Growth*, in *The Law and Economics of Development* 59 (Edgardo Buscaglia et al. eds., 1997).
20. See Capelik & Slay, *Antimonopoly Policy*, at 84 (discussing resistance by state-owned enterprises and state ministries to market reforms in Russia); Kovacic, *Competition and Consumer Protection Reforms*, at 1203-05; William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 *American University International Law Review* 437, 439-41 (1996).
21. The influence of models developed in Western market economies on the design of competition laws in transition economies is recounted in John Fingleton *et al.*, *Competition Policy and the Transformation of Central Europe* 54-57 (1996); Vladimir Capelik & Ben Slay, *Antimonopoly Policy and Monopoly Regulation in Russia*, in *De-monopolization and Competition Policy in Post-Communist Economies* 57, 62 (Ben Slay, ed. 1996) (hereinafter *Antimonopoly Policy*); Ben Slay, *Industrial De-monopolization and Competition Policy in Poland*, in *De-monopolization and Competition Policy in Post-Communist Economies* 123, 134 (Ben Slay, ed. 1996) (hereinafter *Industrial De-monopolization*); Carolyn Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary*, 15 *Michigan Journal of International Law* 1129, 1149-56 (1994); Derrick McKoy, *Antitrust Law in Jamaica: The Fair Competition Act of 1993*, 5 *Journal of Transnational Law & Policy* 183, 185 (1995); Tineo, *Competition Policy*, at 4-5.
22. The example presented here is presented in Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 *George Washington Journal of International Law and Economics* 1, 34-37 (1997).
23. See William Grant et. al., "Moroccan Flower Subsector Study and Recommendations for Project Actions" (Dec. 1993) (U.S. Agency for International Development: Morocco Agribusiness Promotion Project).
24. This is a central theme of Hernando de Soto's formative study of the informal sector in Peru. Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (1989).
25. See Kovacic, *Institutional Foundations*, at 273-74 (presenting rationales for conducting pre-reform research).
26. For a recent example of an empirical study that examined pre-reform conditions relevant to competition policy development in Benin, Madagascar, and Senegal, see Cynthia L. Clement et al., "Competition Policies for Growth: Legal and Regulatory Framework for SSA Countries" (May 2001). See also Peter Murrell, *Missed Policy Opportunities During Mongolian Privatization: Should Aid Target Policy Research Institutions?*, in *Institutions and Economic Development* 235, 237 (Christopher Clague ed., 1997) (hereinafter *Missed Policy Opportunities*) ("Each new institution interacts with a larger preexisting structure. Therefore, the effectiveness of each new institutional brick crucially depends on its fit with the existing institutional foundation. As a consequence, if it is to be effective, the generation of information on the effects of existing policies and the formulation of new policies needs to reflect the deep characteristics of a society. To know how a policy will work, one must understand the concurrent processes occurring in the economy.").
27. See Douglass C. North, *Why Some Countries Are Rich and Some Are Poor*, 77 *Chicago-Kent Law Review* 319, 330 (2001):

We know what makes for rich countries. We know the characteristics of productivity. We even know the kinds of institutions that must be put in place. The rule of law, property rights that provide incentives for people to be productive, and investment in human capital: all of these are necessary. We know all of this; but we do not know how to put in place the formal rules of the game accompanied by the informal rules and enforcement characteristics that are necessary for success.

28. See William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DePaul Law Review 1197, 1202-14 (1995) (discussing importance of studying existing transition economy conditions as basis for drafting new laws); Spencer Weber Waller & Rafael Mueente, *Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru*, 21 Case Western Reserve Journal of International Law 159, 165 (1989) ("a sophisticated political and economic analysis of the activities carried out by the enterprises in a national economy is an important aid in designing competition legislation for that country"). The Ray & Goodpaster paper, *Decentralization* cited above is one outcome of a substantial research program that various donors sponsored in Indonesia to analyse local institutions relevant to the development of Indonesia's competition policy system.
29. Examples of pre-reform studies that focus on in-country data collection and related field work include Karen Turner Dunn et al., *The Meat Processing Sector in Mongolia*, in *De-monopolization and Competition Policy in Post-Communist Economies* 107 (Ben Slay ed., 1996) (describing, inter alia, collusive arrangements by meat processors to set prices to be bid for livestock); Zimbabwe Monopolies Commission Study, *Study of Monopolies and Competition Policy in Zimbabwe* 47-48 (Sept. 1992) (discussing findings concerning collusive tendering in construction industry).
30. See Hernando de Soto, *The Other Path* 17-127 (1989) (documenting substantial role of "informal" sector in Peru's economy).
31. The importance of institutional arrangements to the operation of a legal regime and to the process of economic growth is examined in Michael J. Trebilcock, *What Makes Poor Countries Poor? The Role of Institutional Capital in Economic Development*, in *The Law and Economics of Development* 15 (Edgardo Buscaglia et al. eds., 1997).
32. Compare Melinda Smale & Vernon Ruttan, *Social Capital and Technical Change: The Groupements Naam of Burkina Faso*, in *Institutions and Economic Development* 182, 183 (Christopher Clague ed., 1997) (discussing how a nation's existing indigenous cultural and social endowments can facilitate the process of economic growth).
33. See Michal Gal, *Competition Policy for Small Market Economies* (2003) (emphasizing importance of attentiveness to national economic characteristics in designing competition policy regime).
34. See Jay Hillman & Ronald Braeutigam, *Price Level Regulation for Diversified Public Utilities: An Assessment* 3 (1989).
35. See Michael A. Crew & Charles Rowley, *Feasibility of Deregulation: A Public Choice Analysis*, in *Deregulation and Diversification of Utilities* 5, 17 (Michael A. Crew ed., 1989) (hereinafter *Feasibility of Deregulation*) ("Rent-seeking and rent-protection may become so unprofitable and impose such large wealth losses that they disintegrate without outside influence.").
36. See Gary S. Becker, *Political Competition Among Interest Groups*, in *The Political Economy of Government Regulation* 13, 20-21 (J. Shogren ed., 1989) (describing how technological change can increase the deadweight costs of regulation and generate interest group pressure for change); Robert W. Crandall, *Regulating Communications: Creating Monopoly While 'Protecting' Us From It*, *Brookings Review*, Summer 1992, at 34, 39 ("Over time, regulatory rules that protect incumbent monopolists break down because of the competition that develops from new technologies and new services.").

37. See Thomas K. McCraw, *Prophets of Regulation* 222-29 (1984) (describing key role of Alfred Kahn in executing airline deregulation initiatives during Kahn's chairmanship of the U.S. Civil Aeronautics Board in the late 1970s).
38. See, e.g., George W. Douglas & James C. Miller III, *Economic Regulation of Domestic Air Transportation: Theory and Policy* (1974).
39. The impact on subsequent reforms of empirical work on the costs of limits on entry and pricing in the U.S. airline sector is examined in Kaplan, *The Changing Airline Industry*, in *Regulatory Reform: What Actually Happened* 40 (Leonard Weiss & Michael Klass eds., 1986).
40. See Crew & Rowley, *Feasibility of Deregulation*, at 17 ("The role of the political economist as entrepreneurial provider of hypotheses concerning institutional reform is not to be underestimated.").
41. The value of *ex post* analysis as a component of a research agenda is considered in William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 *George Mason Law Review* 843 (2001).
42. The pool of resources that a competition agency can draw upon to perform relevant research will vary from country to country, depending upon the charter of the competition authority and its location within the framework of the government. Most competition agencies hire economists, and a number of agencies have formed separate bureaus for economic analysis that can serve as platforms for conducting research. Other competition agencies have express provisions in their legislative charters that authorise or require the agencies to perform research-related tasks, and annual budgetary appropriations typically provide funds for the accomplishment of these duties. Still other competition bodies are subunits of larger government ministries – for example, a ministry of trade and industry – that have research powers or resources that the competition body can draw upon.
43. See Armando E. Rodriguez & Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy*, 23 *Brooklyn Journal of International Law* 365 (1997) (discussing how the examination of a nation's economic institutions should guide a competition agency's decisions about the choice of advocacy initiatives).
44. See William E. Kovacic & Robert S. Thorpe, *Antitrust and the Evolution of a Market Economy in Mongolia*, in *De-monopolization and Competition Policy in Post-Communist Economies* 89, 94-96 (Ben Slay ed., 1996) (describing usefulness of case studies as means for foreign experts to transmit analytical know-how and information-gathering techniques to transition economy economists and lawyers); Kovacic, *Competition Policy Entrepreneur*, at 471 (same).
45. The value of using hypothetical exercises based on economic problems found in transition economies to train competition agency officials is discussed in U.S. Federal Trade Commission & U.S. Department of Justice, *The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective* (Feb. 2002) (note submitted for the OECD Global Competition Forum).
46. See Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 *Stanford Law Review* 1731, 1801-02 (2000) (describing possible benefits of foreign aid investments in strengthening Russian business schools and law schools in advancing market-oriented reforms); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *Brooklyn Journal of International Law* 403, 440-41 (1997) (discussing importance of indigenous academic institutions to operation of competition policy system).
47. See, e.g., William E. Kovacic & Ben Slay, *Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia*, 43 *Antitrust Bulletin* 15, 35 (1998) (describing how academic institutions might contribute to development of new competition and consumer protection programs in Georgia); Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: the Uneven*

- Legacy of Doi Moi*, 29 New York University Journal of International Law and Policy 555, 566-72 (1997) (discussing the significance of law school education to the process of economic law reform in Vietnam).
48. On the role of professional bodies in disseminating information relevant to competition policy, see William E. Kovacic, *Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions*, 66 Antitrust Law Journal 231 (1997).
49. INDECOPI's creation and early operations are examined in Peru's Experience in Market Regulatory Reform 1993-1998 (Beatriz Boza ed., 1998). Boza's role in designing measures to enhance the intellectual foundation for policymaking in INDECOPOI is discussed in William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 St. John's Law Review 361, 370-72 (2000).
50. See, e.g., *The Role of the State in Competition and Intellectual Property Policy in Latin America: Towards an Academic Audit of Indecopi* (Beatriz Boza, ed., 2000).
51. See also International Competition Network, Working Group on Capacity Building and Competition Policy Implementation, *Capacity Building and Technical Assistance – Building Credible Competition Authorities in Developing and Transition Economies* 45-69 (2003) (identifying useful elements of technical assistance programs).
52. See Murrell, *Missed Opportunities*, at 236 (proposing that foreign aid programs “aim to create a capacity for information gathering, research, and analysis”); see also *Comprehensive Legal and Judicial Development* 273-338 (Rudolf V. Van Puymbroeck ed., 2001) (series of essays discussing, inter alia, the value of dedicating technical assistance resources to the improvement of legal education as element of law reform in transition economies).



**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
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**LES DEFIS ET OBSTACLES RENCONTRES PAR LES AUTORITES
DE LA CONCURRENCE POUR ACCROITRE LE DEVELOPPEMENT
ECONOMIQUE EN PROMOUVANT LA CONCURRENCE**

Contribution de Khelifa Tounekti

-- Session II --

Cette contribution est soumise par le principal intervenant Khelifa Tounekti (Directeur Général de la Concurrence et des Enquêtes et Economiques, Ministère du Commerce) au titre de la Session II du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

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LE RÔLE DES AUTORITÉS DE LA CONCURRENCE DANS LA STRATÉGIE DU DÉVELOPPEMENT

*Khelifa Tounekti, Directeur Général de la Concurrence
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Introduction

1. La politique de la concurrence en Tunisie s'inscrit dans le cadre de la politique de réformes économiques qui a permis le passage d'une économie encadrée à une économie de marché.

2. Dès le début de l'adoption de cette politique, des objectifs bien définis lui ont été assignés, il s'agit de:

- Parvenir à assurer un équilibre global et durable de l'économie.
- Améliorer la compétitivité des produits tunisiens.
- Assurer une meilleure allocation des ressources et une meilleure efficacité économique.
- Donner à l'économie la capacité d'adaptation requise.
- Améliorer le bien être du consommateur.
- Permettre l'intégration de l'économie tunisienne dans le processus de mondialisation et en tirer profit.

1. Cadre juridique et institutionnel

3. La mise en oeuvre de la politique de la concurrence nécessite un environnement adéquat, permettant la contribution de tous les agents économiques sans lesquels cette politique ne peut pas avoir un impact positif, surtout dans une économie traditionnellement encadrée.

4. Soucieuse de ces exigences, la Tunisie a adopté une loi sur la concurrence et les prix depuis 1991 qui a été révisée à plusieurs reprises en 1993, 1995, 1999 et 2003. Cette loi a consacré l'ensemble des principes et règles universels en matière de pratiques restrictives de concurrence.

5. Elle a interdit les pratiques anticoncurrentielles et les pratiques discriminatoires, ainsi que les abus de position dominante et a établi le contrôle des concentrations. Le cadre juridique, tel qu'il se présente aujourd'hui, est exhaustif, proche de la réglementation européenne et très adapté aux exigences nationales et internationales. Cette loi a en outre créé les institutions chargées de son application.

6. La promulgation de la loi s'est accompagnée d'un processus de libéralisation économique qui a concerné le commerce, l'investissement et la privatisation des entreprises publiques. La déréglementation a été aussi une composante essentielle de la réforme en vue de créer un contexte favorable à la concurrence et à l'initiative privée.

7. La mise en place des autorités de la concurrence est une condition de réussite de toute politique en la matière. La Tunisie a adopté un système bicéphale avec :

- une direction générale (Direction Générale de la Concurrence et des Enquêtes Economiques) au sein du ministère du commerce chargé notamment de :
 - l'application de la politique de la concurrence ;
 - veiller au respect du bon fonctionnement du marché ;
 - détecter les indices et enquêter sur les pratiques anticoncurrentielles ;
- le Conseil de la concurrence qui a un pouvoir décisionnel et un pouvoir consultatif.

2. Contribution des autorités de la concurrence dans la réalisation des objectifs économiques

8. La politique de la concurrence n'est pas une fin en soi, elle est un moyen parmi d'autres pour réaliser des objectifs économiques et sociaux.

9. Les moyens utilisés pour atteindre le même but peuvent faire l'objet d'une controverse.

10. De même, la politique de la concurrence n'est pas toujours en cohérence avec les politiques sectorielles, d'où parfois des contradictions entre les objectifs horizontaux et verticaux. Dans ce contexte, les autorités de la concurrence sont appelées à trouver un équilibre entre leur mission de promotion de la concurrence et les contraintes du développement sectoriel.

11. Souvent, dans une économie en transition, les opérateurs économiques et les responsables sectoriels ont tendance à ne pas s'inscrire dans une logique de concurrence et essayent toujours de s'orienter vers l'encadrement sectoriel ou solliciter les solutions de l'administration notamment en réclamant plus de protection ou d'intervention des autorités au lieu de s'exposer aux règles du marché.

12. Les autorités de la concurrence ne doivent pas céder aux pressions et doivent faire valoir les règles de la concurrence dans le traitement des affaires qui leurs sont soumises ou lorsqu'elles sont amenées à émettre des avis sur des questions concernant la concurrence.

13. Les solutions de facilité sont souvent préférées par les autorités administratives et par les professionnels, mais cette attitude est de nature à compromettre l'avenir de la concurrence et risque de mener l'économie dans un état de vulnérabilité permanente.

14. Les autorités de la concurrence doivent se placer dans une perspective de long terme, alors que les autorités sectorielles et les organisations professionnelles sont tentées par les intérêts à court terme.

15. Parallèlement à la politique de la concurrence, les pays entretiennent des politiques industrielles ou sectorielles qui font appel à des exemptions ou exceptions pour la réalisation des objectifs spécifiques de développement. Tous les pays font recours à de telles méthodes pour protéger certains secteurs de la concurrence interne et externe. Toutefois, et bien que les politiques sectorielles soient justifiées, elles ne doivent pas se traduire par une situation de protection durable ou créer des poches d'inefficacité à l'intérieur de l'économie. Ce genre de comportement peut être à l'origine d'un coût supplémentaire à faire supporter par le consommateur ou la collectivité. Les autorités de la concurrence ont un grand rôle à jouer pour assurer l'équilibre entre les objectifs contradictoires ; les contraintes de développement sectoriel et le maintien d'un environnement concurrentiel. L'agriculture, les industries naissantes, l'artisanat, le secteur

bancaire et le secteur des assurances bénéficient souvent d'un traitement spécial qui les met à l'abri d'une réelle concurrence.

16. Cette situation encourage des pratiques à la limite de la légalité dans ces secteurs qui empêchent leur développement et n'encouragent pas leur intégration dans une logique concurrentielle.

17. L'intervention des autorités de la concurrence en Tunisie a été déterminante pour la consolidation d'un environnement concurrentiel favorable au développement économique, elles jouent ce rôle sous plusieurs formes :

- par un effet dissuasif auprès des entreprises en empêchant les pratiques interdites par la loi et en engageant les poursuites légales à leur encontre devant le Conseil ;
- par l'impact médiatique des procès et des enquêtes et ;
- des investigations menées par les autorités de la concurrence : en cas de pratiques anticoncurrentielles, les professionnels sont avertis pour éviter l'infraction ;
- les avis des autorités de concurrence sont utilisés pour justifier l'introduction de réformes dans les politiques sectorielles ou pour accélérer la déréglementation ;
- le contrôle et l'application effective des textes permettent d'assurer le fonctionnement normal du marché et empêcher les entraves à la concurrence.

18. Les entreprises se trouvent rassurées par un environnement qui les incite à l'innovation et à exploiter les aptitudes professionnelles pour faire face à la concurrence et améliorer leur performance. En Tunisie, nous avons constaté ces dernières années un changement radical dans le comportement des entreprises qui ont pu maîtriser la qualité des produits et baisser leur prix grâce à la pression concurrentielle.

19. Le consommateur est le premier bénéficiaire de l'économie de marché et de la politique volontariste de concurrence.

3. Les obstacles à la mise en oeuvre d'une politique de concurrence

20. L'existence d'un dispositif juridique et institutionnel ne garantit pas, à lui seul, la mise en oeuvre d'une politique de concurrence. La mobilisation de moyens budgétaires est nécessaire pour réaliser une telle politique. Trois difficultés sont rencontrées par les autorités de la concurrence qui les empêchent d'accomplir convenablement leur mission il s'agit :

- du manque de moyens matériels et humains ;
- des difficultés de disponibilité de personnel qualifié, d'où la nécessité d'une formation adéquate ;
- de l'absence d'une culture de concurrence, d'où le rôle des autorités pour la promotion de cette culture mais, les moyens sont très limités pour accomplir cette mission.

21. Une politique de concurrence est souvent accompagnée de l'ouverture économique sur l'extérieur et la libéralisation du commerce.

22. Mais, la concurrence des firmes multinationales met les petites entreprises en difficulté et compromet les secteurs fragiles.

23. Le problème d'équilibre des échanges extérieurs et de l'emploi se pose très rapidement avec acuité. Les autorités de la concurrence doivent trouver un équilibre entre la politique de développement et la politique de concurrence qui ne doit, en aucun cas, compromettre les objectifs nationaux.

24. Les agissements internationaux ne sont pas étrangers à ce dilemme. Beaucoup de pays mènent des politiques nuancées en fonction de leurs intérêts propres ils mettent des secteurs entiers en dehors du jeu concurrentiel. Entre efficacité de la concurrence et problèmes sociaux économiques qui risquent de se poser, l'autorité de la concurrence à certainement sa place à jouer.

25. Les petits pays ont plus que les autres, besoin d'un minimum de concurrence, il ne s'agit pas de neutraliser, par des procédures et pratiques non orthodoxes, l'effet d'une politique de concurrence sous prétexte de problèmes sectoriels ou sociaux. Les petites économies n'ont pas d'autre chance de continuer leur développement qu'en améliorant leur compétitivité pour s'intégrer dans l'économie mondiale. Une petite économie fermée n'offre aucune possibilité de concurrence interne. Elle finit par être une économie inefficace de manière éternelle qui constitue un fardeau pour les consommateurs autochtones.

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OECD Global Forum on Competition

**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING
GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**
Contribution by Khelifa Tounekti

-- Session II --

This contribution is submitted by the Lead Discussant, Khelifa Tounekti (Director-General for Competition and Economic Surveys, Ministry of Trade) for Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.

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THE ROLE OF COMPETITION AUTHORITIES IN DEVELOPMENT STRATEGY

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Introduction

1. Competition policy in Tunisia is an integral part of the economic reform policy that has promoted the transition from a centrally managed economy to a market economy.

2. From its inception, Tunisian competition policy was given the following clearly defined objective, namely to:

- Promote the overall, sustainable equilibrium of the economy;
- Improve the competitiveness of Tunisian products;
- Ensure better resource allocation and greater economic efficiency;
- Give the economy the necessary capacity to adapt;
- Improve consumer welfare;
- Enable the Tunisian economy to become integrated into the globalisation process and reap the benefits of this integration.

1. Legal and institutional framework

3. Competition policy can only be implemented if there is an adequate environment that allows all economic agents to participate; this is essential if this policy to have a positive impact, particularly in an economy that has traditionally been centrally managed.

4. Aware of these requirements, in 1991 Tunisia passed an act on competition and prices, which has been revised in 1993, 1995, 1999 and 2003. This legislation has established the entire body of universal guidelines and rules on practices that restrict competition.

5. This act has banned anti-competitive and discriminatory practices and abuse of dominant position and has established merger control. The current legal framework is now exhaustive, is close to European legislation and regulations, and is well adapted to domestic and international requirements. In addition, this act established the institutions responsible for its enforcement.

6. The implementation of the act has gone hand in hand with a process of economic liberalisation of trade and investment and of privatisation of government-owned enterprises. Deregulation has also been a key component of the reform aimed at creating a favourable context for competition and private initiative.

7. The establishment of competition authorities is essential to the success of any policy in this field. Tunisia has adopted the following dual system consisting of:

- A directorate-general (Directorate-General for Competition and Economic Studies) within the Ministry of Trade, responsible for:
 - Enforcing competition policy;
 - Ensuring that economic actors do not interfere with the proper functioning of the market;
 - Detecting infringements and investigating anti-competitive practices;
- The Competition Council, which has decision-making and advisory powers.

2. The competition authorities' contribution to attaining economic objectives

8. Competition policy is not an end in itself, but it is one means among others for achieving economic and social goals.

9. The means used to attain the same goal can be open to dispute.

10. Similarly, competition policy is not always consistent with sectoral policies, and this sometimes leads to conflicts between horizontal and vertical objectives. This being the case, the competition authorities must strike a balance between their mission of promoting competition and the needs of sectoral development.

11. In an economy in transition, economic operators and sectoral decision-makers often tend to avoid competition and still try to implement centrally managed sectoral policies or ask for government assistance, particularly greater protection and government intervention, rather than having to adapt to the rules of the marketplace.

12. The competition authorities must not yield to pressure and must enforce the rules of competition when handling the cases submitted to them or giving opinions on competition issues.

13. Governments and professionals often prefer easy solutions, but this is an attitude that can only compromise the future of competition and can lead to an endemically vulnerable economy.

14. The competition authorities must view these issues in a long-term perspective, while sectoral authorities and professional organisations are tempted to defend short-term interests.

15. Together with their competition policy, countries also have industrial and sectoral policies in which exemptions are granted and exceptions made to attain specific development goals. All countries use these kinds of methods to protect certain sectors from domestic and foreign competition. However, even though sectoral policies may be justified, they must not be allowed to lead to a situation of lasting protection or to create pockets of inefficiency within the economy. This type of behaviour can generate additional costs that will have to be borne by consumers or the community as a whole. The competition authorities have an important role to play in striking a balance between the conflicting objectives of meeting the needs of sectoral development and maintaining a competitive environment. Agriculture, infant

industries, small businesses and the banking and insurance sectors often receive special treatment that shelters them from real competition.

16. This encourages behaviour on the borderline of legality in these sectors, which prevents them from developing and gives them no incentive to adopt a competitive strategy.

17. The competition authorities in Tunisia have played a key role in consolidating a competitive environment favourable to economic development through the following:

- the dissuasive effect on businesses of action taken to prevent illicit practices and legal proceedings brought before the Council;
- the impact of litigation and investigations reported in the media;
- investigations conducted by the competition authorities, and when anti-competitive practices were found, warnings issued to professionals to prevent violations;
- opinions issued by the competition authorities that are used to justify introducing reforms in sectoral policies or to accelerate deregulation;
- monitoring and effective enforcement of legislation and regulations that ensure the normal functioning of the market and prevent barriers to competition.

18. Businesses are reassured by an environment that encourages them to innovate and take advantage of professional skills to face competition and improve their performance. In Tunisia, in recent years we have witnessed a radical change in the behaviour of businesses, which have been able to improve the quality of their products and lower their prices under the pressure of competition.

19. Consumers are the first to benefit from the market economy and activist competition policies.

3. Obstacles to implementing competition policy

20. The mere fact that there is a legal and institutional framework does not in itself guarantee that competition policy will be implemented. Adequate budgetary resources must be provided if competition policy is to become a reality. The competition authorities face three difficulties that prevent them from carrying out their mission effectively:

- Insufficient physical and human resources;
- Lack of skilled staff, which points to the need for adequate training;
- Lack of a competition culture, which highlights the role played by the competition authorities in promoting this culture although the resources for this mission are very limited.

21. Competition policy is often combined with an opening up of the economy to the outside world and trade liberalisation.

22. However, competition from multinationals jeopardises small businesses and compromises vulnerable sectors.

23. The problem of the foreign trade balance as well as that of employment very rapidly become crucial. The competition authorities must strike a balance between development policy and competition policy that must under no circumstances compromise national objectives.

24. International behaviour also contributes to this dilemma. Many countries have subtle policies aimed at protecting their own interests, and shelter entire sectors from free competition. In finding a trade-off between effective competition and the economic and social problems that it can create, the competition authority unquestionably has a role to play.

25. More than other countries, small countries need a minimum of competition, and they must not try to neutralise, by using unorthodox procedures and practices, the effects of competition policy under the pretext of having to address sectoral or social problems. Small economies will only be able continue to develop by improving their competitiveness in order to become integrated into the global economy. A small, closed economy provides no opportunity for domestic competition and will ultimately become a perpetually inefficient economy that will be a burden to native consumers.

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution by WAEMU

-- Session II --

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**CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES
IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH
THE PROMOTION OF COMPETITION**

SPEECH

Introduction

1. Where competition policy is concerned, the debate about incorporating the development dimension in the process of framing and implementing legislation has always asked the basic question as to how the rules of competition can be made to play a role in development.

2. Adopting legislation presupposes, importantly, that the capacity exists to ensure proper implementation. Then there are political and administrative pressures which can considerably restrict the effectiveness of the rules. To illustrate these points, I propose to summarise the main phases in the recent history of WAEMU and its member States.

3. Allow me, first, to remind you that WAEMU is an organisation for regional organisation comprising eight West African countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo) which decided in 1994 to merge some of their policies and resources with the object of promoting the economic development of the area thus created.

4. The main new feature of this group, which is not the first such endeavour in the area, is the clearly stated intention to give trade the key role in developing member States' economic and financial activities.

5. The obstacles facing WAEMU are manifold, the most significant being:

- the myth of national self-sufficiency, which has the effect of reducing intra-community trade;
- the differences between national economic policies which take priority over community objectives; and
- the inadequacies of the road and rail infrastructure, which result in excess transaction costs.

6. To overcome these obstacles, WAEMU began by launching a wide-ranging liberalisation programme, coupled with the following reforms:

- financial integration through adhesion to the CIMA Code (Inter-African Conference on Insurance Markets) and the creation of a BRVM (*Bourse Régionale des Valeurs Mobilières*, or regional securities exchange);
- the standardisation of business law under the Organisation for Harmonisation of African Business Laws (OHADA).

7. With all these reforms aimed at setting up a common market, the WAEMU authorities established in the Treaty itself the principles of clear competition rules. In order to apply the said principles, it was necessary to consider the context in which existing national laws were established and in which they were to be incorporated in the new arrangement.

8. The first stage in the preparation of draft community legislation on competition was devoted to analysis of the real problems of competition policy in such key sectors of the WAEMU economy as energy, transport, finance, telecommunications, etc.

9. It became apparent that, in the specific context of WAEMU member States, which are poor developing countries, it is vital that special attention be given to a number of anti-competitive practices, employed by both public and private companies, that have been in existence for a very long time. In many sectors, an insufficient number of competitors and ineffective competition are distorting prices, this being especially true in the case of monopolies which restrict production and push prices up above competitive levels.

10. Then again, special attention needs to be given to cartels and the sharing of markets confined to national frontiers, the latter representing an obvious boundary for the purpose of establishing market sharing agreements. Such agreements are common and are not easy to combat, the reasons being the following:

- they are difficult to detect because they generally involve companies that are subsidiaries of parent companies based outside the WAEMU area;
- few companies are involved;
- their existence is facilitated by the simultaneous existence of other barriers between the countries concerned.

11. Legislative and administrative barriers to entry also need to be targeted, particularly when they are easy to put in place. Over and above practices that restrict competition, the WAEMU countries are subject to constraints inherited from the monopolistic sectors that governments seek to maintain even after their liberalisation, notably via quality controls, standards, rules of origin and informal barriers to entry.

12. Challenging vertical restrictions is a real priority in sectors dominated historically by a single company in a monopoly situation. Particular emphasis needs to be given to drawing up price and distribution agreements, to barriers to entry (including trade barriers), and to the behaviour of rent-seeking firms in a private monopoly situation. Measures to encourage the entry of new competitors are also vital as a back-up to measures aimed at penalising anti-competitive behaviour.

13. Analysis also shows that competition policy is just one of a number of policies that need to be implemented in order to increase the competitiveness of the WAEMU economies and enhance economic efficiency. Competition policy and the other common market policies appear altogether complementary in this respect.

14. By abolishing trade barriers and governmental privileges, the setting up of the common market encourages the opening up of markets and can bring competitive pressures to bear on long-standing companies, thereby reducing waste and costs by the same token.

15. Measures are also needed where production is concerned. What is required are policy decisions aimed at reducing production costs that are excessive because of monopoly-induced rigidities, corruption,

unwarranted administrative costs and the limited size of the markets. The same applies to the harmonisation of the rules governing the main infrastructure industries (electricity), the object being to expand production and thereby achieve greater cost efficiency.

16. Privatisation policies are also policy measures which could bring benefits in terms of productive efficiency, lowering costs by disciplining the market and asset-holders.

17. In this connection, considerable thought needs to be given to the application of competition rules in the WAEMU. The question is how to transfer to the private sector firms that used to be public utilities and, at the same time, guarantee the lowest possible prices for consumers whose purchasing power is very meagre.

18. There are two solutions, one being careful regulation of these sectors and the other the promotion of competition, which also has the effect of pushing prices closer to marginal costs. However, the uncontrolled introduction of competition in network industries can also have the unwanted effect of squandering the benefits of economies of scale by breaking the historical operator up to an excessive degree. These questions need to be addressed in detail during the other phases of framing community rules.

19. In short, all of the work involved in drawing up WAEMU's community competition law is centred on the two main issues of defining the rules (1) and organising their implementation (2).

1. Defining the rules

20. Taking into account the economic considerations, the legal context at national level and all the studies carried out, the fundamental aspects of community competition law in WAEMU were dealt with by looking at the extent of community control over anti-competitive practices and the implementation of that control.

21. The following points constitute the substance of the texts adopted:

1.1 Control over State operations:

22. Practices that restrict competition can derive from both private and public initiatives. Although applying competition rules to State activities can sometimes be problematical, there are a great many legal instructions which either implicitly or expressly provide that competition rules shall apply to both public and private entities.

23. The question arising in a community framework is that of member States' compliance - as regards their legislative and regulatory activities - with community competition rules. The WAEMU Treaty provides that competition rules shall apply to public entities. On the other hand, two more specific issues are not dealt with by the Treaty. First, there is no article devoted to the special - from the point of view of competition law - case of a company managing a service of general interest. Nor, moreover, does the Treaty address the question of member States' legislative and regulatory activity being subject to community rules, i.e. when companies are obliged to restrict competition.

24. It being established that States are prohibited from infringing competition law, the question of companies managing a general interest service was dealt with by a regulation establishing which categories of public or private entity providing a general interest service could be exempted from the bans imposed by Article 88 of the Treaty.

25. In view, however, of the variable and changing nature of the general interest concept, the regulation referred to could prove difficult to apply.

1.2 Control over State aid:

26. With the WAEMU Treaty banning State aid that restricts competition, it was not difficult to ensure that the subsequent legislation incorporated definitions of the concept of State aid and the criteria for assessing the anti-competitive nature of such aid. What was difficult, on the other hand, was to draw up rules of procedure adapted to the WAEMU context, some countries continuing to have the same reactions in financial matters – especially as regards relations between the State and public undertakings, where there is very little transparency.

1.3 Field of application:

27. Community law applies first of all to anti-competitive agreements and practices. Vertical agreements are subject to the legislation, but this is relaxed to take account of our markets' need to modernise distribution.

1.4 Establishing a non-exhaustive list of banned practices:

28. To promote clarity and legal predictability with regard to competition, it was deemed necessary that competition law should include a non-exhaustive list of banned practices. The content of the list was based partly on the practices most frequently encountered in any market economy, and partly on the distinctive features of WAEMU, particularly as regards vertical agreements.

29. With respect, more specifically, to abuses of dominant position, since Article 88 (b) of the Treaty is somewhat vague as to the significance of the concept of a practice “*comparable*” to an abuse of dominant position, it was considered that the concept should, under certain conditions, include merger operations.

1.5 Exemptions:

30. The nature and objectives of competition law require that exemptions from bans on anticompetitive practices should be possible. Such exemptions can be either individual or general.

31. In the case of WAEMU, however, at least as things stand, it was impossible to list all the exemptions by category because of the lack of information in many sectors of activity.

32. That said, competition law has given the Commission the legal means to adopt regulations covering exemptions by category in future. These powers vested in the Commission may enable it to adjust the way bans are applied on the basis of trends in the area's economy and the realities of the different sectors of activity.

1.6 Legal field of application:

33. The existence of national laws made it necessary to define rules by means of which to easily determine what law should apply in the case of a given practice. The criterion of “*affecting trade between Member States*” is used in a number of community legal rulings. Since, however, the WAEMU Treaty does not appear to refer to it, this criterion was not deemed necessary by the Court of Justice which, in its opinion 003/2000/CJ/UEMOA, gave the Commission exclusive authority to implement the Treaty provisions concerning competition.

34. This means that national laws are inoperative in areas covered by community rules.

1.7 Mergers:

35. Controlling merger operations is an essential aspect of competition law and, while the WAEMU Treaty does not refer to this expressly, competition law does not totally disregard this type of restraint of competition. WAEMU Article 88 (b), which bans practices “*comparable*” to an abuse of dominant position, served as a legal basis for a certain degree of merger control.

36. It has to be said that the scope of this control is not clearly defined in the legislation which, with respect to requests for exemption, includes a system of prior notification of merger operations.

2. Implementation

37. Where competition is concerned, the way legislation is implemented is probably just as important as the actual content thereof. No legislation can be applied if the people responsible for the material and legal appraisal of the facts and for implementing the decisions and penalties are not clearly identified.

38. The following questions had therefore to be addressed when establishing the way WAEMU community competition rules were to be applied.

2.1 Centralisation or decentralisation of responsibilities:

39. Implementation can be either centralised or decentralised. Although both approaches have legal and economic advantages that are relevant in the WAEMU context, the Union has opted for the time being for centralised implementation which it deems more appropriate. That said, it is expected that some form of decentralisation will be introduced in the context of co-operation between the Commission and national competition authorities.

2.2 Definition of procedures:

40. Procedures that take account of the characteristics of WAEMU should allow proper implementation of previously established competition law.

41. The first criterion, in defining the procedures, was the requirement that legal simplification should comply with legal security.

42. Secondly, account was taken of the constraints deriving from the capacity and means to intervene, which explains the efforts made to set up a network between the Commission and national competition authorities which will be working in combination throughout.

43. This will ensure that competition culture will develop uniformly throughout the Union, the same rules applying at all levels of the community market in an identical manner involving both member States and the Commission.

2.3 Identifying requirements

44. The following prerequisites were identified:

- staff training in the administration of competition;
- training for company representatives and lawyers;

- training for magistrates;
- an academic infrastructure such as to be able to analyse competition-related issues and shape a doctrine capable of guiding decision-makers in the future;
- sufficient resources to carry out surveys and studies and circulate the decisions taken by the competition authorities.

3. Conclusion

45. As we have seen, drawing up and implementing competition law against a background of under-development is a complex and long-drawn-out process.

46. I have not put much emphasis on the duration of the operations just described, but it is worth mentioning that it took the WAEMU Commission at least five months before it was able to have the first regulations and directives governing competition in the Union adopted. And the work is far from over, since it is now that most of the institutional adjustments of which the framework has been defined are going to take place.

47. It will also take a considerable time to restructure departments and retrain staff.

48. We are convinced, however, that a competition culture will in time begin to flourish in the area. It is worth emphasizing that the Commission has already had submitted to it cases concerning such sensitive areas as subsidies and privatisations.



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PEER REVIEW OF RUSSIA'S COMPETITION LAW AND POLICY

-- Note by the Secretariat --

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PEER REVIEW OF RUSSIA'S COMPETITION LAW AND POLICY

The Role of Competition Policy in Regulatory Reform*

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* This report was principally prepared by Sarah Reynolds, a consultant to the Directorate for Financial and Enterprise Affairs of the OECD. It has benefited from extensive comments provided by colleagues throughout the OECD Secretariat and by the Government of the Russian Federation.

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Background Report on the Role of Competition Policy in Regulatory Reform

Competition policy is central to regulatory reform, because its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. As regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and in regulatory processes.

The Russian Federation created a competition authority early in its transition period and has embodied strong support for competition in law, but competition has not always been an immediate priority in practice. After a shift away from a gradualist model of transition, emphasis was placed on rapid privatization, resolution of fundamental questions of state structure and then the management of a major fiscal crisis. Instead of concentrating narrowly on the creation and vigorous protection of competition, the competition authority has been expected to serve as a general regulator of behavior in markets, assigned to remedy institutional and structural problems and enforce against a variety of undesirable practices. Relatively rapid changes in its structure and task assignments, regular amendment of the competition law and related legislation, and the sheer size of enforcement responsibilities have complicated the development of legal standards and drained resources away from core competition concerns.

Despite these difficult conditions, the competition authority has made significant contributions to the creation of a competitive market environment, both through enforcement practices and through creation of necessary institutions. Achievements include a significant reduction in barriers to the movement of goods and services and the creation of legislation needed to protect consumers and to regulate other aspects of market activity. The competition authority was also responsible for the creation of the initial legislation on natural monopolies, establishing a narrow field of regulation and the concept of independent regulators, and it continues to play a major role in the reform of monopolized areas, both in defining reform strategies and in supervising the operation of new systems to ensure the development of competition.

As Russia moves past crisis stabilization concerns and into the next phase of economic expansion, new priorities include the broadening of economic growth into more domestic industries and geographic areas and the creation of new investment and new business opportunities. This will require the further restructuring of regulated sectors to promote investment and provide support for overall growth, as well as the removal of both state and private impediments to entry and to vigorous and fair competition in a transparent and open environment. A strong and effective competition policy will be essential in meeting these goals; experience shows that a competition policy that rewards efficiency has a positive effect on overall economic performance. But significant structural and legal problems currently interfere with MAP's ability to be effective in its enforcement of the competition law and to undertake focused competition advocacy. MAP's responsibilities are too broad and interfere with its ability to concentrate on competition issues. And while the subject-matter coverage of the competition law conforms to familiar models, sanctions for even the most serious violations are insignificant and MAP has limited investigation powers. Low merger control thresholds, the absence of comprehensive regulation of natural monopolies and a broad jurisdiction over state actions and decisions, combined with the lack of any discretion in enforcement, result in unmanageable caseloads containing many matters that are unlikely to have an effect on competition. A general reform of state administration and the beginning of drafting work on a new competition law offer an important opportunity for these structural and legal issues to be addressed, resulting in a stronger and more focused competition authority that will be able to meet the challenges of reform and be a catalyst for economic growth.

1. Foundations and History of Competition Policy

1. The Russian Federation created a competition authority early in its transition period and has embodied strong support for competition in law, but competition has not always been an immediate priority in practice. In addition to core competition issues, the competition authority has been assigned a broad variety of tasks related to market activity, including the creation of legal institutions to regulate market behaviour, regulation of natural monopoly tariffs, and the development of market infrastructure and new enterprises. There have been rapid shifts in its priority areas of activity and in its authorities, as well as regular amendment of the competition law and related legislation. Current priorities include participation in the restructuring of natural monopoly areas and creation of the associated legislation and new enforcement patterns and a focus on the role of state bodies and officials in the economy. Authorities continue to be shifted into and out of the competition body and drafting work on a completely new competition law is beginning.

1.1 Context and early history

2. When the Soviet Union began to plan a path toward a market economy in the late 1980s, the initial transition policies of the central government focused on stimulation of the creation of small businesses and new enterprises. A gradual reduction of the amount of planned activity was to allow state enterprises to move at a measured pace into market behavior patterns, while newer forms of business enterprise would speed increases in the provision of consumer goods and services and spur the formation of the market infrastructure needed to support broader market reform. Enterprises and activities that were considered strategic or key to basic economic stability were to be left in state hands and/or regulated until other parts of the economy had moved into more market-oriented structures. Significant concerns were expressed about the starting levels of monopolization of both productive industry and distribution channels, and this concern led to expectations of a relatively strict regulation of dominant enterprises during a potentially long transition period, to be combined with very substantial “demonopolisation” or deconcentration of larger enterprises and associations before privatization. Special provisions allowing state control of monopoly behavior began appearing in legislative acts concerning reform.¹

3. In 1990, the first Russian² competition authority was created – the State Committee for Antimonopoly Policy and the Support of New Economic Structures³ – and the Law “On Competition and the Restriction of Monopolistic Activity on Goods Markets” (hereinafter the Law on Competition) was passed in 1991.⁴ The law contained relatively mild sanctions for most violations, preferring cease and desist orders and disgorgement of improperly received income to direct fines or the punishment of individuals. This was consistent with expectations that the worst potential problems would be controlled by regulation and also reflected fairness concerns about the complete unfamiliarity of competition law concepts and a desire to allow the new rules to become known before severe sanctions were applied. A long history of planning and coordination, as well as a lack of familiarity with methods used to govern and regulate markets, led to expectations that state bodies of various kinds would attempt to continue to control economic activity. To counter this, the Law on Competition included provisions prohibiting such behavior. Likewise, the expectation of a need to divide large enterprises or associations was reflected in the inclusion of an article specifically authorizing such division after repeated violation of the law.

4. Many enterprises had been deliberately created by planners to be dominant or even monopolists within specific geographic areas or in specialized products and activities and transportation and distribution functions were likewise deliberately concentrated under planning. This situation contributed to fears of a massive, inflationary price explosion and wide-spread abusive behavior as liberalization reduced legal controls on enterprise behavior. One of the chief tasks of the new competition authority was expected to be prevention and control of this problem and accordingly one of its first acts was the creation of a register of enterprise-monopolists. It was expected that supervision would be exercised over the business

decisions of those enterprises included in the register, especially over their pricing patterns.⁵ A significant amount of energy was expended by the competition authority during the earliest part of its existence in the compilation of the register, creation of reporting forms for enterprises listed in it, verification of their activities and reports, and participation in disputes concerning the removal of enterprises from the register. At the same time, the competition authority worked to develop guidelines for the enforcement of the new law and materials for the education both of new staff and of a public almost completely unfamiliar with market mechanisms and competition concerns after several generations of state planning.⁶

5. As its name suggested, the State Committee's mandate was not limited to competition issues. The new State Committee was made generally responsible for the support of "new economic structures" -- i.e. markets. The tasks that would be involved were not specified and it was anticipated that the State Committee itself would take some responsibility for defining the necessary programs and legislation, as well as being assigned responsibilities by the Government. In practice, it included measures to encourage the formation of new businesses and proposals concerning the development of necessary market infrastructure. It also included the control of not only anticompetitive actions, but of all kinds of undesirable or 'uncivilized' behavior that might be engaged in by economic actors in a market setting. As a part of this broader mandate, the new body expended substantial effort during its first years on the production of a law on consumer protection appropriate to market conditions. It was also necessary to develop the legislation, regulations and other legal acts necessary for the organization and functioning of the authority itself and for the creation of "territorial administrations" -- branch offices of the new body in the territorial units that form the Russian Federation.

1.2 Legislation to address shifting paradigms

6. While the competition authority was engaged in these tasks, the broader transition process was moving quickly, with fundamental changes in the structure of the state. This process gave rise to a new Constitution, adopted at the end of 1993. Among other innovations, the new Constitution expressed Russia's intent to adhere to market principles, explicitly including support for competition as a constitutional value in two separate articles.

BOX 1. CONSTITUTION OF THE RUSSIAN FEDERATION

Article 8.

1. In the Russian Federation, the unity of the economic space, the free movement of goods, services and financial assets, ***support for competition*** and the freedom of economic activity shall be guaranteed.

Article 34.

1. Each person shall have the right to the free use of his/her talents and property for entrepreneurial and other economic activity not prohibited by law.

2. ***Economic activity directed toward monopolization and unfair competition shall not be permitted.***

(emphasis supplied)

7. The first part of the new Civil Code of the Russian Federation, passed in 1994 and intended to serve as the foundation upon which new economic relationships would be constructed, also contains specific provisions designed to protect competition.

BOX 2. CIVIL CODE OF THE RUSSIAN FEDERATION

Article 1(3). Goods, services and financial assets shall circulate freely on the entire territory of the Russian Federation. Restrictions on the movement of goods and services may be imposed in accordance with federal law, if this is necessary in order to provide for safety, protect the life and health of persons, and to protect the environment and cultural values.

Article 10 (1). Actions of citizens and legal entities taken solely for the purpose of causing harm to the other party shall be not be permitted, nor abuse of rights in other forms.

The use of civil-law rights for the purposes of restriction of competition or for abuse of a dominant position on the market shall not be permitted.

8. During this same period (late 1992 through 1994), the Russian government's paradigm for economic transition was shifting fundamentally. Concerns about the maintenance of political support and fears of asset stripping during a prolonged transition led to rejection of the earlier focus on gradual change and movement instead toward a policy of rapid privatization. This change in economic policy entailed a major shift in the role envisioned for competition policy and the competition authority. Instead of the expected effort to divide enterprises to promote competition prior to their privatization, proponents of rapid privatization insisted that no division or restructuring of enterprises should be attempted, either because no rational choices could be made concerning the desirable size and structure of enterprises or because political considerations required the fastest possible transfer of wealth to private hands in order to create a political constituency for further reform and restructuring for competition would take too long. Instead, the new strategy would rely on profit incentives to encourage efficiency and restructuring of enterprises, as well as competition from international firms after an abrupt opening of previously controlled foreign trade.

9. Practice had also begun to reveal difficulties with the Register system. Some enterprises in the Register appeared to be operating in markets where little initial investment was required and in which the possibilities for quick entry and increased competition seemed intuitively high. Others appeared to be "dominant" in a particular area more as the result of habitual trading patterns, lack of transportation and distribution channels, and absence of market-supporting information systems than due to any durable qualities of their markets or products. The Register system applied price control based on costs reported by the enterprises, and thereby encouraged the regulated enterprises to overstate costs and provided few incentives for the listed enterprises to move toward more efficient and competitive behavior.⁷ From this perspective, the controls imposed by the Register system appeared likely to retard the restructuring of markets and to reduce incentives for entry, and thereby to lead to an unnecessarily long-term regulation of many enterprises. In 1994, the Register system was changed to eliminate direct controls over the business decisions of enterprises, and to provide instead for monitoring of enterprises with more than a defined market share.

10. Criticism of the perverse incentives produced by the Register, growing attention to the significance of market infrastructure and the fundamental change in transition theory all led to a shift in perception of the proper role for the competition authority. It was no longer expected that the competition authority would exercise supervision over the economic conduct of a large number of dominant enterprises over a long transition period, nor would restructuring for competition play any substantial role in the privatization process. Instead, the competition authority would be responsible for the creation of the institutions and infrastructure that would allow competition to develop post-privatization and would enforce against specific instances of anticompetitive behavior.

11. During the next several years, the competition authority undertook a major legislative drafting effort to meet these goals. One primary objective, related in part to experience with the registers, was the separation of areas in which direct price control was required from others in which this would be counterproductive. The competition authority led an effort that resulted in the passage of the law “On Natural Monopolies⁸” in 1995. That legislation introduced the concept of natural monopoly and contained a narrow definition of natural monopoly areas in which price regulation was to be carried out by independent regulators (outside the branch ministries and enterprises themselves) created or designated by the Government. While this did not prevent price regulation from being imposed in other areas by legislation, it did in principle identify those areas as potentially competitive. After its passage, work began on the legislation and regulations required to establish separate regulatory bodies in the areas of energy, transport and communications, as these tasks were viewed as separate from and not entirely consistent with the competition authority’s focus on the creation of competition. Another priority objective was encouragement of the creation of new businesses, and new substantive legislation articulating general principles in this area was developed, together with legislation establishing a state body to administer programs of support for small and medium enterprises.⁹ Further items of specialized legislation were also created, supporting the participation of small enterprises in specific economic activities and reducing reporting requirements.

12. Additional legislative drafting was done to fill perceived gaps in legal regulation of market activities. One of the largest of these projects was the drafting of a broad federal law “On Advertising¹⁰” that was also passed in 1995. Although the Law on Competition already gave the competition authority some control over advertising practices as between competitors, including publication of false information about competitors or of incorrect comparisons of goods, the new legislation was intended to provide a complete framework for advertising regulation for the protection of consumers, public health and morals, and other values. The new legislation was based on systems and rules in place in European market economies and included restrictions on advertising of alcohol and tobacco and on advertising directed at or involving children, established maximum amounts and timing restrictions on advertising in some broadcast media, and addressed a variety of other concerns. The competition authority was assigned as the primary enforcement body for the new advertising legislation, and began to establish monitoring practices the wide variety of advertising media and enforcement procedures for advertising cases.

13. In the area of support for the creation of market infrastructure, the competition authority was assigned to elaborate broad “demonopolisation plans,” directed toward the elimination of structural barriers to competition, the creation of infrastructure, and the facilitation of entry in highly concentrated markets.¹¹ This task was defined in an expansive manner that in practice required the State Committee for Antimonopoly Policy to expend a great deal of effort in the creation of universal formulas and criteria to be used for evaluation of the level of competition in markets at all levels and a set of general solutions that could be applied to increase competition in any sector. These criteria and potential solutions were to be the basis for the creation by branch ministries and by other state and local bodies of demonopolisation plans for branches of industry and for specific regions and localities. The competition authority and its territorial offices supervised the creation of the plans and reviewed them, but no budget was allocated to fund the implementation costs of specific policies and programs to increase competition and no authority was established to directly impose demonopolisation plans or to force the completion of specific measures to reduce concentration and market power. The authority also completed a substantial set of amendments to the Law on Competition¹², and continued throughout the period to process a significant caseload concerning specific violations of the competition law.

14. While the competition authority was occupied with these tasks, a great deal of attention was being given to questions of state structure and the authority of local, regional and federal bodies, including in relation to control of economic activity through licensing, standards, safety restrictions and direct limitations on the movement of goods. Measures to ensure the application of federal laws, to eliminate

local and regional legislation and regulations in conflict with superior legal rules, and to provide for the preservation of the single economic space guaranteed by the Constitution became an increasingly high priority of the Government as a whole. Within the competition authority, this was reflected in an increased priority on scrutiny of state action at the regional and local levels and a program of cooperation with the procuracy to address legislative acts outside the reach of the Law on Competition.

1.3 Crisis and retrenchment

15. Following the severe financial crisis in 1998, the Government of the Russian Federation was restructured to reduce size and expenditures. As a part of this restructuring, the process of transfer of regulatory authority over tariffs for natural monopolies out of the competition authority was reversed. The regulatory bodies for transport and communications – created in 1996 and 1997¹³ – were moved into the competition authority, although regulation of natural monopolies in the energy sphere was left with the Federal Energy Commission. The separate state committee for the promotion of small business was eliminated and those functions were also returned to the competition authority – which was recreated as the Ministry for Antimonopoly Policy and the Support of Entrepreneurship. (The competition authority will be referred to hereinafter as the Ministry for Antimonopoly Policy, the Ministry or “MAP.”)

16. New responsibilities were also created. In 1999, in part as a response to financial manipulations and anticompetitive behavior by banks and financial institutions that was revealed during the crisis, a law on competition in financial markets was passed.¹⁴ The law had been drafted and entered into the legislative process several years prior to its passage, but had made little progress toward passage and prior to the financial crisis had seemed to have become lost or been abandoned in the passage process. The law has a similar structure to that of the Law on Competition. It contains provisions covering state actions, unfair competition and abuse of dominance and establishes preliminary controls over agreements involving financial organizations and state purchasing of financial services. The Ministry for Antimonopoly Policy is the primary enforcement body for the law, although it is in some instances required to determine standards by agreement with other oversight bodies – the Central Bank, the Federal Commission on Securities Markets and others – whose responsibilities include the relevant financial services sectors.

1.4 New restructuring and the challenges of reform

17. As the economy has stabilized, overall economic priorities have moved toward the promotion of investment and support for broadly-based economic growth. Administrative reform of state structures and of regulatory procedures is also a high priority, although this is primarily associated with the elimination of wasteful duplication of functions and reduction of the general regulatory burden on enterprises rather than specifically with the promotion of competition. Structural reform of MAP has reversed direction yet again. In 2001, by a Presidential edict, the task of regulation of natural monopolies in transportation was moved out of the jurisdiction of the competition authority and was assigned to the Federal Energy Commission.¹⁵ MAP continues to serve as the regulator for natural monopolies in the sphere of communications, but it is generally expected that this function will also be transferred in the relatively near future either to the FEC, effectively creating a unified tariff setting body at the federal level, or to a separate body focusing on communications issues. Other structural changes that would mirror those made in the mid-1990s are also under active discussion as a part of administrative reform efforts, including removal of functions in the area of support of small enterprises, and possibly those relating to advertising, into other state bodies.

18. The removal of these tasks from MAP, however, does not necessarily indicate a trend toward a narrowing of its overall responsibilities. In 2002, another significant set of amendments was made to the Law on Competition – the eighth amendment of the law in its ten years of existence. Changes in this most recent round included the creation of a voluntary procedure for submission of agreements to MAP for review and clearance, and the addition of a new article requiring MAP to enforce legal standards ensuring

the fairness of individual tender processes for purchases by state bodies. Other changes were designed to facilitate MAP's new roles in applying competition law to reforming regulated industries, such as the inclusion of discriminatory terms of access to necessary facilities as a form of abuse of dominance and authorizing MAP to exercise *ex ante* as well as *ex post* control in this area by issuing orders concerning the public provision of information and other matters.

19. One of MAP's priorities in the current period is the further development of legislation and procedures facilitating the promotion and protection of competition during regulatory reform of natural monopolies. MAP has devoted considerable attention to the design of these reforms, and expects the need for its involvement in policy analysis and advocacy for competition in policy design will increase as the reforms that are underway move toward more complex stages (such as the opening of retail electricity markets to competition). The restructuring process has already created new substantive tasks for MAP, including supervision of the conduct of the new trading administrator for the wholesale electricity market and enforcement of nondiscriminatory access rules in electricity trading and transmission systems and with respect to rail infrastructure. Additional enforcement tasks will likely be created as the process continues. MAP is currently working on rules for the supervision of purchasing by natural monopolies to ensure competition, which will envision enforcement by MAP itself.

20. Another priority for MAP is the creation of a new law on competition. Although MAP took the lead in drafting the 2002 amendments and shepherded them through the passage process, it announced almost immediately after their passage that the overall structure and content of the competition law is no longer appropriate and a fundamentally new competition law is now needed by the Russian Federation. MAP expects to take the lead in drafting a new law and has begun work on its concept. The drafting effort will require a good deal of resources and is expected to take several years.

21. The Ministry is facing significant pressures in the short term future. New tasks and law enforcement responsibilities continue to be added to MAP's list of responsibilities, while it already manages an exceptionally large number of individual complaints and other enforcement duties not only under the competition laws, but also in the areas of consumer protection and advertising. It would be difficult for any single state body to perform all of these functions well. While MAP and its predecessors have made a significant contribution to building the legal institutions necessary to regulate market behavior, the conception of the competition authority as broadly responsible for civilizing markets and protecting the public and weaker parties in many contexts results in task overload and interferes with the ability to concentrate on serious competition problems. MAP needs to use the drafting process for a new competition law to focus its own attention more narrowly. The administrative reform process may also offer prospects for a broadening of responsibility for competition and a more efficient distribution of law enforcement responsibilities, as well as an opportunity to increase attention to the creation of competition as a central goal of economic policy.

2. Substantive Issues: Content of the Law on Competition

22. The Russian Federation's competition law is not directly modeled on the law of any other single jurisdiction. It contains several relatively unusual provisions, some of which were designed to meet the special concerns raised by Russia's early stage of economic transition in 1991, when the law on competition was passed. These include a seldom-used ability to divide enterprises after multiple violations of the law and a broad authority to enforce against state actions and decisions that limit competition. The latter continues to play a very important role in the Russian context, allowing MAP to address local and regional barriers to the movement of goods and services and providing it with the ability to supervise the behavior of regulatory authorities and act to prevent them from favoring specific market participants or hindering the development of competition in newly restructured areas. Nonetheless, although some parts of the competition law are well-designed for Russia's particular circumstances, it is also the specific

provisions of the law that create some of the most serious obstacles to effective enforcement and render an apparently significant commitment of resources inadequate to ensure vigorous competition in markets and a strong competition focus in policymaking. Because improvement in these areas is critical, this and the following section discuss the provisions in the law and the use of MAP's resources in some detail.

BOX 3. THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Box 3 (cont'd)

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

23. There are two laws on competition, one that applies generally and one that applies to the financial services sector. The primary law is the Federal Law “On Competition and the Restriction of Monopolistic Activity on Goods Markets” (hereinafter the Law on Competition), initially adopted in 1991. The definition of “goods” contained in the law specifically includes work and services, so it covers most markets. There is, however, a specific exemption (Art. 2(3)) for financial services (except where actions on those markets affect competition on goods markets). This exemption was intended, among other things, to prevent inappropriate application of the Law on Competition to the early formation of securities markets during the privatization process, and to allow development of more complex rules for markets in which concerns about financial reserves, prudential regulation and licensing must be taken into account in promoting competition. Competition in financial services markets is now explicitly covered by the Federal Law “On the Protection of Competition on the Market for Financial Services,” adopted in 1999 and also enforced by MAP. That law is discussed further in Section 4, below.

2.1 *Anticompetitive agreements*

24. The Law on Competition in its current version specifically prohibits (Article 6.1) horizontal agreements concerning prices or any element of pricing behaviour (mark-ups, discounts), market division, restriction of market access, elimination of participants from the market, or boycott. Previously, finding any of these violations required a combined market share on the part of the violators of at least 35% of the relevant market. The latest amendment eliminated this market share “safe harbour” and also made them *per se* violations by removing the possibility for approval by the competition authority on the basis of positive effects.

25. Other types of horizontal agreements are prohibited if they prevent, restrict or eliminate competition (or may do so) and infringe upon the interests of other economic subjects (Article 6.2). The language of the provision as currently stated does appear to require both of these elements; that is, both the restriction of competition and the infringement upon the interests of other economic subjects. Since the definition of the term “economic subject” appears to exclude private citizens engaged in transactions for their own needs (consumers), it is not at all clear that this general provision, as it is currently formulated, applies to horizontal agreements in which the only injury was to individual consumers. Like the *per se* violations defined in Article 6.1, the other possible types of horizontal agreements are no longer subject to the collective 35% market share test.

26. Vertical agreements are prohibited “between economic subjects not competing on the corresponding market, receiving and supplying goods” if such agreements prevent, restrict or eliminate competition (Article 6.3). The provision is not applicable, however, to “economic subjects with a collective share of the market for a specific good of less than 35%.” It is not at all clear how this restriction is to be applied to vertical agreements since the participants in a vertical agreement may not have a “collective share” in any market at all. The entire article concerning agreements was rewritten more than

once during the drafting process for the amendments, and at one point all agreements other than horizontal cartel agreements were covered in a single provision. The current wording may have been the result of a last minute change in the organization of the article's provisions that moved a market share requirement intended to apply to horizontal agreements other than cartels into the separate subpoint on vertical agreements. Whatever the original intent, however, it may be possible to interpret the provision to require that at least one of the participants in the vertical agreement have a share of more than 35% in a market affected by the agreement (although this would not be a "collective share"), which might limit enforcement to situations in which the agreement is somewhat more likely to have a restrictive effect.

27. There are no block exemptions in the Law on Competition and the law does not envision a process for the creation of such exemptions. In exceptional circumstances, the competition authority is authorized to allow specific horizontal or vertical agreements (except for horizontal cartel agreements listed in the first subpoint of the law), if it is shown that their positive effects outweigh their negative effects, or if the specific type of agreement is provided for by federal law. After the 2002 amendments, new language in this provision states that this may be done "through the procedure envisioned by Article 19.1 of this law." Article 19.1, which was also inserted into the law by the 2002 amendments, provides for a voluntary procedure for participants in an agreement to seek the prior approval of the competition authority for the agreement. It has been suggested that the amended language now allows for such approvals only at a preliminary stage and only if the participants have sought the approval/agreement voluntarily using the Article 19.1 procedure. This does not, however, appear to have yet been conclusively resolved. MAP is currently working to develop methodological guidance for staff members on the application of the balancing test indicating the kinds of factors that are to be considered.

28. A separate provision of Article 6 prohibits the coordination of entrepreneurial activity of commercial organizations that has or may have as its result the restriction of competition, and provides for MAP to seek liquidation of an association or organization found to be carrying out such coordination by court order. Coordination of economic activities by industrial associations and by "unions" of enterprises conducting similar activities was a common practice under planning, and early enforcement efforts under the Law on Competition included a number of cases in which the competition authority objected to specific clauses and provisions in the founding documents of commercial associations, industry representative organizations and other similar bodies allowing them to exercise such direct coordination. Such cases have been rarer in recent years, but do still occur (see example number 2 in the text box below).

BOX 4. RECENT PRACTICE -- RESTRICTIVE AGREEMENTS

1. A territorial office of MAP conducted on its own initiative a "verification" of the activities of the airline occupying a dominant position in its region. During the verification it was learned that the three airlines serving the route between Moscow and the regional capitol had, for the period January 10-15, 2002, set the same price for coach class fares on that route. The territorial office noted that the common price represented a significant increase, and that it was imposed simultaneously by airlines with differing costs of service. This was classified as a violation of Article 6 of the Law on Competition and a formal case was opened in May of 2002. During the consideration of the case the airlines informed the territorial office about changes in their prices. The commission considering the case qualified this as a voluntary elimination of the violation and terminated proceedings in the case.

2. An agricultural association approached the MAP territorial office concerning cooperation with the agricultural union of the neighbouring region. In a Record of a session of the agricultural association that discussed cooperation proposals, the territorial office found suggestions that the supply of certain goods coming from the neighbouring region could be regulated by means of designation by the agricultural association of "primary" enterprises to handle those goods and definition of specialized wholesale markets for them with required use of particular storage facilities. This was to be done in order to maintain "pricing parity" and to protect local producers. The territorial office of MAP opened a formal case and found those proposals to amount to coordination by an association of the economic activities of its members in violation of Article 6 of the Law on Competition. An order was issued requiring that the relevant point (the proposals) to be stricken from the Record of the session.

Box 4 (cont'd)

3. In July of 2002, the central office of MAP received a complaint from the city government of Moscow concerning the simultaneous increase of cement prices by four producers supplying cement to the Moscow construction market. MAP opened a formal case concerning violation of Article 6 of the Law on Competition. During the consideration of the case, however, the companies offered evidence that the increase in prices was due to multiple increases in price for electricity, gas and rail transport, as well as prices for diesel fuel and spare parts for a machinery base that was described as 70% worn out. The commission was convinced by this evidence that the increases in prices had made cement production a loss-making endeavour, and this accounted for the price increase. The commission did not find a violation of competition law directed toward the receipt of additional profits.

The same commission did find during the consideration of the case an agreement between three of the cement producers and the management of the architectural and construction complex for the reconstruction of the city of Moscow (responsible for construction of municipal housing and social infrastructure) for cement to be provided to organizations within the complex at a lower price than it was offered to other construction organizations. The commission found this to be an agreement on division of the market and therefore a violation of Article 8 of the law, which prevents agreements between state bodies and enterprises that restrict competition. The commission found that cement sold for social construction might be used instead for commercial production, creating super-profits for that organization, and that commercial organizations were likely to complain about the differences in price for the same product made by the same producer. The mayor of Moscow was informed and the agreement was annulled.

Source: MAP November 2003

29. There have been relatively few cases concerning agreements during the life of the Law on Competition, and of those investigations that have been pursued only a small minority have been successful in showing an agreement. Pursuit of these kinds of cases has been hampered by a lack of complaints and, until the October 2002 amendments, also by the need to prove that the participants in an alleged horizontal agreement had a collective market share above 35%. Adequate proof of agreement or concerted action has also been an issue. Both MAP and the courts have had some difficulty in determining what the standard of proof should be, and the investigatory powers of the MAP do not appear to be adequate to support the kinds of coordinated investigations that are usually required to reveal cartel behaviour. The lack of sufficient investigative powers has meant that enforcement efforts have had to be based primarily on the appearance of coordinated pricing and the explanations of those involved for similar pricing behaviour, or on documentary evidence of an agreement.

30. Sanctions available against participants in anticompetitive agreements are very modest. Having found individual persons or enterprises to have participated in an illegal agreement, MAP may order them to cease the violation of the law. Article 12 of the Law on Competition authorizes MAP also to obligate a violator to disgorge income received due to a violation of the law, but after recent amendments to the law it appears that this may apply only to income received if the violator continues the violation after an order is issued (for example, during a period in which MAP's decision and order are being appealed to a court). Failure by those addressed by the order to fulfil its conditions within the relevant time period may result in a fine of between 40 and 50 times the minimum monthly wage for individuals and between 2000 and 5000 times the minimum monthly wage for legal entities. The "minimum wage" figure that is used for the calculation of fines and other amounts keyed to the wage rate is currently 100 rubles. Using this figure, the maximum fine that may be imposed on an individual is 5000 rubles, or the equivalent of about \$167 US, while the maximum fine that may be imposed upon a legal entity is 500,000 rubles, or about \$16,700 US.¹⁶

31. Criminal sanctions, available in theory, are untested. Article 178 of the Criminal Code concerns the "prevention, restriction or elimination" of competition and covers the division of markets, pricing agreements, and attempts to create barriers to entry or to remove competitors from the market, as well as the charging of monopolistically high or low prices, which are classified in the Law on Competition as types of abuse of dominance. Sanctions for a first offence may include fines of up to 200,000 rubles or the

equivalent of the convicted person's income or salary for up to 18 months, arrest for a period of four to six months, or a term in a prison or penal colony of up to two years. Where the offence was committed by a group of persons or by prior conspiracy (which would appear to apply to all anticompetitive agreements), the sanctions increase to a maximum fine of 300,000 rubles or the convicted person's income for two years, and a maximum prison term of five years. Where violence or property destruction, or threats thereof, are involved, the potential prison term is from three to seven years, and this may be accompanied by a fine of up to 1 million rubles or the convicted persons income for up to five years. Direct prosecution of a criminal case, however, is not within MAP's authority, and would require that the procurator in the relevant jurisdiction undertake a criminal investigation and bring the case to a court of general jurisdiction with a formal charge. Moreover, both criminal and administrative penalties cannot be imposed for the same actions, so such a criminal charge would have to be viewed as an alternative to the imposition by MAP of an administrative sanction. There do not appear to have been any prosecutions under Article 178 of the Criminal Code to date.

2.2 *Abuse of dominance*

32. The Law on Competition defines dominance as an exclusive position of an economic subject that gives it the ability to exert decisive influence on the conditions of circulation of the relevant goods or to obstruct access of others to the market. Under the current definition, entities with a share of the market equal to 65% or greater will be found to be dominant unless the entity proves the contrary, while those with a share of 35% or less may not be found to be dominant under any circumstances. Between the two percentages, firms may be found to be dominant if the competition authority can establish this based on all of the evidence.

33. MAP and its territorial offices keep a register of enterprises with a share of the relevant market of above 35%. Firms may be entered into the register on the basis of a finding made during the investigation of an alleged violation of the law, or on the basis of studies of the competitive environment on particular markets done by the MAP outside its direct enforcement work. If a firm disagrees with MAP's conclusion in this regard, it may make a petition for its removal, and may also appeal the decision to a court. The inclusion of a firm in the register has consequences for merger control requirements (see below), but does not otherwise formally impose specific duties or consequences on the firm. Several sources, however, have indicated that a firm listed in the register will experience increased scrutiny of its behaviour through MAP-initiated verifications, especially if it is registered as having above 65% of a market and therefore falling within the legal presumption of dominance. There is some evidence that both courts and parties mistake the nature of the market share registers, understanding them to be lists of monopolies or believing that entry into the register with any percentage of a market is evidence of dominance or market power. Elimination of the registers entirely might reduce both costs and confusions, but concern was expressed by some MAP staff members that this would deprive MAP of the ability to exercise concentration control in relation to smaller, more local markets and by some outside MAP that it would reduce the ability to prevent violations by supervising the behaviour of already dominant enterprises.

34. Abuse of dominance is defined as acts of a dominant subject that have or may have as their result the prevention, restriction or elimination of competition. Both acts and failures to act are specifically covered. An illustrative list of abusive practices in the law includes: withdrawal of goods from the market to create a deficit and/or raise prices; imposition of abusive terms of contract or terms not related to the subject of the contract on contracting partners; tying; creation of discriminatory conditions for access to the market or for sales and purchases for specific contracting partners; creation of barriers to entry or exit; violation of legally imposed pricing restrictions; establishment of monopolistically high or low prices; reduction or cessation of production of a good that is in demand and that can be produced without incurring losses; and boycott. The list is not exhaustive, but the vast majority of abuse cases fall within one of the listed types of abuse. The law permits MAP to recognize specific actions that fall within the

terms of Article 5 as acceptable if the firm proves that the positive effects of those actions exceed the negative consequences for the market. This provision is, however, rarely if ever used.

BOX 5. RECENT ENFORCEMENT PRACTICE – ABUSE OF DOMINANCE

1. A territorial office of MAP received complaints about repeated electricity service outages. It investigated the case and found that the company failed to take available steps to ensure supply. It characterized this as abuse of dominance. On appeal, the court reversed. It found the company's explanations for supply interruption acceptable, but also ruled that an existing unresolved dispute over terms meant that no contract existed and there was no obligation to supply.

2. A bread company complained to MAP about the terms of contract offered to it by the local electricity provider. MAP reviewed the terms during its consideration of the case and found a number that were not in agreement with legal rules, such as stipulation that the price would be as agreed between the buyer and seller (prices are regulated), failure to provide for emergency service, and requirement of automatic bank payment of invoices. MAP's decision finding this an abuse of dominance was appealed and upheld in full by the court.

3. A local transmission network used a contract term providing that if more than the contracted amount was provided, the customer would be charged additionally for the overage. The territorial office of MAP viewed the formulation of the term as allowing the network to over provide on its initiative and then increase charges, and found it to be an abuse and ordered a change. The network appealed. The court found that the term was not abusive and also that the transmission network was not dominant, since it did not produce and sell energy.

4. A local telephone company required telephone equipment purchased from someone else to be examined, for which it charged a fee. The territorial office found this an abuse and issued an order stopping the practice.

5. Although it had previously done so, a port facility refused to provide volume discounts on stevedoring to a shipper of raw sugar, deciding to provide them only to its shareholders – competitors of the company that was denied who shipped similar amounts of the same materials. MAP found the discrimination between similarly situated customers an abuse. The decision was appealed and reversed by the first instance and appeals court, but upheld by the cassational court.

6. A city firm responsible for maintenance of the city graveyard refused access to the burial grounds to a private funeral services firm attempting to compete with the city enterprise. The territorial office of MAP found this to be an abuse of dominance and issued a cease and desist order.

7. A forest products company that owned a road providing the only access to the facilities of a coal company set prices for road use on the basis of the cost to maintain all of its roads and demanded 85% of the access fees to be paid in advance. MAP's territorial office found both the charges and the payment procedure abusive. The decision was appealed and upheld by the court.

8. Nuclear plants producing electric energy signed a contract with a partner in the Republic of Georgia to supply electric energy through the transfer grid. RAO EES refused to conclude a contract with the suppliers for the transmission of the energy, claiming a legal monopoly on electricity export and demanding input into the contract terms. MAP found this an abuse and issued an order to conclude a contract. The order was not observed and MAP went to court and obtained an order for the contract to be concluded. Despite repeated attempts to secure the transmission contract and a number of court decisions supporting MAP, no contract was ever concluded.

Source: MAP June 2003; cases provided by MAP for OECD programs; MAP website

35. Abuse of dominance cases have always been a very large part of the Russian competition authority's case load, usually accounting for half or more of the large number of violation cases (that is, excluding merger control petitions) considered each year. Among those abuse cases, cases involving natural monopolies dominate, accounting for well over half, and in some years as much as three quarters, of the case load. Common types of cases include disputes over contract terms (such as penalties or prepayment requirements); refusals to contract with a new customer (including failure to respond to

requests for service); tying problems and classification of necessary services as “additional” and unregulated; and manipulation or improper application of tariff scales. The majority of abuse cases (roughly 88%) come to MAP on the basis of a complaint by an affected customer and most address the behaviour of the dominant entity in relation to the specific customer alone, rather than a broad policy or contracting practice of the dominant entity.

36. The pattern of sanctions for abuse of dominance mirrors that described above for cases concerning restrictive agreements. There are no immediate sanctions that may be applied upon the finding that the law has been violated. MAP issues a decision recognizing the violation and an order instructing that it be stopped. Many of the cases in this category concern contract provisions, but MAP has no power to order that a contract be concluded on specific terms (only a court may do this), so its orders in relation to such cases will require that the violator cease violation of the law in the form of requirement of abusive contract terms, but may not state what contract terms precisely would not be considered abusive. If MAP’s order is not executed, it may impose the fines listed above. It may also file suit in court to force a dominant entity to conclude a contract.

37. Although not all cases concerning abuse of dominance address natural monopolies or regulated utilities, many of the remaining cases also concern allegedly dominant enterprises with a market share at or well above the 65% that results in a presumption of dominance. Correspondingly, the cases tend to rely on the legal presumption and there is rarely any qualitative analysis of the market power of the respondent. MAP’s focus in the majority of such cases is the question of whether the behaviour in question was abusive, although respondents do sometimes appeal the dominance determination, even in relation to natural monopolies. Staff members have indicated that a lack of resources to conduct research, poor official information sources and restrictive time frames all make it difficult for them to conduct significant economic analysis to define markets and clarify the market shares of multiple participants, and that as a result they may favour cases in which dominance appears obvious.

2.3 *Merger control*

38. Merger control provisions apply to both mergers and similar combinations of entire firms (Article 17) and to transactions involving acquisitions of shares or transfers of control (Article 18). Basic thresholds are calculated on the basis of the most recent balance-sheet value of the assets of the companies involved, without reference to the value of the transaction itself or to the amount of economic activity currently conducted by the company.

39. Pre-merger notification and approval is required for mergers and other similar combinations of firms in which the combined value of the assets of the firms exceeds 200,000 times the minimum wage (20 million rubles or about \$668,000 US). The competition authority is to refuse permission for the transaction if the transaction may lead to restriction of competition, including as a result of the creation or strengthening of a dominant position. Permission may also be refused if information in the filing that has significance for the decision is not correct. A transaction may be approved, even in the face of negative consequences for competition, if the petitioners show that the positive effects of the transaction exceed the negative consequences. The law specifically includes socio-economic effects among those to be considered in making this decision. The competition authority may issue an order requiring that certain conditions be observed in order to preserve competition.

40. Post-merger notification is required concerning mergers and other combinations where the combined balance-sheet value of the assets exceeds 100,000 times the minimum wage (10 million rubles or about \$334,000 US). Post-transaction notification is also required concerning the creation of a new commercial entity with a balance-sheet asset value of more than 200,000 times the minimum wage; concerning the creation, merger or other combination of non-commercial organizations if at least two

commercial organizations are participants or members in the non-commercial organizations, and also concerning changes in the participants or members of non-commercial organizations if two or more commercial organizations are members. Requirements related to non-commercial organizations, however, apply only to those non-commercial organizations that carry out or have the intention to carry out coordination of the entrepreneurial activities of their members. Notification must be made within 45 days of state registration of the new entity or entry of the official notation concerning the change in members. If the competition authority concludes that the notified transaction may lead to the restriction of competition, it may issue an order requiring the participants to observe conditions designed to preserve competition.

41. Failure of firms to abide by the rules concerning pre- and post-merger notifications, and also failure to abide by the terms of an order of the competition authority designed to preserve competition, may serve as grounds for MAP to bring an action in court seeking the liquidation of the firm or non-commercial organization involved, but such cases are rare. The far more common consequence of failure to file the required notification or petition is the imposition of a fine under Article 19.8 of the Code of Administrative Violations, which provides for fines of from 20 to 50 times the minimum monthly wage on individuals (a range of about \$67 US to about \$167 US) and from 500 to 5000 times the monthly wage on legal entities (about \$1670 to \$16,700 US). In 2002, MAP initiated 1558 cases concerning violations of Article 17's rules and imposed 1254 fines.

42. Pre-transaction notification and approval is required for the acquisition of more than 20% of the voting stock of a company, the acquisition of assets accounting for more than 10% of the asset value of a company, or the acquisition of the right to control the activity or serve as the executive body of a company, if the combined balance-sheet asset value of those involved exceeds 200 thousand times the minimum wage or one of the firms is listed in the Register of firms having a share of more than 35% of a market, or the acquirer in the transaction is a group that controls a firm listed in the register. The legal standards for approval or rejection are identical to those for full mergers, with the addition of a specific right to refuse the transaction if participants refuse to reveal the sources, conditions for use or amounts of the money or property required for the transactions. Permission for a transaction expires if the transaction has not been completed within a year of the issuance of the decision.

43. Post-transaction notification is required within 45 days of the completion of the same types of transactions if the combined balance-sheet asset value of the firms involved exceeds 100 thousand times the minimum wage. In addition, firms with a balance-sheet asset value of more than 100 thousand times the minimum wage and those that are listed in the Register of firms with more than 35% share of a market are required to notify MAP within 45 days concerning the election or appointment of individuals to their executive bodies and boards of directors or supervisory boards. For both pre- and post-transaction notifications, orders may be issued concerning specific actions that must be taken or conditions that must be met in order to preserve competition.

44. The overall merger control caseload is astonishingly large. In 2002, MAP as a whole received 10,198 petitions and 9461 notifications under Article 18 (covering securities transactions and corporate relationships) and an additional 779 petitions and 3592 notifications under Article 17 (covering mergers and asset purchases), for a total of more than 24,000 filings. The ability of Ministry staff members to conduct meaningful review of this number of transactions is at best questionable, and the combination of such high numbers of filings with relatively short time frames for review may hinder the performance of other duties and the conduct of other investigations. Although the threshold levels for both petitions and notifications were doubled by the October 2002 amendments to the law there appears to have been no reduction in the caseload. Petitions under Articles 17 and 18 for the first half of 2003 numbered 308 and 5292, respectively, which is well on track to equal the 2002 statistics.

45. Under Article 18, MAP may file suit to void transactions to which the pre- and post-transaction notification requirements apply if the transactions were completed in violation of legal requirements *and* the transaction can be shown to have led to a restriction of competition. Failure of firms to abide by an issued decision of MAP or by the conditions contained in an order concerning preservation of competition is also legal grounds for a court to void the relevant transaction. As in relation to full mergers, however, this remedy is rarely pursued. In general, the consequence of failure to file the required notice or petition is the imposition of fines under Article 19.8 of the Code of Administrative Violations. In 2002, MAP opened 1670 cases on violation of Article 18's notification requirements concerning transactions and imposed fines in 1040 of them.

46. In contrast to the active enforcement of the requirement that filings be made, refusal of permission for a merger or transaction on the grounds of a threat to competition is quite rare. In 2002, MAP received 779 petitions under Article 17 and refused consent in only 9 instances, while 10,198 petitions were received under Article 18, with a total of 58 refused. In the first half of 2003 (under the newly increased threshold amounts), the relevant numbers were 308 petitions under Article 17 with one refusal, and 5292 petitions under Article 18 with 47 refusals. According to MAP staff members, conditions are imposed for the preservation of competition in about 4.4% of all cases. In the highly concentrated fuel and energy industries, the percentage of transactions in which conditions are imposed is higher – reaching about 10%. The large majority of the conditions currently imposed are behavioural conditions requiring that companies continue to serve particular markets or areas, maintain availability of particular products or services or concerning other aspects of business conduct. MAP would like to increase its use of structural remedies and is currently developing guidelines for the definition and imposition of structural conditions.

BOX 6. RECENT PRACTICE -- MERGER CONTROL

1. A territorial office of MAP conducted on its own initiative a “verification” of the activities of a local coal company listed in the register as dominant. During the verification, it was learned that the coal company, which had previously sold its product directly through a wholly owned subsidiary, had concluded an agency agreement with another company, allowing the agent to conclude agreements for sale of coal, for which the agent would receive a commission. In fact, the agent was a limited liability company newly formed by three individuals who had previously worked in the subsidiary responsible for the sale of coal for the dominant company. According to the agency contract, the new company's expenses were to be paid out of receipts for coal sales, and its commission would be added to the contract price for the coal, which was to be set by the coal company. In analyzing the agreement, MAP found that the ability of the agent to pay its own expenses out of receipts for the coal made it able to define the expenses of the coal company, while its ability to arrange sales of coal made it able to define the overall income of the coal company. On this basis, the agreement was qualified as granting the new limited liability company the ability to control the entrepreneurial activity of the dominant company. MAP fined the company for failure to petition for preliminary approval under Article 18, and also denied permission for the transaction overall on the grounds that it could lead to the dominance of the new limited liability agency company on the wholesale coal market.

2. Three investment companies controlled by Gazprom petitioned to buy 35.69% of the shares of the “Krasnoyarsk synthetic rubber plant.” The Krasnoyarsk plant accounts for 85% of domestic production and is listed in the register. One other plant located in Voronezh produces the rest. When the petition was made Gazprom's group of companies controlled 69.39% of the voting shares of the Voronezh plant and already held 15.3% of the Krasnoyarsk plant (the latter held through Sibur, which is in turn 50.67% owned by Gazprom). In addition, the main supplier of raw material for production at the Krasnoyarsk plant was also Sibur. If the transaction were completed, the Gazprom group would hold 50.99% of the voting shares of the Krasnoyarsk synthetic rubber plant and could control 100% of the domestic production. Permission for the transaction was denied.

Box 6 (cont'd)

3. Rusagrokapital petitioned to acquire 80.1% of the voting shares of the closed joint stock company “Samara Flour Milling Factory No. 2.” At the time of the petition, Rusagrokapital held 76.47% of the voting shares of “Samara Flour Milling Factory No. 1” and already held 19.9% of the voting shares of “Samara Flour Milling Factory No. 2.” If the transaction were completed, Rusagrokapital would have a share of approximately 67% of the market for flour and 100% of the market for milled grain (groats) in Samara Region. Permission for the transaction was denied.

Source: MAP June 2003; MAP January 2004

47. In addition to controls on mergers and transactions, the law (Article 19) provides for the possibility of break-up of commercial firms or of non-commercial entities engaged in commercial activities, if the entity is dominant and engages “systematically” in monopolistic activities, which is currently defined as having twice been found to have engaged in such activities within a three year period. “Monopolistic activity” under the law is either the abuse of a dominant position or participation in restrictive agreements. An order of this type may only be issued, however, if it will lead to the development of competition, if the technological ties between the parts of the firms to be divided are not tight, if the separated parts can be physically divided from one another and if the part to be separated does not provide more than 30% of its production for the consumption of the other parts of the original entity. In practice, this provision of the law has rarely been used. Only one such case was opened in each of the past three years for which statistics are available (2000, 2001 and 2002), and of these three only one resulted in an order separating a subdivision from the relevant entity.

2.4 Actions of state bodies, state aids and public purchasing

48. The Law on Competition specifically prohibits acts, actions and agreements of state bodies that prevent, restrict or eliminate competition (Articles 7 and 8). Like the parallel provisions aimed at private conduct, the language of the provision does not cover distortion of competition. The prohibitions apply to federal bodies of the executive power, to all state bodies of the subjects of the Federation (its constituent parts), and to bodies of local self government, as well as to other bodies or organizations to which the functions or rights of such bodies have been delegated. They do not apply, though, to federal laws and other acts of the federal representative bodies (the State Duma and the Council of the Federation).

49. Actions and decisions of the stated bodies are prohibited by law if they restrict the independence of economic actors or create discriminatory conditions for the activities of particular firms and if those acts or decisions have or may have as their result the prevention, restriction or elimination of competition and infringement on the interests of economic actors. Sub-points of Article 7(1) specifically prohibit: restrictions on or obstruction of the formation of new economic actors in any sphere of activity or prohibitions on any form of activity or production of any product unless the prohibition is contained in federal law; obstruction of the economic activity of any economic actor; restriction or prohibition of trade among regions or localities or restrictions on the sale of goods or services; mandatory instructions concerning the priority supply of specific customers except where the priorities are established by federal law; and the provision without grounds of special advantages to one or more firms. This list is not exhaustive, however, and other acts or actions of state bodies may also be found to improperly restrict competition.

50. The combined requirement – that the act or decision both restrict competition and infringe upon the interests of an economic actor – is the result of the October 2002 amendments to the law. Previously, the law made such acts illegal if they restricted competition *or* infringed upon the interests of one or more economic actors. This effectively made a large number of improper actions of state bodies violations of the Law on Competition due to their infringement on someone’s interests, even where they had little or no

effect on the level of competition in the relevant market. Cases under this article of the law have accounted for a significant part of the overall caseload for many years, but some studies have suggested that many of such cases relied on the illegal or improper nature of the act itself and the effect on the complaining party, so the new wording might be expected to reduce the Article 7 caseload considerably. However, statistical information for the first half of 2003 does not, in fact, show any such reduction.¹⁷

51. The same article of the law contains a general prohibition on the combination of commercial activity with the exercise of state power, whether in the form of commercial activity by state bodies or in the form of delegation of state powers to private commercial entities. An exception is made where such combinations are authorized by federal “legislative acts” – a concept that includes not only laws but also presidential edicts, acts of the Government, and other federal regulations. In practice, this broad exception has permitted quite a number of state bodies at various levels to engage in commercial activities, resulting in monopolization of the relevant services and in some cases leading to tying of the commercial services to the performance of state functions. MAP has proposed that the language of this portion of the law be changed in order to eliminate the exception.

52. The law (Art. 8) also prohibits state bodies from engaging in agreements or coordinated actions, either among themselves or with firms or organizations, if these have or may have as their result the prevention, restriction or elimination of competition. The law specifically lists agreements that may affect prices, that divide markets, or that concern restriction of entry to the market or elimination of some competitors from it, but the list is not exhaustive and other agreements that meet the general criteria may be found to violate the law. There is a specific exception in the law for agreements envisioned by federal laws, acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

53. The primary sanction applied to a violation by a state body is the same as that for abuse of dominance and agreements: recognition of the violation in a decision and the issuance of an order requiring cessation of the violation. It is not unusual in cases concerning violations by state bodies for the violation to be eliminated prior to the completion of the formal consideration of the case and the issuance of an order. In some of these cases, MAP completes the consideration of the case and issues a decision recognizing the act or action as a violation, although it does not issue an order concerning a remedy. The sanctions listed above for individuals can legally be applied to individual officials for failure to execute an order, although in practice questions of chain of command and job responsibility may cause complications.

54. Because cases under these articles have tended to focus on actions of state bodies that are per se illegal or on the infringement of the interests of a single firm, standards for a more complex analysis that take into account the needs that the state action was intended to meet, the means available to the state body to do so and the costs of the options have not been developed. Indeed, it is not clear that the provisions as written would support a more complex form of analysis, since they do not contain a “least restrictive means” standard, but rather a simple prohibition. Nonetheless, as practice under these articles moves away from simpler types of violations it seems clear that analyses that take these factors into account will be needed in order to prevent conflicts between the competition laws and the reasonable use by local and regional bodies of zoning rules, local taxation scales, and other common tools of local governance.

BOX 7. RECENT PRACTICE -- STATE ACTIONS

1. The State Tax Inspectorate established a simplified procedure for the refund of VAT to firms meeting certain criteria as “traditional exporters.” One of the criteria included was a requirement that the firm not use any of a list of banks that were identified by the State Tax Inspectorate as previously being used during attempts at improper VAT refunds. MAP opened a case after receiving a number of complaints from companies forced to choose between remaining with their banks and being able to use the special procedures, and found the rule to be an illegal restriction of competition in the market for financial services. In making its decision MAP also took into account the Tax Inspectorate’s practice of issuing such rules without state registration of the legal act and without publication.

2. An instruction of the Ministry of Railways required directors of railroads and heads of stations, enterprises and other railway organizations to provide space on an uncompensated basis to the state enterprise “RailPharmacy” (organized under the Ministry) to establish pharmacies and pharmacy kiosks at stations, stops, enterprises and other locations, and to cease provision of space for any “outside” organization for this purpose. Lease agreements were broken with a number of companies, and their spaces given to “RailPharmacy” for use. MAP found this to be a state action that improperly advantaged “RailPharmacy” and ordered the Ministry of Railways to make corresponding changes in the acts.

3. A territorial office of MAP considered a case concerning electricity rates set by the administration of a city. The rates differentiated among users of electric energy on the basis of the capacity of their connections and their electricity usage. This was found to be a state act that created a groundless obstruction to the activity of economic actors and restricted competition.

4. A territorial office of MAP received a complaint petition from an individual entrepreneur and opened a case concerning the refusal of the city to extend his lease on the plot on which he had established a kiosk. The territorial office found the decision not to extend the lease to be without grounds and therefore an illegal obstruction of his activity. Prior to the issuance of the decision the city reversed its decision, which was considered a voluntary elimination of the violation.

5. The head of a municipality refused to allow a limited liability company to change the zoning of certain premises from residential to non-residential for use as a pharmacy on the grounds that there were already a sufficient number of pharmacies in the municipality and the space was not located in an appropriate place for the organization of retail trading. The territorial office of MAP found this to be violation of the provisions on state action, as it restricted the independence of the company in the use of its space and obstructed its activity in the retail pharmacy sphere.

Source: MAP November 2003

55. A special focus of enforcement efforts under Articles 7 & 8 has been restrictions imposed by regional and local governments on the movement of goods into or out of their areas. This practice was reasonably common during the mid-to-late 1990s. It was used by regional and local bodies and officials as a means to keep basic foodstuffs and other items of first necessity (sometimes subsidized by the same bodies) from being traded into other locations, as an indirect price control mechanism, and also as a means to protect local producers from competition in order to protect the jobs and other benefits they provide to the local economy. In some instances, local or regional bodies faced with unfunded mandates concerning maintenance of social infrastructure may have essentially traded protective provisions for the agreement of enterprises to assist with some of these responsibilities. Prevention of the fragmentation of the Federation and provision for both a unified economic space and a uniform observance of the laws was and remains a high overall priority of the federal government, and correspondingly of MAP as well. Although there was a sharp spike in such activities immediately after the 1998 default, MAP’s enforcement efforts in this area have paid off and there are far fewer direct prohibitions of this kind in evidence in recent years.

56. The provision of special assistance to specific enterprises or firms by a local or regional government or by the relevant federal ministry or other executive body would fall under the terms of either

or both Articles 7 and 8. Moreover, Article 7 requires that any act of a covered state body or official that grants privileges or assistance to one or more specific enterprises be subject to the consent of MAP. If the assistance is provided under the terms of a federal law, however, or is within the scope of an agreement envisioned by such a law or by an act of the President or of the Government, it is outside the reach of the Law on Competition and would need to be addressed through the repeal or amendment of the act in question. MAP has recently taken action to address one such situation by promoting the inclusion in a recent package of reform legislation on rail transport of specific provisions disallowing separate agreements between the rail system and individual customers concerning privileged tariff rates.

57. State bodies are required by a separate law to make purchases of goods and services for state and local needs on the basis of competitive bid. The Law on Competition includes an article (Art. 9) setting out “antimonopoly requirements for the conduct of competitive bidding” in such cases, including prohibitions on the creation of advantages for some participants, granting of access to confidential information or reduced fees for participation, improper restriction of access to participation, and any coordination of the activities of the participants by the organizer of the competitive bidding. In the case of a violation of these rules, MAP may seek to have the results of the competitive bid declared void by a court.

2.5 *Unfair competition*

58. Unfair competition is covered by Article 10 of the Law on Competition. Forms of unfair competition specifically listed in the law include: distribution of false information capable of causing losses or injury to the business reputation of another economic actor; publication of incorrect comparisons of goods; falsification or confusion of consumers about the maker, quality or other information about goods; improper use of trade marks or other intellectual property; and improper receipt or use of secret or proprietary information. Use of intellectual property rights owned by or registered to the violator for the purpose of unfair competition is also covered. The law provides that in the case of a violation of this type the question of early termination of such rights may be raised before the appropriate state body.

59. In most cases, the result of a finding of a violation is the issuance of a decision by MAP recognizing the behaviour as a violation and ordering it to stop. Failure to abide by the order may result in a fine under the Code of Administrative Violations. In the case of publication of false or misleading information, MAP may require that a retraction or correction of the incorrect information be published at the expense of the violator in the same sources in which it was published.

60. Unfair competition cases are not a large part of the overall caseload, accounting for about 362 matters (petitions and those opened on the initiative of the MAP) in 2002 throughout the system. Just over a third of these concerned improper use of trade mark or other intellectual property, and another third concerned distribution of false information or the confusion of consumers about the origin, qualities, maker or other aspects of products. The central office of MAP dealt with a number of well-publicized cases concerning the close imitation of the trade dress and/or trade or brand name of popular imported consumer products (including such varied products as chewing gum, soap products, and insulin).

BOX 8. RECENT PRACTICE -- UNFAIR COMPETITION

MAP on its own initiative opened a case concerning the sale by a Russian company of white vermouth under the name "Martuni," with a label very similar to that used by Martini & Rossi SpA on its "Martini" white vermouth and registered in Russia. The Martini & Rossi company reported that it had demanded the use of the "Martuni" label be stopped, but had received no reply. The Russian company presented evidence that it had registered a label for wine with the name "Martuni," but upon examination this label was not the same as that actually used on the white vermouth. The Russian patent authority issued an opinion stating that the "Martini" and "Martuni" labels were similar to the point of consumer confusion. MAP found a violation of Article 10 and issued a cease and desist order.

Source: MAP November 2003

61. MAP itself does not have the power to estimate the damages caused to the complaining party or to order compensation. However, a private party may seek compensation for damages caused by unfair competition under the general tort claims provisions of the Civil Code, citing the decision by MAP as evidence of the violation. In recent years, several firms have successfully resorted to this means to obtain compensation. Compensation of damages that cannot be proven by specific evidence (e.g. cancelled contracts as opposed to "speculative" damages based on projected sales as a function of market share or similar evidence), however, is still a matter of some uncertainty under the law. There are no provisions for punitive damages.

2.6 Consumer protection

62. MAP plays a major role in the enforcement of consumer protection law, dealing directly with thousands of complaints each year. Consumer protection complaints can also be made directly by consumers to a court or to a local body for the resolution of consumer disputes. Consumer protection groups and the procuracy are authorized to bring actions under the consumer protection law to protect the interests of large or undetermined groups and the procuracy may also proceed for the purpose of protecting the general public interest. Violators may be subject to fines (which are relatively modest) and may be ordered to cease violations as well as to publish retractions of false information or other information that may inform a broad group of consumers about the resolution of a case and their rights. Individual consumers may obtain damages through a court of general jurisdiction, including compensation for moral harm as well as economic damages. Procedural law does not permit class actions and there are no provisions for punitive damages as such.

63. MAP's role in enforcing consumer protection laws is particularly important given the current formulation of the Law on Competition. The competition law's provisions generally require that a violation affect an "economic subject," which term is defined to include commercial and some non-commercial entities, but not individuals in their private capacities. For this reason, some MAP offices have combined enforcement of the Law on Competition with the consumer protection law in order to reach violations affecting individual consumers.

BOX 9. RECENT PRACTICE – COMBINING COMPETITION AND CONSUMER PROTECTION

An energy provider made a habit of turning off hot water supply to entire buildings if any of the customers in the building had not paid the bill, or where they had paid but the housing authority had not transferred the payment to the company. The territorial office of MAP opened a case based on the abuse of dominance provisions of the Law on Competition and the provisions of the consumer protection law and ordered the practice stopped and a statement published in the papers informing consumers about their rights.

Source: MAP June 2003

3. Institutional Issues: Enforcement Structures and Practices

64. Reform of regulated sectors of the economy can be less beneficial, or even harmful, if the competition authority cannot act vigorously to prevent abuses in developing markets. While MAP's resources may at first glance appear to be substantial, they are in practice insufficient due to the extraordinarily large number of tasks assigned to the Ministry and its large caseload under the Law on Competition. The Ministry's investigatory powers are quite weak and sanctions for violations of the competition laws are absent or at best very modest. If significant legal and institutional changes are not made to address these concerns, it will be difficult or impossible for MAP to make the improvements in law enforcement that are desirable and to meet the challenges presented by the large scale regulatory reforms now underway.

3.1 Competition policy institutions

65. The MAP is a Ministry within the composition of the Russian Government, headed by a Minister who is appointed (upon nomination by the Prime Minister) and may be removed by the President of the Russian Federation. Deputy Ministers (of which there may be as many as seven) are appointed and may be removed by an act of the Government. Prior to 1998, the competition authority was a state committee, with a status somewhat junior to a ministry within the structure of the Government. The change had the advantage of raising the status and visibility of the competition authority, and also gave MAP direct access to a very broad range of policy discussion and planning at the highest level through the participation of the Minister in sessions of the government and through the practice of obtaining the comment or recommendation of all ministries on Government policy changes and planned decrees.

66. Its placement within the composition of the Government, however, does place MAP in a position of equality with other bodies against which it may need to enforce the law and which may have positions strongly opposed to MAP's regarding some competition issues. According to the standard working pattern of the Government, MAP must seek the comment and approval of the other ministries on its own legislative and regulatory initiatives as well as on those policy and legislative documents that it is assigned to develop (though this does not apply to enforcement actions). This may make it more difficult for MAP to gain approval for policy proposals or reform recommendations that are opposed by the industrial ministries affected. There has been some discussion at various times of the possibility of changing the nature of MAP to make it less subject to the influence of the other members of the Government, perhaps by creating a more direct subordination to the President. This would, however, be a complicated change as there are few constitutional models for such a body and there is currently no concrete proposal being considered.

67. MAP has a broad set of responsibilities. In addition to the enforcement of the Law on Competition and the separate law on competition in financial markets, MAP also has primary enforcement responsibility under the federal law regulating advertising (reporting the consideration of 11,811 facts of such violations in 2002), and considerable responsibility for enforcement of the laws on consumer protection (reporting the consideration of 7913 petitions by MAP's territorial offices within the same period). MAP is also responsible for enforcing regulations on commodities exchanges and for federal programs for the promotion of entrepreneurial activity and the protection of small and medium sized businesses. MAP is currently serving as the tariff regulator for natural monopolies in the area of communications, including basic local telephone services and postal and telegraph services.

68. In addition to these tasks, MAP has also been required to expend substantial resources on its participation in the process of reform of infrastructure monopolies. MAP has sponsored a number of discussions and forums on the directions of reform and has been actively involved in developing its details. It was one of only two bodies to present a full plan to the Government for rail reform (the other being the

Ministry of Railways). The plan of measures to be taken for structural reform of rail transport confirmed by the Government in May of 2003 requires MAP to take the lead in developing a set of rules for non-discriminatory access to rail infrastructure (adopted in December) and measures for the creation of competition in freight transport, and to participate actively with other bodies in the creation of 18 other sets of basic rules, analytical reports, policy recommendations or legal documents before the end of 2005. This plan addresses only the initial stage of reform and a similarly large assignment of work is expected for the development of further rules and legislation refining the system and creating further competition. Similar tasks are being performed by MAP in relation to the restructuring of electricity, and in this area MAP also sits on the supervisory council for the trading system and serves as the regulator overseeing the non-commercial partnership that administers the system. Reform of the gas and telecoms sectors is at a somewhat earlier stage, but MAP is already responsible for ensuring non-discriminatory access to the gas transport and distribution systems may be assigned other roles as reform of Gazprom moves forward. As the tariff regulator for communications, MAP has focused its attention on adjusting tariffs to eliminate cross-subsidization and provide for competition where that is possible. If the tariff regulation task is removed to another body as expected, MAP may play other roles in this area.

69. MAP consists of a central office and 75 territorial administrations that are located throughout the Russian Federation. The central office investigates cases with larger economic impact or involving national economic issues, and is responsible for organizing law enforcement activities and providing for the functioning of the system as a whole, including budgetary support, educational measures, legislative work, analytical work and the creation of methodological guidance for investigations. It is divided into a number of departments and administrations responsible for the enforcement of specific laws (consumer protection, advertising, support of entrepreneurship) or for specific functions within the Ministry (legal department, personnel, finance and so forth). Activity in the enforcement of the Law on Competition is divided among three offices responsible for particular sectors of the economy: (1) fuel, energy, transport and communications; (2) industry and construction; and (3) agro and forest industries, chemicals and natural resources. This structure is thought to allow staff members to be more knowledgeable about the area in which they are enforcing the law than the previous structure, which divided enforcement among the areas of the law (agreements, abuse of dominance, merger control). Enforcement of competition law rules on unfair competition is combined with enforcement of the advertising law in a separate group, and another group is responsible for the laws on competition in financial markets and on commodity exchanges. The maximum number of staff of the central office is regulated by the Government, and as of the beginning of 2003 was 380. At that time, there were a total of 357 actually employed in the central office. This includes both professionals and support staff, but not security and maintenance personnel who are directly employed by the federal body responsible for maintenance of the building.

70. The territorial administrations are responsible for the enforcement of the laws in one or more of the constituent parts of the Russian Federation, and take part in analytical work, policy development, and prognosis of economic conditions in their areas. Recently, MAP assigned seven of the territorial administrations, one in each of the federal administrative districts, to act as "leading" offices within their districts, assisting in the coordination of enforcement efforts and also educational and other measures. The size of territorial administrations varies widely, from as few as 5 staff in total to 25 or more. The maximum staffing level of the territorial administrations as a whole, like that of the central office, is regulated by the Government, and at the beginning of 2003 was 1477, with 1408 actually employed.

71. As a rule, if a case involves more than five separate constituent parts of the Russian Federation a territorial office must hand the case off to the central office of the Ministry or to seek its consent and cooperation in the investigation and initial decision. A set of rules also limits the territorial administrations in their consideration of petitions and notifications under the merger control provisions, providing maximum overall asset limits beyond which the matter must be addressed by the central office. In other respects, the territorial administrations act quite independently, being guided by methodological

recommendations and other documents issued by MAP, but without needing to seek permissions or approvals in individual cases. According to MAP's procedural rules, the central office of MAP has the right to reverse the decisions or orders of the territorial offices if they are contrary to legislation or exceed the authority of the territorial office. In practice, however, this is a rare occurrence and decisions of the territorial offices are usually appealed directly to a local court. The central office collects brief statistical information from the territorial offices concerning each of their cases, and receives more detailed reports twice a year, but with many thousands of cases per year the collection and analysis of information is a serious challenge. The Ministry is currently working on the development of an optimal system for the computerized reporting, sharing and retrieval of information across MAP as a whole. Until such a system is in place, the ability of the central office to supervise the current work of the territorial administrations in detail will remain quite limited.

3.2 Competition law enforcement

72. MAP can act against violations of the Law on Competition on its own initiative or on the basis of a petition or complaint received. General procedures regarding violations of the law are currently governed by a set of Rules for the Consideration of Cases on Violations of Antimonopoly Legislation confirmed by order of the Ministry in 1996. Where a petition has been received concerning the violation, the Rules require response to the petitioner within a period of a month. If the petition does not appear to contain information indicating a violation, MAP will generally respond with a statement that the petitioner needs to submit documents confirming the facts of the violation. If such documents are not provided, the petitioner may be informed that the elements of a violation appear to be absent. However, MAP has absolutely no discretion to refuse to pursue any petition which appears to state, or may after further investigation state, a violation of the competition laws. It is obligated to investigate and respond to every such complaint or petition, without exception. It is irrelevant whether the possible violation is technical or is insignificant in nature or whether the violation fits within MAP's enforcement priorities. An improper refusal by MAP to pursue a case, and also failure to respond within the legally required time period, may be appealed by a petitioner to a court or be the subject of a complaint to a procurator responsible for supervising the enforcement of the law by executive bodies. Both of these have occurred in practice.

73. If MAP is not certain whether a petition indicates a violation of the law, or if additional information is required at any stage of an investigation or consideration of a case, it may make demands for information from state and private bodies and persons under Article 14 of the Law on Competition. Article 14 provides for a written demand to be made for the presentation of documents or for the provision of oral or written explanations or other information necessary to MAP. Failure to provide the requested information, or to respond at all, may result in a fine, imposed by MAP under the Code of Administrative Violations. The fine, however, is small, particularly in relation to the resources of a large company – amounting to from 50,000 to 500,000 rubles, or about \$1670 to \$16,700 US. In practice, if information is still not provided after a fine has been imposed, MAP may be forced to make a new demand for the information and repeat the process of recognizing a failure to provide it and fining the violator. It may also go to court to attempt to force the provision of the required information.

74. Under Article 13 of the law, MAP staff members also have a right of “unhindered access” to the premises of businesses and many state bodies for the purpose of collecting evidence and documents necessary for investigations, and they are to be assisted when necessary by the police and other bodies. In practice, however, this right is difficult for MAP to enforce and MAP really does not possess the capacity to conduct searches of premises, surveillance of suspected violators, or other investigatory activities that would be more promising in terms of evidence of hard core cartels. Nor does it have the kind of sanctioning authority that would allow it to be taken seriously when demanding information and conducting interviews with suspected participants in agreements or that would facilitate a leniency

program. MAP currently must rely primarily on the time consuming procedures under Article 14 to obtain information.

75. Consideration of alleged violations of the competition laws takes place through a quasi-judicial procedure conducted within the MAP. The procedure requires the creation of a “commission” from among the staff members of the MAP to consider the case. The petitioner and respondent must be notified and be given a chance to be heard at a sitting of the commission, and third parties are sometimes heard as well. If the commission, after considering all of the evidence and testimony, comes to the conclusion that a violation of the law has been committed, it issues a decision stating this and an order (called a “prescription”) requiring the violator to cease violation of the law.

76. In the majority of cases, MAP’s order to the respondent to cease the violation of the law is the only immediate response that MAP can make to a finding of a violation. The law contains no direct, immediate sanctions – either fines or other penalties – for violation of most of the provisions of the competition laws. Fines may be generally be imposed only for a failure by a respondent to execute the terms of MAP’s order (as well as for failure to provide information or to file required petitions and notifications) and not for the violation itself. Fines for failure to execute an order may be imposed by MAP directly under the Code of Administrative Violations, which dictates the procedure to be followed.

77. This system essentially allows violators of the competition law a “free ride”– they are entirely free to violate the law and the consequence of being found in violation is only that the violating behaviour must be stopped, while the company is free to keep what it has earned up until that point through the violation. Even where a respondent fails to execute MAP’s order to cease a violation, the direct fines available are small, with a maximum limit of 500,000 rubles (about \$16,700). Such limited sanctions are unlikely to deter behaviour that is even modestly beneficial to a violator, much less the most serious kinds of violations that may be worth very large sums.

78. Article 12 of the Law on Competition permits MAP to issue an order requiring that a violator eliminate the consequences of a violation or restore the situation prior to the violation of the law. This does not, however, include the ability to order specific compensation to be paid, and so the use of these provisions to provide credible sanctions against a violation is not an option. No statistics are available concerning the frequency with which these provisions are used or the costs of ordered actions, but the absence of appeals concerning this issue suggests that it is not common. Article 12 also states that MAP may order a violator to transfer income received as a result of the violation of the law into the federal budget. Apparently this does not authorize orders that would confiscate all of the income illegally received for the entire period during which the violation occurred. The October 2002 amendments to the law inserted Article 23¹ stating that the behaviour must be properly recognized as a violation of the law (through a decision of MAP, presumably) and that income from the illegal behaviour *which continued after an order was issued requiring cessation* may be confiscated. Confiscation of the income requires MAP to file a suit in court, and thus cannot be accomplished through an order.

79. In a few cases, MAP may be able to specify the actions that must be taken to remedy the violation, such as ordering that a contract be concluded with the petitioner in a case concerning refusal to deal or requiring publication of a retraction in an unfair competition case. MAP has no power, however, to specify the terms of contract between a petitioner and respondent, or to dictate in its order the correct content of a decision of a state body that it has found to violate the law (although it may review and advise on this). If such violations are not corrected after the issuance of an order, MAP may directly impose the available fine for failure to execute the order, but to obtain actual performance it must file a case in court seeking a court decision requiring the conclusion of a specific contract or invalidating the illegal act or decision of the state body. And while the court may impose costs upon a party that improperly fails to comply, there are no provisions allowing the court to impose additional, punitive damages or fines upon

the violator outside those envisioned in the Code of Administrative Violations and directly imposed by MAP.

80. If a respondent disagrees with MAP's decision or order, it may appeal the case in an arbitrazh court (a court handling economic disputes). In addition to the initial consideration of the case in a first instance court, full de novo reconsideration on appeal and a cassational reconsideration are also usually available. A "supervisory" review of the case may also be available through the highest court in the arbitrazh court system, but this is discretionary and most requests for such review are denied. For purposes of consideration of the case at any level of the courts, the burden of proof of the factual circumstances and of the correctness of its decision and order are placed upon MAP. In 2002, of 2103 orders and recommendations issued concerning violations of the law, 276 (about 13%) were appealed, and 73 of those (about 26% of those appealed) were overturned by the courts. Cases most likely to be appealed are those concerning Article 5 (abuse of dominant position) and Article 7 (anticompetitive actions of state bodies). Selective review of available court decisions suggests that courts have difficulty with questions of market definition and dominance and MAP has in some cases been forced through several levels of appeal on the issue of whether a regulated natural monopoly is dominant. Courts have also had difficulty in defining the limits of MAP's power to interfere in contractual relationships, even to protect a weaker party, and are sometimes confused about how the general rules on public contracts and contracts of adhesion that are contained in the Civil Code and the provisions of the Law on Competition related to contractual relationships relate to one another.

3.3 *Other enforcement methods*

81. Private action for damages is possible under a combination of direct prohibitions in the competition laws on particular behaviour with the general tort claims provisions of the Civil Code. Although there have been some debates in recent years concerning the limits of what constitutes improper behaviour sufficient to warrant civil tort liability, a long tradition of interpretation of similar provisions of previous civil codes establishes that illegal behaviour that has been recognized as such by the proper authorities gives rise to the right. In recent years there have been at least a few cases of the successful use by parties of MAP's recognition of unfair competition as evidence of such illegal behaviour in a civil suit for damages. While the use of such provisions cannot substitute for the creation and enforcement of credible sanctions to be applied to violators, the facilitation and encouragement of similar cases may be an appropriate way for MAP to increase the effectiveness of the law and also public awareness of its principles and effects. The October 2002 amendments to the Law on Competition removed a general reference to the ability of private parties to seek damages through the usual procedures, but this was explained as being in accord with a legislative policy of removing provisions that amount to general restatements of existing legal rights and not an attempt to eliminate the right or discourage its use.

82. Article 26 of the Law on Competition contains a very broadly stated requirement that damages caused by illegal acts of federal executive bodies and other state bodies at the regional and local levels, *including* those caused by acts violating the antimonopoly legislation, as well as by failure of such bodies to fulfil their obligations or improper fulfilment of their obligations, are subject to compensation by the Russian Federation or the corresponding body of regional or local self government. Article 12 of the law gives MAP no corresponding ability to order the payment of such damages, and the presumed remedy would therefore be for the injured party to seek damages in court. Article 26 was inserted into the law by the October 2002 amendments and the breadth of the provision is somewhat surprising in light of the fact that the same set of amendments narrowed the prohibition on improper state actions to require that an effect on competition be shown. Read literally, it makes a statement of general state policy of compensation of damages caused by any improper behaviour of state bodies whatever, and there is some question how courts may interpret the inclusion of such a norm in the Law on Competition.

83. Another avenue for enforcement of competition law is through the procurator, or public prosecutor. Procurators have some legal responsibilities related to protection of the public and supervision over the proper observance of the laws by state bodies. In this capacity, procurators have sometimes brought suits in court demanding that the court void acts of state bodies that violate the competition law or related provisions, including those of Article 8 of the Constitution and Article 1(3) of the Civil Code regarding the free movement of goods and services. Procurators, through their authority to take actions to protect the public interest or to address violations that affect large or undetermined groups of persons, may also be able to file suits in court or petitions with MAP concerning broad violations such as improper behaviour by a monopoly utility in relation to its customers across the board.

3.4 *International issues in competition law enforcement*

84. Article 2 of the Law on Competition states that the law is to be applied not only to conduct occurring in the Russian Federation, but also in all instances in which actions or agreements occurring outside the Russian Federation lead or may lead to the restriction of competition or to other negative consequences on the markets of the Russian Federation. Despite this broad mandate, however, there have long been practical questions about the means for international issues to be addressed in the regular practice of MAP in enforcement of the law. Information problems can make it quite difficult for territorial offices to take sales of goods produced outside the Russian Federation into account when the case deals with a localized market.

85. In practice, international issues arise most frequently in relation to merger control activities concerning stock purchases and corporate structure, in which the participation of foreign firms is relatively common. In 2002, just under 10% of pre-transaction petitions and just over 4% of post-transaction notifications under Article 18 involved foreign firms (a total of 1381 transactions). MAP has expressed serious concerns about its ability to adequately analyze these transactions, due to difficulties in obtaining accurate information on parties who are the beneficial owners of foreign corporate entities and shares or who otherwise control the behaviour of those entities. Refusal of permission for such transactions can nonetheless be difficult due to the high priority on the encouragement of inward investment.

86. In addressing competition issues with an international element, MAP takes account not only of the level of competition in the abstract, but also of other aspects of Russia's overall economic policy priorities, including provision for the national and economic security of the nation and strong concern for the competitiveness of domestic industry. In so doing, MAP attempts to balance the issue of the need for a sufficient level of competition in domestic markets and a unified economic space with account for the priorities of state policy concerning development of domestic producers. Where domestic producers are encountering international competition from globalizing markets, MAP sees the question of competitiveness of domestic producers as strongly related not only to improvements in their technological processes but also in the need for the economic size of domestic producers to correspond to the size of foreign firms operating in the same international markets.¹⁸ This focus may tend to push MAP toward a policy of leniency with respect to merger control questions raised by companies arguing that size is necessary to allow them to compete internationally, even if they then dominate smaller domestic markets. MAP also takes the question of competitiveness and fair treatment of Russian enterprises into account in addressing such issues as tariff changes, and has supported tariff restrictions imposed in response to discriminatory treatment of Russian producers and proposed the elimination of import duties where the items are not available in a sufficient amount domestically to supply Russian producers' demand for them.

87. The Law on Competition specifically authorizes MAP to conduct cooperation with international bodies and those of foreign countries and to participate in the development of international instruments and treaties that affect areas within its competence. It also specifically provides for MAP to engage in information exchange with international organizations and with foreign governments within its spheres of

authority. (Article 12, points 12 and 13) MAP has used these authorities in its work as a member of the International Council on Antimonopoly Policy of the States of the Commonwealth of Independent States, within the framework of which it has developed a treaty on coordinated conduct of antimonopoly policy and a number of related agreements on cooperation and sharing of information. In addition to agreements within the CIS framework, MAP has also concluded agreements with other states, including Bulgaria, Poland, China, France, Hungary, the Czech Republic, Slovakia, Greece, Korea, Italy and others, covering various forms of cooperation including policy dialog, technical assistance and other measures. Most of these agreements have included provisions concerning the exchange of information covering legal materials and statistical information. The agreements with Hungary, Bulgaria, Romania, and Latvia include specific provisions concerning exchange of information in the conduct of specific investigations, including questions of the level of confidentiality. These agreements have facilitated investigations, including a 2001 investigation into possible anticompetitive agreements in forest products involving both Russian and Finnish participants, and an investigation into illegal trading of automobile parts in Bulgaria using a trade mark that copied that of a Russian producer.

3.5 *Competition body resources and caseload*

88. MAP's available staff resources have fluctuated only slightly in recent years. In 2000, staffing reductions were required across all federal bodies by the federal government as a cost saving measure. These resulted in drop of about 10% for MAP, which was in line with the overall reduction, while some federal bodies lost up to 30% of their staffing allocations. Reduction of the staffing limit by 35 persons in 2002 was the result of a shifting of responsibility for tariff regulation of transportation monopolies from MAP to the Federal Energy Commission, with a corresponding shift in staffing. A modest increase in 2003 brought MAP back up to the overall staffing levels of 2000 and 2001, with the additional staff positions going primarily to the creation of two new territorial administrations.

89. The educational backgrounds of staff members are varied. As of the beginning of 2003, 275 of the 357 persons employed in the central office of MAP had completed a higher education, but only about half of these were in areas of study directly related to the work of the Ministry such as law or economics.¹⁹ Graduate degrees are significantly less common, with 15 of the central staff members possessing degrees as candidates of sciences and 2 having doctoral degrees. The statistics for the territorial offices are quite similar.²⁰ Rapid loss of personnel is a problem for MAP, as for many competition authorities, in part due to the higher rates of pay for corresponding specialists in private employment. In 2002, the territorial offices of MAP lost a total of 254 staff members, or about 18% of the staff, while the central office of MAP lost a total of 97 employees, or about 27% of the staff.²¹ Where only 50% of staff have educational backgrounds directly related to their duties, job experience and work-related training programs are a very important component in creating staff competence, and turnover rates of up to a quarter per year may make it impossible for MAP to maintain the necessary staff capabilities in economic and legal analysis required for high quality competition law enforcement. Such high turnover rates also imply a continuing need for high rates of expenditure on basic training activities, with impacts upon the resources available for other needs.

90. Allocation of budgetary funds has increased consistently year-to-year, with the most significant increases in 2000 and again in 2003. Changes in the total budget available to MAP do not, however, precisely mirror the changes in budgetary allocations, since MAP has also been allowed to expend a portion of the fees submitted with merger control petitions and notifications (noted in Table 3.1 as extra-budgetary funds) on its own needs, especially technology purchases. Beginning in 2002, the law on the federal budget has required that the Ministry move toward being supported solely by federal budgetary allocations, with fees from Ministry activities to go into the general federal budget as non-tax income. This change in the financing system resulted in a small decrease in the overall funding available from 2001 to 2002, but a large increase in the budgetary allocation resulted in an increase of more than 33% in the

available budget for 2003. The change in the funding channels for the Ministry eliminates any conflict that MAP might have faced in relation to a change in the notification thresholds for merger control activities, as well as any incentive to maximize fee income by concentrating resources on the enforcement of notification requirements.

**Table 3.1: Trends in Ministry Resources
(thousands of rubles)**

Year	Person-years	Budget Allocation	Extra-budgetary Funds Available	Total Available Budget
2003 (plan)	1857	390824.6	38000.0	428824.6
2002	1822	266431.4	44540.2	310971.6
2001	1857	242548.9	80546.8	323095.7
2000	1857	180576.6	49470.2	230046.6
1999	1907	96426.1	40743.0	137169.1

Source: MAP November 2003

91. While the staffing complement and budgetary figures presented here may initially seem quite ample in comparison to those for other competition authorities, they may well be inadequate to address all of MAP's current duties. Far from 100% of the listed totals can be considered competition resources. In addition to its duties in the areas of competition law and policy, MAP is also responsible for enforcement of advertising law, consumer protection law, and laws on commodities exchanges, the promotion of entrepreneurial activity and the protection of small businesses, and the regulation of tariffs for natural monopolies in communications. MAP's financial reporting information does not permit separate identification of the budgetary and personnel resources expended on its differing areas of responsibility.

Table 3.2: Trends in Enforcement Actions

	<i>Abuse of dom.</i>	<i>Agmts</i>	<i>State Actions</i>	<i>Unfair Comp.</i>
2002				
Matters considered ⁽¹⁾	3566	74	3110	345
Violations found	1420	51	1751	170
Eliminated informally	591	5	726	37
Formal cases pursued	829	46	1025	133
Agreement before decision	378	20	318	53
Formal decisions issued	451	26	707	80
2001				
Matters considered	3129	45	2442	343
Violations found	1537	22	1315	175
Eliminated informally	673	7	325	41
Formal cases pursued	846	15	990	134
Agreement before decision	326	5	252	45
Formal decisions issued	538	10	738	80
2000				
Matters considered	2478	45	2386	310
Violations found	1273	18	1332	191
Eliminated informally	545	6	437	27
Formal cases pursued	728	12	895	164
Agreement before decision	290	3	262	53
Formal decision issued	438	9	633	111

(1) Matters considered includes petitions received and matters investigated on the initiative of MAP.

Table 3.3: Trends in Merger Control Activities

Year	Art.17/ Art. 18	Total petitions and notifications reviewed	Violations Investigated(1)	Violations found
2002	4371/ 19,659	24,030	3438	3307
2001	4827/ 16,165	20,992	5182	5071
2000	3882/ 12,092	15,974	4193	4000

Source: MAP November 2003

(1) Violations in the context of merger control may include failure to file a petition or notification, failure to present necessary information or presentation of false information

92. Tables 3.2 and 3.3 document a heavy caseload under the Law on Competition alone. Moreover, these tables understate somewhat, as they not include cases enforcing compliance with information requests. (These cases accounted for between 630 and 840 formal cases per year in 2000-2002.) Nor do they reflect the resources expended to defend the several hundred competition law cases per year that are appealed to court and that may remain in one or another stage of the judicial process for several years or the separate caseload under the law on competition in financial markets (198 formal cases in 2002). One must also factor in the resources expended on review of proposed acts of state bodies for consistency with the competition law. MAP reviewed 2645 draft acts in 2002 and issued 697 negative conclusions explaining to the relevant state body why the proposed act was not consistent with the law.

93. When MAP's duties outside the enforcement of competition law are considered, the situation appears even more extreme. Taking into account only complaints concerning violations of the laws, petitions and notifications concerning transactions, and matters opened on MAP's initiative in the areas of competition, consumer protection and advertising, the number of matters to be addressed rises to over 100,000 per year, as shown in Table 3.4, below. This excludes policy work, competition advocacy activities, public education and public information activities, review of draft legislation, and all tasks related to the support of entrepreneurship and small businesses, commodities markets, or the regulation of monopoly communications tariffs.

Table 3.4: Matters Addressed by MAP in 2002

	Complaints On Violations	Petitions for Consent	Notifications	Own Initiative
Law on Comp. On Financial Mkts ⁽¹⁾	125	1052	623	412
Law on Consumer Protection ⁽²⁾	46,000	Not relevant	Not relevant	5031
Law on Advertising ⁽³⁾	2953	Not relevant	Not relevant	8858
Law on Comp. On Goods Mkts ⁽⁴⁾	6717	10,977	13,053	5046
Total Matters Addressed	55,795	12,029	13,676	19,347

(1) Source: MAP 2003 (sbornik). (2) Source: State Report on Competition for 2002. Complaints include both oral and written. It is assumed that all "verifications" listed were undertaken on own initiative. (3) Source: State Report on Competition 2002. The report lists a total of 11, 811 cases, with 3/4 of these being undertaken on own initiative. (4) Source: MAP 2003 (sbornik).

94. With respect to merger control activities, the high numbers are produced by a combination of low overall thresholds and the lack of criteria (such as value of the transaction reviewed or a minimum value for each of the participating companies) that would eliminate the need for large companies with an asset value above the combined threshold amount to file petitions or notifications for nearly any transaction they conduct. MAP has recently proposed a large increase in the combined asset value thresholds for review, suggesting that pre-merger notification thresholds be raised to a level equivalent to 100 or even 150 times the current amounts. An increase to 150 times the current levels would bring the pre-merger (pre-transaction) petition threshold to a combined balance sheet asset value of just over \$100,000,000. It is also proposed that the post-transaction notification threshold be increased to 200 million rubles, or about \$6,670,000. MAP staff estimated that this would greatly reduce the caseload across the Ministry as a whole, leaving it at about 10% of the current load, or about 2400 petitions and notifications per year in total. The reduction in the central office of MAP, which handles cases concerning the largest firms, would be less significant – perhaps to about 20% of current totals.

95. With respect to cases concerning actions and agreements of state bodies, the high caseload through 2002 appears to be due to a combination of the absence in the law of a requirement that the acts or agreements complained of have an effect on competition and MAP's lack of any kind of discretion to refuse investigation and prosecution of complaints that state a violation of the law. The recent amendment of the law to require a showing of an effect on competition could reduce the caseload under Articles 7 and 8 to a more reasonable level, provided that requirement is interpreted in a substantive manner requiring the careful definition and analysis of the market involved and that proof of restriction on one or a few competitors is not allowed to substitute for proof of effects on the level of competition. Questions arise, though, as to why the statistics for the first half of 2003 (after the amendments went into effect) don't appear to show any reduction in the caseload.

96. The high case load in the area of abuse of dominance is primarily accounted for by the large number of cases that concern abuses by natural monopolies or by entities operating in areas not legally defined as natural monopolies – such as generation and supply of electricity or sale of natural gas to consumers – but which are the sole operating supplier to many customers. Such cases account for more than half of all abuse cases in most years, and in some years quite a bit more than half. The high number of such cases appears to be due to a combination of factors, including very narrow regulation of natural monopolies, a lack of other bodies authorized to resolve the relevant disputes and the inability of MAP to impose serious sanctions or to issue orders requiring specific contract terms or preventing repetition of violations.

97. Russia's law on natural monopolies, passed in 1995, does envision the creation or designation of specific regulatory bodies for a narrow list of natural monopoly sectors, including transmission of electricity through the network and also of gas and oil through pipelines, services of ports and airports, basic local telephone services, railway services and also post and telegraph. The law defines the methods of regulation that are to be used by the regulators in these sectors, limiting them to price regulation (by means of specific price setting or price caps), the specification of customers that must be served by the natural monopoly on a mandatory basis, and definition of the required volume of service to various customers if there is insufficient capacity to supply all of the relevant demand. Although the terms of contract are clearly vital to a regulator's ability to price properly, the law does not provide for any kind of direct regulation of contract forms or contract terms (other than prices and tariffs) by the regulatory bodies. In some areas, general rules relating to the provision of service and/or the use of the relevant systems by consumers, imposed by decrees of the Government or the relevant branch ministries, are in force and may regulate such matters as the type of technical documents that can be demanded by the monopoly as a condition of service. Even where such rules are in force, however, the regulatory bodies are not given the authority to enforce them directly or to resolve any disputes between regulated natural monopolies and specific customers except those concerning the regulated tariff. In effect, there is no general sectoral

regulator with responsibility for overseeing most aspects of the behaviour of the natural monopoly entities. There is only a tariff setting body with a relatively narrow mandate. Thus, disputes over contract terms, refusals to contract and other similar matters, even in natural monopoly sectors, are often brought by the relevant customer to the MAP as an abuse by the regulated monopoly of its dominant position.

98. Because the law on natural monopolies contains a specific and exhaustive list of natural monopolies that are to have tariff regulation as specified by the law, other areas in which purchasers/consumers may still commonly face a sole supplier are not covered by the law on natural monopolies. Pricing in these areas may be regulated by various legal acts and adjustment of pricing may be assigned to a particular state body – in some cases the same body that regulates tariffs for natural monopolies in the same sphere. Rules may exist concerning the use and/or provision of the good or service, or governing specific aspects of the contract or of the breach and cessation of service. Enforcement of the rules, however, generally requires individual customers either to file suit in court or file a complaint with MAP concerning abuse of a dominant position. Moreover, existing rules do not cover all aspects of the contractual relationship, and parties objecting to the use by a de facto monopoly of specific terms of contract (for example, high penalties for minor changes in consumption) may have no recourse other than to characterize this as the abuse by the entity of its dominant position in a complaint to MAP. While in theory such a case could also be taken directly to court, court procedures are more formal than MAP's and the courts will not undertake an investigation in the way that MAP is obligated to do. In recent years, this type of case has been especially common in relation to electricity suppliers, which are not classified as natural monopolies (only transmission is covered by the law) but which are very often operating in a monopoly position in relation to specific customers.

99. The lack of effective sanctions and an enforcement procedure not designed for policing the behaviour of regulated monopolies also contribute to maintaining the high abuse of dominance caseload. MAP's enforcement procedures were designed for application to competitive markets, and require that each element of a violation – including the existence of dominance and the abusive nature of the specific behaviour involved – be proven by MAP in each case, and if necessary defended in court on the basis of evidence developed by MAP at the time it made its decision. MAP cannot rely on its own earlier cases when addressing another instance of the same or similar conduct and it cannot issue an order broader than the individual case, such as one that might require the respondent to amend all contracts with provisions identical to those found abusive in response to a specific complaint. Thus, each complaint is addressed individually, and later plaintiffs may not know of or benefit from the decisions in earlier cases. If sanctions for violation of the law were significant, the respondents might have sufficient incentive to avoid a repeat violation even in the absence of a direct order to that effect, but since the only immediate consequence to the violator is an order to cease the violation, there is no such incentive.

100. There are several ways in which the large abuse of dominance caseload could be reduced and some of the repetition avoided. One strategy that is employed in many countries is for a substantial proportion of the relationships between natural monopolies and their customers, and between monopoly utilities and their customers until competition begins to occur, to be defined by legislation or by other forms of binding rules that are quite detailed. This can take the form of mandatory contract terms or contract forms, defined permissible ranges for some terms, detailed rules concerning establishment and termination of service, and other similar strategies. This additional clarity concerning the mandatory or the permissible terms of contract could eliminate a number of cases simply by eliminating doubt on the part of both monopolies and their customers about what kinds of behaviour will be found to constitute an abuse.

101. Another strategy would be to place broad powers – including the power to define permissible behaviour and contract terms – in the hands of a sectoral regulator. The regulator could likewise be assigned to resolve, at least in the first instance, disputes and complaints concerning the terms of such contracts using a short, efficient procedure that would have as its primary purpose the determination of

whether the regulated monopoly violated the detailed rules contained in legislation or issued by the regulator. This would have the advantage of allowing the regulatory body to set tariffs with full knowledge and control of all of the circumstances, including the sizes, reasons and frequencies of penalties and other charges, and avoiding lengthy legal wrangles about the existence of dominance or first principles of contract law. MAP would retain authority, through the legal provisions on state action, to challenge decisions or behaviour of the regulator that unduly restrict competition, but would not retain responsibility for the resolution of specific disputes.

BOX 10. RECENT PRACTICE – NATURAL MONOPOLIES AND REGULATORS

1. A city water provider included in its contracts for water connection to private houses a term requiring “voluntary participation in shared contribution to development of water system infrastructure” which was intended to cover costs incurred in laying new pipes and not covered by regulated tariffs. MAP’s territorial office found both an abuse of dominant position and a violation of consumer protection law. The water company appealed and MAP’s decision was reversed by the court on the grounds that the term was not within those regulated and the parties had the right to agree on whether or not to include such issues, so should conduct negotiations. The appeals and cassational courts reversed the court of the first instance and agreed with MAP that the term was abusive and was being forced on the customers.

2. MAP received complaints from gas distribution organizations in several regions that they are unable to compete in the gas market because the Federal Energy Commission has refused to set regulated mark-ups for their services as required by law. The regulated amount is what may be charged by the gas distribution organization in addition to the regulated wholesale price of the gas. MAP has opened a case charging the Federal Energy Commission together with Gazprom and Mezhtregiongaz (its related regional supplier) with conclusion of an anticompetitive agreement intended to prevent the gas distribution companies from competing in the market and the Federal Energy Commission separately with state action restricting competition.

Source: MAP June 2003; MAP website

102. This option not as simple as assigning the relevant function to existing tariff regulators. Some commentators have expressed concern about the possibility that “industry capture” of existing regulatory bodies would make such a system undesirable and itself a source of abuse. Even if this were not a concern, the existing regulatory bodies could not possibly take on an additional dispute resolution function. They are already overtasked, covering price setting in a number of widely varying activities in energy supply (oil pipelines, gas pipelines, electricity transmission and traffic regulation), transportation (rail, ports, airports) and communications (telecoms, post, telegraph, broadcasting). As reform progresses, there will be an increasing number of service types and providers in each area of activity and an increasing need to consider the relationship of national rules and tariffs with those at the regional and local (retail) levels as markets are developed. Conflicts and complex inter-relationships between the regulated activities may also present problems as regulators are tempted or pressured to adjust interrelated tariff structures to benefit particular sectors or to meet other policy goals, rather than with the goal of covering appropriate costs and supporting competition. These concerns suggest that proposals for a unified tariff body or “mega regulator” for all natural monopoly sectors are not likely to lead to an effective structure for regulation and that it would be far preferable to increase the number of regulators in order to have separate regulators for differing industries. Attention may also need to be given to stronger guarantees of independence and accountability than are now in force. The creation of effective, independent regulatory bodies for all of the areas in which they are required will demand substantial additional resources, but they are a prerequisite for the long term success of reforms. MAP cannot efficiently substitute for them and its ability to meet its other obligations will continue to suffer if it is forced to try.

4. Limits of Competition Policy: Exemptions and Special Regulatory Regimes

4.1 *Economy-wide exemptions and special treatment*

103. The Law on Competition contains very few explicit exemptions. According to Article 2 of the law, relationships connected with intellectual property are not covered except in instances where agreements connected with their use may lead to restriction of competition or where the acquisition, use or violation of intellectual property rights may lead to unfair competition. The same article exempts issues of monopolistic activity and unfair competition on financial markets, stating that they are to be regulated by other federal law except where they affect competition on goods markets.

104. By its terms, the prohibition in Article 7 on state acts and actions restricting competition applies on the federal level only to acts and actions of executive bodies, which exempts federal laws. A federal law that seriously restricted competition, and in particular a law that created barriers to the movement of goods and services within Russia, might conceivably be found to violate the constitutional provisions discussed in part 1, but this would require a decision of the Constitutional Court, which would be required to determine whether the limitation was for constitutionally acceptable purposes (e.g. protection of life and health) and was proportional to the purpose served. Standing before the Constitutional Court is strictly limited, however, and such a case could only be submitted by a private party whose rights were violated by application of the law in a specific case, by a court called upon to apply the law, or by one of a limited number of state bodies that does not include MAP.

105. Part 3 of Article 7 contains a broader exemption from the prohibition on combination of the functions of state bodies and those of an “economic subject,” allowing such combination in instances where this is provided for by “legislation of the Russian Federation.” The concept of “legislation” includes not only laws but also other legal acts and this language would therefore allow such combinations of functions where authorized not only be a federal law but also by decrees of the Government or other similar acts. An exemption from Article 8’s prohibition on agreements of state bodies that concern pricing is also provided; such agreements may be concluded where they are authorized by federal law, or by a normative legal act of the President or the Government of the Russian Federation. The limitation of the exemption to “normative” legal acts means that only an act stating a general rule would qualify, so the exemption might not apply to a non-normative act that created a special pricing situation for a single firm.

106. The term “economic subject” is used throughout the law to refer to participants in commercial or entrepreneurial activities whose rights and obligations are defined by the law or whose interests are being protected. Article 4 of the law defines “economic subjects” as Russian and foreign commercial and non-commercial organizations, excepting those that do not engage in entrepreneurial activity, and including agricultural cooperatives and individual entrepreneurs. Entrepreneurial activity does not have a strict legal definition, but is usually defined as activity that is directed toward the receipt of profits, so the wording of the definition might well exclude the application of much of the law to non-commercial entities whose economic activities are not undertaken for profit, even where they may have a significant effect on competition in a market. Certainly it appears to exclude the interests of such non-commercial entities from protection under some of the provisions of Article 5 (such as that preventing a dominant enterprise from discriminating among economic subjects) and of Article 7 (where infringement upon the interests of an economic subject is a qualifying element of a violation, together with an effect on competition).

107. There are no exemptions or special treatments under the law for small enterprises, nor is there a *de minimis* rule applicable to most of the law’s provisions. As discussed above, provisions on vertical agreements do not apply to economic subjects “whose collective share on the market for a specific good” does not exceed 35%, but it is not clear how this provision will be applied in practice. There are no block exemptions under the Law on Competition and no procedure for their creation.

4.2 *Sector-specific Rules and Exemptions*

Regulation and reform of natural monopolies

108. The federal law on natural monopolies requires that the prices and tariffs charged by such monopolies be regulated by the bodies created or assigned for this purpose by the Government. The law contains an exhaustive list of the types of activities that are to be considered natural monopolies, and includes:

- transportation of oil and petroleum products through main pipelines;
- transportation of gas through pipelines;
- rail transportation;
- services of terminals, airports and ports;
- basic local telephone services;
- telegraphic services and postal services and some services related to the transmission of television and radio programs;
- the transmission of electric energy;
- the transmission of heat energy; and
- the operative-dispatcher service controlling transmission in the market for electric energy.

109. The tariff regulator for monopolies in the spheres of energy and of transportation is the Federal Energy Commission, and for monopolies in the sphere of communications is MAP. The regulation envisioned by the law on natural monopolies is quite narrow and extends only to pricing and some aspects of investment decisions, as well as to the definition of what customers must be served by the monopolies and distribution of the relevant good or service among customers if demand cannot be met completely. Other aspects of the behaviour of the natural monopolies are not directly regulated by the law on natural monopolies and the designated tariff regulator is not authorized to create new regulations covering issues not directly addressed in the law.

110. There is no exemption from the Law on Competition for natural monopolies. Prohibitions in that law related to pricing abuses by dominant enterprises and to pricing agreements or priority service assignments by state bodies contain exemptions for situations in which the behaviour is required by federal acts, and so there is no conflict between the competition law's provisions and those of the acts regulating natural monopolies. Potential problems such as the tying of other goods and services to those in which there is a natural monopoly, discrimination among customers, refusal of service and other similar issues are not addressed by the regulatory bodies, but rather by MAP on a case-by-case basis. The effects of this practice on MAP caseloads and the possible efficiency concerns raised by a post-hoc, case-by-case method of addressing these issues were discussed above in Part 3.

111. Regulatory reform processes underway in a number of natural monopoly sectors plan progressive changes in the regulatory scheme applying to particular natural monopolies or to their potentially competitive parts, but do not at this time include any plans for a fundamental change in the division of regulatory responsibility between tariff regulators and MAP. In fact, the 2002 amendments to the Law on Competition included the insertion of specific language on non-discriminatory access to markets and infrastructure, which will be applied by MAP to prevent remaining infrastructure monopolies from

discriminating in favour of particular companies as competition begins to be created for access to their services.

112. The regulatory reform process may in some cases result in clearer and/or more detailed regulation of monopoly behaviour during the reform process and in “competitive” sectors of the market than has so far been in effect under full monopolization of the same goods and services. For example, the rail reform has included the passage of a set of specific rules concerning non-discriminatory access to rail infrastructure adopted in December 2003 and envisions a separate statute on competition in rail transport. Violations of these rules will still, apparently, be addressed by MAP, either on the basis of complaints or on MAP’s own initiative, but if the rules are sufficiently clear and detailed they may reduce uncertainty and thereby the need for MAP to address repetitive instances of similar violations. MAP has taken the lead responsibility for the drafting of these new rules and the statute, and is basing them in significant part on its experiences in addressing railway cases under the abuse of dominance provisions. There is no indication, however, that the sanctions for violation of the rules will be any greater than those that apply generally to violations of the competition law, which may reduce the effectiveness of the rules.

113. Similarly, existing provisions on reform in the electricity sector involve the passage of detailed rules concerning use of the market, access to transmission services, and other aspects of the wholesale system, with very detailed rules planned to be issued at a later stage concerning contracting with smaller end users and citizens who will not be involved in the wholesale market. Rules will also require participants in the market to make available a specific list of information, including some information related to contract terms. This may allow customers to demand appropriate terms ‘up front’ in the contracting process and reduce the ability of those with market power to impose abusive or discriminatory terms on contracting partners who are unaware of the terms offered to others, correspondingly reducing the need for MAP to address abuses on a case-by-case basis at a later stage. The new system may also, however, create new opportunities for abuse. For example, after the establishment of the wholesale market for electric energy, MAP has begun to receive complaints concerning attempts by RAO EES and its associated regional companies to prevent enterprises from entering the national wholesale electricity market, due to concerns that this will result in large tariff increases for the remaining customers of the regional companies.

114. The new systems will also create new roles for, and demands upon, MAP. In the electricity sector in particular, MAP has been assigned to regulate the behaviour of the administrator of the electricity trading system to ensure non-discriminatory access. The administrator itself is a non-commercial partnership in which all of the interested parties participate. MAP proposed this structure and believes that it facilitates open communication about the reform process and may reduce the likelihood of abuses. There is also a supervisory council in which MAP participates. The law establishes some specific requirements in the area of electricity provision and some specific powers for the body regulating the system administrator and its participants (that is, MAP). Enforcement will apply the existing procedures under the Law on Competition.

Financial services markets

115. Competition in financial services markets is regulated by the 1999 law “On the Protection of Competition on Markets for Financial Services,” which is enforced by MAP. The law defines financial services markets to include securities markets, markets for banking services, markets for insurance services, services in trust management of assets, financial leasing arrangements and “other services of a financial nature.” Although separately passed, the law on competition in financial markets was based heavily on the Law on Competition and designed primarily to close the gap left by a specific exemption in the Law on Competition, rather than to impose a radically different regime of competition law control on financial markets. The structures of the two laws are very similar, as are a number of their provisions. The

law on competition in financial markets, however, imposes considerably tighter control on both agreements and concentration through preliminary review and notification requirements. The main substantive differences include the following:

116. Abuse of dominance by a financial organization is defined very broadly as actions that create barriers to entry into the market by other financial organizations or “exert a negative influence on the general conditions for the provision of financial services on the market.” (Article 5) An illustrative list of such abuses includes: inclusion of discriminatory conditions in contracts that result in advantage or disadvantage to particular financial organizations; tying of unrelated or disadvantageous conditions; and establishment of groundlessly high or low prices for the financial services provided. It may be noted that the first two sub-points in the list refer specifically to disadvantage to “financial organizations” which would appear to exclude such behavior directed toward customers or contracting partners that are not themselves financial organizations. Since the list is not exhaustive, however, this is not definitive.

117. The law on competition in financial markets contains a single provision (Article 6) covering all types of restrictive agreements of financial organizations: agreements concluded with one another, those with other legal entities, and those with regulatory bodies or other state bodies. Such agreements are prohibited if they have or may have as their result the restriction of competition. The illustrative list includes agreements that are directly or indirectly intended to: establish prices or mark-ups; rig bids at auctions or tenders; divide markets; restrict access to the market or eliminate other financial organizations from it; or establish groundless criteria for membership in payments or other systems without which a financial organization cannot compete that serve as barriers to entry. The illustrative list does refer to agreements “directed toward” these outcomes, but this does not appear to have caused questions about an intent standard, perhaps due to the earlier statement in the same article that the agreements are prohibited on the basis of their effects or possible effects on competition.

118. Article 7 of the law on competition in financial markets does contain four specific block exemptions for agreements covering: (1) unification of standards for the activities of financial organizations; (2) the conduct of joint scientific research and development; (3) joint purchase of technical equipment for the conduct of core activities; and (4) use of unified programming or technical equipment for the processing of information or unified data bases. The same article provides that additional block exemptions may be established by the Government of the Russian Federation, including exemptions for specific types of financial organizations.

119. Unlike the Law on Competition, the law on competition in financial markets contains a mandatory notification procedure for agreements (Articles 8 & 9). Agreements must be notified to MAP within 15 days of their conclusion where the participants in the agreement account for a minimum percentage of turnover in the relevant market (currently 10%)²². This includes not only agreements between financial organizations, but also all other agreements covered by the unified provision – agreements of financial organizations with bodies of executive power of any level, with bodies of local self government and also with any other legal entity concerning the conduct of joint activities. MAP is required to respond to such a notification within 30 days of its receipt of all of the required information, or may extend consideration for up to 30 days if additional verification is required. Copies of the agreement and all appendices, information on the basic activities of the participants and the amount of their turnover in these areas, and copies of the financial reports required by the Central Bank and the local bodies of executive power are to be attached to notifications and MAP is not permitted to request any other information. If MAP finds the agreement to limit competition, it may require the participants to annul it, cease activities under it or to alter it to preserve competition in the market. Agreements that are not annulled or altered to preserve competition by the participants may be voided by a court on the basis of a suit by MAP.

120. Merger control procedures under the law on competition in financial markets require either preliminary consent from MAP or post-transaction notification to MAP in all instances when more than 10 percent of the assets or 20 percent of the shares of a financial organization are acquired; acquisition by means of release of rights of claim of a value of shares in a financial organization that exceeds the amount set by the Government of the Russian Federation; acquisition of the right to control the activity of a financial organization (including by contract); any merger of financial organizations; and the creation of a financial organization or a change in its charter capital. Whether the transaction requires preliminary consent or a post-transaction notification depends upon whether the size of the charter capital of the organization (for creation or change in charter capital) or the amount of stock or assets acquired exceed a value set by the Government of the Russian Federation.²³

121. For preliminary consent, a petition must be filed with MAP containing the information specified in the law (Article 17.2). MAP may not require the submission of any other information, and must issue a written response to the petition within a maximum of 45 days of its receipt. Post-transaction notification must be made within 30 days of its completion and the scheme for MAP review mirrors that for preliminary consent. Consent may be withheld (or the notified transaction objected to) if the transaction will result in the creation or strengthening of a dominant position on the financial services market and the restriction of competition. MAP may impose conditions intended to protect competition in the relevant market, and may consent to a transaction despite negative consequences if the participants show that its positive effects will outweigh its negative effects. MAP may also permit the transaction if the participants prove that they are holding the relevant shares solely for the purpose of the receipt of income associated with them. In this case, the shares may be held for not more than one year following their acquisition and the only rights that may be exercised in relation to them are the right to receive income and to dispose of the shares. Completion of transactions in violation of the requirements for preliminary consent or notification or failure to abide by conditions imposed by MAP are grounds for the transactions to be voided by a court on the basis of a suit filed by MAP.

122. Provisions prohibiting state acts and actions that restrict competition in financial markets are very similar to those contained in the Law on Competition, as are those related to unfair competition. The law on competition in financial services contains a direct requirement that financial organizations conducting operations with budgetary funds be chosen by open competitive tender, and a requirement that the terms of such tenders be submitted by the executive bodies of the corresponding level for the consent of MAP. Failure to abide by this rule is grounds for the results of the tender to be voided. MAP has been actively enforcing these rules, reviewing in detail the tender conditions, processes and results of tenders of various regional and local bodies and issuing corresponding orders for changes or voiding the results.

Natural gas

123. Pricing for natural gas (with the exception of gas sold by small producers not affiliated with any of the large companies that dominate gas production) is regulated by the Federal Energy Commission on the basis of several Presidential decrees. The powers of FEC in relation to natural gas are the same as those defined in the law on natural monopolies for the tariff regulator – it can set prices by means of direct dictation of specific price, or by the definition of upper limits, mark-ups or maximum coefficients for price changes. The price for gas produced as a by-product of petroleum extraction and sold to a gas processing facility for further processing is regulated by the Ministry for Economic Development and Trade by the same means. The Law on Competition is applied in full measure by MAP.

124. A number of steps have been taken towards regulatory reform in the gas sector, including the restructuring of Gazprom as an open joint stock company, the separation of types of business activities (production, transportation, distribution and sales) into different legal entities and the separation of accounting for subsidiary and related entities within the Gazprom group of companies. Rules for non-

discriminatory access to the gas transportation and gas distribution networks have been adopted and the share of independent participants in the gas sector has risen over the past ten years from none to about 15%. Further reform of Gazprom, including divestment of holdings outside its core functions, isolation of natural monopoly functions and creation of competition in other parts of the natural gas sector has been widely discussed in the press and in policy circles and is expected in the future, but no specific commitments have been made concerning the specifics of such reform or its time frame.

Telecoms

125. Prices for basic telephone services through the traditional network are regulated as a natural monopoly area, with the tariff regulation service currently functioning under MAP. In its work in this area, MAP has focused its efforts on reforming tariffs to eliminate cross-subsidization and to allow competition in areas where the conditions for it are present, as well as on ensuring that tariffs actually cover the costs of running the network and of modernization and development. Cases indicate that in some locations there have been problems with the conduct of companies that have obtained (usually by contract) the right to operate a small part of the network in a specific geographic area, or with the relationship between these companies and others operating other parts of the system. With more than 100 licensed companies, competition is developing actively in mobile and satellite telephone services, but price differences currently keep these modes from competing directly with the traditional network in the provision of basic services.

Licensing requirements and other barriers to entry

126. In 2001, the federal law “On the Licensing of Specific Types of Activities” was adopted to provide a general framework for the licensing of various kinds of activities. Although licensing activities are in general carried out by the regional and local bodies, the federal law is characterized as an exercise of the constitutional power of the federal government to provide for a unified economic space and one of its primary purposes was to prevent the multiplication of licensing requirements at regional and local levels and to require that licenses issued by one regional or locality be honoured by others (after proper notification of the existence of a valid license), thus reducing barriers to the movement of goods and services. The law establishes the general principle that licensing may be required only for those types of activities the conduct of which may result in infringement on the rights and legal interests of citizens, or result in damage to the defence capability or security of the state, to the cultural heritage of the peoples of the Russian Federation, and which cannot be adequately controlled by any other means than licensing (Article 4).

127. The law contains an exhaustive list (in Article 17) of the types of activities for which a license may be required, and federal, regional and local bodies are forbidden to establish licensing requirements for other types of activity. Activities in the list are generally limited to those raising questions of safety and include work related to information security (encoding and decoding of financial information, electronic signatures, printing of securities and others), work involving weapons and dangerous substances (explosives, chemicals, oil and gas, disease agents), transportation services, and medical, veterinary and pharmaceutical activities. There are some items in the list that may raise questions, such as requirements for the licensing of tourist agencies and tour operators, work in the area of cartography, the running of movie theatres, the storage and processing of grain and the sale or processing of scrap metals. Some of the entries in the list are worded quite broadly, including “activities related to” the relevant listing, which may permit the extension of licensing requirements beyond that necessary to protect the public interest. The extent of any limitation on competition, however, would depend upon the nature of the specific licensing requirements in each area.

128. A significant number of activities are exempted entirely from the provisions of the federal law on licensing. Most of these are regulated by more complex sectoral legislation and regulations that cover separately the issues of licensing and supervision. Exceptions include credit organizations, communications activities, activities related to customs rules, production and sale of alcoholic beverages, insurance, securities markets and other exchanges, radio and television broadcasting, natural resource extraction (except fishing which is covered by the licensing law), atomic energy, education and the protection of state secrets.

129. The elimination not only of unnecessary licensing requirements, but also other administrative barriers to entry and to the conduct of entrepreneurial activity has been a priority area of state policy initiative in recent years. In addition to the law on licensing, federal laws on the registration of legal entities (simplifying the registration process) and on the protection of businesses and individual entrepreneurs from abuse related to inspections and supervisory powers have also been recently passed. In June of 2001, a decree of the Government created the Commission of the Government of the Russian Federation for the Reduction of Administrative Restrictions on Entrepreneurial Activity and Optimization of the Expenditures of the Federal Budget on State Administration in the work of which MAP participates. The priority goal of the Commission's work is the elimination of excessive, ineffective or overlapping administrative regulation of such activities. By an initiative of MAP, commissions for the elimination of administrative barriers have been formed in 40 of the regions of the Russian Federation. Representatives of the territorial offices of MAP participate in these regional commissions.

130. It should be noted that price controls are also applied in some of the areas in which licensing is required, as well as in areas exempted from the application of the law on licensing and covered by special sectoral regulation. Examples of this include:

- military products and products related to the nuclear fuel cycle, circulation of which is very restricted and handling of which requires licensing. Pricing for these items is regulated by the Ministry of Economic Development and Trade;
- raw diamonds and other precious stones, production and circulation of which are regulated by laws on mining and natural resources and a specific federal law "on precious metals and precious stones. Pricing of these items is regulated by the Ministry of Finance;
- loading and unloading services at ports and rail terminals, and passenger and freight services at airports, which require licensing under the law on licensing. Pricing for these services is regulated by the Federal Energy Commission.
- vodka and other alcoholic beverages (above 28% alcohol by volume), which are exempted from the law on licensing and regulated by a special federal law controlling their production and circulation and applying both to domestically produced and imported products. Pricing for these products is regulated by the Ministry of Economic Development and Trade.

131. The presence of direct price controls in addition to entry restrictions may suggest that entry restrictions are being applied too tightly – resulting in perceived shortages of necessary services, or that licensing and other entry controls are being applied for reasons other than or additional to protection of public interests.

Price controls on basic goods and services for citizens

132. A list of the most basic goods and services used by citizens remains subject to price control under decrees of the President and of the Government that were issued in 1995. Prices are controlled primarily due to concern about the possible inability of citizens with lower incomes to have access to basic

necessities, and the prices are regulated by the bodies of executive power of the subjects of the Federation. According to MAP's information, prices for the following goods and services are generally controlled:

- natural gas sold to citizens or to housing cooperatives;
- bottled gas sold to citizens for everyday needs, except where used for automobile transport;
- electricity and heat;
- kerosene, hard fuels and consumer fuels for heating stoves;
- water and sewer services;
- public transportation services within a city and serving suburban areas (except trains);
- apartment rents and communal services fees for non-privatized apartments;
- funeral services;
- social services provided by state and municipal service institutions;
- trade mark-ups on the prices of medicines and medical products.

133. In addition, the same executive bodies are permitted to regulate prices or mark-ups on the following types of services provided by transport, supply and trading organizations:

- mark-ups on products sold in the Far North and other regions where the ability to move freight is seasonally restricted;
- mark-ups on products sold to organizations providing food services for schools, technical training centers, and middle and higher educational institutions;
- trade mark-ups on the prices of baby foods (including food concentrates);
- passenger and baggage transport on suburban rail transport (by agreement with the Ministry of Railways and if losses are compensated by the budget);
- passenger and baggage transport on routes within the subject and between subjects of the Federation, including taxis;
- passenger and baggage transport on local air transport and on local river transportation and river crossings;
- transport of passengers, baggage and freight by sea, air or river transport into the regions of the Far North and those equated with them;
- transportation services on spur lines provided by organizations providing industrial rail services and other economic subjects, except for federal rail transport organizations.

134. A few of the goods and services on these lists are in or related to areas of natural monopoly (e.g. natural gas piped into living premises, water and sewer services), where the creation of competition is unlikely or will be a more complicated process that will need to be addressed by staged regulatory reform plans. Some, however, are areas in which competition should be efficient and relatively easy (e.g. automobile transportation of passengers and baggage, trade in baby foods) and it seems likely that price controls imposed in these areas may limit supply and thereby create a vicious circle in which supply limitations are interpreted as a general shortage, which is in turn used to justify continuing price controls.

135. For those goods and services in which competition is possible, the goal of provision for low income citizens can be met more efficiently by providing subsidies directly to those citizens rather than subsidizing the price of the relevant goods for all citizens – whether they require this or not. The creation

of a more direct subsidy system for those living in poverty or at low income levels has been under discussion for a number of years, but it is a complex process and the difficulties in the creation of such a system must be acknowledged, particularly in a country in which a substantial percentage of the population falls into the “low income” category and in which incomes from the cash economy may be significant, making verification of income levels and qualification for income subsidies difficult.

Professional services

136. Professional associations or self-regulating organizations exist for a number of business areas and professional activities. Depending upon the legal regulation of such bodies, they may restrict competition through entry restrictions or through fee guidelines, practice area restrictions, advertising restrictions or other means. MAP has previously taken action on both the federal and the regional level concerning competition restriction by professional or business associations. Examples include objection by the central MAP office to a legal provision making membership in a self-regulating professional association mandatory for professional participants in the stock market, after which this requirement was rescinded, and actions by territorial offices against price setting by local realtors’ groups. MAP also participates in some associations, such as the Russian Advertising Board, in which representatives of advertisers, consumer protection bodies and representatives of MAP participate.

137. There is no unified legal regulation of professional and business associations and their authorities. Specific laws concerning professional activities make references to such associations and may list their primary purposes or their specific powers and authorities. Provisions in the laws concerning auditors associations, evaluators associations and associations of professional participants in the stock market all permit the associations to establish professional standards for their members and to apply sanctions where they are violated. None of the laws specifies the permissible content of such rules and standards. None of these laws appear to make membership in a professional association mandatory, so there is no direct control over entry, but close cooperation of the associations with regulatory bodies may provide influence over entry conditions, as well as in state disciplinary proceedings. The law on auditing activity, for example, permits accredited auditors associations to take part in the certification of auditors by the authorized federal body, to monitor the compliance of individual auditors or auditing organizations with rules, and to seek sanctions against specific auditors or organizations and to the granting, suspension or annulment of qualifications certificates.

138. There may be competition problems in relation to specific areas of professional services that need to be addressed, although the number and extent of these is not certain. Some types of legal services may only be provided by members of a collegium of advocates, which collegia are relatively free to set their own membership requirements and entry restrictions. Persons performing services related to the conduct of bankruptcy proceedings for enterprises are apparently required to receive licenses and to obtain membership in a professional association. It is not clear whether similar arrangements may exist in relation to medical services.

139. In at least some instances, potential restrictions are a product of treatment of a profession as a quasi-public or quasi-state activity rather than as a business activity. The services of notaries may serve as an example.²⁴ Notarial chambers work together with the Ministry of Justice and regional departments of justice in defining the number of notary positions that will be formed in each notarial district, both for state employed and for privately practicing notaries. Persons are assigned to fill these positions as they become free, on the basis of a recommendation of the notarial chamber. Candidates for the receipt of a position as a notary must complete a one year *stage* with a practicing notary and possess a license obtained after passage of a qualifying examination. The number of available *stages* and the procedure for and content of the qualifying examination are also determined jointly by the Ministry of Justice and the notarial chambers.²⁵ A candidate for a position as a private notary must be a member of notarial chamber. The law

treats notarial services as a special, quasi-judicial category of activity – restricting the other earnings of notaries to fees from publishing and teaching activities (the same restrictions are applied to judges) and specifically stating that notarial service is not considered entrepreneurial activity. However, private notaries are free to set their fees on the many notarial services that are not state mandated (on legally required notarizations all notaries are required to charge the fees set by the state) and their earnings are their own to keep. While it is clear that the system of notarial districts is a direct restriction on entry and notarial fees are reported to be high, the legal definition of notarial activity as “not entrepreneurial activity” means that the Competition Law does not apply.

5. Competition Advocacy for Regulatory Reform

140. The legislative and policy development work performed by state bodies of the Russian federal government takes place within a very structured set of procedures that emphasizes planning and the formal assignment of specific tasks. Much of MAP's competition advocacy in relation to federal policies and legislative measures takes place within this framework and relies on its role and functions as defined by official procedures rather than on independent agitation for reform. While MAP should certainly make use of this important means for promoting competition, the cooperative structure of Government procedures and a strong tradition of seeking consensus may lead to a need for compromise to prevent log-jams and preserve working relationships, which in turn may prevent MAP from continuing to seek further improvements after Governmental approval has been given. The breadth of MAP's responsibility leads to a large number of task assignments and may prevent concentration of attention on the most important competition issues.

5.1 Participation in policy formation and legislative drafting

141. As a Ministry within the composition of the Government of the Russian Federation, MAP is represented at all sessions of the Government and has the opportunity to comment on any draft law or draft decree of the Government or general policy change that is discussed. In addition, as a part of the Government the Ministry takes an active part in the formation of the plans that are drafted each year concerning the work to be undertaken by the Government in the coming period, including the Plan of Measures of the Government of the Russian Federation for the Medium Term and the Plan for Legislative Drafting Activities of the Government of the Russian Federation. These plans define the priorities of the Government concerning the drafting of legislation, policy documents and other matters and assign primary and cooperative responsibilities for their completion to the ministries and other bodies within the Government. One of the most important ways in which MAP currently engages in competition advocacy is its work to include important pro-competition legislative and policy changes in these plans. In addition to tasks included in the plans, additional tasks concerning draft legislation or work on policy documents are assigned to MAP and other ministries as necessary during sessions of the Government.

142. In 2002, MAP served as the primary ministry for the drafting and submission to the Government of a total of 9 draft laws, including the law amending the Law on Competition that was passed in October of that year. In addition, MAP participated as a cooperating ministry in the drafting of 30 other draft laws. In the legislative drafting plan for 2003, approved in February, MAP is assigned as the primary ministry for drafting of amendments to the law on advertising, and as a cooperating ministry for work on drafts of new laws on the regulation of international trade and on the legal protection of business names, and on amendments to the law on the postal service and to the law on natural monopolies. In addition, the Ministry of Economic Development and Trade, with the cooperation of MAP, was given a separate assignment concerning an amendment to the Law on Competition increasing the threshold amounts for merger control. The corresponding draft was submitted to the Government by MEDT on August 15, 2003.

143. In the separate plan for activities of the Government for 2003, a section is included on measures to be taken for the purpose of implementing policies on socio-economic development of the Russian Federation that includes work on the reform of state administration, institutional and infrastructure reforms, and stimulation of economic diversification and openness, as well as other issues. Within this section of the plan alone, MAP is assigned as the primary ministry for 2 activities and the cooperating ministry for 20 additional measures. Among these are work on elimination of combinations of exercise of state power with participation in entrepreneurial activities (as part of administrative reform), preparation of a procedure for exercise by MAP of supervision over tenders for purchasing by natural monopolies, and development of draft federal laws concerning a procedure for proving the need for state intervention in the economy and a requirement for periodic re-evaluation of the effectiveness of regulatory measures. MAP is also assigned to participate in the preparation of plans for reform in the area of electricity provision for 2003, development of measures for carrying out rail reform in 2003-2005, work on legislation related to self-regulating organizations, work on issues of accounting and the use of international standards, development of a conception for a system of export guarantees for industrial products and in work on conforming Russian legislation to the requirements of the WTO, as well as others measures. The list of tasks emphasizes how many of the questions related to major economic and administrative reform programs have significant competition aspects, and also how many resources MAP would need to expend to take an active part in all of the listed work. While all of the listed areas of work are important, the large number of tasks and their varied nature may prevent MAP from focusing its available resources on core competition issues.

144. For very broad or complex issues, those on which the interests and opinions of different parts of the Government may be at odds, and where an inter-departmental approach is needed on an ongoing basis, government commissions or other advisory bodies may be created in which MAP may participate and which provide additional opportunities for advocacy of pro-competition policies. Examples of MAP's participation in such commissions include its role in the government commission addressing regulatory reforms in infrastructure industries, and its membership in the commission on protective measures in international trade and the setting of tariffs.

145. The procedure for the work of the Government also gives MAP opportunities to comment upon and, where required, object to the drafts and proposals submitted by others, even where MAP was not included among the bodies assigned to develop the draft. As a rule, such drafts are circulated to all of the bodies that make up the Government for comment prior to their passage, and substantial efforts are made to eliminate objections before the document is approved. This includes draft laws and other documents that are not submitted by Government but rather by legislators, by regional bodies, by courts or by others possessing the authority to submit legislation directly to the Federation Council. The procedure followed by the State Duma concerning such drafts requires that they be submitted to the Government for the receipt of a formal conclusion, which involves the same opportunity for commentary by the members of the Government.

146. Although the cooperative structure for the work of the Government gives MAP many opportunities for competition advocacy in the form of comment on legal and policy proposals, it may have negative as well as positive aspects. For example, while the fact that efforts are made to resolve objections and achieve consensus approval mean that MAP's own objections will be seriously considered, it also means that objections of other ministries to MAP's drafts and proposals will be equally seriously considered and may weaken pro-competitive positions. In both instances, pressure to move forward with the large burden of work may require compromises, after which MAP may not be in a position to reopen the question and press for the compromise to be rejected.

5.2 *Participation of MAP staff members on corporate boards*

147. A somewhat unusual opportunity for competition advocacy is created by the fact that MAP staff members at both the federal (central) and territorial levels sometimes sit as members of corporate boards for companies in which the state has a large ownership interest. This practice is not limited to representatives of MAP, and other officials also sit on corporate boards as representatives of the state. The interests of the state are often defined by specific policies in relation to the company or sphere of activity articulated in plans or other statements, and in many cases the board member receives specific directives from the corresponding state bodies or the Government concerning the vote that is to be cast on concrete issues. MAP staff members have been assigned to fulfil this role in some corporate entities in areas of natural monopoly where there may be significant competition issues, such as Gazprom, RAO UES, railways and so forth. Whether or not the promotion of competition has been specifically articulated as the Government policy, MAP staff members see one of their tasks in relation to such companies as raising competition issues in relation to strategy proposals and discussions within the board. For example, in one board meeting a representative of MAP urged against the conclusion of agreements between insurance companies and the railway on the grounds that it would limit competition.

148. Although this practice raises interesting possibilities for competition advocacy at the level of individual, influential firms, it also raises concerns about potential conflicts between participation in the formation of corporate strategy and corporate decision making and MAP's role in enforcing the law. One means by which MAP attempts to avoid such conflicts is by the use of abstentions during board votes. This strategy is most commonly used in relation to votes concerning transactions which, if approved by the board, will have to be the subject of MAP review to determine whether they may restrict competition.

5.3 *Competition advocacy and public education*

149. While public education and information activities and competition advocacy are usually considered to be separate functions, they are closely related and effective competition advocacy is unlikely to be possible where general understanding of the goals and benefits of competition are weak and there are indications that this is the case in Russia. Although MAP's activities receive quite a bit of press coverage, that coverage tends to be brief and is often limited to reporting only the fact of an action taken or decision made without explanation of the reasoning. MAP has taken a number of steps in recent years to improve public access to information, including the relatively recent establishment of a substantial website containing copies of relevant legislation and some information on MAP's activities in each of its areas of responsibility. Low rates of Internet use, however, means that the website's ability to serve as a source of information to the general public is limited. MAP also publishes a bulletin containing articles and analysis, but a lack of resources severely limits the press run and the bulletin is currently provided primarily to MAP's own departments and territorial offices and to other state bodies.

150. While some progress is being made in this area, there is a need for significant improvement. Materials addressed to a general public audience explaining the purpose and benefit of competition and the basic content of the competition laws are not available either in print or on MAP's website, nor are clear, plain language guides to MAP's procedures and requirements. A few of MAP's case decisions are published or described on its website, but the vast majority are not regularly published in any form. This makes it difficult for anyone other than the parties to learn of them and for lawyers and businesses to develop an accurate sense of MAP's approach to specific questions in the application of the law and to conform business behaviour accordingly. The website does contain an increasingly large selection of MAP's analyses of specific markets, which is a useful innovation. The opportunity for advocacy that this presents, though, is not always effectively used, since many of the market reports are limited to description and only a minority contain direct discussion of specific competition problems that are encountered in the market or specific recommendations for changes that need to be made to increase competition.

Production of publications is expensive and resource limitations play a large role in preventing more rapid progress in this area. Nonetheless, MAP needs to find means to inform the public concerning the requirements the competition law places on market behaviour and to make at least its more important decisions readily available.

6. Conclusions and Recommendations

6.1 Overview

151. Despite some periods of instability, Russia has completed the transformation of a large number of basic economic and legal institutions, replacing many of them with completely new structures. The creation of a competition-based market economy has been articulated as a central goal of the restructuring process, with support for competition strongly expressed in the new Constitution and Civil Code, as well as in the early creation of a competition law and competition authority.

152. In practice, the competition authority – MAP and its predecessors – has faced a shifting policy environment that has not always supported the immediate creation of competition or the direct enforcement of competition law above other policy goals such as rapid privatization, crisis recovery and the creation of internationally competitive structures. Despite this, it has made significant contributions to the creation of a competitive market environment both through enforcement and through participation in policy formation and legislative drafting efforts. These include the substantial reduction of direct barriers to the movement of goods and services within the country and a leading role in the creation of the basic legislative frameworks for consumer protection, advertising regulation and other tasks necessary to allow markets to function in a civilized manner.

153. The competition authority has also played a central role in regulatory reform efforts directed at natural monopoly sectors. It led the drafting effort for the initial law on natural monopolies, creating a narrow definition of natural monopoly and separating tariff regulation in those sectors from other, potentially competitive areas of activity. As current regulatory reforms move forward, MAP continues to play an active role in the process – proposing models for the restructured industries and supervising the conduct of their newly formed components to ensure non-discriminatory access for competitors. Strong public and business interest in structural and regulatory reforms, particularly in the energy sectors, may result in a heightened profile for competition issues and opportunities for MAP to improve support for enforcement of competition law across the board. Care will need to be taken, however, to ensure that adequate regulatory structures are in place and that MAP is not assigned more responsibilities for supervision and enforcement in these areas than it can reasonably perform.

154. Some serious structural and legal problems currently interfere with MAP's ability to effectively enforce competition law and undertake focused competition advocacy, both in relation to regulatory reform and in the economy overall. Chief among the structural problems is the breadth of MAP's responsibilities. MAP and its predecessors played an important role during the first decade of transition in identifying and helping to fill major gaps in legal and institutional structures for the regulation of activities of companies in the market. Most of these basic structures are now in place, however, and Russia's markets have been developing rapidly. The mission of the competition authority needs to shift away from broad responsibility for the creation and regulation of market activity to a clear focus on the creation and protection of competition. Other state functions related to business activity, such as the support of small businesses, advertising regulation, and supervision of commodities exchanges, are not unimportant but they require differing sets of skills and different types of activities and should be performed by other bodies.

155. The substantive competition law, while relatively complete in terms of its areas of coverage, does not contain credible sanctions and fails to provide MAP with sufficient investigative authority. A lack of

discretion to refuse cases, broad wording of some provisions of the law, and low merger control thresholds combine to produce unrealistically large workloads containing many matters unlikely to have any effect on competition as a whole. MAP expends large amounts of resources resolving individual disputes between entrepreneurs and state bodies and between utility providers and their customers – functions that do not appreciably increase levels of competition and that could be more efficiently and effectively performed by other bodies. Unless these structural and legal problems are addressed, it will be difficult for MAP to move toward more effective responses to the most serious competition problems and to meet the challenges of enforcement in newly deregulated sectors of the economy.

6.2 *Specific policy options for consideration*

6.2.1 *Narrow MAP's focus to competition issues alone*

156. MAP's tasks are too broad and too varied in their nature for any single body to be able to devote adequate attention to monitoring, law enforcement, public education and policy development in each of those areas of responsibility. The various tasks demand different types of analysis and different information sources, imply differing patterns for law enforcement activities, and require cooperation with different groups of state bodies, firms and citizens. In order for MAP to address the most serious competition issues facing the Russian economy, participate appropriately in the major reforms of infrastructure industries now underway, and develop the legislation and law enforcement methods that will prevent markets from becoming a source of abuse rather than of wealth and efficiency, it will need to be relieved of many of its non-competition-related responsibilities.

157. The process of redistribution of authority that now appears to be underway in which tariff regulation functions are being moved out of MAP should be completed, with communications tariffs moved to one or more state bodies outside MAP. Other functions not directly related to the promotion and protection of competition, including the enforcement of legislation and regulations on advertising, the support of small and medium businesses and the supervision of commodities exchanges, should also be moved to other bodies. This could be accomplished either by the creation (or re-creation) of separate bodies for these purposes or by the assignment of some of the relevant enforcement responsibilities to existing bodies. (For example, existing bodies already carrying out licensing and supervision of broadcasting and publication activities might take on the enforcement of advertising legislation in the respective media.)

158. MAP's close coordination with consumer protection bodies is complementary to its competition responsibilities and an ability to draw upon the consumer protection law may be required, at least under the current competition law, to allow MAP to reach situations in which consumers (rather than commercial actors) are the primary victims of anticompetitive behaviour. Consideration should be given, however, to a redistribution of enforcement authority that would move some of MAP's responsibility for responding to individual consumer complaints to other bodies and would allow it to focus its attention on problems related to competition issues affecting consumers.

6.2.2 *Broaden responsibility for support of competition*

159. Assignment of all competition concerns only to the competition authority leads to an unrealistic multiplication of its tasks and responsibilities and may foster counterproductive attitudes and behaviour on the part of other bodies (branch ministries, privatization authorities, sectoral regulators, fiscal and auditing bodies, and others) that are unaware of competition issues or view their primary responsibilities as unrelated to competition concerns. Inclusion of specific responsibilities for promotion of competition or elimination of competition restrictions in the mandates of ministries, regulators and other bodies would broaden appreciation of the centrality of competition. One area in which broader distribution of

responsibility for competition could have a significant impact would be further reform in the areas of price regulation, licensing and other restrictions. While MAP can act on its own initiative against improperly imposed price limits, licensing and other competition restrictions, exemptions where these are imposed by certain kinds of government acts appear still to cover a broad group of existing restraints administered by a variety of state bodies. Making the state bodies administering such restrictions responsible for reviewing them and removing (or proposing the removal of) as many as possible would require the bodies to explicitly consider the competition impacts of government regulation in their spheres and evaluate alternatives, creating a valuable skill as well as promoting further regulatory reform. MAP could provide consultation and serve as the coordinator for such a project, receiving the analysis and proposals of the various state bodies and combining them into proposals for the amendment or repeal of the relevant legislation. Similarly, the task of ensuring fair competition for state purchasing contracts could be moved to fiscal or auditing bodies, while dispute resolution functions currently being performed by MAP in relation to state actions and utilities contracts can be more efficiently performed by courts and sectoral regulators.

6.2.3 *Provide credible sanctions against violators*

160. Provide credible sanctions against violators in the form of substantial fines or other penalties to be imposed upon a finding of a violation. Fines must be high enough to provide a serious deterrence to violations, which may require that they be adjusted to take the size and economic position of the violator into account (an example of this is the percentage of turnover measures in use in some jurisdictions). It would also be desirable to encourage private actions for damages as both a supplementary form of sanction against violators and as a means to raise awareness of competition issues in the business community. As MAP becomes more able to concentrate on and successfully investigate the most serious forms of violation, it would be appropriate to address the possibility of criminal prosecutions and to move toward changes in the law and the organization of cooperation with prosecutorial bodies that would be required. Priority in the short term, though, should be given to increasing civil and administrative penalties and enforcing them effectively.

161. Increases in sanctions should be made simultaneously with measures to restrict MAP's caseload to the most serious violations, but if the presence of a considerable number of minor violations in past practice raises concerns about the imposition of significant sanctions, an alternative would be provisions that tie the amounts of fines to the amount of damages caused by the violation. This solution would probably require that legislation contain specific measures for the estimation of damages to avoid the importation of restrictive concepts of damages and strict standards of proof from other areas of the law. There may be difficulties with the imposition of increased sanctions of the type recommended through the Code of Administrative Violations (as are current fines for failure to execute an order), as they would greatly exceed its general limitations on penalties and are not well suited to imposition through its simplified proceedings. If necessary, the law could provide for the sanctions to be imposed by a court on the basis of an action by MAP.

6.2.4 *Substantially reduce merger control submissions and strengthen economic analysis, information requirements and the use of structural remedies for those most likely to affect competition*

162. Very significant increases in the merger control thresholds along the lines of those currently proposed by MAP will certainly be required to give competition authority staff the ability to do more than a brief review of submitted files for completeness. Strong consideration should also be given to the addition of criteria that would prevent companies whose own asset values meet the single, combined threshold from being required to notify (and MAP required to review) every transaction they conduct. A minimum value for the second company participating in the transaction could serve this purpose and be workable under current accounting conditions. As accounting practices move toward international

standards and objective market valuations of transactions become more readily available, merger control rules should move away from overall asset value criteria toward the use of measures that more accurately reflect the economic activity of the participants in the transaction (e.g. turnover).

163. Even with a reduced burden, it may be appropriate to institute a two-tiered review system, allowing mergers unlikely to affect competition to be dealt with quickly and on the basis of limited information, while providing more generous time frames for the analysis of those that are of greatest concern. Parties to transactions should not be allowed to hide their true corporate structures and control relationships behind offshore ownership and pressure to facilitate inward investment should not result in the approval of transactions where parties have failed to provide adequate information on beneficial ownership and control. Increased use of structural remedies should allow MAP to accommodate mergers designed to increase international competitiveness without permitting monopolization or abuses on domestic markets.

6.2.5 *Focus enforcement on state action that has an effect on competition*

164. Recent change in the law appears to require an effect (or likely effect) on competition before a violation of the state action rules may be found. This provision should be strictly interpreted to protect competition rather than individual competitors. Cases concerning individual license denials, lease renewals, zoning disputes, land rents and similar matters should be referred to courts or other dispute resolution facilities and resolved on the basis of standards for decision reflected in the relevant laws. MAP should not be responsible for reviewing such matters to determine whether a state body's decision is "groundless" and therefore an improper interference with an economic actor. For cases in which a state action or policy does affect competition, a more complex standard for evaluation needs to be developed that balances the effect on competition against the legitimate needs and responsibilities of the state actors. Achieving a clearer focus in this area may require a change in legislation to eliminate vague prohibitions on "groundless" actions by state bodies and more clearly articulate the elements of a violation.

6.2.6 *Relieve MAP of the burden of case-by-case dispute resolution concerning contracting practices by natural monopolies and regulated entities*

165. The absence of comprehensive regulation of natural monopoly activity has left MAP with a large burden of abuse of dominance cases that are in essence individual disputes between a regulated monopoly and its customer concerning service obligations, applicable tariffs or contract terms. MAP must resolve these cases by applying its quasi-judicial procedures, which require a showing in each individual case that the regulated monopoly is dominant and that the specific contract terms or behaviour meet the standard for abuse, and permit a remedy that applies only to the specific contract considered. This is a very inefficient means for the resolution of these issues, leading to repetitive consideration of issues, and in some instances to lengthy court appeals concerning the dominance of regulated monopolies and the abusive nature of specific behaviour, the outcomes of which sometimes vary.

166. A far more efficient resolution of this problem would involve a more detailed and comprehensive regulation of contract terms and service obligations by sectoral regulators. The regulators should possess the power to resolve complaints and disputes about such matters through simplified proceedings and to impose a solution that will bind the regulated entity in all similar situations. This would allow the regulator to make decisions on such matters as permissible types and levels of penalties that are consistent with the pricing models being used to set tariffs, and would avoid the repetition and inconsistencies inherent in the current system. MAP would continue to serve in a supervisory role, able to address undue restriction of competition by the regulator through its authority over anticompetitive actions and decisions of state bodies, but no longer required to serve as the initial forum for the resolution of thousands of specific complaints.

6.2.7 *Increase MAP's investigative powers*

167. Increase MAP's investigative powers to allow in practice the conduct of searches of premises without advance warning, the taking of evidence from those premises and the interview of staff and witnesses. More significant and immediate sanctions should also be provided for failure to provide information in response to written requests, with a possibility for increasing penalties with increased delay. Deliberate provision of false information should be separated from failures or delays and should be subject to greater penalties.

6.2.8 *Reduce or eliminate MAP's responsibilities for general supervision of state purchasing and resist assignment to MAP of similar tasks during regulatory reform*

168. The recent addition to the Law on Competition of "antimonopoly requirements" applied to all competitive bidding for state purchases appears to make MAP responsible for supervising all such activity and seeking to void tenders where improper conduct or conditions were present. In the financial services sector, MAP's responsibilities go further, with not only a general requirement that services for state bodies be obtained through tender, but also a requirement that the terms for tenders for all purchases of financial services with budgetary funds be approved by MAP. The volume of state purchasing is enormous, and these provisions may impose a nearly unlimited drain on MAP's resources as it attempts to monitor state purchasing at all levels and is drawn into disputes concerning whether the specific requirements contained in a tender are appropriate or are designed to advantage a particular supplier. While a requirement that state bodies use competitive purchasing procedures may stimulate competition in a variety of markets, enforcement of that requirement should be entrusted to state financial and/or auditing bodies, backed up by a system for private complaint. It has been proposed that MAP take on similar supervisory responsibilities in relation to the purchasing activities of natural monopolies within the newly formed regulatory structures, in order to ensure that these do not advantage related companies or otherwise restrict competition. Concern about such activities may well be appropriate in the Russian environment, where divestiture of non-core holdings by infrastructure monopolies is being conducted in some areas simultaneously with, rather than prior to, the first stages of other structural reform (e.g. railways). Detailed supervision of such purchasing activities, however, would entail many of the same problems as detailed control of state purchasing, and is a task more appropriate to sectoral regulators than to the competition authority.

6.2.9 *Resolve uncertainties concerning legal treatment of agreements through clear interpretation or amendment*

169. Uncertainty concerning the application of the collective 35% share requirement for vertical agreements and the apparent inability to exempt horizontal agreements other than cartels unless they have been voluntarily submitted for preliminary approval (both resulting from the 2002 amendments) could make an otherwise desirable enforcement focus on agreements difficult and lead to counterproductive results. While both of these issues may be resolved when MAP completes its planned draft of a fundamentally new law, the drafting, submission and adoption process for such a law is likely to take several years, and functional provisions on agreements cannot wait that long. If possible, steps should be taken to deal with the problem by interpreting the new language in a reasonable manner, so that the 35% market share requirement applies if either of the participants possesses it (just as collective asset value criteria for merger control are considered to be met when one of the participants accounts for the entire sum), and non-cartel horizontal agreements may be approved through the same process as that used for preliminary approval, even if they come to light during an investigation and were not voluntarily submitted. If such an interpretation cannot be made, or if it is rejected by the courts, it may be necessary to seek corrective amendment, perhaps at the same time that the current proposal on increase of merger control thresholds is considered.

6.2.10 Improve the economic analysis and information gathering capabilities of MAP staff

170. Staff members report that they do not have the time to undertake such standard tasks as telephone interviews of market participants or the distribution of questionnaires for the purpose of market definition, nor do they receive timely and accurate information. The reductions of enforcement burdens and increased investigatory powers recommended above may themselves lead to improved economic analysis by providing more opportunities for such work to be performed and better quality information. Information held by other government bodies, including the state statistics agency, branch ministries and bodies supervising state enterprises, should be available to MAP where necessary for investigations and analyses. Receipt and circulation of firm-specific information by all state bodies is complicated by a lack of clear legal rules on confidential business information. Many state bodies and officials are subject to a general requirement to compensate damages caused by improper revelation of confidential information, and in the absence of clearer definitions of what may be confidential and specific rules on what is sufficient protection of such information, the liability provisions tend to discourage information sharing. This is a long-standing problem that needs to be resolved by general legislation on the issue.

171. Although improvements in workloads and information flow may be helpful, the marked lack of in-depth economic analysis in individual cases, the lack of advanced economics training among staff and the high staff turnover rates suggest that practical training in economic analysis and the attraction and retention of qualified staff will need to be a high priority. One possibility for consideration might be the creation within MAP of a specialized economic analysis department that would both assist other departments on economic issues and prepare training materials and guidelines to give staff members practical training on case investigation and analysis using realistically available information sources.

6.2.11 Improve transparency of MAP policies and actions and public understanding of the benefits of competition and the provisions of competition law

172. A first-order priority should be the preparation and dissemination of informational materials designed for the general public and for the business community explaining competition and the provisions of the competition laws. Without clear notice concerning the contents of the law, enforcement actions raise procedural fairness questions. And better appreciation of the benefits of competition and the provisions of the competition laws will allow the public and the business community to be active partners with MAP in the promotion of competition and the discovery of violations.

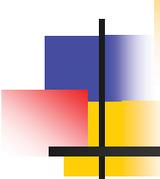
173. Priority should also be given to improving access to MAP's written decisions and to ensuring that public notices and information contain not only the fact that specific actions or decisions have been taken, but also a clear statement about the reasoning behind them. This will allow those interested to develop an accurate understanding of MAP's approach to the interpretation and enforcement of the law and allow them to conform their conduct appropriately. Moreover, transparency is required to reassure the public and the business community about the quality of MAP's analysis and the adequacy of its motivations. In its absence, decisions may seem random or suggestions of inappropriate motivations for particular actions may appear credible, leading to an atmosphere of insecurity and mistrust that are not conducive investment and growth.

NOTES

1. The Law of the USSR "On Enterprises," for example, passed in 1990, included provisions for the control of prices resulting from monopoly and allowed the state to undertake measures against monopolization and to impose various penalties on enterprises which violated the relevant controls. (Articles 26-34).
2. Difficulties in defining the roles to be played by the USSR and by its constituent republics in legislation and regulation were also a factor during the early stages of development of competition law and policy. A competition law was, in fact, passed at the Union level as well as at the Russian level, although the Union law was considerably less detailed. A Law of the USSR "On the Limitation of Monopolistic Activity in the USSR" was adopted on July 10, 1991. (Ведомости Съезда Народных Депутатов и Верховного Совета СССР, 1991, No. 31, Item 885) Although forgotten by many commentators in the wake of the enormous changes that have occurred in the ensuing years, these tensions were an important consideration at the time.
3. The body responsible for enforcement of competition law in the Russian Federation was originally called the State Committee of the Russian Federation for Antimonopoly Policy and the Support of New Economic Structures, often abbreviated as GKAP, and thereafter the State Antimonopoly Committee, or GAK. In 1998 it became the Ministry for Antimonopoly Policy and the Support of New Economic Structures, usually referred to simply as the Ministry for Antimonopoly Policy or MAP.
4. Law "On Competition and the Limitation of Monopolistic Activity on Goods Markets," Ведомости Съезда Народных Депутатов РСФСР и Верховного Совета РСФСР, 1991, No. 16, Item 499. The law has since been amended eight times by: Law of the RF No. 3119-1 of 24 June 1992; Law of the RF No. 3310-1 of 15 July 1992; Federal Law of the RF No. 83-FZ of 25 May 1995; Federal Law of the RF No. 70-FZ of 6 May 1998, Federal Law of the RF No. 3-FZ of 2 January 2000; Federal Law of the RF No. 196-FZ of 30 December 2001; Federal Law of the RF No. 31-FZ of 21 March 2002; and Federal Law of the RF No. 122-FZ of 9 October 2002.
5. For example, Decree of the Government of the Russian Federation, No. 576, of August 11, 1992, "On State Regulation of Prices and Tariffs on the Products and Services of Enterprise Monopolists in 1992-93" established state regulation of pricing, mandatory declaration of price increases and profitability limitations on goods produced by enterprise-monopolists.
6. See, *e.g.*, Рынок и Антимонопольное Законодательство России (The Market and Russian Antimonopoly Legislation) Iustitsinform: Moscow 1992 -- the first major publication of the new committee. The book contained an explanation of the proper application of the core articles of the Competition Law -- Комментарии к основным статьям закона с учётом практики его применения (Commentary to the Fundamental Articles of the Law in Light of the Practice of Its Application) (Yu. Burlinov, A. Podlesnyi, B.J. Phillips and S.J. Reynolds), which was developed by the new committee in cooperation with the OECD's Competition Division.
7. The Committee's general report on its activities STATE REPORT ON THE DEVELOPMENT OF COMPETITION ON THE MARKETS OF THE RUSSIAN FEDERATION AT THE FEDERAL AND REGIONAL (LOCAL) LEVEL, which was issued in 1995 and summarized the Committee's experiences through 1994, commented on the unsatisfactory results of the Register in this respect and described the change to a monitoring system. (pages 31-33)
8. Law of the Russian Federation "On Natural Monopolies," Собрание законодательства РФ (Collected Legislation of the Russian Federation) 1995, No. 34, Item 3426.
9. Edict of the President of the Russian Federation "On the Creation of the State Committee of the Russian Federation for the Support of Small Entrepreneurship," Собрание законодательства РФ (Collected Legislation of the Russian Federation) 1995, No. 24, Item 2262. A set of general principles for state support of small enterprise was articulated in the Law of the Russian Federation "On State Support for Small Entrepreneurship," Собрание законодательства РФ (Collected Legislation of the Russian Federation) 1995, No. 25, item 2343.

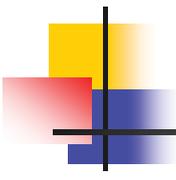
10. Federal Law of the Russian Federation "On Advertising" Собрание законодательства РФ (Collected Legislation of the Russian Federation) 1995, No. 30, Item 2864.
11. Decree No. 191 of the Government of the Russian Federation, "On the State Program of Demonopolization of the Economy and Development of Competition on the Markets of the Russian Federation (Basic Provisions and Priority Measures)" March 1994.
12. See the Law of the Russian Federation "On the Insertion of Amendments and Additions into the Law of the RSFSR "On Competition and the Limitation of Monopolistic Activities on Goods Markets," Собрание законодательства РФ (Collected Legislation of the Russian Federation) 1995, No. 22, Item 1977.
13. The regulatory bodies were slow to be created after the passage of the Law on Natural Monopolies. It took until 1997 for the legal acts creating all three bodies (one for energy, one for communications and one for transportation) to be passed, and by the time of the 1998 financial crisis only the Federal Energy Commission had really been staffed.
14. Federal Law of the Russian Federation No. 117-FZ "On the Protection of Competition on the Market for Financial Services," June 23, 1999. [official publication cite]
15. Edict No. 1091 of the President of the Russian Federation of 4 September 2001 "On Amendment of Edict No. 1194 of the President of the Russian Federation of 29 November 1995 "On the Federal Energy Commission of the Russian Federation."
16. For simplicity an exchange rate of 30 rubles to 1 US dollar is used throughout this chapter.
17. According to MAP's statistical reporting, the first half of 2003 saw 1401 petitions and 486 cases initiated. This is an increase over the first half of 2002, for which the corresponding numbers were 1278 petitions and 437 cases initiated. (MAP December 2003.)
18. MAP November 2003.
19. The figure is about 47%, with 56 university degrees in law and 73 in economics or management.
20. Of the 1408 staff members in the territorial offices, 1218 had higher educations, with about 50% of those being degrees in law or in economics or management. The figures for the territorial offices were 302 university degrees in law and 408 in economics or management. 56 territorial office employees had candidates degrees, and 3 doctoral degrees. Figures were provided by the central MAP office responsible for personnel issues. A number of staff members also obtained second university degrees with a new concentration, often through part-time programs sponsored by the Russian Academy of State Service. Although some of these second degrees are in the areas of law or economics, they are not counted separately here since there appears to be significant overlap (e.g. a number of senior staff members in the central MAP office with initial training in economics took "second degrees" in law through this program).
21. These figures include both those who were fired and those who left voluntarily. If only those leaving of their own volition are counted, the loss percentages are 15.6% for the territorial offices and 23% for the central office for 2002.
22. The percentage is defined by the Government of the Russian Federation. The current provision is Decree No. 194 of 7 March 2000, which establishes the 10% turnover figure and also confirms an appended procedure for definition of the turnover and of the boundaries of the relevant financial market.
23. At present the amounts are defined by Decree No. 194 of the Government of the Russian Federation of 7 March 2000, and are 160 million rubles in charter capital for credit organizations, 10 million rubles for insurance organizations, and 5 million rubles for other financial organizations.

24. The general law governing notaries in the Russian Federation is the Fundamental Principles of Legislation of the Russian Federation on the Notariat, No. 4462-1, of 11 February 1993. (Ведомости Съезда Народных Депутатов и Верховного Совета РСФСР, 1993, No. 10, Item 357.)
25. Order No. 179 of the Ministry of Justice of the Russian Federation of 21 June 2000.



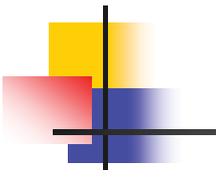
DEVELOPMENT OF COMPETITION POLICY IN THE RUSSIAN FEDERATION

Mr. Ilya Yuzhanov,
Minister
of the Russian Federation for
Antimonopoly Policy and
Support of Entrepreneurship



Improvement of the competition policy:

- development of the Russian competition legislation;
- creation of the system control over the observance of the competition while granting the state aid;
- participation in the procompetitive restructuring of the natural monopolies in the Russian Federation.

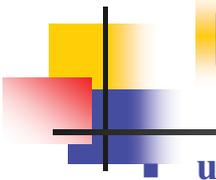


Promising changes of the competition legislation:

New Law on Competition

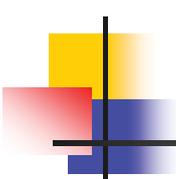
Aim:

perfection of the competition legislation, aimed at the increase of the enforcement efficacy.



New Law on Competition:

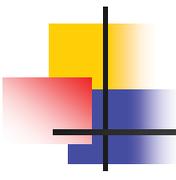
- unification of the rules, regulating competition relations on commodity and financial markets in the same law;
- switch in the control over economic concentration in most of the cases from the preliminary authorization (mandatory) to the notification;
- switch to the post-merger control in all cases, when a transaction is made in the frames of one group of persons;
- legislative establishment of the obligation to disclose the information about the real beneficiaries, taking part in transactions of the offshore companies;
- introduction of the procedure of the antimonopoly agencies' listening to the opinions of the transaction's participants and other persons in the process of the public examination of the concrete transaction;
- modification of the existing procedure of laying down demands, directed at the ensuring of competition,



New Law on Competition

(continuation) :

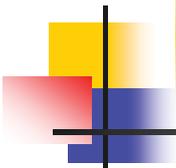
- revelation mechanism's improvement of anticompetitive agreements;
- reinforcement of the antimonopoly control over abuse of dominant position;
- specification of the order and register's of the economic entities, having the market share of the specified goods more than 35 % formation and keeping;
- estimation of the exceeding beneficial effect over negative consequences for the examined commodity market as a result of the anticompetitive actions specification's;
- strengthening of the powers of the competition authorities in receiving of information and suppression of a violations of the competition legislation;
- toughening of penalty sanctions for violation of the competition legislation.



The draft of the Law

“On alterations to articles 17 and 18 of the Law on Competition”

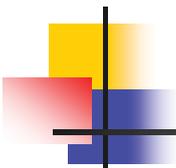
The threshold value's increase of the cumulative assets of economic entities, whose transactions come within the antimonopoly control.



Preliminary control:

The threshold value currently in force:

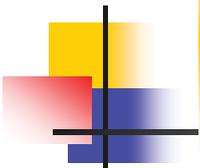
- 20 millions rubles – about 660 thousands US dollars;
- Proposed increase of the threshold value will be at 150 times:
- 3 billions rubles – about 100 millions US dollars.



Posterior control:

The threshold value currently in force:

- 10 millions rubles – about 330 thousands US dollars;
- Proposed increase of the threshold value will be at 20 times:
- 200 millions rubles – about 660 thousands US dollars.



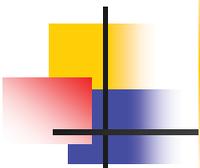
Creation of the system control over the observance of the competition while granting the state aid

Actuality:

- carry on negotiations on the accession of Russia to WTO (WTO's agreement on subsidy and compensation measures);
- fulfillment of the obligations, arising from the Agreement on partnership and cooperation between Russia and EC (article 53 "Competition").

Form of realization:

- special section in the new law on competition, devoted to the state control over granting benefits and preferences by government authorities.

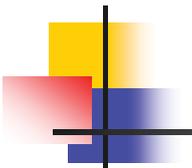


Creation of the system control over the observance of the competition while granting the state aid

(continuation)

Fundamental provisions:

- definition of basic principals of the realization of the state antimonopoly control over granting benefits and preferences by government authorities;
- division of benefits' and preferences' granting on three categories:
 - prohibited;
 - permissible;
 - authorized;
- introduction of the preliminary control by the antimonopoly authorities over granting benefits and preferences by government authorities.



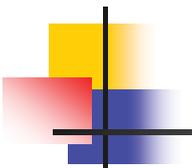
Participation of MAP Russia in process of the procompetitive reforming of natural monopolies in the Russian Federation

Participation of MAP Russia in drafting of the Law "On Natural Monopolies";

Introduction of the system for preventing creation of discriminatory conditions, including subjects of natural monopolies;

Participation of MAP Russia in the preparation of programs of reforming natural monopoly subjects;

Providing of regulation of natural monopoly subjects' activities, based on principles of publicity and necessity of preventing of competition legislation's.



Conclusions:

Creation and development in the Russian Federation of competition legislation, based on principals, compatible with rules, adopted in OECD countries.

Impending changes of competition legislation will allow rating up the effectiveness of its application and bringing down barriers to enter the market.

Competition principles in the Russian Federation are becoming an integral part of business making rules and rules of decision making by the state authorities.

Non classifié

CCNM/GF/COMP(2003)7



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

19-Feb-2004

Français - Or. Anglais

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

**CCNM/GF/COMP(2003)7
Non classifié**

Forum mondial de l'OCDE sur la concurrence

COMMENT LE PROGRES ECONOMIQUE S'EST ACCELERE EN AGISSANT CONTRE LES COMPORTEMENTS PRIVES ANTICONCURRENTIELS

(Note de référence du Secrétariat)

La note du Secrétariat est soumise POUR DISCUSSION à la Session IV du Forum mondial sur la concurrence qui se tiendra les 12 et 13 février 2004.

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Français - Or. Anglais

COMMENT LE PROGRES ECONOMIQUE S'EST ACCELERE EN AGISSANT CONTRE LES COMPORTEMENTS PRIVES ANTICONCURRENTIELS

NOTE DU SECRÉTARIAT

1. Introduction

1. La deuxième réunion du Forum mondial de la concurrence, les 14 et 15 février 2002, avait consacré sa première session à la politique de la concurrence envisagée dans son rapport avec la croissance et le développement économiques, et diverses questions avaient été plus particulièrement soulevées, à cette occasion, à propos des marchés en développement et en transition. Plusieurs participants avaient alors formulé le souhait de pouvoir disposer de données plus systématiques sur la contribution positive que la concurrence est en mesure d'apporter aux économies en développement et en transition. Le fait est que pour dégager un soutien en faveur de l'adoption de règles modernes, du respect du droit et de la mise en place d'institutions indépendantes dans le domaine de la concurrence, les partisans des réformes ont besoin de pouvoir s'appuyer sur des exemples concrets et convaincants. De tels exemples sont également très importants pour le succès des efforts de sensibilisation visant à instaurer une culture de la concurrence et à favoriser sa diffusion. La quatrième réunion du Forum mondial de la concurrence abordera divers aspects des effets bénéfiques de la concurrence, et permettra notamment de voir, dans le cadre de la quatrième session, le 13 février, comment les mesures prises pour lutter contre les comportements anticoncurrentiels privés ont contribué au développement économique.

2. Cette session ne sera pas centrée sur la théorie et les principes, mais sur les enseignements que l'on peut tirer de cas concrets. Les participants sont donc invités à puiser dans leur propre expérience des exemples à même d'illustrer comment l'action des autorités de la concurrence a permis de mettre un terme à des comportements restrictifs et les conséquences qui en ont résulté pour le développement économique. Après un bref rappel des effets préjudiciables que les comportements anticoncurrentiels entraînent pour les acheteurs, les consommateurs et l'économie dans son ensemble, la présente note s'intéresse aux raisons pour lesquelles les économies en développement et en transition sont particulièrement exposées à ces pratiques, ainsi qu'aux outils dont elles disposent pour les combattre. Elle présente ensuite plusieurs exemples extraits de travaux antérieurs de l'OCDE, dont les participants pourront s'inspirer pour soumettre leurs propres contributions. Les diverses modalités de l'appel à contributions, en termes de contenu, de présentation et de délai, sont exposées à la fin du document.

3. Après avoir reçu les contributions des participants, le Secrétariat ajoutera à la présente note un résumé des principaux points abordés dans les cas exposés, assorti d'une liste de questions proposées pour examen. Si les participants le souhaitent, les documents soumis au Forum pourront aussi servir de point de départ pour d'autres travaux dans le même domaine.

2. Comportements privés anticoncurrentiels – comment et pourquoi ?

4. En principe, une économie de marché repose sur un modèle dans lequel le consommateur¹ peut librement choisir entre différents produits (biens ou services) et différents fournisseurs pour l'achat de ces produits. De leur côté, les fournisseurs sont censés être en concurrence les uns avec les autres, et s'efforcent de proposer les produits qui correspondent le mieux aux préférences des consommateurs, dans

¹ Dans ce contexte, la notion de « consommateur » s'entend aussi de tout acheteur qui n'est pas l'utilisateur final.

l'espoir d'être récompensés par une augmentation de leurs ventes. Dans la réalité, cependant, les choses ne se passent pas toujours ainsi. Au contraire, comme tous les responsables le savent, la concurrence a tendance à s'auto neutraliser. Les concurrents en présence ont donc de bonnes raisons de ne pas vouloir entrer en rivalité. Ils peuvent le faire de diverses manières, et cela entraîne un certain nombre d'effets.

2.1 Les raisons qui poussent à adopter un comportement anticoncurrentiel

5. En théorie, la suppression de la concurrence permet au vendeur d'augmenter ses prix jusqu'au niveau correspondant à une situation de monopole. Malgré la réduction des ventes qui s'ensuit, du point de vue quantitatif, le profit dégagé se trouve globalement accru. De fait, l'expérience confirme qu'une faible concurrence – ou une absence de concurrence – permet souvent aux vendeurs de pratiquer des prix plus élevés. La recherche du profit maximum est donc à l'évidence l'une des motivations essentielles qui incitent à restreindre, voire à supprimer la concurrence.

6. Cependant, il n'est pas toujours possible de prouver empiriquement l'existence d'une corrélation étroite entre niveau élevé de profit et absence de concurrence. Faute d'être soumise à la pression de la concurrence, une entreprise peut en effet laisser ses coûts augmenter, de sorte que ses profits resteront bas malgré des prix excessifs. Il en résultera une mauvaise organisation, dite inefficience X, du gaspillage, un approche passive du développement des produits et de l'innovation, ou encore des rémunérations accrues pour le personnel et la direction, laquelle pourra alors être encouragée à restreindre la concurrence, même si cela ne correspond pas nécessairement aux intérêts des actionnaires.

7. A l'inverse, des profits supérieurs à la normale ne reflètent pas nécessairement l'existence de restrictions à la concurrence. Il y a aussi des situations où la recherche d'efficience peut engendrer une hausse des profits.

8. Enfin, les entreprises ont souvent des objectifs plus complexes et plus variés que la simple maximisation du profit postulée par la théorie économique. Par exemple, les efforts que déploient un grand nombre d'entre elles pour croître et se développer vont bien au-delà de ce que l'obtention de gains économiques à court terme suffit à expliquer. Ainsi, certains comportements susceptibles d'affaiblir la concurrence peuvent en fait être motivés en premier lieu par une stratégie de croissance.

2.2 Les effets des comportements anticoncurrentiels

9. Les effets des comportements anticoncurrentiels, comme ceux des mesures prises par les autorités pour y mettre fin, sont souvent indirects, se manifestent sur le long terme et concernent le fonctionnement général de l'économie. Au niveau macroéconomique, les travaux de recherche effectués jusqu'ici – parmi lesquels ceux de l'OCDE – aboutissent à la conclusion qu'une concurrence qui s'exerce effectivement a des effets bénéfiques pour la croissance et le bien-être. Cependant, il est plus difficile, pour ne pas dire impossible quand on en vient aux cas particuliers, d'évaluer scientifiquement les retombées que peuvent avoir l'adoption de lois sur la concurrence et les mesures prises pour les faire appliquer. Or le travail de sensibilisation qui vise à obtenir le soutien de l'opinion publique en faveur d'un tel dispositif et à renforcer la culture de la concurrence ne peut pas se contenter de généralités. Les autorités doivent pouvoir expliquer à l'aide d'exemples concrets quels sont les effets dommageables des comportements anticoncurrentiels et comment la législation peut être appliquée pour y remédier, afin que le libre jeu de la concurrence puisse ensuite produire ses bienfaits.

10. La théorie économique considère la réduction de la production totale comme l'effet le plus préjudiciable des restrictions à la concurrence. On peut parfois observer ce type d'effet quantitatif sur certains marchés de produits d'où la concurrence est exclue par la réglementation économique : dans certains pays, par exemple, les services de taxi ou le marché immobilier ont effectivement souffert de

pénuries au niveau de l'offre. Mais lorsque les comportements anticoncurrentiels sont d'origine privée, la contraction de l'offre qui peut en découler n'apparaît pas toujours de façon aussi évidente. Il est vrai néanmoins que les accords de partage des marchés, par définition, empêchent les consommateurs d'avoir accès à certaines sources d'approvisionnement et que les ententes sur les prix rendent les produits inabordable pour tous ceux qui auraient été disposés à payer le prix de concurrence, mais pas plus.

11. On admet plus généralement que les hausses de prix sont la conséquence directe des accords horizontaux de coordination des prix. D'un point de vue économique, on peut considérer qu'il s'agit là d'un effet sur la distribution du revenu qui n'affecte pas l'efficacité économique dans son ensemble. Cependant, de nombreux pays tiennent la maximisation du surplus du consommateur pour l'un des objectifs fondamentaux de la politique de la concurrence. Ainsi, une enquête récemment conduite par le Comité de la concurrence de l'OCDE sur le préjudice économique causé par les ententes injustifiables² montre que ce préjudice est estimé en termes d'effets sur les prix, pourtant difficiles à mesurer, dans 14 cas au total, avec des estimations allant de 3 % à 65 %, et une valeur médiane comprise entre 15 et 20 %.

12. Les effets directs sur les prix peuvent aussi résulter du comportement unilatéral d'un vendeur en position dominante ou jouissant d'un pouvoir de marché substantiel. Bien que le prix de monopole soit une notion parfaitement bien définie au plan théorique, les abus de position dominante, comme on a coutume de les appeler, soulèvent dans la pratique d'énormes difficultés d'appréciation dès lors qu'il s'agit d'appliquer le droit de la concurrence. Aussi, faute de preuve quant au « véritable » niveau des coûts et de la productivité en situation de concurrence, toute estimation de l'écart entre prix effectif et prix compétitif ne peut qu'être sujette à caution.

13. Outre leurs effets statiques, on estime que les comportements anticoncurrentiels ont aussi des effets dynamiques – peut-être même plus graves encore. Dans un marché où les concurrents en présence se sont mis d'accord pour modérer leurs offensives commerciales ou qui est protégé contre l'arrivée de nouveaux entrants, la satisfaction des consommateurs a tendance à passer au second plan. Or, cela peut nuire aux efforts de recherche et de développement qui visent à améliorer les produits existants ou à en proposer d'autres en remplacement, empêcher l'apparition non seulement de nouveaux produits, mais aussi de nouveaux producteurs et de nouvelles filières de distribution sur le marché, et enfin anéantir tout ce qui peut inciter à mettre au point des méthodes de production plus efficaces pour réduire les coûts. Tous ces effets sont toutefois difficiles à observer dans la pratique. Une rationalisation qui n'a pas lieu, un produit qui n'est pas inventé ou une entreprise qui esquivent ses concurrents ne sont pas des choses qui sautent aux yeux. Si l'on pouvait prouver ces effets dynamiques et démontrer qu'ils peuvent être évités par une action efficace contre les comportements anticoncurrentiels, on serait alors beaucoup mieux armé pour faire campagne en faveur de la concurrence.

2.3 Les différentes formes de comportements anticoncurrentiels

14. « Les ententes injustifiables constituent la violation la plus flagrante du droit de la concurrence ». Ces pratiques, qui consistent en des accords entre concurrents ayant pour but de fixer des prix, de restreindre la production, de procéder à des soumissions concertées ou de partager des marchés, « lèsent les consommateurs dans un grand nombre de pays en augmentant les prix et en limitant la production ». De plus, en « faussant les échanges internationaux », elles sont aussi « source de pouvoir de marché, de gaspillage et d'inefficacité dans des pays dont les marchés seraient sinon concurrentiels ».

² Les résultats de cette enquête sont exposés dans « Lutte contre les ententes injustifiables. Effets dommageables, sanctions efficaces et programmes de clémence » (OCDE, 2002), et « Les ententes injustifiables : progrès récents et défis futurs » (OCDE, 2003). Ces deux rapports, ainsi qu'un grand nombre d'autres documents et recommandations de l'OCDE concernant la politique de la concurrence sont accessibles sous la rubrique concurrence du site web de l'OCDE, à l'adresse : www.oecd.org/competition.

Telles sont les conclusions de la Recommandation adoptée en 1998 par le Conseil de l'OCDE concernant une action efficace contre les ententes injustifiables³.

15. Il existe d'autres formes d'accords qui n'ont pas nécessairement des effets négatifs sur la concurrence. Ainsi, certains accords entre concurrents directs (accords horizontaux) peuvent s'avérer parfaitement anodins – voire favorables à la concurrence – lorsqu'ils portent par exemple sur la définition de normes communes ou sur un effort conjoint de recherche et développement. Quant aux accords verticaux – entre entreprises qui ne se font pas concurrence sur le même marché –, ils peuvent renforcer la concurrence entre les différentes marques d'un même produit, mais ils peuvent aussi la restreindre entre les différents producteurs d'une même marque. En outre, ils ont parfois pour effet de protéger le marché intérieur de la concurrence étrangère, spécialement dans les petites économies. Dans de nombreux pays, les effets anticoncurrentiels des accords verticaux sont évalués à l'aune du bon sens et généralement jugés avec moins de sévérité que ceux des accords horizontaux.

16. Certaines entreprises parviennent à se positionner de telle sorte sur le marché qu'elles peuvent alors agir à leur guise, sans se préoccuper des réactions de leurs concurrents ni même de leurs clients. Dans la plupart des pays, cette domination n'est pas considérée comme une restriction à la concurrence en soi, surtout lorsqu'elle a été obtenue par une plus grande aptitude à répondre aux besoins des consommateurs. Cependant, le pouvoir de marché dont dispose une entreprise peut lui permettre de prendre des mesures unilatérales qui restreignent la concurrence. On qualifie ainsi d'*exploitation* abusive de position dominante la situation de l'entreprise qui peut augmenter ses prix – ou s'enrichir par d'autres moyens – d'une façon qui n'aurait pas été possible sur un marché concurrentiel. Cet abus est dit à effet d'*exclusion* ou d'*éviction* lorsqu'il a pour objet d'éliminer les concurrents du marché, de les mettre au pas pour atténuer leur influence ou d'empêcher l'arrivée de nouveaux venus par des moyens que seule une entreprise dominante est à même de pouvoir employer. Comme on l'a indiqué plus haut, dans la théorie comme dans la pratique, les abus de position dominante posent des problèmes d'évaluation, et dans la plupart des pays développés, la place qu'ils occupent dans les affaires traitées par les autorités de la concurrence tend aujourd'hui à diminuer. Dans les économies en transition, en revanche, l'exploitation abusive de position dominante fait généralement l'objet d'une plus grande attention.

17. Les fusions, les prises de contrôle, les concentrations et autres mesures structurelles ou institutionnelles du même genre peuvent restreindre la concurrence ou même la rendre impossible dans la mesure où elles engendrent un pouvoir de marché ou contribuent à le renforcer. C'est pourquoi les mesures de contrôle qui leur sont appliquées s'accompagnent généralement d'un pouvoir d'interdiction ou d'intervention a posteriori dès lors que le caractère anticoncurrentiel des opérations en question a été établi. Dans la réalité, cependant, il est rare qu'une fusion notifiée soit purement et simplement interdite, car il suffit le plus souvent d'en modifier certaines modalités pour la rendre conforme aux règles de la concurrence.

3. Caractéristiques particulières des économies en développement et en transition

18. Bien que les comportements anticoncurrentiels privés se présentent pour l'essentiel de la même façon dans tous les pays, qu'ils soient développés et industrialisés, en développement ou en transition, certaines caractéristiques des « nouvelles » économies méritent peut-être à cet égard de retenir l'attention. Il y a tout d'abord le processus de transformation radicale qui est à l'œuvre, par exemple lorsqu'une économie informelle de subsistance doit tout d'un coup se structurer et fonctionner avec des contrats, des entreprises et des règles en matière d'échanges. Ou lorsqu'à une économie planifiée, placée sous le contrôle de l'État, doit succéder une économie de marché animée par des acteurs privés. Un autre trait à signaler est l'absence de culture de la concurrence, avec les comportements que cela entraîne, du côté des

³ Accessible à l'adresse www.oecd.org/competition.

vendeurs comme des acheteurs, ainsi que l'attitude de divers intervenants à l'égard de la législation, de son application et souvent aussi du principe même de la concurrence. Enfin, si l'on en juge par la situation actuelle, les économies en développement semblent être davantage exposées à la corruption, au népotisme et à un manque de respect pour la loi en général – comportements qui tendent à placer d'emblée les entreprises honnêtes dans une position désavantageuse.

19. Les économies en développement et en transition présentent peut-être des faiblesses structurelles qui les rendent particulièrement vulnérables face aux comportements anticoncurrentiels privés. Celles qui sont énumérées ci-dessous, en tout cas, ont probablement une incidence négative sur la concurrence.

- Marchés locaux plus largement à l'abri des mesures de libéralisation des échanges
- Accès limité aux intrants essentiels
- Canaux de distribution plus limités
- Dépendance plus forte à l'égard des importations (produits industriels courants) et/ou des exportations (pour la croissance)
- Incidence plus marquée des obstacles administratifs/institutionnels à l'importation
- Marchés financiers peu développés

3.1 *La « création » de marchés concurrentiels pose de gros problèmes*

20. Le remplacement d'un monopole d'État par une série d'entreprises privées est un processus qui peut comporter en soi des éléments de nature à fausser la concurrence ou à faciliter les comportements anticoncurrentiels de la part de certains acteurs. Ainsi, face à de nouveaux entrants, un ancien monopoleur peut bénéficier d'avantages qu'il a « hérités » de son ancienne situation, par exemple une position financière solide, le contrôle de certains éléments de réseaux, des contacts et des soutiens politiques, ou des relations établies de longue date avec les fournisseurs et les clients. Cette entreprise dominante, que l'on appelle aussi « opérateur historique », dispose de multiples moyens pour rendre la vie difficile aux nouveaux entrants et se débarrasser à la longue de tous ses concurrents. Dans de nombreux pays qui ont libéralisé leurs marchés, les plaintes pour abus présumé de position dominante qui inondent aujourd'hui les instances chargées de la concurrence reflètent ce déséquilibre entre ancien monopole et nouveaux concurrents.

21. La privatisation des anciens monopoles offre un autre exemple des problèmes que peut poser l'ouverture des marchés à la concurrence. Les économies en transition et en développement peuvent avoir plusieurs raisons d'encourager les investisseurs étrangers à prendre le contrôle d'entreprises publiques. Le manque de capitaux disponibles sur le marché intérieur en est une évidente, mais un investisseur étranger peut aussi amener avec lui des méthodes de gestion et de production modernes qui sont essentielles pour la croissance. Or, pour attirer les capitaux étrangers, certains pays offrent parfois des avantages qui permettent ensuite aux nouveaux propriétaires de limiter ou d'exclure la concurrence, surtout s'ils sont autorisés à acquérir une position de monopole, d'où les risques que comportent les opérations de privatisation quand on n'en soupèse pas soigneusement auparavant les modalités au regard de cette éventualité.

3.2 *Les comportements anticoncurrentiels privés dans les économies en développement et en transition*

22. En règle générale, les comportements anticoncurrentiels privés revêtent peu ou prou la même forme dans les économies en développement et en transition que dans les pays plus développés. Cependant,

l'importance relative des divers agissements rangés dans cette catégorie peut varier, et il semble aussi que certaines pratiques aient plus spécialement cours dans les économies moins avancées.

23. Lorsque le droit de la concurrence commence à peine à s'imposer et que la culture de la concurrence n'est pas encore très développée, les entreprises sont parfois amenées à former des **ententes** sans même se rendre compte qu'il s'agit d'un comportement illicite. Dans les économies en transition, la plupart des ententes que l'on voit ainsi apparaître concernent en général des entreprises petites ou moyennes. Ces ententes « innocentes » sont faciles à mettre au jour dans la mesure où ceux qui y participent ne font aucun effort pour les dissimuler – dans certains cas, il arrive même qu'ils les signalent de leur plein gré aux autorités de la concurrence. Quoique de portée limitée, ces comportements anticoncurrentiels peuvent causer un préjudice considérable aux consommateurs locaux. Les autorités de la concurrence ont donc raison de prendre des mesures à leur encontre, même si elles le font de façon moins draconienne que dans le cas d'ententes plus dangereuses et probablement secrètes. En pareilles circonstances, il est évident que le travail d'information et de sensibilisation est particulièrement indiqué.

24. Il est assez rare, lorsqu'un régime de concurrence vient d'être mis en place, qu'il se heurte d'emblée à des **ententes injustifiables** impliquant de grandes entreprises. Cela ne signifie pas nécessairement que les économies en développement et en transition sont épargnées par ce genre de pratiques, mais les lois nouvellement adoptées ont bien souvent le défaut majeur de ne pas prévoir les habilitations nécessaires en matière d'enquêtes et de recherche de preuves. Et même lorsque les autorités de la concurrence ont ces pouvoirs, les sanctions prévues en cas de refus de coopérer sont souvent insuffisantes et les moyens de l'administration loin d'être à la hauteur de ceux dont disposent les grandes entreprises. Cela dit, étant donné les effets gravement dommageables des ententes injustifiables, surtout dans les économies en transition et en développement, il semblerait qu'une application plus rigoureuse du droit de la concurrence dans ce domaine puisse apporter une contribution importante au développement économique.

25. Par rapport aux pays où le droit de la concurrence a déjà une longue histoire, les **abus de position dominante** sont souvent plus fréquents dans les pays en transition et en développement. Une autre différence frappante concerne l'exploitation abusive de position dominante, catégorie qui a pratiquement disparu aujourd'hui des affaires traitées par les autorités de la concurrence dans les pays développés. Le retour déguisé du contrôle des prix, typique des économies planifiées, après que des lois et des politiques ont été adoptées en faveur de la concurrence, est une explication possible. Mais il y a peut-être aussi des raisons plus légitimes de prendre des mesures lorsque des prix sont jugés abusivement élevés : il se peut que l'étape de transition ait laissé subsister des obstacles qui empêchent la concurrence de s'exercer et bloquent l'arrivée de nouveaux entrants ; qu'en l'absence de culture de la concurrence, les concurrents ne sachent pas manier l'arme des prix, ou bien que les institutions compétentes pour traiter ce genre de situation ne soient pas encore en place.

26. Les avis divergent sur l'intérêt qu'il peut y avoir à instituer un dispositif de **contrôle des fusions** dès les premières étapes de la mise en place d'une législation et d'institutions visant à développer la concurrence. D'un côté, en effet, le contrôle des fusions est un exercice qui suppose une capacité d'analyse économique très étendue, et les autorités qui ne possèdent pas encore ce type d'expertise risquent de faire plus de mal que de bien. Mais c'est aussi un domaine qui suscite l'intérêt et le soutien du public et du monde politique pour la concurrence, et qui peut donc être utilisé pour montrer la voie à suivre.

27. Quel que soit le niveau de développement d'une économie, l'un des aspects fondamentaux des règles applicables au contrôle des fusions a trait aux **seuils de notification**. Si ces derniers sont bas, il peut en résulter une lourde charge administrative pour les autorités de la concurrence, alors que le nombre de cas véritablement susceptibles de poser problème sera en fait limité. Cependant, lorsque les autorités de la concurrence tirent une partie de leur financement des commissions versées pour la notification des fusions,

il peut y avoir des raisons administratives de faire en sorte que ces notifications restent nombreuses. Si l'on en juge par l'expérience, le risque observé dans les économies en transition en ce qui concerne le contrôle des fusions est que les autorités attachent trop d'importance aux aspects formels des notifications, au lieu de se concentrer sur les effets économiques des changements structurels proprement dits.

4. Moyens d'action contre les comportements anticoncurrentiels

28. Les moyens d'action contre les comportements anticoncurrentiels visent à a) mettre fin aux agissements en cause, b) récupérer les gains illicitement acquis, c) modifier le comportement des entreprises de façon à réduire ou à éliminer les effets anticoncurrentiels qui peuvent en découler, ou d) dissuader les entreprises de se livrer à ce type de pratiques. Sur le plan de la procédure, les mesures prévues ont pour but d'obliger les entreprises à fournir des informations ou de se soumettre par tout autre moyen à des enquêtes et d'y coopérer.

4.1 La nature des moyens d'action disponibles

29. Les sanctions les plus couramment prononcées à l'encontre d'entreprises reconnues coupables de comportements anticoncurrentiels sont des sanctions pécuniaires, de nature pénale ou administrative. Certaines juridictions prévoient aussi des peines d'emprisonnement pour les personnes physiques, mais elles sont moins souvent appliquées que les peines d'amende. Pour obliger une entreprise à se soumettre à une enquête, par exemple en fournissant des documents ou d'autres éléments d'information, ou en donnant accès à ses locaux pour inspection, il est également possible de recourir à des astreintes.

30. Les injonctions prononcées pour qu'il soit mis fin à une infraction et les agréments donnés à des fusions ou à des accords sous réserve de conditions spécifiques sont d'autres moyens de mise en œuvre du droit de la concurrence. De leur côté, les entreprises peuvent aussi prendre certains engagements de leur plein gré pour obtenir de la part des autorités l'agrément d'une opération de fusion ou d'un accord qui serait sans cela prohibé. Dans la plupart des cas, les autorités de la concurrence jugent les mesures structurelles plus efficaces que celles qui portent sur les comportements.

4.2 La nécessité de règles, de procédures et d'institutions efficaces

31. Le droit de la concurrence, tel qu'il est mis en œuvre par les autorités compétentes et par les tribunaux, est le principal instrument qui existe pour combattre les comportements anticoncurrentiels privés. Par conséquent, la première condition à remplir pour promouvoir et défendre une économie de concurrence consiste à mettre en place les règles et les institutions correspondantes. Cependant, la mise en œuvre du droit de la concurrence comporte aussi un aspect qualitatif. Elle doit permettre d'agir contre les formes les plus graves de comportement anticoncurrentiel, et de prononcer des sanctions suffisamment lourdes pour être dissuasives. Elle doit aussi fournir aux autorités de la concurrence des moyens efficaces d'investigation, en particulier le pouvoir d'exiger et de rechercher des informations. Après avoir mené une action crédible dans ces deux directions, de nombreux pays ont découvert que les règles de clémence, qui encouragent les entreprises à coopérer sans réserve avec les autorités, sont un élément indispensable de tout effort visant à débusquer les ententes injustifiables les plus graves. Enfin, les autorités de la compétence et les instances judiciaires doivent avoir les ressources quantitatives et qualitatives nécessaires pour appliquer la législation avec efficacité. Dans ces conditions, il est très largement admis que le droit de la concurrence est l'un des principaux instruments dont on dispose pour mettre fin aux comportements anticoncurrentiels, et contribuer par la même à la croissance et à l'amélioration du bien-être dans l'ensemble de l'économie.

5. Droit la concurrence et développement économique : illustration

32. Les comportements anticoncurrentiels ayant pour effet d'amoindrir ou de supprimer les avantages que procure le libre jeu de la concurrence en termes d'efficience statique et dynamique et de surplus dégagé pour les consommateurs, conditions indispensables à la croissance et à l'amélioration du bien-être, les mesures prises pour sanctionner et dissuader effectivement ces comportements devraient logiquement concourir au développement économique. Cependant, cette relation n'est pas toujours facile à démontrer sur le court terme. Outre le fait, évident, qu'il est généralement difficile d'isoler quelque effet que ce soit du processus de développement économique, il se peut aussi qu'il s'écoule un certain temps entre la levée des restrictions à la concurrence et le moment où les acteurs du marché commencent à tirer parti de la nouvelle situation.

33. Dans l'idéal, l'illustration des succès remportés grâce au droit de la concurrence ne devrait pas se limiter à l'élimination des comportements anticoncurrentiels ; il serait bon de décrire aussi les avantages qui en résultent pour les consommateurs et la contribution positive de ces actions en termes d'efficience économique. Le travail d'information et de sensibilisation a particulièrement besoin de ce genre d'exemples pour démontrer que la concurrence n'est pas simplement un modèle à l'usage des économistes, mais qu'elle a des retombées positives tangibles pour tous les citoyens. Lorsqu'il est impossible d'apporter la preuve de ces effets, les exemples utilisés aux fins d'illustration devraient au moins viser à faire comprendre comment l'élimination de tel ou tel comportement dommageable en particulier devrait en principe contribuer au développement économique.

5.1 Exemples tirés des travaux antérieurs de l'OCDE

34. Les exemples qui suivent sont tirés de travaux antérieurs de l'OCDE concernant aussi bien des pays développés que des économies en transition. Le but n'est pas qu'on en discute à la prochaine réunion du Forum mondial sur la concurrence, mais plutôt que les participants puissent s'en inspirer pour soumettre leurs propres contributions.

Encadré 1. Affaire du béton prêt à l'emploi en Allemagne

Cette affaire est la plus importante dont ait eu à s'occuper jusqu'ici le Bundeskartellamt, c'est-à-dire l'Office fédéral des ententes, en Allemagne. Il s'agit d'une entente dans laquelle étaient impliquées 62 entreprises appartenant à 28 groupes, ainsi que 42 personnes physiques, toutes poursuivies pour avoir conclu, dans les années 1999-2000, une série d'accords de répartition du marché concernant Berlin et plusieurs autres régions d'Allemagne. Au total, les ventes de béton régies par ces accords représentaient une valeur d'environ 1,3 milliard d'euros, et il a été estimé qu'elles avaient donné lieu à une surfacturation de 112 millions d'euros. L'enquête a été ouverte à la suite de plaintes déposées par des entreprises du bâtiment dénonçant des hausses de prix. Ultérieurement, des informations anonymes ont également été versées au dossier. Les membres de l'entente conservaient des archives détaillées, allant même jusqu'à préciser qui était chargé de fournir nourriture et boissons pour les réunions qu'ils tenaient. L'accord prévoyait un contrôle régulier des ventes par rapport aux parts de marché préalablement attribuées, et ceux qui dépassaient leur quota étaient pénalisés lors de la répartition suivante du marché.

Les intéressés ont été condamnés à des amendes d'un montant total de 153 millions d'euros, représentant environ 137 % des surfaturations estimées.

Les effets indirects des ententes injustifiables de ce type sont en général bien plus importants encore que leurs effets directs. A partir du moment où il a été mis fin à l'entente, en l'occurrence, les prix du béton ont baissé dans toute la région, ce qui a eu pour conséquence de réduire les coûts de construction et d'accroître la production. Dans les grandes affaires d'entente comme celle-ci, qui donnent lieu à de très lourdes sanctions, le plus important est l'effet de dissuasion que l'on peut ainsi exercer en direction des entreprises d'autres régions et d'autres secteurs, mais qu'il est malheureusement impossible de quantifier au cas par cas.

Encadré 2. L'affaire des services portuaires en Lituanie

Dans cette affaire, Klasco, entrepreneur de manutention installé dans le port maritime de Klaipeda, avait mis au point un système de permis pour l'accès des navires aux quais situés dans la zone qu'il avait en location. Selon ce système, les sociétés qui assuraient des services aux navires – fourniture d'équipements et de pièces détachées, par exemple – avaient le droit d'acheter des permis d'entrée simple à la condition de pouvoir présenter préalablement un bon de commande émanant d'un armateur ou d'un capitaine de navire. Toutefois, cette condition ne s'appliquait pas à l'une des sociétés de services, Komeximas, filiale de Klasco, qui disposait quant à elle d'un permis d'entrée permanent pour accéder aux installations. Le Conseil lituanien de la concurrence a estimé que cette pratique constituait un abus de position dominante.

Les comportements d'exclusion fondés sur l'exercice d'un pouvoir de marché substantiel renforcent les structures monopolistiques et ont donc des effets préjudiciables pour le bien-être économique. Le fait de limiter ou d'éliminer de cette façon la concurrence sur un marché non seulement conduit à l'exclusion des autres acteurs en présence, mais il revient aussi à empêcher toute nouvelle entrée.

Encadré 3. L'affaire du gaz liquéfié en Slovénie

En Slovénie, un groupe de distributeurs de gaz liquéfié s'était doté d'une série de « règles techniques » en vertu desquelles il imposait aux revendeurs, sous peine de ne plus les approvisionner, l'obligation d'appliquer aux clients un prix uniforme pour la maintenance des bouteilles de gaz. Dans son enquête, l'Office slovène de protection de la concurrence a démontré que l'élasticité de la demande sur le marché était très faible et qu'il était donc assez facile pour les membres de l'entente d'augmenter sensiblement les prix. Au tarif convenu par les distributeurs, les quelque 300 000 bouteilles de gaz sur lesquelles portait l'accord représentaient au total un montant de 60 888 000 SIT par an.

Les distributeurs concernés s'étant par ailleurs mis d'accord pour refuser d'approvisionner les détaillants, le cas échéant, alors qu'ils contrôlaient ensemble plus de 60 % du marché, l'Office de protection de la concurrence a également conclu à l'existence d'un abus de position dominante contraire à la loi.

Bien entendu, il aurait été impossible en l'espèce de mesurer les effets tant statiques que dynamiques de l'accord mis en cause, mais sa gravité ne fait cependant aucun doute étant donné qu'il privait de leur autonomie les revendeurs d'un produit essentiel. Il faisait aussi potentiellement obstacle à l'arrivée de nouveaux entrants ou au développement de nouvelles filières de distribution, sans compter les autres effets indirects qu'ils auraient pu entraîner ou qui se sont d'ailleurs effectivement produits.

Encadré 4. L'affaire de la distribution d'essence en Russie

A la suite d'opérations de privatisation, la compagnie russe Tvernefteprodukt JSC s'est trouvée en possession de parts de marché très importantes dans la distribution d'essence, en gros et au détail, dans la région de Tver. Des consommateurs s'étant plaints de cette situation, le bureau régional de Tver du ministère de l'action antimonopole et de l'initiative économique a ouvert une enquête au terme de laquelle il a conclu que l'entreprise en question pratiquait des prix largement supérieurs au prix de concurrence, et qu'il existait par ailleurs une forte probabilité, vu les conditions du marché, qu'elle ait conclu des accords verticaux anticoncurrentiels en amont avec une compagnie de raffinage. Compte tenu de ces divers éléments, il a été décidé que le comportement de Tvernefteprodukt JSC constituait effectivement une infraction à la législation de la concurrence.

La part de marché très importante que détenait Tvernefteprodukt JSC, par rapport aux autres acteurs économiques en présence, créait en fait une structure industrielle qui avait un certain nombre d'effets nocifs pour le développement économique. Outre des prix élevés, la qualité de l'essence se dégradait et les services laissaient de plus en plus à désirer. Du fait de la configuration du marché et de ses particularités, les obstacles à l'entrée étaient extrêmement élevés, et cette situation était de surcroît aggravée par le comportement de Tvernefteprodukt JSC, qui pouvait refuser, par exemple, l'accès des tiers aux réservoirs de stockage.

Encadré 5. L'affaire des produits laitiers en Lettonie

Valio et Rigas Piena Kombinats, deux compagnies présentes sur le marché des produits laitiers en Lettonie, avaient décidé de créer une entreprise commune de publicité et de commercialisation, projet dont le Conseil letton de la concurrence a été chargé d'évaluer les effets positifs et négatifs éventuels. Les parties intéressées étant des concurrents effectifs ou potentiels, l'une des conséquences néfastes de l'opération aurait été de restreindre la concurrence sur divers marchés. L'accord aurait également pu faciliter la fixation de prix communs ou une politique concertée de vente au rabais. D'un autre côté, la coentreprise aurait permis à Valio – un nouvel entrant – d'accéder au marché letton des produits laitiers, et son autorisation permettait donc d'escompter une amélioration de la production et l'offre de nouveaux produits (en particulier de produits bénéfiques pour la santé). Après examen, l'opération a finalement été approuvée.

Certaines entreprises conjointes n'ont pas ou quasiment pas d'effets négatifs sur la concurrence, alors qu'elles présentent de réels avantages en termes de gains d'efficacité. Entrent notamment dans cette catégorie les opérations qui ont pour but de mettre en œuvre des activités que les associés ne seraient pas en mesure d'entreprendre individuellement, à condition que cela n'entraîne pas de restrictions pour les uns ou pour les autres. L'exemple classique en l'occurrence est celui de la filiale montée pour tirer parti d'importantes économies d'échelle résultant de la fabrication commune d'intrants qui ne représentent qu'une faible part des coûts de production de chacune des sociétés mères. En principe, ce type d'opérations ne devrait pas poser de problème pour les autorités de la concurrence, qui devraient simplement les ignorer ou, le cas échéant, les approuver sans s'y attarder.

Il existe en revanche, à l'opposé du spectre, des coentreprises qui n'offrent pas d'avantages réels mais qui comportent beaucoup de risques du point de vue de la concurrence. Il s'agit généralement de montages qui n'ont pas grand-chose à voir avec une véritable intégration entre les parties associées. Une fois identifiées comme telles, ces opérations devraient être purement et simplement prohibées – surtout s'il s'agit de structures fictives, c'est-à-dire essentiellement constituées pour faire écran à des ententes injustifiables

5.2 Appel à contributions

35. Les participants sont invités à soumettre des contributions qui permettront d'illustrer, à l'aide d'un cas au moins par juridiction, comment l'action des autorités contre les comportements anticoncurrentiels privés peut contribuer au développement économique. Les contributions ne devront pas comporter plus de cinq pages, et dans toute la mesure du possible, il serait bon que les exemples choisis ne décrivent pas seulement ce qui a été fait pour limiter ou éliminer les restrictions à la concurrence, mais aussi les conséquences que cela a pu entraîner pour les consommateurs et pour l'économie dans son ensemble.

36. S'il n'est pas possible, pour des raisons juridiques, de dévoiler l'identité des entreprises concernées ou d'autres éléments, les informations pourront rester anonymes conformément aux dispositions prévues en matière de confidentialité.

37. Les contributions, en anglais ou en français, devront être envoyées sous forme électronique à Mme Laurence Langanay (assistante, Division de la concurrence), à l'adresse suivante : Laurence.langanay@oecd.org, et parvenir au plus tard le **lundi 1^{er} décembre 2003**.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

(Background note by the Secretariat)

This note is submitted FOR DISCUSSION under Session IV of the Global Forum on Competition to be held on 12-13 February 2004.

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English - Or. English

HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

NOTE BY THE SECRETARIAT

1. Introduction

1. In the second meeting of the Global Forum on Competition, on 14 and 15 February 2002, the first session dealt with competition policy and economic growth and development. In particular, competition policy issues in developing and transition markets were discussed. Several participants called for more systematic evidence that competition is good for transition and developing economies. In order to raise support for the establishment and refinement of modern rules, effective enforcement and independent institutions in the competition law and policy area, advocates for reform need concrete and convincing examples. Such examples are also crucial for successful advocacy aiming at creating and enhancing a competition culture. The fourth meeting of the Global Forum on Competition will address various aspects of the beneficial effects of competition. Session IV of the meeting, on 13 February, will discuss how enforcement against private anti-competitive conduct has contributed to economic development.

2. The centre of gravity of this session will not primarily rest upon theory and principles, but on the practical experience offered by real-life cases. Participants are invited to submit descriptions of competition cases from their jurisdictions that demonstrate how law enforcement has halted restrictive behaviour and the subsequent effects on economic development. This note will briefly recall how anti-competitive conduct harms buyers, ultimate consumers, and the economy as a whole. It will touch upon factors that make developing and transition economies particularly vulnerable to competitive restraints, and the tools available for fighting private anti-competitive behaviour. Some examples from the OECD's past work are presented as an inspiration for participants' contributions. Finally, the invitation to submit cases will set out some details on contents, format and timing.

3. After having received contributions from participants, the Secretariat intends to add a post-script to this note, summarising the main points from the submitted cases and proposing issues for discussion. Subject to participants' views, the material discussed in the Forum meeting could also serve as a starting point for further work on this issue.

2. Private anti-competitive conduct – why and how?

4. In principle, a market economy rests upon a model where the consumer¹ has a free choice between alternative products (goods or services) and alternative suppliers of those products. The suppliers are expected to compete among each other, trying to offer products that best meet the consumer's preferences, in the hope of being rewarded by increased sales. In real life, this is not always what happens. On the contrary, as every competition official knows, 'competition has a tendency to neutralise itself'.

¹ The term 'consumer' is in this context also understood to include buyers who are not end-users.

Thus, competitors have obvious reasons to avoid competing. This can be done in a number of ways, and there are a number of effects of such market behaviour.

2.1 *The incentives behind anti-competitive conduct*

5. In theory, the exclusion of competition allows a seller to raise his price from the competitive level to the monopoly level. In spite of the subsequent reduction of the quantity sold, this will leave him with increased total profit. Practical experience confirms that weak competition – or the absence of it – often allows sellers to charge higher prices. Thus, the profit-maximising motive is clearly one of the driving forces behind attempts to restrict or exclude competition.

6. However, empiric studies may fail to demonstrate a strong link between high profits and lack of competition. A lack of competitive pressure will allow a firm to let costs increase, and as a consequence profits may stay low in spite of excessive pricing. This may leave room for organisational slack, so-called x-inefficiency, waste, a passive approach to product development and innovation, or increased remunerations to staff and management. Consequently, management may have incentives to restrict competition that do not always concur with owners' interests.

7. Conversely, higher than normal profits are not necessarily the result of competitive restraints. There are also situations where efficiency-enhancing behaviour may lead to a high profit.

8. Business enterprises often have more complex and multifarious objectives than the simple profit-maximising goal of economic theory. For instance, many firms strive for growth and expansion to a higher degree than is explained by short-term economic gains. Thus, some anti-competitive conduct may primarily aim at growth, which in its turn could have a lessening of competition as an effect.

2.2 *The effects of anti-competitive conduct*

9. The effects of anti-competitive conduct, and subsequently of competition authorities' successful activities to halt such conduct, are often indirect, long-term, and related to the general functioning of the economy. On the macro-economic level, economic research – including work done by the OECD - supports the conclusion that effective competition leads to growth and enhanced welfare. However, the effects of implementing a competition law and enforcing it in individual cases are more difficult, maybe impossible, to prove scientifically. Still, advocacy work aiming at building public support for competition policy and strengthening competition culture cannot rely on generalities. Competition authorities need to provide concrete examples of the harms of anti-competitive conduct, and how competition law enforcement can effectively address those harms and allow the good effects of competition to have their free play.

10. Economic theory points to the reduction of total output as the most detrimental effect of competitive restraints. Such quantitative effects can sometimes be observed in specific product markets where economic regulation excludes competition. For instance, shortages of supply have in some countries affected taxi services or the housing market. Corresponding quantitative effects of private anti-competitive conduct may be less obvious. However, market sharing arrangements by definition prevent customers from accessing certain sources of supply, and collusive arrangements to raise the price make the product inaccessible to customers who would have been prepared to pay the competitive price, but not more.

11. Price increases are more commonly recognised as the immediate effect of horizontal agreements to co-ordinate pricing. From an economic point view, this could be seen as an effect on income distribution that does not affect economic efficiency at large. However, many countries perceive the maximisation of

consumer surplus as a major objective of competition policy. The OECD Competition Committee recently conducted a survey about the economic harm caused by hard core cartels.² Although economic effects are not easily quantified, this survey identified estimated price effects in 14 cases ranging from 3% to 65%, with a median of between 15 and 20%.

12. Direct effects on prices may also result from unilateral behaviour by a seller enjoying a position of dominance or substantial market power. Although the concept of a monopoly price is clearly defined in theory, such cases of so-called exploitative abuse of dominance present considerable difficulties in practical competition law enforcement. Thus, short of evidence of the “true” costs and productivity under competitive pressure, estimates of the difference between the actual price and a competitive price are mostly uncertain.

13. In addition to static effects of anti-competitive conduct, competitive restraints are considered to have – maybe still more serious – dynamic effects. In a market where agreements allow competitors to refrain from aggressive marketing or where new entry is hampered, the efforts to increase consumer satisfaction tend to fade away. Such effects may negatively affect research and development in order to improve existing products or replace them with new ones. They may prevent new products, new producers or new distribution channels from appearing on the market. And they may take away the incentives for developing more efficient production methods in order to save costs. Such effects are more difficult to observe in practice. A rationalisation that does not take place, a product that is not invented, or a firm that does not challenge existing suppliers do not manifest themselves. To the extent such dynamic effects can be demonstrated to result from successful enforcement against private anti-competitive conduct, they should provide weighty arguments in competition advocacy work.

2.3 *Different forms of private anti-competitive conduct*

14. “Hard core cartels are the most egregious violations of competition law.” This conduct, which includes agreements among competitors to fix prices, restrict output, submit collusive tenders or share markets, “injures consumers in many countries by raising prices and restricting supply.” It also “distorts world trade” by creating “market power, waste and inefficiency in countries whose markets would otherwise be competitive.” These are the conclusions from the 1998 Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels.³

15. Other forms of agreements may or may not have anti-competitive effects. Some agreements between direct competitors (horizontal agreements) may be harmless – or even pro-competitive – for instance an agreement on common standards or joint research and development. Vertical agreements – between firms that do not compete in the same market – may enhance competition between different brands of the same product. On the other hand such agreements could restrict competition between suppliers of the same brand. Vertical agreements may also have the effect of protecting a domestic market from foreign entry, especially in small economies. The anti-competitive effects of vertical agreements are in many jurisdictions assessed on a rule-of-reason basis, and are in general looked upon less severely than horizontal agreements.

² The results are reported in ‘Fighting Hard-Core Cartels. Harm, Effective Sanctions and Leniency Programmes’, (OECD 2002), and ‘Hard Core Cartels. Recent Progress and Challenges Ahead’, (OECD2003). These reports, as well as many other OECD documents and recommendations relating to competition policy, can be found at the competition page of the OECD web site, at www.oecd.org/competition.

³ Available at www.oecd.org/competition.

16. Some firms have achieved a market position allowing them to act autonomously, without having regard to reactions from competitors or even their customers. Such a position of dominance is in most jurisdictions not seen as a restriction of competition in itself, especially when arrived at by satisfying customers more efficiently than the firm's competitors do. However, market power may enable a firm to take unilateral action that restrains competition. So-called *exploitative* abuse of a dominant position refers to a situation where the dominant firm raises the prices – or by other means enriches itself – in a way that would not have been possible in a competitive market. *Exclusionary* or predatory abuse is about driving competitors out of the market, disciplining them in an effort to attenuate their competitive influence, or preventing new entry, by anti-competitive means that are only available to a dominant firm. As set out above, cases of exploitative abuse entail difficulties both in practice and theory, and in most developed countries this category of cases play a diminishing role in competition law enforcement. Transition economies, on the other hand, tend to put more emphasis on exploitative abuse cases in their enforcement work.

17. Mergers, take-overs, concentrations and similar structural or institutional measures may restrict or prevent competition to the extent that market power is created or strengthened. Merger control normally includes powers to prohibit, or effectively address post-implementation, mergers that meet certain criteria for being anti-competitive. However, in practice few notified mergers are halted altogether as the anti-competitive effect often may be eliminated through modifications of the arrangement.

3. Special characteristics of developing and transition economies

18. Although much of private anti-competitive conduct follows the same patterns in developed, industrialised countries and developing and transition economies, there are some special characteristics of a “new” economy that may call for attention. One is the process of major change, for instance when an informal subsistence economy needs to develop structures based upon contracts, enterprises and trade. Or when a planned economy, where the state is the major economic player, is succeeded by a market with private actors. Another special feature of developing and transition economies deals with the competition culture. Lack of competition culture affects sellers' and buyers' behaviour in the market, as well as various stakeholders' attitude to competition law enforcement and, often, also to competition as such. Still another aspect relating to prevailing attitudes is that economies in development may be more vulnerable to corruption, cronyism and disrespect of rules – behaviour that may put law-abiding companies at a competitive disadvantage.

19. Developing and transition economies may have structural weaknesses that make them particularly vulnerable to private anti-competitive conduct. The following factors, where they are found, are likely to have a negative impact on competitive pressure.

- Greater proportion of local markets insulated from trade liberalisation measures
- Limited access to essential inputs
- More limited distribution channels
- More dependent on imports (basic industrial inputs) and/or exports (for growth)
- Greater incidence of administrative/institutional barriers to imports
- Weak capital markets

3.1 Major competition problems related to the 'creation' of competitive markets

20. The process of replacing a state monopoly by a number of private enterprises may in itself contain elements that distort competition on equal terms, or facilitate anti-competitive behaviour by certain market actors. A former monopolist being challenged by new entrants may have 'inherited' advantages from the former position, like a strong financial position, control of certain network facilities, connections and political support, or established relations to suppliers and customers. Such a dominant firm or 'incumbent operator' may find many ways to make life difficult for new entrants and in the end exclude competitors effectively. In many countries that have liberalised markets, the competition law enforcer finds itself inundated by endless cases of alleged abuse of dominance resulting from the imbalance between a former monopolist and new entrants.

21. Another example related to the opening of markets for competition deals with the privatisation of a former monopolist. Transition and developing economies may have several reasons to encourage foreign investors to take over state-owned firms. One obvious motive is the lack of domestic capital, but a foreign investor may also bring modern production and management methods that are crucial for growth. In order to attract potential foreign owners, a country may offer special advantages. There are obvious risks that terms related to such privatisation, if not considered carefully in view of possible anti-competitive effects, may enable the new owner to limit or exclude competition, particularly if it is allowed to purchase a monopoly position.

3.2 Private anti-competitive behaviour in developing and transition economies

22. In general, private anti-competitive behaviour in developing and transition economies largely take the same forms as in more developed countries. However, the relative importance of different categories of cases may vary. There may also be some special kinds of infringements that are more common in less advanced economies.

23. Where competition law enforcement is young and competition culture less developed, firms may form **cartels** without realising them to be illicit behaviour. Typically, most cartel cases in transition economies involve small or medium-sized enterprises. Such 'naïve' cartels are easy to discover as participants do not make efforts to hide them – sometimes they are even voluntarily reported to the competition authority. Despite the small scale of such anti-competitive behaviour, they may still cause considerable harm to local consumers. Therefore competition authorities rightly take action also against 'naïve' cartels, although with less draconic consequences than in the case of more serious, and perhaps covert, conspiracies. Advocacy and information activities obviously have a role to play in these cases.

24. Younger competition regimes often have relatively few cases of **serious hard core cartels** involving big companies. This does not necessarily imply that developing and transition economies are spared such anti-competitive behaviour. However, when competition laws are first introduced one of the major shortcomings often deals with the powers to demand information and search for evidence. Even where competition authorities have such powers, sanctions for refusal to co-operate may be weak and the administrative capacity to match large enterprises may be insufficient. Still, given the serious harm caused by hard core cartels, not least in transition and developing economies, this is an area where more vigorous competition law enforcement may provide important contributions to economic development.

25. Transition and developing countries often have more **abuse of dominance** cases, as compared to countries with a longer record of competition law enforcement. Another conspicuous difference is the strong focus on exploitative abuse in many transition economies, whereas this category of cases has next to disappeared from the case records of developed countries. One explanation may be traditions of price

control in planned economies, which come back in new disguise after the introduction of competition laws and policies. However, there may also be more legitimate reasons for taking action against prices considered to be abusively high. Potential competition and new entry may be lacking as a result of entry barriers following from the state of transition; lack of competition culture may prevent competitors from underbidding excessive prices; or more relevant institutions for dealing with the situation may still be lacking.

26. There are differing views on the usefulness of including **merger control** in the earliest stages of establishing competition law and institutions. On the one hand, merger control calls for advanced economic analysis and authorities that have not yet developed the needed expertise may risk doing more harm than good. On the other hand, merger control is an area which raises public and political interest in and support for competition, and may serve as a front-runner for other branches of competition law and policy.

27. Irrespective of the level of development of an economy, one core aspect of merger control rules is about the **thresholds for notification**. Setting these thresholds low may result in an important administrative burden for the competition authority, in spite of only a small share of those cases actually causing any concerns from a competition point of view. However, where competition authorities receive part of their funding from merger notification fees, there may be administrative reasons for keeping the number of notified mergers high. Experience from transition economies demonstrate that competition authorities may risk focusing excessively on the formal aspects of merger notification, rather than on the economic effects of the structural changes as such.

4. Tools to fight private anti-competitive conduct

28. Remedies to private anti-competitive conduct aim at (a) halting the conduct, (b) recapturing the gains from illicit behaviour, (c) modifying the behaviour of firms so that anti-competitive effects are reduced or eliminated or (d) deterring companies from engaging in such activities. Procedural tools similar to remedies aim at compelling companies to provide information or in other ways submit to, and cooperate with, an investigation.

4.1 *The nature of available remedies*

29. The most common sanctions imposed in response to anti-competitive conduct are fines of either an administrative or a criminal nature. Some jurisdictions also allow for jailing individuals, although that would be applied less commonly than pecuniary sanctions. Periodic penalties may be used in order to compel a company to submit to an investigation, for instance by providing documents or information contained in documents, or giving access to premises for an inspection.

30. Other remedies include orders to terminate an infringement of competition rules and decisions to approve a merger or an agreement subject to specific terms. Voluntary commitments by a firm may enable the competition authority to approve a merger or an agreement that would otherwise have been prohibited. Competition authorities mostly find structural remedies to be more effective than behavioural ones.

4.2 *The need for effective rules, procedures and institutions*

31. Competition laws enforced by competition authorities and adjudicated by courts of justice are the major tool to fight private anti-competitive conduct. The first step to promote and protect a competitive economy is having such rules and institutions in place. However, there is also a qualitative aspect of

competition law enforcement. The law must enable action against the most serious forms of anti-competitive behaviour, and allow for sanctions serious enough effectively to deter anti-competitive conduct. It must also provide the competition authority with effective tools for investigation, including the right to request and search for information. After having established a credible enforcement and sanctioning record, many countries have found leniency rules, encouraging firms fully to co-operate with the competition authority, to be a prerequisite for discovering egregious hard core cartels. Finally, the competition authorities and the judiciary must have the necessary qualitative and quantitative resources for effectively implementing the rules of competition legislation. Under these conditions, there is broad consensus that competition law enforcement serves as a major tool for halting anti-competitive behaviour, and thereby contributing to growth and enhanced welfare throughout the economy.

5. Examples of successful competition law enforcement contributing to economic development

32. Anti-competitive conduct negatively affects or eliminates the benefits of effective competition like static and dynamic efficiency and consumer surplus gains – all being prerequisites for growth and enhanced welfare. Consequently, competition law enforcement that effectively sanctions and deters such conduct should lead to economic development. However, such effects may sometimes be difficult to demonstrate in the short term. One reason is evidently the general difficulty of isolating effects in the economic development process. Another one is the time span that may occur between the removal of competitive restraints and market actors taking advantage of the new situation.

33. Examples of successful competition law enforcement should ideally not be confined to the elimination of anti-competitive behaviour but also describe how the subsequent development was beneficial to consumers and contributed to economic efficiency. Such examples are most effective in advocacy work, in order to demonstrate that competition is not just a model for economists but offers tangible benefits to every citizen. Where such evidence of concrete effects is impossible to produce, examples used for advocacy purposes should at least aim at describing how the elimination of anti-competitive conduct in the specific case is expected to contribute to economic development.

5.1 Cases from the OECD's past work

34. The following cases are taken from the OECD's past work with developed as well as transition economies. The purpose is not to have these cases discussed at the meeting of the Global Forum on Competition, but rather to offer some examples serving as inspiration for contributions from participants.

Box 1. The German Ready-mix Concrete Case

This was the largest cartel case prosecuted to date by Germany's Bundeskartellamt, involving 62 businesses from 28 business groups, and 42 individuals. The respondents had engaged in a series of quota agreements in the years 1999-2000, affecting Berlin and several other regions in Germany. The conspiracy affected sales of concrete worth about €1.3 billion. The estimated overcharges totalled about €112 million. The investigation was prompted by complaints about price increases received from construction companies. Later, anonymous information was also provided. Evidence of the cartel included detailed records kept by the participants, specifying who was to provide food and drink for the cartel meetings. Actual sales were regularly compared to the agreed allocations, and those who exceeded their sales quota were punished in the next allocation of contracts.

Fines totalling about €153 million were assessed, which amounted to about 137% of the estimated overcharges.

The indirect effects of hard core cartel cases like this one are typically much more important than the direct ones. Halting the cartel behaviour obviously results in lower prices for ready-mix concrete in the region, with a subsequent reduction of construction costs and an increased quantitative output. The most important effect of major cartel cases, where impressive sanctions are imposed, is the deterrent effect on anti-competitive conduct in other regions and other economic sectors, which cannot be quantified on a case-by-case basis.

Box 2. The Lithuanian seaport case

Klasco, a stevedore company in Klaypeda seaport, provided access to piers by introducing a system of passes for the territory it leases. Companies providing services to vessels, like supplying equipment or spare parts, were allowed to purchase single entry passes on the condition that they could present a preliminary order for their services from ship owners or captains. However, such conditions were not applied to one of the service providing companies, Komeximas. Being an affiliate company to Klasco, Komeximas was able to supply services to ships on the basis of free permanent passes. The Lithuanian Competition Council found that this behaviour constituted an abuse of a dominant position.

Exclusionary behaviour based upon a position of significant market power strengthens a monopolistic structure and consequently harms economic welfare. Limiting or eliminating competition in a market by such means not only excludes current competitors, it also prevents new entry.

Box 3. The Slovenian Liquefied Gas Case

A group of liquefied gas distributors in Slovenia had agreed on so-called 'technical regulations for maintenance of gas bottles'. These rules set a uniform price for the maintenance of gas bottles and required dealers to charge this price to final costumers as a prerequisite for distributing gas in bottles to dealers. The investigation by the Slovenian Competition Protection Office showed that the elasticity of demand was very small, which made it relatively easy for cartel members to raise prices significantly. The agreement among distributors affected about 300,000 gas bottles sold at the agreed price for a total of SIT 60,888,000 per year.

Another effect of this agreement was the refusal to supply dealers. The distributors taking part in the agreement had a market share larger than 60%. As a consequence of this conduct the Competition Protection Office found that the distributors also infringed the law by abusing their dominant position.

Neither the static nor the dynamic effects of this infringement could have been measured. However the gravity of the conduct is apparent taking into account that this agreement precluded

the autonomous conduct of the dealers of an important product. It also potentially prevented new entry or the development of new distribution channels and could or in fact did cause other indirect effects.

Box 4. The Russian Gasoline Case

As a consequence of privatisation, the Russian gasoline company Tvernefteprodukt JSC obtained high market shares in the wholesale and retail gasoline market in the Tver region. After receiving complaints from customers the Tver Regional Office of the Ministry for Antimonopoly Policy and Support to Entrepreneurship initiated an investigation. As a result, the Office declared that the Tvernefteprodukt JSC maintained prices far above the competitive price. The investigation also revealed that the market environment indicated a high possibility of concluding anti-competitive vertical agreements with the oil-processing enterprise. In view of these facts the competition authority concluded that Tvernefteprodukt JSC infringed the law by its conduct.

The high market share of the Tvernefteprodukt JSC, together with the low shares of the other economic entities in the market, created an industry structure that triggered a number of negative effects on economic development. Apart from the high prices, the quality of gasoline degraded and service became unsatisfactory. Due to the structure and the characteristics of the market, entry barriers were extremely high. In addition, those barriers to entry were aggravated by the conduct of Tvernefteprodukt JSC, such as refusing access to oil storage tanks.

Box 5. The Latvian Dairy Products Case

Valio and Rigas piena kombinats, two companies active in the Latvian dairy products market, agreed to set up a joint enterprise for advertising and trade. The Competition Council of Latvia made an assessment of the foreseeable positive and negative effects of the agreement. Since the parties were competitors or potential competitors, one negative result would have been the restriction of competition in various product markets. The agreement could also have facilitated joint pricing or a concerted discounting strategy. On the other hand, the joint venture would have provided Valio - a new entrant - access to the Latvian market for dairy products. Given this new entry the authorization of the agreement was expected to result in the improvement of production and the supply of new products (especially products beneficial for healthy nutrition). Having evaluated the positive and the negative effects of the agreement the Competition Council approved the joint venture.

Some joint ventures have few if any anti-competitive effects, while at the same time offering real efficiency benefits. This category of agreements include joint ventures conducting activities that parents could not perform individually, provided there are no restrictions on the competitive activities of the parties to the joint venture. Good examples of such joint ventures are those set up to reap important economies of scale through common production of inputs accounting for a minor portion of the parents' total costs. Such joint ventures should present no real difficulty for competition authorities. They should simply be left alone or approved as quickly as possible.

At the other end of the spectrum are joint ventures offering no real benefits, but entailing substantial risks to competition. Typically such arrangements involve little in the way of real integration among the parents. Once it has been determined that a joint venture falls into this category, it can be summarily prohibited - especially if it is essentially a sham, *i.e.* a hard core cartel masquerading as a joint venture.

5.2 Invitation to GFC participants to submit contributions

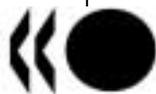
35. Participants are invited to submit contributions describing at least one case from each jurisdiction demonstrating how the enforcement of competition law against private anti-competitive conduct has contributed to economic development. Contributions should not exceed five pages. To the extent possible, the cases should not just illustrate how competitive restraints were limited or eliminated, but also subsequent effects to consumers and the economy at large.

36. If the identity of firms or other facts of the case are not in the public domain, the cases may be anonymous as requested to respect confidentiality rules.

37. Submissions in English or French should be sent in electronic form to Mrs. Laurence Langanay (Assistant, Competition Division) at the following e-mail address: Laurence.langanay@oecd.org , no later than **Monday 1st December 2003**.

Non classifié

CCNM/GF/COMP(2004)4



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

17-Feb-2004

Français - Or. Anglais

**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

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Forum mondial de l'OCDE sur la concurrence

COMMENT LE PROGRÈS ÉCONOMIQUE S'EST ACCÉLÉRÉ EN AGISSANT CONTRE LES COMPORTEMENTS PRIVÉS ANTICONCURRENTIELS

Note du Secrétariat

-- Session IV --

La présente note additionnelle du Secrétariat complète la note de référence établie pour la session IV. Elle est soumise POUR EXAMEN dans le cadre de la session IV du Forum mondial sur la concurrence qui se tiendra les 12 et 13 février 2004.

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Français - Or. Anglais

COMMENT LE PROGRÈS ÉCONOMIQUE S'EST ACCÉLÉRÉ EN AGISSANT CONTRE LES COMPORTEMENTS PRIVÉS ANTICONCURRENTIELS

Note additionnelle du Secrétariat

1. Introduction

1. La présente note vient en complément de la note de référence¹ du Secrétariat établie pour la session IV de la réunion du Forum mondial sur la concurrence des 12 et 13 février 2004 [CCNM/GF/COMP(2003)7]. Elle est issue des contributions écrites qui ont été soumises au 30 janvier 2004². Elle n'a pas pour objectif de synthétiser ces contributions en tant que telles, mais de formuler quelques observations sur les effets décrits dans les contributions ; elle aborde ensuite les différentes difficultés rencontrées pour démontrer les répercussions sur le développement économique des actions visant les comportements anticoncurrentiels privés, et propose en conclusion quelques thèmes qui pourront être débattus lors de la réunion.

2. Les contributions qui ont été soumises présentent un certain nombre d'affaires dont les juridictions nationales ont eu à connaître dans le domaine du droit de la concurrence, ainsi que certaines autres mesures visant à introduire ou promouvoir la concurrence dans différents secteurs de l'économie. Les résultats et les effets de ces activités sont décrits et examinés en termes essentiellement qualitatifs, mais une quantification a aussi été tentée dans certains cas. Les effets les plus visibles concernent en général les prix des produits, mais on a pu noter des incidences sur la qualité, la disponibilité des produits, l'entrée sur le marché, la structure du marché et le développement technique. Les contributions sont multiformes, et les éléments qu'elles présentent souvent anecdotiques. Même si certaines d'entre elles abordent par ailleurs de possibles méthodes de mesure de l'impact du droit de la concurrence sur le développement économique, il n'est pas évident d'apporter la preuve de ses effets sur la croissance et le développement économique général. Les différentes sortes d'incidences décrites dans les contributions font l'objet de la section 2 ci-après.

3. Toute tentative de démonstration des effets sur le développement économique d'actions contre les agissements anticoncurrentiels privés se heurte évidemment à plusieurs difficultés. Premièrement, la politique de la concurrence comporte plusieurs volets, l'application de la loi étant l'un d'entre eux, et il peut s'avérer difficile d'isoler ses effets de ceux d'autres mesures telles que les réformes réglementaires ou structurelles menées en faveur de la concurrence. Une autre difficulté tient au caractère indirect des effets les plus importants de la concurrence, qui ne se manifestent que dans le long terme. D'un autre côté, lorsqu'on examine les répercussions de cas d'espèce en matière d'application de la loi, il peut être difficile d'aller au-delà des effets directs et à court terme. Il existe également des difficultés évidentes pour mesurer quantitativement les effets de l'application du droit de la concurrence ; il est en effet plus facile de décrire les résultats qualitatifs des actions menées pour stopper les comportements anticoncurrentiels. Ceci nous conduit à la question de la méthodologie et des techniques de mesures, que nous abordons plus en détail à la section 3.

2. Effets observés et démontrés

2.1 Prix

4. L'effet le plus évident d'un cartel de prix est que les entreprises impliquées sont en mesure de hausser les prix au-dessus du niveau qu'ils atteindraient dans un contexte concurrentiel. Par conséquent,

l'anéantissement de cartels de ce type a principalement des conséquences évidentes et directes sur le prix, conséquences qu'il est possible de calculer en termes quantitatifs³. La contribution du Pakistan⁴ décrit trois cas d'application réussie de la loi sur la concurrence à l'encontre de cartels de prix – deux dans le secteur cimentier et un dans l'industrie du câble.

5. La contribution du Taipei chinois⁵ offre un exemple de quantification des effets délétères d'un cartel. À la suite d'une période de libéralisation accrue réussie des marchés du GPL (gaz de pétrole liquéfié) furent établis deux cartels couvrant plus de 90 pour cent des marchés de l'embouteillage et de la distribution du GPL de la région septentrionale du pays. L'autorité de la concurrence a effectué une évaluation des hausses durables de prix résultant des activités de ce cartel ; elle a conclu à un effet total supérieur à 1 milliard de TWD (soit environ 30 millions d'USD).

6. Un autre contexte dans lequel on pu constater des effets notables sur les prix est celui dans lequel l'autorité de la concurrence remet en question les prix réglementés des monopoles fixés par une autre autorité de réglementation. Par exemple, la contribution de l'Ukraine⁶ indique que grâce à ce mécanisme, appliqué aux prix de l'électricité et de l'eau, les consommateurs ont bénéficié, en deux ans, d'une économie totale correspondant à plus de 200 millions d'USD.

7. Le secteur des télécommunications offre de nombreux exemples de fixation monopolistique des prix due à la position dominante dont jouit l'opérateur historique, y compris après la phase de libéralisation et/ou de privatisation. La contribution de la Pologne⁷ signale plusieurs exemples de comportement abusif, consistant par exemple à faire participer le consommateur à des programmes d'investissement mixtes en échange d'un raccourcissement des délais d'obtention d'une ligne téléphonique, à lui faire supporter des intérêts illégitimes en cas de paiement tardif de l'abonnement, et à lui imposer des hausses de prix considérables des services RNIS. Dans tous ces cas, les actions d'application de la loi menées par l'autorité polonaise de la concurrence ont généré des gains économiques directs pour le consommateur.

8. La contribution suédoise signale une affaire concernant un programme de fidélisation de la clientèle d'une compagnie aérienne. Sur les lignes intérieures, où la compagnie historique était quelque peu en concurrence, on a estimé que l'offre de bonifications aux passagers était un abus de position dominante susceptible de mettre en danger la concurrence subsistante. Une étude économétrique comparant les tarifs pratiqués dans le contexte et hors du contexte de ce dispositif de remises pour fidélité a conclu que ce dernier augmentait les tarifs d'environ 10 pour cent. Une autre étude a estimé que le programme de bonification provoquait une hausse moyenne des prix de 500 SEK (soit environ 55 EUR) par passager d'affaires, soit à peu près 25 pour cent du tarif du billet moyen.

9. Quelquefois, la simple crainte de mesures d'application de la loi peut avoir un effet sur les prix. La Roumanie⁸ fournit un exemple de cimentiers qui ont réduit leurs prix peu après le lancement d'une enquête. Une autre affaire roumaine dans le domaine des cimenteries illustre le délicat équilibre entre efficacité et structure du marché. Cette affaire s'était conclue par une autorisation de fusion sous conditions, qui d'un côté réduisait le nombre de fournisseurs – au point de créer un monopole dans certaines régions – et de l'autre facilitait des économies d'échelle qui étaient impossibles dans le cadre de la structure antérieure à la fusion. La contribution roumaine conclut donc que les avantages de la réduction des coûts peuvent être répercutés sur le consommateur.

10. L'une des affaires rapportées dans la contribution du Pakistan a eu un effet direct sur les prix, l'une des conditions de la fusion étant une réduction des prix.

2.2 *Qualité et développement technique*

11. La libéralisation et la privatisation du secteur des télécommunications nécessitent dans la plupart des cas une application active du droit de la concurrence destinée à empêcher des agissements anticoncurrentiels de l'opérateur historique. La contribution lituanienne fait ressortir les effets sur le développement économique de ce secteur qu'ont pu avoir les actions des autorités, en particulier du point de vue de la modernisation du réseau existant et de l'amélioration de la qualité des services : la numérisation des réseaux atteint 88 %, et 85 % des clients de l'opérateur de télécommunications peuvent disposer de services ADSL.

12. Une affaire présentée par la Roumanie concerne les scories utilisées pour la production du ciment, qui sont des produits dangereux pour l'environnement. Au terme de cette affaire, le fournisseur dominant de scories s'est vu interdire de conclure avec les trois cimentiers existants un accord conjoint affectant les sources d'approvisionnement en fonction de critères de territoire et de volume de ventes. L'une des conclusions tirées était que le fait de remettre cet accord sur le métier faciliterait la collecte des scories, ce qui ne manquerait pas d'avoir des effets positifs sur la protection de l'environnement.

13. Deux affaires de fusion détaillées dans la contribution du Pakistan fournissent des exemples de recherche du développement technique. Dans l'une des affaires, la fusion a été autorisée à condition que l'entreprise fasse la promotion de la culture du thé dans une région précise. L'autre fusion a été autorisée à condition que soit mise en œuvre une technologie japonaise améliorée et une production au meilleur coût.

2.3 *Disponibilité et choix*

14. La contribution russe⁹ décrit les détails de l'affaire *Western Union*, où le fournisseur d'un système de transferts de fonds avait tenté d'empêcher les banques russes d'utiliser en parallèle d'autres systèmes du même ordre. La contribution conclut que cette affaire illustre le concours apporté par les mesures contre les agissements anticoncurrentiels privés au développement des systèmes de transfert de fonds au sein de la Fédération de Russie, ce qui favorise non seulement la concurrence sur le marché des services financiers, mais aussi le progrès économique.

15. Dans une affaire similaire rapportée par la Jamaïque¹⁰, un éditeur local de logiciels s'était plaint de l'avantage inéquitable obtenu par un concurrent en raison du cahier des charges technique de l'interface de communication. Au terme de l'enquête lancée par l'autorité de la concurrence, la banque centrale a accepté de configurer son système pour que les maisons de change y accédant puissent utiliser n'importe quel logiciel développé à cet effet. Ainsi, les clients et les bureaux de change purent disposer d'un éventail de choix leur permettant d'opter pour le produit correspondant le mieux à leurs besoins.

2.4 *Entrée sur le marché et structure du marché*

16. Le contrôle des fusions a un lien évident avec les questions de structure du marché. L'une des affaires décrites dans la contribution sud-africaine s'est soldée par l'interdiction d'une fusion entre deux des plus grandes chaînes de magasins d'ameublement du pays. Dans la période qui a suivi cette interdiction, des changements structurels de ce marché ont réduit l'impact de la concurrence des tiers. Au bout du compte, les deux entreprises qui n'avaient pu fusionner sont devenues les principaux concurrents du marché. La contribution indique que « si la transaction avait été approuvée, il ne fait guère de doute que les consommateurs sud-Africains disposant de faibles revenus paieraient plus cher certains éléments de base du panier de la ménagère ».

17. Par ailleurs, lorsque des fusions sont approuvées, les conditions de l'approbation peuvent influencer l'entrée sur le marché et la structure du marché. Une fusion dans le secteur des vins et spiritueux d'Afrique du Sud fut ainsi autorisée à condition que l'entité fusionnée se sépare de certaines marques

essentielles de spiritueux. Du coup, les deux concurrents des entreprises concernées par la fusion purent entrer sur le marché avec ces marques performantes, et jeter ainsi les bases d'une solide concurrence future.

18. D'autres affaires rapportées par l'Afrique du Sud¹¹ ont trait au caractère monopolistique des canaux de distribution du secteur agricole. À la suite de décisions du Tribunal de la concurrence concernant les statuts de nouveaux prestataires de services aux entreprises dans les secteurs des raisins secs et des agrumes, de nouveaux marchés de services essentiels pour les agriculteurs se sont développés et les marchés existants ont intégré de nouveaux prestataires.

19. L'une des affaires lituaniennes du secteur des télécommunications fournit un exemple d'opérateur historique tentant d'empêcher les fournisseurs de services Internet concurrents d'entrer sur le marché en installant des filtres sur les lignes téléphoniques analogiques louées. La bonne application du droit de la concurrence a permis aux nouveaux concurrents de louer ces lignes à des conditions concurrentielles. La Lituanie rapporte une autre affaire dans laquelle les actions des autorités ont empêché l'opérateur historique d'exclure la concurrence du marché des services téléphoniques via Internet. Plus de 30 entreprises tentant de s'implanter sur ce marché avaient été exclues du trafic RNIS, et se trouvèrent finalement en mesure de fournir de tels services grâce à l'issue favorable du conflit. La contribution de la Pologne signale des tentatives similaires, imputables à l'opérateur historique de services téléphoniques, visant à empêcher l'entrée sur le marché de nouveaux concurrents offrant des prestations en aval. Dans un dossier, les nouveaux concurrents potentiels étaient priés de contribuer au développement des infrastructures possédées par l'opérateur historique. D'autres dossiers se signalaient par des tarifs excessifs appliqués pour empêcher les opérateurs de téléphonie fixe et mobile et les prestataires de services Internet de louer des lignes téléphoniques. Dans toutes ces affaires, l'application du droit de la concurrence a facilité l'entrée de nouveaux concurrents sur le marché et la croissance de nouveaux marchés.

20. L'affaire des scories roumaines dont nous avons parlé plus haut est elle aussi considérée comme ayant renforcé la concurrence sur le marché en question et ayant supprimé des obstacles à l'entrée.

21. La contribution du Pakistan mentionne cinq affaires qui se sont traduites par une réduction de l'actionnariat d'entreprise. Ces affaires résultaient de l'application d'une règle de la Loi contre les monopoles et les pratiques commerciales restrictives qui interdit à tout individu de détenir plus de 50 % des droits de vote.

2.5 Croissance et développement économique

22. Une approche décrite dans la contribution de l'Ukraine consiste à comparer des marchés aux conditions concurrentielles différentes. Ainsi, dans les secteurs industriels ukrainiens où la concurrence joue pour la moitié au moins des activités – comme c'est le cas dans le secteur alimentaire, l'industrie forestière et les industries légères –, la croissance est entre 1,2 et 2 fois plus élevée que dans l'industrie en général. Quant au secteur du transport routier de voyageurs qui a été ouvert à la concurrence au cours de ces trois dernières années, la croissance du volume a été près de 6 fois plus forte que celle du secteur du transport ferroviaire qui reste monopolistique.

3. Une efficacité difficile à prouver

3.1 Effets comparés des mesures prises contre les agissements anticoncurrentiels privés et d'autres mesures de défense de la concurrence

23. Plusieurs contributions donnent des exemples issus du secteur des télécommunications, où la libéralisation et la privatisation ont ouvert les marchés à la concurrence. Simultanément, l'ancien détenteur du monopole conserve en général une position forte et contrôle les infrastructures de lignes fixes. Dans un

tel marché, les mesures réglementaires sont indispensables pour empêcher l'opérateur historique de brider la concurrence et d'abuser de sa position dominante. Les autorités de la concurrence ont senti un besoin d'application active du droit de la concurrence, notamment lorsqu'il manque une autorité sectorielle de la réglementation ou que l'autorité existante est perçue comme ne jouissant pas de pouvoirs suffisants. La Lituanie et la Pologne ont fourni des exemples de situations de ce type dans le secteur des télécommunications. À l'évidence, il est difficile ou impossible de séparer les effets de l'application de la loi de ceux de la libéralisation en tant que tels, ce qui traduit le fait que l'application de la loi tout à la fois dépend des réformes réglementaires et structurelles et soutient ces dernières.

24. Par ailleurs, la Jamaïque rapporte des effets positifs sur le marché des télécommunications, obtenus depuis que le fournisseur historique des services téléphoniques a été soumis à la concurrence. Le seul cimentier jamaïcain a connu une croissance significative de son chiffre d'affaires et de ses bénéfices au cours des périodes où il a été le plus soumis à la concurrence d'importateurs de ciment. Simultanément, les consommateurs ont bénéficié de délais de livraison plus courts, de prix plus bas et d'une qualité de ciment meilleure. Ces faits corroborent la conclusion qu'un renforcement de la concurrence peut engendrer à la fois une croissance pour les producteurs et des avantages pour les consommateurs, contrairement à ce que déclarent craindre certains milieux. L'exemple de la Jamaïque montre également qu'il est plus facile de démontrer les effets positifs de la concurrence en tant que telle que les effets particuliers des mesures prises contre les agissements anticoncurrentiels privés.

25. Un autre exemple des liens entre libéralisation et nécessité d'une action contre les pratiques anticoncurrentielles privées est fourni par la contribution du Taipei chinois. Les ex-monopoles d'État des marchés de la production et de la distribution du GPL ont été progressivement supprimés, à compter du début des années 90, pour aboutir à un marché entièrement libéralisé moins de 10 ans plus tard. Néanmoins, des pratiques anticoncurrentielles ont bientôt été détectées, et l'autorité de la concurrence a pris des mesures contre 30 sociétés d'embouteillage et de transport du GPL de la région septentrionale du pays qui avaient formé deux cartels pour monopoliser les marchés locaux de l'embouteillage et de la distribution. La contribution conclut que « le seul recours à la libéralisation du marché n'a pas suffi à garantir un fonctionnement sain du marché et les avantages afférents ».

3.2 *Effets à court terme et effets à long terme*

26. La concurrence n'est pas une fin en soi, mais un moyen d'atteindre des objectifs de longue haleine. Parmi ces objectifs figurent l'efficacité économique, qui mène au développement et à la croissance économiques et – notamment dans les pays en développement – à la diminution de la pauvreté. Le bien-être du consommateur est souvent considéré comme un objectif de la politique de la concurrence, à travers entre autres des prix plus bas, une qualité en hausse, un choix plus étendu et des produits nouveaux et améliorés. L'application judiciaire du droit de la concurrence, d'un autre côté, peut se traduire essentiellement par des effets de court terme. Parfois, on peut observer un effet immédiat sur les prix ou - par exemple dans les cas de fusions - sur la structure du marché. Les affaires qui traitent de questions de discrimination, en raison par exemple d'un abus de position dominante, peuvent avoir pour les concurrents des répercussions évidentes qui sont supposées renforcer la concurrence à plus long terme. Parfois, le seul effet à court terme démontrable est la suppression d'un comportement anticoncurrentiel.

27. Lorsqu'on cherche à faire la preuve des effets bénéfiques de l'application du droit de la concurrence, l'une des difficultés évidentes est de démontrer que les effets à court terme observables conduisent à plus long terme au développement économique. En effet, un prix plus bas ne mène pas dans toutes les circonstances à davantage d'efficacité économique qu'un prix plus élevé. Et l'amélioration des conditions faites à un concurrent n'est pas toujours synonyme d'amélioration de la concurrence.

3.3 *Effets directs et effets indirects*

28. La contribution du Japon¹² range la baisse des prix, l'amélioration de la qualité et la réduction des coûts parmi les effets directs, tandis que la prévention des actes de violation du droit de la concurrence par d'autres entreprises est un effet indirect des mesures prises contre les agissements anticoncurrentiels. À l'évidence, les effets directs sont plus faciles à mesurer, mais les effets indirects peuvent s'avérer à long terme les plus importants. La contribution conclut qu'il est donc nécessaire de mettre au point une méthode permettant d'évaluer les effets économiques indirects.

3.4 *Effets qualitatifs et effets quantitatifs*

29. La plupart des effets présentés dans les contributions sont de nature qualitative. Les tentatives existantes d'évaluation des effets de l'application du droit de la concurrence de manière quantitative ont pour la plupart utilisé les effets des prix. Si l'on peut soutenir que l'effet sur les prix n'est pas le seul impact d'un renforcement de la concurrence, ni même peut-être son impact le plus important, les prix peuvent constituer un indicateur quantitatif commode des effets globaux. Une approche quantitative est indispensable pour mener des analyses coûts/avantages plus avancées de l'application du droit de la concurrence telles que celle présentée dans la contribution japonaise.

3.5 *Effets pervers*

30. L'application de la législation sur la concurrence suppose d'intervenir dans le libre jeu des forces du marché. Cette intervention est motivée lorsqu'un non-interventionnisme aurait des conséquences négatives sur l'efficacité du marché. Cependant, les difficultés évidentes que l'on rencontre pour quantifier les effets de l'application du droit de la concurrence au niveau de chaque dossier rappellent l'importance de veiller à ne pas créer d'effets pervers, c'est-à-dire d'entraver l'efficacité, la croissance et le développement économique, par les mesures prises. La contribution de la Jamaïque cite un exemple dans lequel l'entente entre concurrents sur le marché du pétrole a été considérée comme porteuse d'une efficacité accrue qui finirait par avantager les consommateurs grâce à une baisse des prix à la pompe. L'autorité de la concurrence n'a donc entamé aucune action contre cette entente. Ainsi, dans l'application du droit de la concurrence, il est tout aussi important d'éviter d'intervenir contre des comportements pro-concurrentiels que d'intervenir contre des agissements anticoncurrentiels.

3.6 *Questions méthodologiques*

31. La contribution du Japon décrit une méthode de mesure des effets d'une ordonnance de ne pas faire qui a été prise dans une affaire de trucage des offres. Pour surmonter les difficultés résultant des différences de contenu, d'échelle, etc., l'autorité de la concurrence a examiné l'évolution des ratios prix contractuels réels/prix contractuels planifiés qu'avaient pré-établis les organismes publics acheteurs. Cet examen, portant sur une affaire de marché public pour des machines et des matériels de test automobile, a conclu que l'effet économique des mesures d'application de la loi atteignait 4.4 millions d'USD en raison de la réduction du coût total des achats. À titre comparatif, il convient de noter que l'autorité de la concurrence a dépensé seulement environ 190 000 USD pour connaître de l'affaire.

32. La contribution suédoise fait référence à une étude économétrique de l'effet sur les prix de l'interdiction d'un programme de fidélisation de la clientèle d'une compagnie aérienne. Cette étude a été effectuée par un chercheur indépendant mandaté par l'autorité de la concurrence, qui a comparé les périodes avec et sans programme de fidélisation à l'aide d'un modèle de régression comportant jusqu'à 15 variables de contrôle (distance, population concurrence du train, etc.). L'analyse a conclu que la pratique anticoncurrentielle avait eu sur les prix un effet évalué à 10 pour cent.

33. La contribution ukrainienne fait référence à une méthode de mesure de l'impact de l'ouverture des marchés à la concurrence par la comparaison de différents secteurs (elle est également mentionnée au paragraphe 20 ci-dessus).

4. Thèmes à débattre

34. Les thèmes suivants sont proposés pour le débat général qui se tiendra dans le cadre de la session IV de la réunion du Forum mondial sur la concurrence :

- Les autorités de la concurrence devraient-elles adopter une démarche plus systématique pour suivre les effets des mesures qu'elles prennent ?
- Devraient-elles encourager les établissements universitaires à mener des recherches économiques permettant de démontrer les effets de l'application du droit de la concurrence ?
- Existe-t-il un besoin d'élaborer des méthodes d'évaluation de ces effets utilisables par les autorités de la concurrence ou des chercheurs indépendants ?
- Existe-t-il un besoin de coopération internationale prenant la forme d'études conjointes des effets et de l'efficacité de l'application du droit de la concurrence ?
- Quels enseignements pour le développement économique peut-on tirer de la comparaison de juridictions qui ont jusqu'ici appliqué le droit de la concurrence de manière agressive et de celles qui l'ont appliqué de manière plus retenue ?

NOTES

1. Note de référence du Secrétariat, CCNM/GF/COMP(2003)7.
2. Au 30 janvier, des contributions sur le thème de la session IV ont été soumises par l’Afrique du Sud, la Fédération de Russie, la Jamaïque, le Japon, la Lituanie, le Pakistan, la Pologne, la Roumanie, la Suède, le Taipei chinois, la Thaïlande et l’Ukraine.
3. Voir la note du Secrétariat CCNM/GF/COMP(2003)7, paragraphe 11.
4. Contribution du Pakistan, CCNM/GF/COMP/WD(2004)18.
5. Contribution du Taipei chinois, CCNM/GF/COMP/WD(2004)26.
6. Contribution de l’Ukraine, CCNM/GF/COMP/WD(2004)14.
7. Contribution de la Pologne, CCNM/GF/COMP/WD(2004)25.
8. Contribution de la Roumanie, CCNM/GF/COMP/WD(2004)7.
9. Contribution de la Fédération de Russie, CCNM/GF/COMP/WD(2004)3.
10. Contribution de la Jamaïque, CCNM/GF/COMP/WD(2004)19.
11. Contribution de l’Afrique du Sud, CCNM/GF/COMP/WD(2004)11.
12. Contribution du Japon, CCNM/GF/COMP/WD(2004)13.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Note by the Secretariat

-- Session IV --

This postscript note by the Secretariat supplements the Background Note for Session IV. It is submitted FOR DISCUSSION under Session IV of the Global Forum on Competition to be held on 12-13 February 2004.

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English - Or. English

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Postscript Note by the Secretariat

1. Introduction

1. This Note is intended to serve as a “post script” to the Secretariat’s Background Note¹ for Session IV of the meeting of the Global Forum on Competition on 12 and 13 February 2004 [CCNM/GF/COMP(2003)7]. It is based upon the written contributions that have been submitted as of 30 January 2004.² While not attempting to summarise these contributions as such, the Note aims to highlight some observations on effects described in the contributions, discusses various difficulties in demonstrating the effects on economic development of enforcement against private anticompetitive conduct, and finally proposes a few points for the general discussion at the meeting.

2. The contributions submitted on present a number of competition law cases from national jurisdictions, as well as certain other measures aiming at the introduction or promotion of competition in various sectors of the economy. The outcomes and effects of those activities are described and discussed, mostly in qualitative terms but an attempt also has been made in some instances to quantify the effects. Typically, effects on the price of the product have been the most apparent, but noteworthy effects have also been identified in relation to quality, availability of products, market entry, market structure, and technical development. The contributions represent a variety of approaches, often in the form of anecdotal evidence. Effects on growth and economic development at large are not as easily demonstrated, although some contributions also discuss possible methods to measure the impact of competition law on economic development. Different kinds of effects described in the contributions are discussed in section 2 below.

3. There are obviously several difficulties involved in efforts to demonstrate how enforcement against private anticompetitive conduct has contributed to economic development. Firstly, competition policy has several branches, law enforcement being one of them, and the effects may be difficult to isolate from those of other measures like pro-competitive regulatory or structural reform. Another difficulty stems from the fact that the most important effects of competition may be indirect, and only manifest themselves in the long term. On the other hand, when discussing consequences of individual law enforcement cases it may be difficult to reach beyond the short term, direct effects. There are also the obvious difficulties in measuring, quantitatively, effects of competition law enforcement, as opposed to describing qualitative outcomes of halting anticompetitive behaviour. That leads to the issue of methodologies and measurement techniques. These difficulties are discussed in further detail in section 3 below.

2. Observed and demonstrated effects

2.1 Price

4. The most obvious effect of a price cartel is that participating companies are able to raise the price above the level established under competition. Consequently, breaking such cartels mostly has obvious and direct effects on the price – effects that may be calculated in quantitative terms.³ The contribution from Pakistan⁴ describes three cases of successful competition law enforcement against price cartels – two in the cement sector and one in the cable sector.

5. The contribution from Chinese Taipei⁵ offers an example of quantifying the harmful effect of a cartel. Following a period of successively increased liberalisation of the markets for liquefied petroleum gas ('LPG'), two cartels were established that covered more than 90 per cent of the LPG bottling and retail markets in the northern part of Chinese Taipei. An assessment of the sustained price increases resulting from the cartel activities was made by the competition authority, showing a total effect of more than NT\$1 billion (approximately US\$30 million).

6. Another area where noteworthy price effects have been identified is where the competition authority challenges the regulated prices of monopolies, set by another regulator. As an example, the contribution from Ukraine⁶ reports that such revisions of prices for electricity and water supply in 2 years have reduced consumers' costs with a total amount corresponding more than US\$ 200 million.

7. The telecommunications sector offers many examples of monopolistic pricing, due to the dominant position held by the incumbent operator also after liberalisation and/or privatisation. The contribution from Poland⁷ reports several examples of abusive behaviour, including demands that customers contribute to joint investment schemes, pay undue interest on subscription payments, and pay extreme price increases for ISDN services. In all these cases, the enforcement activities of the Polish competition authority have led to direct economic gains for consumers.

8. The Swedish contribution reports on a case dealing with a frequent-flyer program. On domestic routes where the incumbent air carrier met some competition, offering bonus points to passengers was found to be an abuse of a dominant position that would endanger remaining competition in the market. An econometric study comparing fares in periods with and without the fidelity-rebate scheme concluded that this system increased fares by approximately 10 per cent. And another study estimated the bonus program to result in an average price increase of SEK 500 (approximately €55) per business passenger, corresponding to approximately 25 per cent of an average business fare.

9. Sometimes, even fears of enforcement action may have an effect on prices. Romania⁸ provides an example of cement manufacturers reducing prices soon after the initiation of an investigation. Another Romanian cement case illustrates the delicate trade-off between efficiency and market structure. The outcome of the case enabled a merger under conditions, which on the one hand reduced the number of suppliers – to the extent of creating a monopoly in some regions – and on the other facilitated scale economies that were not attainable under the pre-merger structure. Consequently, the contribution concludes that the benefits of reduced costs might be passed on to consumers.

10. One of the mergers cases reported in the contribution from Pakistan had a direct effect on prices, as a result of a price reduction being one of the conditions for authorising the merger.

2.2 *Quality and technical development*

11. Liberalisation and privatisation of the telecommunications sector mostly calls for active enforcement of competition law in order to prevent anticompetitive behaviour by the incumbent operator. The Lithuanian contribution identifies effects on the economic development of this sector as a result of enforcement activities, in particular as regards modernisation of the existing network and improved quality of services, with network digitalisation reaching 88% and ADSL services being available to 85% of the telecom operator's customers.

12. A case submitted by Romania deals with slag used for the production of cement – a product which is an environmentally dangerous waste. As an outcome of this case, the dominant supplier of slag was prevented from concluding a joint agreement with the three existing manufacturers of cement, allocating sources of supply according to territorial and sales volume criteria. One conclusion from this

case was that the revision of the agreement would facilitate slag collection, thereby having positive effects on environmental protection.

13. Two merger cases reported in the contribution from Pakistan provide examples of conditions aiming at technical development. In one of the cases the merger was authorised on condition that the company would promote tea cultivation in a specified district. The other merger was authorised subject to the introduction of improved Japanese technology and cost-effective production.

2.3 *Availability and choice*

14. The Russian⁹ contribution describes details of the *Western Union* case, where the provider of a system for money transfers attempted to prevent Russian banks from using other similar systems in parallel. The contribution concludes that the case illustrates how enforcement against private anticompetitive conduct has assisted the development of money transfer systems in the Russian Federation, which serves not only the promotion of competition in the financial services market but contributes to economic progress as well.

15. In a similar case, reported by Jamaica¹⁰, a local software operator complained that a competitor had been given an unfair advantage due to the technical specifications of the communication interface. As a result of the investigation initiated by the competition authority, the Central Bank agreed to configure its system for access in a way that allows cambio operators to use any software program developed for this purpose. Thereby customers and cambio operators were provided with a variety of choices allowing them to select the product that best meets their demands.

2.4 *Entry and market structure*

16. Merger control has an obvious link to issues of market structure. One of the cases described in the South African contribution resulted in the prohibition of a merger between two of the country's largest retail furniture chain stores. In the period after the prohibition structural changes took place in this market that reduced the impact of competition from third parties. Subsequently, the two parties that were prevented from merging were left as the most significant competitors in the market. The contribution states that "there is little doubt that, had the transaction been approved, low income South African consumers would be paying more for some basic elements of their consumption package".

17. Also when mergers are approved, conditions for the approval may have an impact on entry and market structure. A merger in the South African wine and spirits industry was authorised on condition that the merged entity divest itself of certain key spirit brands. As a consequence, the two competitors to the merging parties were able to enter the market with these successful brands, thus laying the basis for robust competition in the future.

18. Other cases reported by South Africa¹¹ deal with single-channel marketing arrangements in the agricultural sector. As a result of rulings by the Competition Tribunal on articles governing the association of new service providers to corporations in the raisins and citrus fruit sectors, new markets for the provision of key services to farmers have developed and there has been new entry in existing service markets.

19. One of the Lithuanian telecommunications cases provides an example of the incumbent operator trying to prevent competing Internet service providers from entering the market by installing filters on leased analogue telephone lines. Successful enforcement of competition law allowed the new entrants to lease such lines on competitive terms. In another case reported by Lithuania, enforcement action prevented the incumbent operator from excluding competitors from the Internet telephone services market. More than 30 companies attempting to provide phone services using the Internet had been blocked from the ISDN

flow, but were eventually able to provide such services due to the successful outcome of the case. Similar attempts by the incumbent telephone services operator to prevent new entry by down-stream competitors are reported in the contribution from Poland. In one case potential new entrants were requested to contribute to the development of the infrastructure facility owned by the incumbent operator. Other cases involved excessive fees being applied in order to prevent fixed and mobile operators and Internet service providers from leasing telephone lines. In all these cases the enforcement of competition law facilitated new entry and the growth of new markets.

20. Also the Romanian slag case, mentioned above, was envisaged to enhance competition in the market and remove existing barriers to entry.

21. The contribution from Pakistan refers to five cases that reduced shareholding in companies. These enforcement cases were applying a rule in the Monopolies and Restrictive Trade Practices Act preventing any individual to hold more than 50% voting power.

2.5 Growth and economic development

22. One approach described in the contribution from Ukraine is to compare markets where competitive conditions differ. Thus, in those industrial sectors in Ukraine where there is competition in at least half of the activities – like the food, forestry and light industry sectors – growth is between 1.2 and 2 times higher than in the industry at large. And in the sector for road transport of passengers, which was opened for competition in the last three years, growth of the transport volume has been almost 6 times higher than in the railway transport sector, still under monopoly.

3. Difficulties in demonstrating effects

3.1 Effects of enforcement against private anticompetitive conduct vs. other action promoting competition

23. Several contributions provide examples from the telecommunications sector, where liberalisation and privatisation have opened markets for competition. At the same time, the former monopolist generally retains a strong position and controls the fixed line infrastructure. In such a market, regulatory measures are needed to prevent the incumbent operator from restraining competition, abusing its dominant position. Competition authorities have seen a call for active enforcement of competition law, especially where there is no sectoral regulator or an existing regulator is perceived to lack sufficient powers. Lithuania and Poland have provided examples of such cases in the telecommunications sector. Obviously, it is difficult or impossible to separate the effects of law enforcement from those of the liberalisation as such, recognising that the enforcement is linked to, and supports, the regulatory and structural reforms.

24. Also, Jamaica reports positive effects in the telecommunications market since the incumbent telephone services provider was exposed to competition. And the sole cement manufacturer in Jamaica experienced significant growth in revenue and profits during the periods when it faced most competition from importers of cement. At the same time, consumers benefited from shorter delivery time, lower prices, and better cement quality. This supports the conclusion that enhanced competition may bring both growth to producers and benefits to consumers, contrary to prevailing fears in some constituencies. The example from Jamaica also shows that it is easier to demonstrate the positive effects of competition *per se* than of the specific effects of enforcement against private anticompetitive conduct.

25. Another example of the links between liberalisation and need for action against private anticompetitive conduct is given by the contribution from Chinese Taipei. The former state monopolies in the markets for producing and distributing LPG were gradually removed, starting in early 1990's and ending up in a fully liberalised market less than 10 years later. However, anticompetitive practices were

soon unveiled, and the competition authority took action against 30 LPG bottling and transport companies in the northern region that had formed two cartels in order to monopolise the local bottling and retail markets. The contribution concludes that “solely relying on market liberalisation was not enough to guarantee a healthy market function and the benefits produced thereby”.

3.2 Short term vs. long term effects

26. Competition is not an end in itself, but a means to achieve long-term goals. Such goals include economic efficiency, leading to economic development and growth and – particularly in developing economies – poverty reduction. Consumer welfare is often seen as a goal of competition policy, including through lower prices, better quality, wider choice, and new and better products. The outcome of an enforcement case, on the other hand, may mostly manifest itself in effects of a short term nature. Sometimes an immediate effect on the price may be observed or – for instance in merger cases – on market structure. Cases dealing with discrimination, for instance through an abuse of dominance, may have obvious effects for competitors that are assumed to enhance competition in the longer perspective. Sometimes the only demonstrable short-term effect is that an anticompetitive behaviour is discontinued.

27. One obvious difficulty in demonstrating the beneficial effects of competition law enforcement is to provide evidence that the observable short term effects lead to economic development in the longer term. A lower price does not under all circumstances lead to more economic efficiency than a higher price would have done. Improved conditions for a competitor are not always equal to improved competition.

3.3 Direct vs. indirect effects

28. The contribution from Japan¹² quotes price reduction, quality improvement and cost reduction among the direct effects, whereas the prevention of competition law infringement by other companies is an indirect effect of measures against anticompetitive conduct. The direct effects are obviously easier to measure, whereas the indirect effects in the long run may be the more important ones. The contribution concludes that it therefore is necessary to develop a method to gauge indirect economic effects.

3.4 Qualitative vs. quantitative effects

29. Most effects presented in the contributions are of a qualitative nature. Existing attempts to assess effects of competition law enforcement quantitatively have mostly been based upon price effects. Although it may be argued that the effect on prices is not the only impact of enhanced competition – maybe not even the most important one – prices may be a convenient quantitative indicator of the overall effects. A quantitative approach is indispensable for more advanced cost/benefit analyses of competition law enforcement, like the one presented in the contribution from Japan.

3.5 Perverse effects

30. Enforcement of competition law implies an intervention into the free play of market forces. Such intervention is motivated when *laissez-faire* would lead to a less than optimal outcome in terms of market efficiency. However, the obvious difficulties in quantifying the effects of competition law enforcement in the individual case is a reminder of the importance of not creating perverse effects – that is, hampering efficiency, growth and economic development – through enforcement activities. The contribution from Jamaica quotes an example where an agreement between competitors in the petroleum market was found to enhance efficiency, which should ultimately benefit the consumer through lower prices at the pumps. Consequently no action against the agreement was taken by the competition authority. Thus, in the enforcement of competition law, avoiding intervention against pro-competitive conduct is as important as the intervention against anticompetitive conduct.

3.6 *Methodology issues*

31. The contribution from Japan describes a method for the measurement of effects of a cease and desist order in a bid rigging case. In order to overcome the difficulty resulting from differences in contents, scale, *etc.*, the competition authority examined changes in the ratios of actual contract prices to planned contract prices pre-set by the procuring public agencies. The result of this examination, related to a case on public procurement in the market for machines and equipment for automobile testing, showed an economic effect of the enforcement action of US\$4.4 million following from the reduction of the total procurement cost. In comparison, it should be noted that the competition authority spent only approximately US\$190 thousand in handling the case.

32. The Swedish contribution refers to an econometric study of the price effect following from the prohibition of a frequent-flyer program. The study was made by an independent researcher commissioned by the competition authority, who compared periods with and without bonus schemes using a regression model that includes up to 15 control variables (distance, population, competition from train, *etc.*). As a result of this analysis a 10 per cent price effect of the anticompetitive practice was identified.

33. A method for measuring the effect of opening markets for competition by comparing different sectors is referred to in the contribution from Ukraine, also mentioned in paragraph 20 above.

4. **Issues for discussion**

34. The following issues are proposed for the general discussion under Session IV of the GFC meeting:

- Should competition authorities take a more systematic approach to follow up effects of enforcement cases?
- Should competition authorities encourage economic research by academic institutions to demonstrate effects of competition law enforcement?
- Is there a need to develop methods for the evaluation of such effects that could be used by competition authorities or independent researchers?
- Is there a need for international co-operation aiming at joint studies of effects and efficiency of competition law enforcement?
- What lessons for economic development can be learned by comparing jurisdictions with aggressive enforcement histories with jurisdictions with modest enforcement histories?

NOTES

1. Background Note by the Secretariat, CCNM/GF/COMP(2003)7.
2. As of 30th January, contributions on the theme of Session IV have been submitted by Jamaica, Japan, Lithuania, Pakistan, Poland, Romania, Russian Federation, South Africa, Sweden, Chinese Taipei, Thailand and Ukraine.
3. See Secretariat Note CCNM/GF/COMP(2003)7, paragraph 11.
4. Contribution from Pakistan, CCNM/GF/COMP/WD(2004)18.
5. Contribution from Chinese Taipei, CCNM/GF/COMP/WD(2004)26.
6. Contribution from Ukraine, CCNM/GF/COMP/WD(2004)14.
7. Contribution from Poland, CCNM/GF/COMP/WD(2004)25.
8. Contribution from Romania, CCNM/GF/COMP/WD(2004)7.
9. Contribution from the Russian Federation, CCNM/GF/COMP/WD(2004)3.
10. Contribution from Jamaica, CCNM/GF/COMP/WD(2004)19.
11. Contribution from South Africa, CCNM/GF/COMP/WD(2004)11.
12. Contribution from Japan, CCNM/GF/COMP/WD(2004)13.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution by Claes Norgren (Lead Discussant)

-- Session IV --

This contribution is submitted by Lead Discussant Claes Norgren (Director General, Swedish Competition Authority) under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

*Contribution from Lead Discussant Claes Norgren,
Director General, Swedish Competition Authority*

1. This paper briefly discusses some aspects of how the effectiveness of enforcement against anticompetitive conduct can be measured and evaluated. There is no doubt that this topic involves major methodological difficulties. At the same time questions about effectiveness are often raised by politicians, lawmakers, researchers and not least by business people who call for amendments to existing laws or abolition of provisions restricting their freedom of movement to engage in certain practices.

2. The Secretariat has proposed a number of issues for our discussion, *inter alia*:

- Is there a need to develop methods for the evaluation of such effects that could be used by competition authorities or independent researchers?
- Is there a need for international co-operation aiming at joint studies of effects and efficiency of competition law enforcement?

3. Sweden has proposed that the OECD Competition Committee take up studies on how effectiveness of enforcement could be measured and evaluated on its work programme for 2005 and 2006. We believe that a comprehensive approach to this topic is fundamental in order to support competition authorities in their work and to ensure that competition policy is designed in the most efficient possible way.

1. Avenues of evaluation

4. In recent years, and in most countries around the world, there has been an increasing awareness of the importance of policies that promote long-term growth. Sound structural policies in general, and sound competition policies in particular, are seen as fundamental for achieving long-term growth.

5. In practice, evaluations of the effectiveness of competition policies and enforcement are rarely done. This is not unique for the competition area. The difficulties involved may be one of the explanations for that.

6. With regard to competition policy, it may be also be difficult to isolate effects stemming from liberalisation and other structural reforms and those stemming from competition law enforcement, which is the topic for the discussion in this session. Other complications are that effects on competition as a result of interventions from competition authorities may be indirect or only possible to appreciate in the long term.

7. A number of possible avenues for measuring and evaluating the effectiveness of competition enforcement can be suggested. First, competition enforcement at one competition authority can be benchmarked against other similar authorities, or compared over time. This approach measures and evaluates productivity of the authority, although, arguably, it tends to do so in a very simplistic manner. Second, the effectiveness of competition enforcement can be measured by evaluating the quality of individual decisions or of decisions in general. Much of the academic literature of law scholars focus on the quality of

individual decisions, while “Gallup” surveys of the perception of competition authorities can be seen as attempts to measure overall decision quality. Third, competition enforcement can be evaluated by looking at the impact of the regulatory interventions on the functioning of the market.

2. Benchmarking bureaucratic productivity

8. The simplest measure of the effectiveness of a competition authority’s law enforcement would be to measure the number of cases handled per staff member, i.e., total number of cases handled per year divided by (average) staff enrolment. Naturally, this is a very crude measure.

9. Because of differences in national legislations, the average complexity of cases varies between different competition authorities. For example, if the merger control system has very low thresholds for compulsory merger notifications, the authority will handle a large number of relatively uncomplicated cases. If the thresholds are high, there will be fewer cases, but the average complexity will be higher. Finally, if merger notifications are not compulsory and if, instead, the authority can open merger investigations at its own discretion, there will be few – or no – uncomplicated merger cases. If, in an international comparison, productivity is measured as the number of cases per staff member, a competition authority will automatically appear to be more productive with a low notification threshold and less productive if notifications are not compulsory. As a simple illustration, the Swedish Competition Authority handled approximately 1600 merger cases during the period 1993-2002, while the EU Commission made 1990 final decisions in merger cases during the same period. The resources used by the Authority during a typical year in merger cases corresponds to approximately 6 person-years, while the size of European ‘Commission’s Merger Task Force, which handles only slightly more cases per year, was several times larger. Naturally, this is due to the much higher average complexity of merger cases examined at the European community level and, consequently, this comparison says very little about relative productivity.

10. Another important problem with a simple comparison of bureaucratic efficiency is that the *quality* of the decisions taken may vary greatly – and the quality of the decisions taken is likely to be at least as important as the number of decisions taken. However, it may still be possible to draw some conclusions from such measures. It may be possible to design more clever measures of bureaucratic output than just the raw number of cases handled. Possible measures would be the number of prohibited mergers, the number of cases with fines for anticompetitive behaviour or where a party has been ordered to terminate an infringement of the law and the number of cartels that have been identified and prosecuted. Data-envelopment analysis or similar techniques may be used to handle the fact that the tasks faced by a competition authority are multi-dimensional.

11. There are still many problems with these measures. The resource requirement depends on whether the authority has the right to make a decision that binds the parties, or whether it has to go to court to get such a decision. The number of cartels detected depends on, i.e., the prevalence of cartels in the domestic market and the sanction system.

3. Assessing the quality of decision-making

12. Certainly, the academic law literature plays an important and influential role when it discusses the quality of the authorities’ decision-making. It can contribute to the development of best practice and safeguard against poor decision making. However, the academic literature gives only a fragmentary picture of the overall quality of decision making. Hence, it is difficult to use this literature for comparison *between* authorities.

13. Naturally, the court system has a fundamental role in maintaining decision quality. Potentially, the courts’ case-by-case quality check can be aggregated into a single measure of the quality of the

authority's decision-making quality. For example, the share of cases won in court can be used as a measure of quality, although differences in legal systems may make international comparisons of this number less useful.

14. The "Gallup-style" surveys that compare a number of competition authorities may be more useful for bench-marking. Such surveys suffer from a number of methodological problems, but some, such as the survey made by Global Competition Review, are given much attention in the media. The surveys are based on the stated opinions of competition lawyers and other practitioners and on factual data from the authorities about staff and enforcement. In 2002, Sweden scored 3.5 out of 5 stars overall, putting it on a par with Canada, Denmark, Finland, Ireland, New Zealand, Japan and the Netherlands.

15. The evaluations of competition-enforcement regimes undertaken in the OECD Competition Committee and now also in this Global Forum on Competition are in many respects unique. These peer reviews are prepared with the specific intention of facilitating the implementation of best-practices in competition policy. The peer reviews may not easily allow direct cross-country comparisons but they offer a thorough analysis of competition law and enforcement in a certain country that may be used as a reference and input for others.

4. Assessing the impact of competition policy

16. Another aspect of interest is the effect of competition policy (law and enforcement) on the efficiency of the economy at large and its ability to increase consumer welfare. Ideally, we would like to know the answer to at least a couple of questions: How much better off are consumers (if at all), because of the current competition policy, relative to a hypothetical situation without competition policy? How much better off would consumers be, relative to the present situation, if a best-practice competition policy was enacted? And how effective is a given country's competition policy, compared to the corresponding policies in other countries?

17. There are two principal ways to address such questions. One can be called a top-down strategy and the other a bottom-up strategy. A top-down strategy would look at the whole of the economy and would try to infer the benefits that accrue from competition law and enforcement, for example by comparing markets or countries which are subject to different forms of competition rules, or by comparing the same country over time, in order to identify the effect of policy reforms. A bottom-up strategy would look at individual cases, attempting to quantify the effect of particular decision or action, and then estimating the aggregated effect of all decisions.

18. The problem with a top-down strategy is that it is very difficult to isolate the effect of competition policy from other factors that influence welfare and economic growth, such as the business cycle, tax policy, educational policy *et cetera*. The problem with a bottom-up strategy is that the most important effect of competition policy is that market participants abstain from anticompetitive actions in the first place. If competition laws and enforcement are effective, firms will not enter into cartel agreements or attempt to abuse their dominant positions, and they may not even try to get approval for anticompetitive mergers.

19. In 1966, George J. Stigler published a study entitled *The Economic Effects of the Antitrust Laws*, in which he reached the conclusion that the economic effect was likely to be quite small. In particular, he analysed the effect of the prohibition against interlocking directorates under US antitrust laws, by comparing the composition of directorates in the USA and in the UK. Stigler's study is an example of a top-down analysis.

20. Later studies have drawn more favourable conclusions as to the effectiveness of competition policy. Virtually all economists would agree that competition is fundamental for generating welfare and that effective competition will only result in an institutional context in which the firms' degrees of freedoms are to some extent circumscribed. However, the views on *how* competition rules should be designed vary more and some would perhaps argue that competition policy is in fact detrimental to welfare, although it appears that this view is quite uncommon.

21. A more recent attempt to evaluate competition policy is George Symeonidis (2002), who compares the evolution of a sample of British industries that were or were not affected by the introduction of a prohibition against cartel agreements. One of his key findings is that cartel policy *was* effective, in the sense that competition became more intense in industries where cartels were prohibited, leading to lower prices and more innovation. In the long run, however, the increased level of competition appears to have led to a higher degree of concentration in these industries, partially offsetting the effect of the stricter competition rules.

22. At an even more aggregate level, one can assess the effect of competition on growth, GDP and price levels. In line with the consensus view of economists, referred to above, the empirical evidence seems to confirm that competition increases growth and GDP, while reducing price levels. In a series of studies, the Swedish Competition Authority has analysed the relation between Sweden's general price level and a number of its likely determinants. The results suggest that the price level is higher than it should be, considering, i.e., Sweden's GDP per capita and taxes. This, in turn, suggests that the Swedish economy may be less competitive than that of the average EU member. However, it appears far-fetched to attribute the relatively high price level in Sweden to ineffective enforcement of the competition law. For example, a legacy of product-market regulations may contribute to a lower average degree of competition.

23. Bottom-up analyses are primarily made in the context of merger control – so called merger simulations. Such simulations provide an estimate of what the price effects of a merger will be. Hence, price-effect simulation of mergers that were prohibited can be used as estimates of the benefits generated by competition law enforcement.

24. In principle, it would be possible to systematically evaluate the effect of other types of enforcement, such as interventions against anticompetitive agreements or against abuse of dominance. In such cases, it would be possible to evaluate the effect of enforcement by analysing the actual effects on the market. However, analysis of this type is rarely done by the authorities themselves, but is sometimes made by academics. As regards Sweden, there appears to be a widespread consensus that the introduction of an EU-style competition law in 1993 has contributed towards more effective competition, providing benefits for consumers. As mentioned above, the Swedish Competition Authority has scored relatively well in an international "Gallup" survey on competition authorities.

25. More anecdotal reports suggest that prices may fall substantially in markets where cartels have been detected and prosecuted. Another example is the detection of a major cartel case in Sweden last year concerning bid-rigging in the asphalt business that resulted in a price fall by 25% in some regions. A wide range of examples on price decreases and other beneficial effects on competition are demonstrated in the contributions for this session..

26. However, as stated also in the Secretariat paper, one major difficulty in demonstrating the beneficial effects of competition law enforcement is to show that the observed short term effects lead to economic growth in the longer term. In the long run a lower price does not necessarily lead to more economic efficiency than a higher price would have done. Cases concerning abuse of a dominant position may be examples of such situations.

27. There are a number of methods that can be used to evaluate the effectiveness of competition enforcement. All of these methods have weaknesses, although one particular method may be the best choice in response to a particular question. There are few studies that allow for an international comparison of effectiveness of enforcement.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from Bulgaria

-- Session IV --

This contribution is submitted by Bulgaria under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. The Constitution of Bulgaria, which has been in force since 1991, sets up the basis for the development of competition. It provides that the Bulgarian economy is based on free economic initiative. Paragraph 2 of Article 19 establishes and guarantees to all citizens and legal persons equal legal conditions as regards economic activity, preventing abuse of monopolistic position, unfair competition and consumer protection.
2. In the 2002 Regular Report of European Commission on Bulgaria's Progress towards Accession, it was concluded that Bulgaria is a functioning market economy. Such an evaluation indicates that Bulgaria has already achieved liberalisation of its economy and has opened up its markets. The Commission for the Protection of Competition of Bulgaria (CPC, Commission) plays an important role as regards its enforcement activities as well as in the field of competition advocacy.
3. On the one hand, in the last few years, the privatisation process in Bulgaria has been extremely intensive. CPC has taken a very active part in the process, as far as an approval of the Commission was a condition for enforcing the deals. Thus liberalisation of the market was launched and foreign investment and private initiative were encouraged.
4. The efforts have been directed to liberalisation of the prices of goods and services; opening the markets for new entrants and promoting competition. According to CPC, it should be noticed that its tasks have been to participate in drafting the relevant legislation and through its enforcement record to prosecute and restrain the anti competitive conduct of economic agents.
5. The process of liberalisation of Bulgarian the economy continued in 2003. CPC made efforts to focus its work on the investigation of serious distortion of competition like restrictive agreements, abuse of a dominant position, and merger control. The latter tendency is to be followed and sufficiently deterrent sanctioning policy be established against any anticompetitive behaviour.
6. With this policy, CPC aims to prevent future distortion of the anti-trust rules; to encourage the economic agents to be more disciplined by respecting the LPC and to guarantee effective competition on the different markets in Bulgaria. As a result CPC believes it will contribute to the economic development of Bulgaria.
7. In the context of abovementioned points and the latest enforcement record of CPC one of the best examples for Bulgaria is the insurance sector.
8. The Bulgarian Commission for Protection of Competition (CPC, the Commission) investigated a suspected infringement of LPC Art. 9 (LPC: Law on Protection of Competition) by nine insurance companies and the National Bureau of Bulgarian Motor Insurers. The procedure was triggered by a newspaper publication of June 3, 2002 stating that as of April 1st, 2002, the cheapest civil liability insurance policy for motoring abroad ("green card" or "GC") has risen twice.

1. Investigation

9. Prior to April 1st, 2002 Bulstrad Insurance and Reinsurance Plc (“Bulstrad”) had been the sole provider of green card coverage on the Bulgarian market, enjoying the status of a National Bureau. With effect from April 1st, 2002 ten licensed GC insurers formed a National Bureau tasked with receiving international claims under policies written in Bulgaria and dispatching them to the local insurer concerned. The National Bureau of Bulgarian Motor Insurers (“the Bureau” or “the National Bureau”) was registered by virtue of Sofia City Court Decision as a non-profit organisation with a wide scope of activity, including, among other things: membership in the Council of Bureaus and acting as a sole “National Bureau” for Bulgaria.

10. The Charter of the National Bureau vests powers in the General Assembly to approve resolutions on the common tariff policy in respect of GC insurance. Any member of the Bureau is liable to be expelled for non-adherence to the minimum tariffs and maximum agent commission levels for green card insurance as established by the General Assembly.

11. For the year 2002, the General Assembly of the National Bureau of Bulgarian Motor Insurers approved a single tariff of minimum green card premiums charged to vehicle owners for their liability outside Bulgaria, with effect from April 1st, 2002.

2. Position of the Bureau

12. The position of the Bureau, discussed and approved by all its members, was that the Bulgarian legislator has placed the insurance business under control by the State, which stipulates the minimum *Civil Liability* (CL) and *Carrier Liability* premiums charged to vehicle owners, holders, users and drivers (both being compulsory). These premiums are defined in an order issued by the Director of the Bulgarian *Agency for Insurance Supervision*, and are published in the State Gazette.

13. By analogy to the minimum premiums for the compulsory *Civil Liability* insurance, which has been introduced by Government Decree, the Bureau adopted a Single minimum tariff for green card insurance policies in 2002. The fixing pertained only to the minimum price of insurance policies. The Bureau maintained that the measure is about controlling the behaviour of market players providing green card coverage. The measure sought to prevent small insurance companies from dumping market prices for this type of insurance in order to attract more clients, which may render them incapable of honouring claims when damages occur. In other words, free pricing threatens to make smaller insurers insolvent as they try to offer lower premiums. Thus the Single Tariff of minimum premiums safeguards both individual insurers from defaulting on claims and the other members of the Bureau from incurring joint liability in respect of such defaults. The Uniform Agreement of Bureaus obliges each National Bureau to cover the claims unsettled by any of its members. Thus the consequences of a member’s non-performance would affect the remaining members and their stability.

14. The insurers from the National Bureau maintained that the premiums must be priced such as to ensure sufficient reserves to cover liabilities incurred outside Bulgaria. Insurance prices are accorded to the condition of Bulgaria’s market economy, while insurance compensations for international occurrences are defined by the conditions, insurance limits and legislative requirements of the country, where the insured event has taken place. In contrast with the Bulgarian legislation, which limits the amount of insurance compensation, a majority of other countries have legislated unlimited compensation rules, especially in the case of non-material (intangible) damages, hence there is appreciable variance between compensation levels.

3. Legal background

3.1 *The Insurance Law*

15. Following the amendments to that Law (published in the State Gazette, No. 96 of October 11, 2002), the *Agency for Insurance Supervision* began to define the minimum premiums for compulsory CL policies issued to vehicle owners, holders, users and drivers when motoring abroad. In the most recent amendment to the same Law (the State Gazette, No. 8/2003), the above provision was repealed and replaced by Art. 16(1)(9) of the newly-adopted *Law on the Commission for Financial Supervision* (CFC), according to which the CFC Vice-President in charge of Insurance Supervision Directorate is authorised to set the minimum premiums for compulsory insurance.

3.2 *Directive 90/232/EEC*

16. Directive 90/232/EEC (OJ L129, 19/05/90) requires in its Article 2 that: “Member States shall take the necessary steps to ensure that all compulsory insurance policies against civil liability arising out of the use of vehicles:

- cover, on the basis of a single premium, the entire territory of the Community, and
- guarantee, on the basis of the same single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.”

3.3 *Charter of the National Bureau*

17. The Charter requires that each member shall provide to the Bureau, not later than March 31, 2002 a six-year guarantee to the amount of 600,000 Euro payable at sight, issued in favour of the Bureau by the Bulgarian National Bank. The bank guarantee covers the Bureau’s claims to any member for payments made or due by the Bureau in lieu of such member, in case the member goes bankrupt or insolvent; as well as the Bureau’s claims to a member for payments made or due by the Bureau for liability incurred under fraudulent, non-authentic or forged documents, etc.

3.4 *Relevant Market*

18. According to the Bulgarian Insurance Law, property insurers may not provide life insurance. Hence, the market is divided in two sub-markets: property and life insurance and each sub-market may be subdivided in as many insurance segments, as are the types of insurance, because each type of insurance has specific features, premium structures and objectives, and thus becomes non-substitutable from the user’s perspective.

19. One type of property insurance is civil liability of vehicle owners, holders, users and drivers for material or non-material damages caused to third parties. This type of insurance is a market of its own extending in two directions depending on territorial coverage: Bulgaria and all other countries (green card). The insurer’s liability is defined according to the minimum motor liability rules prevailing in the country of accident.

4. Relevant market players

20. There are 20 licensed property insurers in Bulgaria. Of these, 18 hold licenses to sell motor insurance, with only 9 of them being members of the National Bureaus and as such authorised to issue green cards.

21. BULSTRAD is the leader among the property insurers with nearly 33% of the market. Its share of green card sales appreciably declined during the investigated period of 2002, which may be attributed to the fact that green cards were not demonopolised before the beginning of April 2002.

5. Analysis and measures taken against the restrictive agreements

22. The activities of the insurance companies from February 15th, 2002 (the date, on which the Single Tariff was approved) until the end of 2002 ought to be examined from the perspective of agreements or concerted practices undertaken by independent undertakings.

23. The companies providing green card insurance are “undertakings” within the meaning of the Bulgarian Law on Protection of Competition. On the other hand, the National Bureau of Bulgarian Motor Insurers is a non-profit organisation established to the private benefit of its members and, looking at its actual functions, there are no reasons to classify the Bureau as an “undertaking” within the meaning of LPC.

24. Seen from the conducted analysis, all members carry out their green card business in compliance with the Bureau’s decisions. CPC considered that the activities of the insurance companies from Feb. 15th, 2002 (the date, on which the Single Tariff was approved) until the end of 2002 had to be examined from the perspective of agreements or concerted practices undertaken by independent undertakings.

25. The amended Article 22(1) of the Insurance Law tasked the *Agency for Insurance Supervision* with defining the minimum premiums charged for compulsory insurance policies *civil liability incurred abroad*. In practice, the Agency defined these premiums for the first time in 2003, hence by the end of 2002 the nine insurers carried their business on the basis of their agreement and therefore the Commission’s analysis focused on their conduct during that period.

26. A specific feature of the market in question is that transactions are not considered to be terminated with the sale of the insurance policy. Instead, each transaction is subject to a contingent event, in the occurrence of which the insurer becomes liable to cover the resulting loss or damage. All this requires sufficient resources to be generated. To this end, the Bureau has established a Guarantee Fund, to which each member submits a 600,000 Euro guarantee. The Bureau has also approved a Single Tariff fixing the minimum prices charged for green card insurance policies.

27. However, what actually concerns CPC is not the necessity as such (which has a bearing on the stability of each individual insurer and is commensurate with the requirement for loyal and good-faith conduct of their business), instead, the Commission is concerned about the uniform levels agreed and the minimum thresholds fixed by the players, which boil down to elimination of market competition. The idea to avoid unfair solicitation of clients by “price dumping” in respect of green cards has obviously evolved in an agreement among all insurers operating on that market, aimed at guaranteeing their sales by all means, irrespective of market conditions.

28. Strict adherence to the agreed terms is guaranteed by the Charter of the Bureau, according to which any member offering lower premiums or higher commissions is liable to be expelled from the association. All this supports the conclusion that the intent of the nine companies was to prevent, or at least restrict, competition among them.

29. While the intent of the parties to an agreement is based on their will, the effect of their agreement should be derived directly from the market as such. The starting price stipulated in the above-quoted Tariff should be such as to leave space for competitive developments over and above the bottom threshold level. The essential element of any insurer’s business, namely the price of the products provided, has become strictly fixed and applied in an absolutely identical fashion by all players operating on the relevant market,

which bereaves the competitors from any freedom or flexibility in defining their market behaviour. Therefore, no competition whatever exists among the nine insurance companies.

30. The Commission decided that by adopting a Single Tariff, the companies in the National Bureau have entered into an agreement within the meaning of LPC Art. 9, which has not been notified to the CPC and as such the parties are liable to be fined. On the other hand, the Commission found that the agreement contains provisions on minimum greed card premiums, which violate the prohibition of Art. 9 and may not, in their present form, be exempted under LPC Art. 13.

31. The CPC believes that the fines should be commensurate to the actual market position of the companies involved. What is more new entrants to this insurance market should not be burdened financially more than what is necessary. Further, the Commission took into account the fact that development of new insurance services and getting a foothold in new markets are effort- and resource-intensive exercises and should not be further encumbered. In addition, the CPC recognizes the parties' cooperation in providing detailed and timely information.

32. On the basis of all these considerations, the Commission took the position that the fines should be set between the minimum and medium levels prescribed in the Law on Protection of Competition, depending on the market position and the financial resources of the respective party.

6. Conclusions

33. The further efforts of CPC should be focused on the restrictive activity of the private economic agents, which aim at establishing barriers for the other competitors in order to ensure their own position on the relevant market. This direction of competition policy could guarantee good conditions for a further economic development. The enforcement of CPC disciplines private economic agents and encourages them to do business in conformity with competition rules.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution of Jamaica

-- Session IV --

This contribution is submitted by Jamaica under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

(Contribution from the Fair Trading Commission, Jamaica's competition agency)

Introduction

1. Economic development refers fundamentally to the sustainable growth of a country's production, improved standard of living, increased per capita income, poverty alleviation and the reduction in unemployment. The benefits of competition are lower prices, better products, wider choice and greater efficiency than one would obtain under conditions in which there is no or very little competition. The benefits of competition therefore are increased consumer welfare and improved productivity of a country's firms. There seems to be a natural link between fostering competition and achieving economic development. The issue therefore is: what are the most appropriate policies which should be pursued to achieve the benefits of competition/economic development?

2. The Fair Competition Act (FCA), Jamaica's competition legislation has as its mandate the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view of providing consumers with competitive prices and product choices. To achieve its mandate the FCA covers two categories of prohibitions: consumer protection related prohibitions and anticompetitive prohibitions. The main consumer related prohibitions are misleading advertising and sale above advertised price. Tied selling is also established as a consumer related offence under the FCA. The main anticompetitive prohibitions relate to agreements which substantially lessen competition and abuse of a dominant position. The abuse must actually or potentially lessen competition substantially. Other prohibitions are bid rigging and collusive tendering, price fixing, exclusive dealing, market restriction and tied selling. The FCA does not contain merger control provisions.

3. Due to the failure of the legislation to provide a clear distinction between the function of the Staff as investigators and the Commissioners as adjudicators, fortified by a Court of Appeal ruling, that the legislation makes for a breach of natural justice, the agency has not had any formal hearing and therefore any prosecution under the provisions which deal with anticompetitive practices. Under the FCA, the Commissioners are authorised to investigate and adjudicate matters relating to agreements which lessen competition, abuse of dominance, market restriction, exclusive dealing and tied selling. The other prohibitions are adjudicated by the Supreme Court. The Court is the only authority which can impose a fine on a company found to have breached the provisions of the FCA; and that fine is limited to a maximum of Jamaican \$5 million dollars (approximately US\$83,000).

4. Notwithstanding the problems with the legislation and the inability of the agency to effectively carry out the mandate of the FCA with regard to some anticompetitive conducts, significant strides have been made in curtailing anticompetitive behaviour in the various markets. The method which has been used by the agency is to investigate all complaints which are deemed to have merit. The Staff, having completed its investigation would present the findings to the Respondent. Where a breach is found, the Staff would recommend that the Respondent enter into discussion with the Staff with a view to agreeing on the most appropriate remedy to correct the effect on the market.¹ If the Respondent decides not to cooperate, the Staff would have no choice but to recommend to the Commissioners that the matter be closed. Matters are closed with the caveat that Commission may re-open them if circumstances so warrant. The process generally culminates with a Consent Agreement which is signed between the Respondent and the Commissioners.

5. The rest of the paper will highlight a few of the cases investigated by the FTC, along with their outcomes.

1. Cases investigated

1.1 Joint Venture among Shell, Esso and Texaco

6. In May 1998, the Staff learnt of a joint venture among the three international petroleum companies operating in Jamaica. A local newspaper had reported that Shell, Esso and Texaco had entered into an agreement to jointly build and operate a storage facility in the western region of the island. An investigation was launched into the matter under Section 17 of the FCA, which renders void agreements which substantially lessen competition. Subsection 17(4), however, exempts agreements which the Commission is satisfied contribute to the improvement of production or distribution of goods and services while allowing consumers a fair share of the resulting benefit.

7. At the end of the investigation, it was concluded that the joint operation of a storage facility contributes to a reduction in operating cost of the companies concerned. It was viewed as efficiency enhancing, which should ultimately benefit the consumer through lower prices at the pumps.

8. It should be noted that while the FCA does not cover merger control provisions, the Staff had investigated the matter under the provision dealing with agreements which lessen competition.

1.2 The Banking Industry

9. The FTC having received a number of complaints regarding the "reader-friendliness" of banks' documents, entered into discussions with the Bankers Association of Jamaica. The discussions resulted in an agreement which covers the following area:

1.2.1 Clarity in banking documents

10. It was agreed that a fact sheet in layman's language would be attached to the face sheet of all loan documents for individual consumers. The fact sheet would contain information that the average person would consider material and could understand. The sheet would detail, at the very least, the effective interest rate, whether or not there are prepayment penalties and the total amount of the loan.

1.2.2 Posting of exchange rates

11. It was agreed that the banks would indicate whether the exchange rates posted were opening rates only. In other words, the consumer should be put on notice if the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate posted is the set rate and he should be entitled to obtain foreign exchange at that posted rate.

1.2.3 Advertising of interest rates

12. It was agreed that where "add-on" rates are used, they will be designated as such. It was generally agreed, however, that it would be more useful to state the effective rate of interest when advertising, as the add-on rate is deceptively lower. This would minimise confusion and the consumer would be better able to compare rates among banks.

1.3 Bank of Jamaica – Central Bank

13. In November 2000, Tangent Limited, a local software developer, complained to the FTC that the Bank of Jamaica's and Intrashare Systems' refusal to release the specification of the Central Bank eGate system, which was developed by Intrashare System, has given Intrashare Systems an unfair advantage over other developers of software for cambios. According to Tangent Limited this specification is necessary to develop an interface to facilitate communication (automatic interface) between its program for cambios and the Central Bank's system. Tangent Limited alleged also that Intrashare Systems, which is a software developer based in the United States, is active in the local market with a product that is similar to Tangent's product. Intrashare Systems advertised on its website that its software has an automatic interface with the Central Bank's system.

14. The Staff investigated the complaint with respect to Section 20 of the FCA, which deals with abuse of dominance. During the investigation the Bank of Jamaica informed the Staff of the FTC that the Bank's system would be configured to facilitate access via a dial-up method only or by an interface system which would be provided by the Bank. That means that no program would be able to communicate with the Bank's system without going through the interface provided; and therefore, Intrashare Systems' product would not have an advantage over other products in this respect. The Bank informed the FTC that its reason for not releasing the technical specifications to all developers relates to security concerns.

15. The Staff was satisfied with the method which the Bank chose to deal with the issue of interface of its program with those of cambio operators. The Staff was satisfied that no program designed for use by the cambio operators would be discriminated against. The Staff also felt that the Bank's reason for not giving the technical specification to all developers was justifiable. Accordingly, the Staff recommended to the Commissioners that the matter be closed. The company which had complained was also satisfied with the outcome. The matter was closed in April 2002.

16. The result of the FTC's intervention is that no software developer of programs for cambio operators is excluded from providing such programmes. Customers, cambio operators, would have choices and be able to select the product that best suits their circumstances.

1.4 Red Stripe Limited

17. Through newspaper reports, the Staff became aware of exclusive sales and promotional arrangements between Red Stripe Limited and several distribution outlets. The Staff therefore initiated an investigation into these arrangements. The contractual arrangements which were investigated related primarily to terms prohibiting the promotion of competing products at selected outlets; demanding supply of sales data on competing brands; prohibiting sales and promotion of competing products at sponsored events; and recommending that competing alcoholic products be sold at premium prices at sponsored events. The investigation also covered clauses relating to post-term preferential treatment.

18. The issues were investigated in relation to abuse of dominance. The Staff concluded that the company has abused its dominance in the market for beer in Jamaica. Red Stripe is one of two breweries in Jamaica; and has over 90% market share. The company disagreed with the findings of the Staff. It claimed that, among other things, the market definition was flawed and that the market should have been defined to include all alcoholic beverages and not just beer. The company agreed, however, to enter into a Consent Agreement with the FTC. There was no admission of a breach of the FCA. In that Agreement, Red Stripe Limited agreed that, *inter alia*:

- With regard to agreements relating to sponsorship at events:
 - No agreements shall exceed three (3) years in duration, or provide for an option to renew and/or rights of first refusal; and
 - The required notice period for termination without cause in such agreements shall vary, depending on the amount of sponsorship contribution made, in accordance with agreed ranges.
- With regard to promotional arrangements with outlets:
 - red Stripe Limited may execute exclusive promotional agreements with a limited number of outlets only, which number has been agreed with the FTC;
 - No exclusive promotional agreements with outlets shall have a duration of more than twelve (12) consecutive months. None of these agreements shall provide for an option to renew and/or rights of first refusal. All agreements may be terminated with a reasonable notice period, which period has been agreed with the FTC; and
 - none of these exclusive promotional agreements shall restrict or limit non-Red Stripe products from being normally displayed for sales purposes.

1.5 Blue Cross of Jamaica – health insurance

19. In January 2002, the Association of Medical Practitioners complained to the FTC that Blue Cross of Jamaica (BCJ) in collaboration with Advance Integrated Systems (AIS), had introduced and implemented an electronic claims processing system, referred to as PAS, to replace BCJ's manual claims system. The Association alleged further that BCJ was requiring that providers pay to AIS a transaction fee of 1.75% of each claim adjudicated through PAS and that all providers sign on to PAS by June 2002; with the result that the manual system would have been phased out by June 2002. It was claimed also that BCJ had not provided any alternative to PAS. Blue Cross of Jamaica is largest of three health insurance companies in Jamaica. AIC is a software development company.

20. The Staff had concerns about the potential impact of BCJ's conduct on competition. Specifically, the Staff was concerned about the following:

- The mandatory use of PAS may have resulted in significant cost to Providers. This cost relates to the necessary acquisition of computer, printer and software and the recurrent payment of a transaction fee.
- Competition in the market for the development of alternative system would be inhibited. In the absence of competition in this market there would be no constraint on the BCJ's behaviour with respect to the cost associated with PAS.
- The exclusion from the BCJ's Provider list, of Providers who are not able to install PAS was likely to result in a reduction of the customer base for such Providers and significantly affect their ability to compete and expand in the market for the provision of health services. Customers/subscribers of the BCJ's (i.e. purchasers of the health insurance from the BCJ) form a significant part of the revenue base of health service providers.

21. Before a full investigation was launched, BCJ agreed to make some concessions to its proposal. A Consent Agreement was entered into between BCJ and the FTC. The terms and conditions relate to the following:

- *Provision of alternative system* — BCJ will make available to Providers either an Internet based system or some other system for which Providers will not be required to pay a transaction fee.
- *Transition period* — BCJ will retain the existing manual system for an 18-month period after it has provided an alternative system to PAS and one which has no transaction fee attached.
- *Retaining the manual system* — BCJ will retain the manual system to facilitate Providers who do not have access to fixed-line telecommunications services or who have only a small number of BCJ claims.
- *Third party developers* — BCJ will make the relevant technical specifications available to any party who wishes to develop an alternative claims processing system which is compatible with its own.

2. Concluding comments

22. The benefits of competition are not always apparent. The effects of the remedy imposed by a competition agency to address an anticompetitive activity might not be realised immediately and in most cases cannot be quantified. The agency believes, however, that a market which is unrestricted and devoid of anticompetitive activities delivers the best outcome for both suppliers and consumers. This has been witnessed in at least two industries in Jamaica: telecommunications and cement. The incumbent telephone service provider has increased its mobile customer base significantly since it was exposed to competition. There have been improvements in its profits also. The sole cement manufacturer has also experienced significant growth in revenue and profits during the periods when it faced the most competition from importers of cement. Consumers also benefited from shorter delivery time, lower prices, and better cement quality.

23. We at the FTC have recognised that some firms are ignorant of the effect of their actions on the market and consumers. The job of the agency therefore is to constantly educate the business community and where possible make recommendations that will correct the effects of anticompetitive conducts in the markets concerned. When the law is amended the agency will have the ability to more effectively enforce the competition law for the benefit of all.

NOTE

1. While the FCA does not authorise the Commissioners to impose fines, it authorises them, in matters relating to abuse of dominance, to direct the offending company to take such steps as are necessary and reasonable to overcome the effects of the abuse in the market concerned.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPEMENT

Contribution from Japan

-- Session IV --

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Introduction

1. The approach presented by the Japan Fair Trade Commission (JFTC) in this paper is to quantify and examine economic effects brought by an investigation against an actual bid rigging case, an example of typical anticompetitive conduct in Japan, under the Antimonopoly Act. The research has shown grounds for us to be convinced that strict implementation of cease and desist measures against anticompetitive conduct under the Antimonopoly Act has promoted fair and free competition, and as a result, has also boosted economic efficiency.

1. Two Economic Effects of Cease and Desist Measures against Anticompetitive Conduct

2. Economic effects of promoting fair and free competition through taking measures against bid rigging, etc. has two folds. One is a direct effect, namely price reduction, quality improvement and cost reduction concerning objects or items which are subject to bidding. The other is an indirect effect, namely a ripple effect on preventing violations of the Antimonopoly Act by others.

3. It is difficult to demonstrate all of those effects quantitatively by related evidence; nevertheless, it may be possible to establish a substantial part of possible economic effects quantitatively by examining the movement of prices before and after the entrepreneurs ceased their anticompetitive conducts, among various conceivable effects. If a significant economic effect is found by using prices as an indicator, it can be concluded that the investigations have been substantially effective.

2. Cease and Desist Measures under the Antimonopoly Act

4. The JFTC shall initiate investigation of conducts which may violate the Antimonopoly Act by entering any place of business of those concerned or other necessary places, obtaining testimonies, etc. The JFTC shall take appropriate cease and desist measures and order to pay surcharges when the Antimonopoly Act is found to have been violated.

(Note: An order to pay surcharges shall be rendered in the case of bid rigging, price cartels, etc.)

3. Presentation of the Case Concerned

5. We studied bidding price changes in a bid rigging case concerning automobile testing machines and equipment ordered by government agencies, etc.

6. In this case, four entrepreneurs participated in the bid riggings. They had decided in advance which bidders would be successful. They made different rules among themselves for each local branch office of the orders for almost all items which were subject to bidding. The four entrepreneurs ceased such violations of the Antimonopoly Act after the JFTC entered their premises for investigation.

7. Subsequently, the JFTC rendered the cease and desist order against these entrepreneurs, and ordered payment of surcharges, totalling about 74 millions yen (US\$670,000).

4. Measurement and Examination of the Effectiveness of the Cease and Desist Orders

4.1 *The method of measuring and examining the effectiveness of the cease and desist orders*

8. It is not meaningful to simply compare the actual contract prices since properties subject to bidding vary by content, scale, etc. Therefore, we examined changes in the ratios of actual contract prices to planned contract prices pre-set by public agencies etc. placing the order, hereafter referred to as the "RCP".

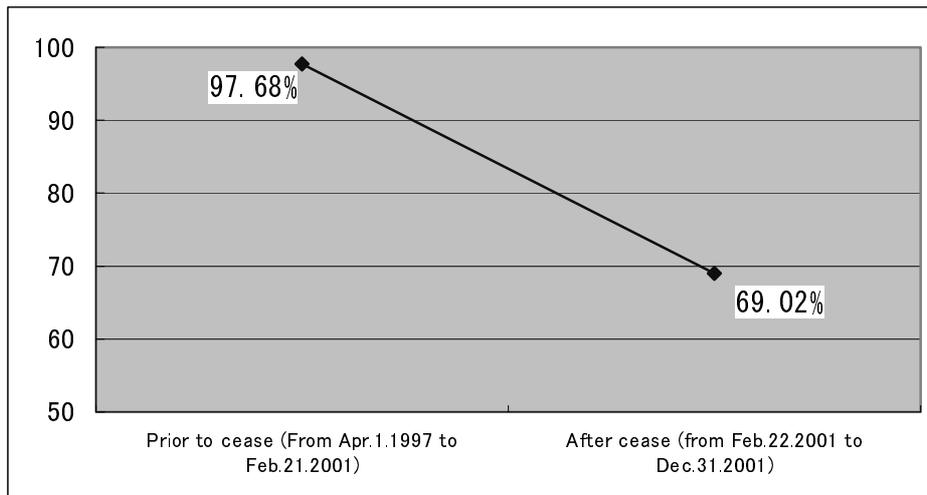
9. In order to assess cost and effect balance of measures taken by the JFTC, we conducted an estimation of materials expenses, personnel expenses, etc. which were devoted to the case concerned.

4.2 *Result of measurement and examination on the effectiveness of the investigation*

A. *The change in the RCP*

10. The change in the average RCP is given below; it was confirmed that the average RCP has gone down since the entrepreneurs ceased such violations.

Chart: Change in the Average RCP for the Automobile Testing Machines and Equipment



B. *Economic effect caused by the decline of the average RCP*

11. The economic effect caused by the decline of the average RCP concerning the case from the date of cease and desist (February 22, 2001 to December 31, 2001) is estimated to be approximately 483 millions yen (see the table below). This estimation was carried out on the tentative assumption that no other factors than the investigation against violations of the Antimonopoly Act led to the decline of average RCP. We also assumed that the average RCP would remain at the same level as that in pre-investigation period if there were not the investigation.

Table: Economic Effect in the Bid Rigging Case Concerning Automobile Testing Machines and Equipment (Unit: 100 Millions Yen)

Period	Number of biddings	Planned total contract price (a)	Assumed total actual contract price (b) (a×97.68%= b)	Actual total successful bid price (c)	Economic effect (b) – (c)
From the date of cease and desist (Feb.22.2001 to Dec. 31, 2001)	29	1396	1364	881	<u>483</u>

C. Factors other than the investigation

12. Factors other than the investigation by the JFTC such as reduction in material expenses, personnel costs might have contributed to the lowered RCP. It is therefore not appropriate to evaluate all decline of the average RCP as a direct consequence of the investigation implemented by the JFTC in the absence of considering these factors. We analysed whether other factors contributed to the decline of RCP in the period. We checked impacts of following factors: 1) changes in material prices and personnel expenses; 2) business trends in the construction industry; 3) presence of a recurring tendency in the index (RCP); 4) business trends in the localities or nation; 5) tendencies of the measures against bid riggings implemented by the JFTC, and 6) others (seasonal factors, etc.). In conclusion, these external factors are unlikely to have had any effect on the RCP decline in the case.

4.3 Result of Measurement and Examination on Economic Efficiency of the Investigation

13. It is useful to take into account the cost of the investigation of the JFTC against the anticompetitive conduct in evaluating their economic effect.

14. We examined the efficiency based on the input cost (personnel and travel cost) of dealing with the case.

15. The approximate cost incurred by the JFTC to deal with the case is about 21 millions yen (US\$190,000), which realised the above-mentioned economic effect, namely about 483 millions yen (US\$4.4 millions). This indicates that the investigation by the JFTC is highly cost-effective.

Note: Cost here refers to the total of personnel and travel expenses required to deal with the case by the staff in charge. The former (personnel expenses) has been calculated based on the average annual income (including various allowances) of the staff of the JFTC, taking into account the number of staff involved in dealing with the case and the time taken. The latter represents travel expenses of the staff to inspect the premises of those concerned, interviewing them, etc. The incidental cost is also incurred in dealing with the cases, but is ignored in this calculation.

5. Conclusion

16. This paper proposed that the strict and distinct enforcement against bid riggings to promote fair and free competition results in improving the economic efficiency of public procurement.

17. JFTC's research indicates that the cease and desist order rendered by the JFTC had the following direct economic effect: average RCP decline from 97.68% to 69.02% in the course of nearly ten months,

from February to December 2001, thus the total procurement cost reduction of 483 millions yen (US\$4.39 millions). The JFTC spent approximately 21 millions yen (US\$190,000) to deal with the case.

18. As it is not easy to quantify the indirect economic effects of the cease and desist measures taken by the JFTC, our estimation is confined to a part of direct economic effects. It is necessary to develop a method to gauge indirect economic effects.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

Cancels & replaces the same document of 03 December 2003

OECD Global Forum on Competition

**HOW ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT
HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

CONTRIBUTION FROM LITHUANIA

-- Session IV --

This contribution is submitted by Lithuania under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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**ENFORCEMENT AGAINST PRIVATE ANTI-COMPETITIVE CONDUCT
IN THE TELECOMMUNICATIONS SECTOR IN LITHUANIA**

**Contribution by the Competition Council of the Republic of Lithuania for the OECD Global Forum
(February 14-15, 2004)**

Privatisation and gradual liberalisation of the fixed-line telephony network

1. AB *Lietuvos telekomas* (public stock company *Lithuanian Telecom*) used to be the only company that could provide telephone calls services using public fixed-line telephony network in Lithuania. At the same time there were three providers of mobile telephone calls services. AB *Lietuvos telekomas* gained its monopoly position not only because of technological reasons but also because it was awarded exclusive rights by the State. On 9 June 1998, the Lithuanian Parliament passed a new Law on Telecommunications one month before the privatisation of AB *Lietuvos telekomas*. During the privatisation Scandinavian telecommunication companies *Telia* and *Sonera* acquired 60 per cent of shares for 510 million USD. The Law on Telecommunications contained a provision that granted exclusive rights to provide telephone calls services using public fixed-line telephony network to AB *Lietuvos telekomas* until 31 December 2002. Some commentators interpreted such legislation as an obvious intent to raise more revenue by making the aforementioned company more attractive to foreign investors. The others argued that exclusive rights of a limited duration (approximately four years) was a reasonable safeguard for a company which was supposed not only to meet universal service obligations but also had to fulfil other conditions of the privatisation agreement, mainly dealing with substantial modernization and only gradual downsizing of staff.

2. At present time the exclusive rights awarded to AB *Lietuvos telekomas* have expired and the net result of its privatisation seems to be positive. After privatisation the management focused at increase of productivity and modernization. At the end of this year the number of full-time employees should be reduced by three times compared to June 1998, however such huge reduction in work-force did not create any social tension. AB *Lietuvos telekomas* did not break its promises to make substantial investments in order to modernize the existing network and substantially improve quality of services. In late 2002 the rate of the network digitalization reached 88%. AB *Lietuvos telekomas* continued to develop its ADSL based access network, ADSL services are currently available to 85% of AB *Lietuvos telekomas*' customers. Nevertheless, AB *Lietuvos telekomas* repeatedly attempted to behave anti-competitively during the last several years. Too often private gain of the privileged incumbent seemed to outweigh social loss. Therefore effective enforcement of the competition law was necessary in order to achieve the goal of the genuine economic development in the telecommunication sector.

Attempt to exclude competition in the Internet service provision

3. The Law on Telecommunications envisaged a creation of the Telecommunications Regulatory Authority. However, its establishment was delayed until June 2000 and only in 2003 this agency received necessary powers to impose *ex ante* obligations and thereby preclude anticompetitive conduct in this

important sector. Therefore at that time the only agency capable to fight with anticompetitive conduct was the Competition Council, however, it could only apply the general principles of the competition law.

4. In 2000, the Competition Council received complaints from several Internet service providers (ISPs) that AB *Lietuvos telekomas* started to install filters that restricted available frequency of leased analogue lines. At that time AB *Lietuvos telekomas* had numerous lease agreements of analogue lines with independent operators that were using leased lines mostly for data transmission services including the Internet access services. The filters substantially reduced available bandwidth and made the lines unsuitable for high speed data transmission. AB *Lietuvos telekomas* argued that according to the legal acts the primary purpose of analogue lines was the transmission of voice signals. Therefore the company did not intend to degrade the product offered for a lease but only tried to comply with the existing standard for analogue lines.

5. It is worth reminding that a local analogue line is easily converted into digital subscriber line by connecting DSL modems to its ends. Complaining ISPs used to upgrade leased analogue lines with the help of such technology. On the other hand, AB *Lietuvos telekomas* began to offer DSL lines by itself and had to compete with existing independent ISPs. If there was no possibility to lease a suitable analogue line, then an independent ISP had to lease the digital line from AB *Lietuvos telekomas*. The latter product was more expensive and an independent ISP would have been hardly able to compete with AB *Lietuvos telekomas* in the data transmission market. Besides that, AB *Lietuvos telekomas* claimed that the company intended to install filters only to the newly leased analogue lines. In such case some individual undertakings operating in the data transmission market would have been put in a position of a competitive disadvantage since no filters were installed in the leased lines of other ISPs.

6. The Competition Council concluded that AB *Lietuvos telekomas* abused its dominant position in the market of lease of lines used for the transmission data by trying to exclude the competition. Such behaviour would have increased prices for Internet services and could have delayed technical progress. The new entrants into the market were discriminated if compared to those already operating in the market because they had to rent much more expensive digital lines from AB *Lietuvos telekomas* instead of having a possibility to upgrade the leased lines themselves.

7. The Competition Council imposed a fine upon AB *Lietuvos telekomas* in the amount of LTL 150 000 and obligated the company not to install filters restricting frequency transmission in the leased analogue dedicated lines. AB *Lietuvos telekomas* appealed the decision all the way up to the highest judicial level available for review of administrative decisions, however, the decision of the Competition Council was upheld at every instance.

Attempt to exclude competition in the provision Internet telephony services

8. The same year the Competition Council began another investigation concerning AB *Lietuvos telekomas*. UAB *Interprova* (closed stock company *Interprova*) filed a complaint that AB *Lietuvos telekomas* blocked the ISDN flow and terminated provision of telephone voice services. According to the complaint, AB *Lietuvos telekomas* tried to justify its actions by claiming that UAB *Interprova* violated the Law on Telecommunications by providing voice telephony services by using fixed public telephone network. As it was found during investigation AB *Lietuvos telekomas* took such actions not only against UAB *Interprova* but also against 30 more companies that attempted to provide phone services using the Internet. Until 31 December 2002 AB *Lietuvos telekomas* had exclusive right to be the sole provider of fixed public telephone services. UAB *Interprova* provided the Internet telephony services and AB *Lietuvos telekomas* interpreted the exclusive rights given by the Law on Telecommunications as covering not only voice telephone services of a guaranteed quality but also the Internet telephony. In spite of the rapid

technological progress in this area, at that time there seemed to be a consensus among the experts that the Internet telephony was unable to guarantee telephone conversation in a *real* time.

9. The Competition Council decided that AB *Lietuvos telekomas* did not have exclusive rights to provide Internet telephony services and therefore it did not have a right to exclude UAB *Interprova* from competition by blocking its ISDN flow and telephone lines. The Council qualified actions of AB *Lietuvos telekomas* as an abuse of a dominant position, obligated the company to resume the provision of services to UAB *Interprova*, and ordered to pay a fine of LTL 2 077 000 because of aggravating circumstances. AB *Lietuvos telekomas* appealed the decision all the way up to the highest judicial level available for review of administrative decisions. After extended litigation and careful review of several testimonies provided by the experts in the field of telecommunications the decision of the Competition Council was upheld.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from Pakistan

-- Session IV --

This contribution is submitted by Pakistan under Session IV of the Global Forum on Competition, to be held on 12 and 13 February 2004.

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English - Or. English

ACTUAL CASES THAT ARE BELIEVED TO HAVE CONTRIBUTED TOWARDS ECONOMIC DEVELOPMENT

Introduction

1. A well-structured program of regulatory reform brings lower prices and more choices for consumers, helps stimulate innovation, investment, and, thereby boosts economic growth. Some important considerations showing the central place of competition law and policy in the national economic development policy framework are as under:

- International cartels and other restrictive business practices of private firms operating in international markets can be detrimental to economic development. Domestic competition laws can be used as effective instruments to alleviate the problem of international anticompetitive practices in at least two ways: (a) they can deter international cartels from operating on the territories of the countries which have adopted such laws; and (b) they may enable the authorities of these countries to prosecute successfully (either alone or in cooperation with competition authorities of the country where the firms are located) international firms adopting anticompetitive practices on their territories¹.
- There is a movement away from government intervention and towards increased reliance on market mechanisms. It is recognised that government interference in market mechanisms may lead to a reduction in the real income of citizens compared with the level they would enjoy if competition prevails. When a reduction in the real income of a large proportion of the population combines with a perception that large profits are being made by a small number of recipients of state protection, resentment may grow, threatening democratic reform. Thus, highly regulated economies are often considered by the public to be unfair to consumers.

2. An effective competition policy/law, therefore, can go a long way in poverty alleviation, promotion of foreign direct investment, a competitive domestic industry and, last but not least, the economic development of the economy as a whole. In this background this write-up presents briefly the contribution made by the Pakistan's competition law towards economic development.

1. Pakistan's competition law and economic development

3. The Monopolies and Restrictive Trade Practices (Control and Prevention), Ordinance 1970 (MRTPO), has three substantive provisions through which it controls and prevent:

1. undue concentration of economic power i.e., more than Rs.300 m. assets of a private limited company; more than 50% voting power with an individual; and dealings between associated companies that unfairly benefit owners/shareholders of one company at the cost of other - (Section 4);
2. creation of monopolies i.e., associated companies having 1/3rd market share; merger/acquisition creating monopoly power; and granting of loan by a bank or insurance company on relatively favourable terms benefiting an associated company - (Section 5); and

3. unreasonably restrictive trade practices such as cartels to fix prices restrict supplies, division of markets, trade restrictive agreements, etc. - (Section 6).

4. Theoretically speaking, all the actions of competition agency lead towards economic development. However, in the paragraphs to follow the developmental impact will be discussed with reference to above three provisions for creation of competitive markets. It may be noted at the outset that though the MRTPO was enacted in 1970 but this was followed by the nationalisation of businesses in early seventies which reduced the role of the Monopoly Control Authority (MCA). It was only in 1994 that the MCA was granted an autonomous status to enforce the Law.

2. Some instances of cases involving undue concentration of economic power viz. disinvestment of excessive shareholding

- Mian Farooq Ahmad Sheikh of Colony Sarhad Textile Mills Ltd. had 58.66% shareholding. This attracted Section 4(a)(2).MCA ordered to reduce voting power to 48%.
- Mr. Aftab A. Sheikh of Sunshine Cotton Mills Ltd. had 57.59% shareholding. This attracted Section 4(a)(2). In response to MCA's show-cause, he brought his voting power up to 48.7%.
- Mr. Muhammad Siddiq Khan of United Carpets Ltd. possessed more than 50% voting power. MCA ordered to reduce voting power. He requested for extended time period since it involved foreign participation in equity and loan from PICIC. The case started in 1979 and in 1980, he complied with MCA's order and offered shares to the public.
- Mian Mohd. Aslam of Sargodha Spinning Mills Ltd. possessed 100% voting power and assets were more than statutory limit of MRTPO. MCA ordered to bring shareholding below 50%.
- Mr. Ghulam Muhammad A. Fecto of Fecto Cement Ltd. possessed more than 50% voting power. Subsequent to MCA's proceedings the individual brought down his shareholding to 28.5%.

3. Some instances of undue concentration of economic power viz. Inter-corporate financing

- Kohinoor Sugar Mills Ltd. did not pay dividend to shareholders due to paucity of cash but did grant loan to associated undertakings. After MCA's proceedings, the company paid the dividends and thus complied with MCA's requirements.
- United Sugar Mills Ltd. granted loans free of interest to the associated undertakings (Rs.29.1m). MCA ordered to charge interest and to prepare books of accounts accordingly.
- Faisal Spinning Mills Ltd. granted loan (Rs.43.70m) but did not charge any interest. MCA ordered the undertaking to recover mark-up and principle amount.
- Kohinoor Power Company Ltd. did not charge any interest on delayed payments from its associated undertaking amounting to Rs.34.87/- million. MCA ordered to pay the balance according to a 'road-map' specifically designed for this purpose.

4. Merger/acquisition cases

- MCA allowed acquisition of Polka Group of Companies by M/s. Unilever Group (UK) along with its subsidiary marketing Walls Ice cream in Pakistan (27 June 1996). Acquisition was allowed on following conditionalities:
 - fair market value of assets will be determined and transaction will be done in foreign exchange through official channels;
 - details of tangible assets, plant capacity/output, prices of important raw materials and retail prices, quantified projected gains will be provided to the MCA;
 - price reduction will be announced by the company preferably along with announcement of acquisition.
- Merger of Lever Brothers Pakistan Ltd. with Brooke Bond Pakistan Ltd. (16 September 1996) was allowed on the conditionality that the company will promote tea cultivation at 600 hectares in areas identified around Shinkiari, Mansehra District – main idea was to start import substitution for tea requirements of Pakistan. It is noted that the United Kingdom supplied technical support and computer based planning system continued during the entire period; LBPL exported a number of tea clones and tea plant selections to private buyers in Hawaii, USA.
- Merger of M/s. Exide Pakistan Ltd. with M/s. Automotive Battery Company Ltd. (03 April 2001) producing motor batteries was allowed on grounds of induction of improved Japanese technology and cost-effective production.

5. Some instances of unreasonably restrictive trade practices

5. Cases under Section 6 have involved the MCA to firstly deal with the cartel formation and secondly to modify/amend suitably the restrictive clauses in the agreements among companies. A review is provided in the paragraphs to follow.

5.1 MCA's experience in breaking cartels

- Cement has remained a cartel prone sector. thus far three cartel-like situations have been dealt with by the MCA. In early nineties most of the cement plants owned by State Cement Corporation were privatised. After going into the hands of private entrepreneurs, there was a tendency to raise prices of cement and make fortune out of the privatisation process. Unfortunately, the most devastating floods of 1992 provided an excellent opportunity to the cement manufacturers. When re-construction and re-habilitation work was started in October, 1992 first cartel in the cement sector was formed. At this juncture MCA undertook an exhaustive investigation, examined distribution system, pricing pattern, capacity utilisation and cost structure. After reaching the conclusion that cartel has been formed, MCA made recommendations to the Economic Coordination Committee of the Federal Cabinet (ECC) which were approved and there-by State Cement Corporation's units were directed to open their retail shops at important points in major cities and sell the cement at the rate recommended by MCA and approved by the ECC. Private cement companies were directed to break the cartel. With these measures cartel was effectively broken and competitive environment in cement industry re-established.

- Cement manufacturers again tried to form a cartel in February 1998. MCA was vigilant enough to persuade a few manufacturers not to join the cartel. Thus the attempt to form a cartel in February 1998 was foiled. But in October 1998 the cement manufacturers succeeded in forming the cartel. MCA passed an order in February 1999 directing the cement manufacturers to break the cartel, operate at the optimum level and reverse the prices to pre-cartel position.
- MCA has recently decided the case of a cartel formed by the Pakistan Cable Manufacturers Association. In September 2002, Islamabad Electric Supply Company (IESCO) which itself comes under the regulatory jurisdiction of National Electric Power Regulatory Authority (NEPRA) referred a case of collusive bidding by nine suppliers of cables, PVC pipes, etc. IESCO alleged that all the nine bidders quoted the same price for all the items offered for supply. MCA in this case ordered the nine bidding companies to desist from collusive bidding.

5.2 *Modification of trade restrictive clauses in the agreements*

6. Several companies namely: Pakistan Oxygen Limited, Bata Shoe Company Ltd. M/s. Muller & Phipps Pakistan Ltd., Exxon Chemical (Pakistan) Ltd, Searle Pakistan Ltd., M/s. Siemens Pakistan Engineering Co. Ltd. & M/s. Schuckertwerke Aktiengesellschaft Berlin and Erlangen, M/s. Warner Lambert (Pak) Ltd., Chloride (Pakistan) Ltd., Lever Brothers (Pak) Ltd., Pakistan Burma Shell, Sterling Products (Pak) Ltd, Rafhan Maize Products Ltd, SmithKline & French (Pak) Ltd., Burshane (Pak) Ltd, Shell (Pak) Ltd. & Cyanamid (Pak) Ltd. are among those who were directed to delete or modify trade restrictive clauses in their agreements.

NOTE

1. The following merger cases: of two US aircraft companies, the Boeing and McDonnell Douglas, of giant oil companies, and the Microsoft anti-trust case all present interesting examples in this regard. See EU, Financial, Times, AOL websites, for details.



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**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE
CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

Contribution from Poland

-- Session IV --

This contribution is submitted by Poland under Session IV of the Global Forum on Competition, to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Introduction

1. From the perspective of the Office for Competition and Consumers' Protection ('OCCP', 'Office'), the past thirteen years of implementing the competition policy in Poland proved quite clearly that there exist a positive correlation between the effective implementation of competition policy and the quality of economic development.

2. On the macroeconomic level, the enforcement of competition law facilitated the success of the economic liberalisation of Polish economy. During the privatisation of the State assets the OCCP played crucial role in the process of introducing the competition in the sectors, which at the beginning of transformation were deemed as structurally uncompetitive. This in turn facilitated the overall economic growth, by enhancing the welfare of the consumers as well as providing the level playing field for the competitors operating in those sectors. The positive influence of competition policy enforcement on the economic development demonstrates itself also on the microeconomic level, where numerous antimonopoly proceedings of the Office allowed for the increase of the undertakings' economic effectiveness, benefiting the consumers in terms of greater availability of goods and services, their better quality and better price.

3. The cases supporting the existence of positive interrelations between the competition policy and the economic development might be found in practically all sectors of the Polish economy. However, judging on the past experiences of the Office, they manifest themselves most visibly in the telecommunications' services sector.

4. Prior to the 1991, the sector of telecommunications' services, together with postal services sector, has been monopolised by the State company "*Przedsiębiorstwo Użyteczności Publicznej Polska Poczta, Telegraf, Telefon*". As of 1992, the aforementioned company has been divided into two independent entities, i.e. Polish national post – "*Poczta Polska*" and the national telecommunications' operator "*Telekomunikacja Polska*" ('TP S.A.', 'incumbent'). In 1998, the TP S.A. has been privatised. Even more important from the abovementioned shift in the ownership of the national incumbent was gradual liberalisation of the telecomm markets. This has been achieved by introduction of competition from the private sector, combined with counteraction of any anticompetitive behaviours of the TP S.A.

5. The exemplary cases from the telecommunications' sector discussed in the herby paper fall into two categories, i.e. anticompetitive practices affecting consumers, and those affecting the competitors. The scope of the paper covers the historical proceedings as well as the most recent ones. The chronological structure has been adopted for two reasons, i.e. to provide an additional information on how the nature of anticompetitive behaviours have been changing on different stages of transformation process and to identify how the abovementioned process has been affected by the successful combating of those behaviours.

1. Anticompetitive Practices Affecting the Consumers

6. In the early 1990s, one of the most typical misbehaviours of the national telecomm operator – TP S.A. stemmed from a need for rapid development of the telecommunications' infrastructure. During that

period the TP S.A. frequently involved its would-be customers as well as local municipalities in the process of co-financing expansion of the network infrastructure it used for providing services (so called 'joint financing'). In exchange for the contributions the potential subscribers waited shorter time for obtaining the telephone line. The joint financing contracts always contained a provision transferring rights to the property originated as a result of the joint-financing onto TP S.A.

7. At this point it ought to be mentioned, that in the early nineties, when the TP S.A. was still a State owned-company, supporting the development of the telecommunications' network (as illustrated above) has been socially acceptable, since it was considered as acting in the public interest. However the situation changed drastically after commercialisation of the TP S.A. in 1992, as from that time on, the joint financing schemes amounted to upgrading the property of the commercial enterprise.

8. From the very beginning of the nineties, the position of the OCCP on the issue of joint financing was clear: such schemes are in fact an out-of-tariff payments, and as such contribute to the unjustified strengthening of the market power of the TP S.A. unless of course the costs incurred by the scheme participants are properly reimbursed either financially or in the form of free packages of telecomm services. Theoretically the TP S.A. did acknowledge the need for compensation. In practice however it used all sorts of tricks in order to escape from those liabilities

9. There were numerous OCCP proceedings dealing with the practices depicted above. The good example of such practice might be found in one of the OCCP proceedings from 1992. In the discussed case the TP S.A. induced the people who wanted to obtain the telephone line to make donations to the Foundation of Development of Telecommunication in Lublin (*Fundacja Rozwoju Telekomunikacji Lubelskiej*, 'FRTL'). Since those donations were not paid directly to the TP S.A., but to one of its proxy entities, legally speaking they could not be treated as out-of-tariff charges. In due process of the proceedings the OCCP discovered however that the donations were clearly linked with shortening of the time for which the contributors had to wait for obtaining the telephone line from the TP S.A. In light of the above the aforementioned practice have been considered as an abuse of dominant position by the TP S.A., therefore cease and desist order has been issued and the fine imposed.

10. As it has been mentioned at the beginning of this section, also the municipalities were quite often participating in the joint financing schemes. However in contrary to the natural persons the municipalities were not reimbursed by the TP S.A. This led to the initiation of investigation by the OCCP on the grounds of suspected abuse of dominant position. Upon the completion of the proceedings, the Office found the practice to be in breach of the Polish competition law and issued a cease and desist order. The TP S.A. appealed to the Court of Competition and Consumers' Protection, but the Court in its verdict issued in 1994 supported the position of the OCCP.

11. The joint investment schemes generated also other sorts of misconducts which were the subject of the OCCP's investigations, for example on regular grounds the TP S.A. was withholding from paying the interest on the financial assets contributed by the participants. This, given the high inflation rate at that time, eroded significantly their value.

12. The joint-investment schemes formed an extremely heavy burden on the budget of the participating consumers. Therefore, by safeguarding the reimbursement of the costs by the TP S.A., the OCCP's antimonopoly investigations contributed to enhancing the consumers' overall welfare. Similar could be said about imposing on the TP S.A. the obligation to compensate to the municipalities, which came thru due to the outcomes of the OCCP's investigations. Relieving the municipalities from the need to subsidise the development of infrastructure belonging to the profit-making enterprise allowed them to redirect the additional resources to other tasks, thus via their increased performance to contribute to the economic development. Additionally, the aforementioned proceedings by preventing the TP S.A. from

strengthening its market position, created the conditions for the gradual development of the competition in this sector.

13. The OCCP cases dealing with joint financing were typical in the first years of the nineties; however with the progress of the economic transformation, their share in the enforcement of the competition policy started to dwindle, while their place has been taken over by cases dealing with other types of misconducts.

14. In 1998 TP S.A. introduced a new system of applying the interest on overdue subscription payments. Namely, TP S.A. began adding default interest to the bills of those consumers whose payments have been transferred to TP S.A. after the 15th day of the month following the month for which the payment was calculated. There would be nothing unusual in the practice except for the fact that as date of payment TP S.A. considered the date on which the money were transferred to its accounts, and not the date on which the payment has been made by the customer, as it is usually the case. Such behaviour amounted to punishing the customers for the faults of the banking system (i.e. long delays between transferring the money from one account to another).

15. The implementation of practice in question triggered an investigation from the OCCP on the grounds of suspected abuse of dominant position.¹ Upon the completion of the investigation the OCCP stated that the practice in question was by no means justified, it violated consumers' rights and also brought unjustified financial profits to the company. The proceeding also revealed that the TP S.A. has been misinforming its customers. In light of the above the OCCP concluded the case with issuing the cease and desist order and imposing a fine.

16. The proceedings of the OCCP discussed above, on one hand contributed to the raising of the consumers' economic welfare by preventing the undertaking with dominant position from unjustified rising of capital and by redirecting this capital to its rightful owners – the consumers. The discussed case enhanced also the overall levels of competition in the sector by preventing the strengthening of the dominant position held by the incumbent.

17. As it has been illustrated above, the nature of the anticompetitive practices in the telecommunications' sector changes with time. So does change the nature of the correlations between the economic development and the fact of counteracting those practices.

18. On 24th November 2003 the OCCP imposed a fine of EUR 1.500.000 on the TP S.A. for the abuse of dominant position. The scope of the investigation covered the unjustified 60% rise in the prices of ISDN services provided by the TP S.A. to its subscribers. The prices have been changed as a result of removing by the TP S.A. two ISDN tariff plans from its offer. The subscribers to those plans has been transferred without their consent to the new more expensive ones. Upon the completion of the investigation the OCCP issued a cease and desist order accompanied by the abovementioned fine.

19. In that case, the positive impact on economic development manifests itself very clearly, in two ways. Firstly, as in the previous examples the economic welfare of 320.000 of Polish consumers has been improved. Secondly, prevention of sharp and unjustified price-hikes, has a general positive impact on the competition in the markets for providing the internet services. Since the prices remained unchanged the potential pace of expansion of those services subscribers' base has grown, as compared with the hypothetical situation in which OCCP losses the case and the prices eventually go up, and the growth is slower. It is possible, that the faster growth of the subscribers' base could spread the incomes of the providers generated by those new customers more evenly between the incumbent and its competitors. Should such case occur the competitors (who in the Poland are more effective that the incumbent) are more likely to invest the surplus capital, since due to their comparatively small size there very strongly

orientated toward expansion. The additional rise in the level of aggregated investments within the sector shall amount to its development, thus rising the overall level of economic development in the economy as a whole.

2. Anticompetitive Practices Affecting the Competitors

20. The overwhelming majority of OCCP proceedings against TP S.A. having as their scope incumbent's relations with the competitors are the proceedings against its abuse of the dominant position it has on many of the markets in telecommunications' sector.

21. As for the earliest cases falling into the abovementioned criteria, it could be stated that the cases did not differ much from the cases of early nineties discussed in the previous section of this paper (i.e. the cases regarding the joint-financing schemes).

22. In 1996, upon the complaint from one of the undertakings willing to become local telephone operator, the OCCP launched an investigation on the grounds of suspected abuse of dominant position by the TP S.A. During the investigation it has been revealed, that upon the entering the market the undertaking in question has been requested by the TP S.A. to contribute to the development of the infrastructure facility which was an exclusive property of TP S.A. The lack of undertaking's compliance resulted in the incumbent's refusal to connect the undertaking to the network. Upon the completion of the investigation the OCCP found the practice to be in breach with the provisions of the Polish competition law. Therefore, a cease and desist order has been issued and the fine imposed by the Office.

23. Another area in which the TP S.A. abused its dominant position was the lease of the telephone lines to other fixed and mobile operators. In 1997 the Office launched the investigation on the grounds of possible overstatement by TP S.A. of fees, it collected for leasing the abovementioned lines. In response, the TP S.A. justified the high price of the leased line with the extra costs it had to bear in relation to upgrading the network infrastructure. As the investigation drew to its end the OCCP established that rise in the fees was an abuse of the incumbent's dominant position as the increase in the fees was much higher than the rise of the extra costs incurred.

24. In addition it ought to be underlined, that in both cases, upon the appeal from the TP S.A. the Court of Competition and Consumers' Protection sustained the decision of the OCCP.

25. One of the most recent OCCP cases dealt with the discriminatory practices of the TP S.A. in its relation with independent internet service providers (ISPs) providing their services via the commuted telephone lines belonging to the TP S.A. In order to offer their services the ISPs have to sign with the incumbent contracts covering the issues of financial transfers associated with usage of incumbent's lines. The first ISPs approached the TP S.A. on that issue already in 1996 however from that time on the TP S.A. consequently refused to sign any contracts with those undertakings. Therefore, the ISPs were not able to receive payments for its services. In December 2003 the OCCP closed the investigation, finding the practice to be competition-restrictive and imposed on TP S.A. a fine of EUR 5.000.000

26. Without any doubt, it can be stated that remedies applied in those cases by the OCCP increased the levels of competition between the undertakings operating on the relevant markets. In the longer term the aforementioned strengthening of competition manifested itself in the telephone and internet services of better quality, better price, and better availability. The telephone, as well as internet services, may be considered as an integral component of the infrastructure necessary for the effective performance of business activities in any given economy. Therefore, improvements achieved in regard to the three features of those services enumerated above, must translate into the increase of the overall effectiveness of business

activities.² This in turn amounts to the improvements in the *tempo* and the quality of the economic development.

3. Conclusions

27. Based on the exemplary cases presented in the herby paper its quite clear that the positive impact of competition policy enforcement manifests itself two ways. Firstly, the remedies applied by the OCCP in the majority of cases led to enhancement of the consumers' economic welfare. The important point to be made here is the fact that, this enhancement has been possible via increases in the levels of aggregated disposable income available to those consumers (lower prices on telecomm services meant that more money has been available to the consumers for purchases of other goods and services). Therefore, enhancement of the consumers' welfare (as defined above), produces certain economic stimulus in the form of increases in consumers' spending and investments. This stimulus in turn translates itself into improvements in the quality and the dynamics of economic development.

28. Secondly, the enforcement of the competition law in the telecommunications' sector also benefits the undertakings themselves. Directly the competition enforcement affects the performance of the undertakings providing telecomm services, by levelling the playing field on which both the incumbent and its competitors operate. Indirect influence takes place due to the fact that telecomm services are an indispensable part of the infrastructure necessary for development of the economy as a whole.

NOTES

1. Further on, by implementing such system of interest calculation the TP S.A. has breached even its own contractual terms regulating its relations with the subscribers.
2. In light of the above it could be observed, that the competition related effectiveness gains in just one sector (telecomms) may amount to the increase of effectiveness in all other sectors of economy

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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
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OECD Global Forum on Competition

**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT
HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

-- CONTRIBUTION FROM ROMANIA --

Session IV

This contribution is submitted by Romania under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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English text only

HOW ENFORCEMENT AGAINST PRIVATE ANTI COMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

*by Theodor Valentin Purcărea, PhD
President of the Competition Council of Romania*

1. Understanding the importance of competition law and policy, as a result of both the economic development and the restructuring of the whole Romanian economy, has become a necessity to attain the objectives of a market economy. Competition law normally prohibits:

- a firm from obtaining monopoly power;
- the abuse of dominance;
- the cartel arrangements in which two or more firms agree to act jointly as a monopolist.

2. Competition policy is a broader concept that includes aspects of regulatory reform, demonopolisation and privatisation, and seeks to halt the harm to society that is caused by a broader range of anti-competitive actions and policies. In the context of accelerating transition, the concept of competition culture is of key importance. With a view to promoting the principles of the competition culture, we have to take into account a range of activities that contributes to an increase in the transparency of the competition environment. Precisely, these instruments can be summarised as follows:

- mass media: internet, publications (magazines, annual reports, press releases);
- seminars and conferences organised in order to promote competition policy;
- co-operation with regulators within the process of privatisation and deregulation;
- consultancy offered by experts;
- policy of setting fines that carries greater deterrence and prevents serious distortions of competition.

3. In the Romanian emerging market economy, the emphasis is on competition advocacy, including use of communication strategies that help educate economic agents. As regards the policy of penalising infringements of the competition rules, the national decision – making authority, the Competition Council, issued a number of 43 decisions¹ setting fines for anti-competitive behaviour (agreements between undertakings that distort competition). It is a significant increase as compared with the previous year, when 12 decisions that implement sanctions were issued. Also, 57 decisions applying sanctions were given for failing to notify the concentrations (mergers or acquisitions). This record, registered at the end of October 2003, is a progress in comparison with the last year result: a number of 30 decisions issued in this field.

¹ The number was recorded at the end of October 2003

Anti-competitive conduct negatively affects or eliminates the benefits of effective competition, like static and dynamic efficiency and consumer surplus gains. Therefore, competition law enforcement that effectively sanctions and deters such conduct should lead to economic development.

4. International business activity can introduce increased competition into markets previously monopolised by domestic firms, leading to an improvement in economic welfare. However, it is also likely to promote cross border trade and investment. Alongside the surge in cross – border mergers and acquisitions there is concern that concentrated market power of transnational corporations will threaten competition in developing countries by cramping domestic production and investment. This is the case of the Romanian cement market, when cement manufacturers have got into the act of trying to shore up cement prices.

Romanian Competition Council

Case Study on Cement Market

1. General Survey

5. For a better understanding of the market, a brief presentation of the Romanian cement industry is needed. Before 1989, the Romanian cement sector was one of the most developed, the cement plants having been built with very big installed capacities which aimed at supplying the building materials needed for a great investment program. The cement plants were placed near the raw material sources, facilitating the building in accordance with the principles of a planned economy. Nevertheless, there was the possibility to deliver cement to users located all over the country, at comparable transportation costs. This landscape was changed between 1997 and 1999 when the cement sector was completely privatised and the main world-wide cement producers entered into the Romanian market, by acquiring control over the local producers.

6. At this moment, three cement companies operate on the market. In order to keep the confidentiality of the information presented, the three economic agents will be defined as the company A, company B and company C.

7. Each of them controls three cement plants, placed uniformly, throughout the country and holds a market share of 30%. Different criteria, such as: production capacity, nominal production and turnover, are taken into account when estimating the market shares. The calculation based on the turnover was considered the most relevant and appropriate. This evidence shows the existence of an oligopoly on the Romanian cement market. The cement demand represented by individuals and companies, providing building and construction services, is the downstream sector. The requested quantities of cement can be provided to the consumers by three different suppliers, in terms of profitability. These elements lead to the idea that, generally speaking, the Romanian cement market is competitive. However, in some north-east counties, consumers have no alternative in choosing the supplier because there is only one cement plant, controlled by company C. The lack of competition is not a problem because there is a poor demand in the region. A similar situation can be found in the south-east of the country, where the demand is fulfilled by a cement plant controlled by the company A. In addition, company B controls two cement plants: Alesd and Turda, located in the north-west.

8. Further on, we will present 2 case studies in order to illustrate how law enforcement has halted restrictive behaviour and the subsequent effects on economic development regarding the cement market.

2. Negative Clearance on Slag Market – Case Study

9. A negative clearance request was notified to the Romanian Competition Council by the parties to the contract, at the end of February 2003.

10. The business partners were company A, company B and company C, on the one hand, and company X, on the other. In carrying out the contract, the supplier – company X - took the responsibility to deliver slag to the beneficiaries -company A, company B and company C. With a view to analysing the effects on competition, the experts asked for information and accounting documents, stating the legal basis and the purpose of the request.

2.1 *The Relevant Market*

11. The relevant product market included the granulated slag of furnace and its alternative products, while the relevant geographic market was defined as the whole country. The supply is restricted to the domestic market because there are no imports for this product. The demand comes from the cement producers and represents approximately 90% of company X' slag production. It may be noted that company X has a dominant position on the relevant market. The beneficiaries prefer to contract the slag from this supplier, taking into account the properties of this product, the fact that company X is the only supplier who delivers the product at high standards of quality and the importance of the granulated slag of furnace in the cement production process.

12. A close examination of the contract raised two problems:

- the abuse of dominant position held by company X on the Romanian slag market, by imposing inequitable contractual clauses on customers,
- the agreement between beneficiaries which may affect the competition on the Romanian cement market as a result of the supply sources allocation according to territorial criteria or sales-and-purchase volume criteria.

2.2 *Conclusions*

13. The information provided by the parties, regarding the clauses of the contract, was not accepted as a conclusive proof. Therefore, the representative agents of the parties were invited to participate in discussions with a view to deciding on contract clauses that should be eliminated in order to support effective competition.

14. The inspectors of competition, responsible with this case, concluded that the contract in question was not in compliance with the provisions of the competition law and solicited the voidness of the contract. Separate contracts between company X and each of the beneficiaries were allowed to be settled on amiable basis. The parties concerned should submit a document to the Competition Council, confirming the voidness of the contract. Otherwise, the parties would be sanctioned drastically.

2.3 *Effects on Competition Environment*

15. The slag is a dangerous type of waste in compliance with the Government Decision no. 856/2002. It has been generally recognised in a number of preambles that it is worthy to protect the environment because of its economic importance. Over the decades, this rationale has become mainstream within international environmental law. Under these circumstances, the collection and storage of waste need financial resources that should be invested in the protection of the environment. The separate concluded agreements between company X and each of the beneficiaries might increase the competition on

the market and remove the barriers to entry. Taking into account the responsibilities assumed by the beneficiaries, the slag collection would be facilitated, having positive effects on environmental protection. The restrictive clauses of the agreement were eliminated and the Competition Council had to grant negative clearances for each agreement concluded. Therefore, the measure proposed by the competition inspectors contributed to effective competition.

2.4 Measures Taken Against Anticompetitive Conduct

16. Secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports are among the most serious restrictions of competition encountered. Such practices ultimately result in increased prices and reduced choice for consumers.

17. In 2001, the Competition Council issued an investigation order as a result of prohibiting the provisions of the competition law regarding the correlated price increase on cement market. As a result of starting the investigation because of doubts concerning compatibility with a normal competitive environment, the cement manufacturers cut down the prices. However, the investigation has not been finalised.

18. Nevertheless, we have to mention that, during the current year, the competition inspectors have focussed on the Leniency Note on the non-imposition or reduction of fines in cartel cases.

3. The Authorisation under Conditions – Case Study

3.1 Case History

19. The present case study concerns a merger, made on the cement market and analysed by the Romanian Competition Council in the year 2000. According to the Letter of Intention, signed by the parties and presented to the Council, a subsidiary of the company A intended to sell one of its own branches – the cement plant Alcim – to the Breitenburger Auslands Beteiligungs (BAB) Company.² The involved parties explained, in the notification form, that the purpose of the operation was to grow the efficiency, to modernise and to make their activities more flexible. At the time of notification, the company B was controlling another cement producer in Romania, called Cimentul Turda, and intended to take control over a second cement plant. Taking into account the dominant position held by the company B on the relevant market, the Council decided that a further investigation would be necessary.

3.2 The Relevant Market

20. In the case of cement, the transportation costs are very high and, therefore, the 200 –km represents the maximum distance wherein the beneficiaries can afford to pay the transportation costs without being forced to look for another supplier. As a rule, the cement plants sell cement product on “ex-works” terms. In the jurisprudence of the Romanian Competition Council it is considered that, in the case of cement, the market “allocated” to each cement plant consists in a circular area with a 200 – km radius. Regarding the above mentioned issues, the geographic market was defined as the north – western region of Romania. There are no foreseeable substitute products for cement, in terms of characteristics, intended use and price. This is the reason why the product market was defined as the cement market. It was noticed that, within the defined geographic market, there were some counties where Alcim and Cimentul were the only suppliers. This means that, after the closure of the notified procedure, the company C was to become the only cement supplier. The territory of the three counties: Satu – Mare, Salaj and Maramures was considered the affected relevant market by this merger.

² The Breitenburger Auslands Beteiligungs (BAB) is the Romanian subsidiary of the company B.

3.3 *Impact upon Competition*

21. As a consequence of the acquisition, the number of the independent cement suppliers would decrease. Moreover, in the countries included in the affected relevant market, Holderbank would have remained the only supplier. In this respect, the decision imposed conditions and obligations aiming at impeding the abuse of dominance on the affected relevant market.

22. These conditions are summarised below:

- company C' s obligation to make investments of within Alcim;
- company C would not sell cement of the same quality from its Alcim plant and Cimentul plant to different consumers at different prices;
- In order to allow the Competition Council to verify the compliance with these conditions, the company C would place at Competition Council's disposal the delivery price lists of plants located in Alesd and Turda, for a five years period.

23. The merger authorisation under conditions enhanced efficiency by facilitating the scale economies which were not attainable under the pre-merger market structure. Also, the benefits of reduced costs might be passed on to consumers promoting economic efficiency and progressiveness.

4. Efficiency Considerations – Competition and Consumer Rights

24. It is important to mention that the “de minimis” threshold of the aggregate turnover of the undertakings participating in mergers and acquisitions will be increased with a view to allowing only those cases that actually cause concerns from a competition point of view. Amendments to the Competition Law are in the process of adoption in order to have a legislation in line with the aquis. The Council's decision to adopt the Leniency Note, which sets out the conditions under which enterprises cooperating with the Romanian Competition Council might be exempted from fines, is an important aspect of its endeavours to achieve the objective of combating cartels. Without effective policies and structures, restrictive business practices can damage consumer rights and social welfare. Competitive markets favour consumers by encouraging efficiency and innovation among suppliers, ensuring that both producers and consumers share the benefits. By promoting the most efficient use of economic resources, competition policy contributes to economic growth.

25. Generally speaking, greater competition achieved through regulatory reform, demonopolisation and privatisation contributes to a general deconcentration of economic power, giving more people an opportunity to apply and develop the entrepreneurial and managerial skills that are needed to sustain the economic development.

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OECD Global Forum on Competition

**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT
HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

CONTRIBUTION FROM THE RUSSIAN FEDERATION

-- Session IV --

This contribution is submitted by the Russian Federation under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. One of the most important activities of the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship (MAP Russia) aimed at development of competition on the financial services market. They are concentrated at resolving of a range of top priority tasks: creation of equal competitive conditions for the financial structures; provision of citizens and legal entities with quality financial services on the whole territory of the Russian Federation; assurance of equal competitive conditions for national and foreign companies in connection with the proposed entry of the Russian Federation into the WTO.

2. Herewith we present summary of the decision of Commission of the Ministry of Russian Federation for Antimonopoly Policy and Support to Entrepreneurship (Commission), concerning the case № 2 06/121-03 on infringement of Russian antimonopoly legislation, initiated in respect to the limited liability company “Non-bank credit organization “Western Union DP East” (LLC “Western Union”) by the joint-commercial bank “Ruslavbank”.

Decision case No. 2 06/121-03 on infringement of the antimonopoly legislation

September 10, 2003

Moscow

The Commission of the Ministry of Russian Federation for antimonopoly policy and support to entrepreneurship (MAP Russia)

ASCERTAINED:

The Joint-stock commercial bank (JSCB) “Ruslavbank” has appealed to the MAP Russia with a declaration of infringement of the antimonopoly legislation. According to the declarant’s opinion, making Contracts between the LLC “Western Union” and Russian banks on services providing to the individuals of sending and payment of money without opening bank accounts present an infringement. The Contracts that Russian banks and the LLC “Western Union” are making contain standard clause 4.2.8., according this clause it’s prohibited to the bank while the Contract with the LLC “Western Union” is in force to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC “Western Union” system.

The declarant has created and is developing the correspondent net “CONTACT” on individual’s money transfers without opening bank accounts through the system of banks’ correspondent accounts. According to the JSCB “Ruslavbank” declaration 40 Russian and foreign banks had joined the created net.

At the same time the declarant has submitted documents testifying Russian banks' refusal to proceed the fulfilment or to make contracts with the JSCB "Russlavbank" on individual's money transfers without opening bank accounts by using the net "CONTACT", because of existence of the Contracts made earlier with the LLC "Western Union" that contain standard clause 4.2.8., according this clause it's prohibited to the bank while the Contract with the LLC "Western Union" is in force to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" system.

The declarant believes, that pointed terms of the Contracts made between Russian banks and the LLC "Western Union" limit the access of other financial organizations to the market of services of individual's money transfers without opening bank accounts, in particular the declarant's, and that is an infringement of article 6 of the Federal law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market" (Law on Protection of Competition). The declarant also believes, that inclusion by the LLC "Western Union" of standard clause to the Contracts with Russian banks, prohibiting banks, while the Contract is in force, to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" is an unfair competition, prohibited by the article 15 of the Law on defence of competition.

The LLC "Western Union" objected to the position declared by the JSCB "Russlavbank" and believes, that the Contracts made between the LLC "Western Union" and Russian banks are not contrary to the antimonopoly legislation.

The Commission examined arguments declared by the parties, analyzed submitted materials and determined the following.

The LLC "Western Union" offers on the Russian market the system "Western Union" – system of individual's money transfers without opening bank accounts. The system "Western Union" is an international system, it has been created by Western Union Financial Services, Inc. – company, established according to the law of Delaver (Diamond) State, USA. Western Union Financial Services, Inc. and the LLC "Western Union" made a Contract on cooperation of 01.01.99, determining rights and obligations of the parties in using the system of money transfers Western Union.

In order to provide to individuals services of money transfers without opening bank accounts, the LLC "Western Union" and Russian banks are making bilateral Contracts on cooperation between the corresponding Russian bank and the LLC "Western Union" directed to providing designated services to individuals that are on the territory of Russian Federation (clause 1 of the model contract).

To co-attain purposes of cooperation that is the subject of the Contract the corresponding bank provides necessary premises, facilities and staff to work at the client services' office in the system "Western Union" (clause 4.2.1 of the model contract). The LLC "Western Union", in its turn, provides advertising and directive materials, necessary to serve individuals, using the system "Western Union", sends specialists to install the software and train bank's staff to work with the system "Western Union", provides bank with advisory support in technical and organizational questions, arising during the usage of this system (clauses 4.1.1– 4.1.3 of the standard contract).

Terms of the Contracts, that the LLC "Western Union" makes with Russian banks, according to which while, the Contract is in force, bank has no rights to act as an agent or representative of other companies, offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" system, are standard, so say identical to all Russian banks.

The LLC “Western Union” itself qualifies the Contracts it makes with Russian banks, using standard terms, as “model”¹ (page 3 of the LLC “Western Union” declaration to the Commission of MAP Russia).

Analysis of the model contract including its subject - cooperation between the LLC “Western Union” and bank on co-providing services to individuals of money transfers without opening bank accounts, as well as basic rights and obligations of the parties, according to which bank and the LLC “Western Union” can offer to the individuals pointed services only together, do not allow the Commission to agree with the LLC “Western Union” in the part that it is a commission contract, according to which, one side (commissioner) under the commission of another side (committent) undertakes to perform for fee one or several deals on its behalf, but at the expense of committent (article 990 of the Civil Code of Russian Federation (CC RF)).

Also the Commission cannot agree with the LLC “Western Union” interpretation of article 1007 of the CC RF as a rule that permits to divide market by sellers, buyers, territories and etcetera. Indeed, clause 2 of article 1007 of the CC RF stipulates the opportunity to enclose in the agency contract agent’s obligation not to make with other principals similar agency contracts, that have to be fulfilled on the territory, fully or partly coinciding with the territory, pointed out in the contract. However it has to be in mind that contracts, made by banks with other organizers of systems of payment (also contracts with JSCB “Russlavbank” to use its system CONTACT), are not considered neither by the parties to the Contract, nor by the Commission of MAP Russia as agency or commission contracts.

Also, according to the clause 2 of article 1 of the CC RF, civil rights can be limited by federal law. In particular, article 6 of the Law on defence of competition, which prohibits the conclusion of agreements, limiting competition on the finance services’ market, is such a limitation and exception. At the same time this article does not contain any exception for agency or commission contracts.

As for the terms of the Contract: the model contract between Russian bank and the LLC “Western Union” contains along with other terms standard clause 4.2.8, according to which while the Contract is in force the bank has no right to act as an agent or representative of other companies, offering services of immediate money transfers in forms similar to those using in the system Western Union.

Presence of this term in the contract does not permit the bank, which made the Contract with the LLC “Western Union”, to make contracts with other organizations, representing another systems of payment. At the same time it cannot be admitted that banks are free to choose a contractor – creator and owner of the money transfers’ system. The width of the territory, covered by the system, served as a criterion to the banks in the process of choosing the contractor for providing services to individuals of money transfers. The international payment system “Western Union”, before entering Russian market, has been establishing and functioning in different countries for a considerable period of time and now covers more than 195 countries; as for Russian Federation – the LLC “Western Union” carries out its activities in 82 out of 89 regions of Russian Federation (pages 2 and 3 of the explanations to the case of the LLC “Western Union” dated 28.08.2003).

Russian companies, having intention to work on this market, will be able to reach such covering only after a considerable period of time and financial expenditure on establishment and development of a payment system.

Presence of the clause 4.2.8 of the model contract, that banks making with the LLC “Western Union”, taking into consideration competitive advantages of this company before new payment systems and companies ready to render services on this very market, restrains competition on the services’ market of individual’s money transfers without opening bank accounts, as it doesn’t permit banks to make

¹ The law-term “model agreement” is used in the text of decision from the viewpoint of LLC “Western Union”.

individual's money transfers' agreements with other organizations, that, taking into consideration the difference between the LLC "Western Union" and its potential competitors in territory covering, forces banks to decline a mutually beneficial cooperation with other organizations in favour of the LLC "Western Union".

It's also necessary to mention, that the LLC "Western Union" itself indicates ensuring bank's interest to promote only one company and its payment system and desire to eliminate competition of other companies, having more flexible inter-payments with banks (the LLC "Western Union" gives the example of the conditions of work in the CONTACT system; page 4 of the LLC "Western Union" declaration to the Commission of the MAP Russia) - as one of the reasons for including the clause 4.2.8 to the model contract.

Mentioned circumstances and examined materials give grounds to the Commission to qualify clause 4.2.8 of the model contract, that the LLC "Western Union" makes with Russian banks, as the term of contract, directed to restriction of access to the market of services of individual's money transfers without opening bank accounts to other financial organizations and development of new payment systems and, as a consequence, restriction of competition.

The Commission stated that it's conclusions on the infringement of articles 6 & 15 of the Law on Protection of Competition by the LLC "Western Union" were made taking in account the following circumstances:

- for credit organizations - participants of the systems of payment the great importance in competition has the possibility to provide clients the maximum range of services. Making contracts with different systems of payment of individuals' money transfers allows to credit organization to wide up the list of services providing and to attract more clients with different demands and finance abilities;
- the analyses and the comparison by the Commission of the different systems of payment and in particular Western Union and CONTACT enable to make a conclusion that those systems are not similar and have number of technological, organizational and other differences;
- clause 4.2.8 of the model contract doesn't permit banks while the Contract is in force to be an agent or representative of other companies on immediate money transfers. However the LLC "Western Union" sends notices to banks of annulment of the Contracts in every case of using by banks other systems of payment than Western Union. At the same time banks on receipt of such notices were sending to the LLC "Western Union" explanations that the relations between them and the other payment system organizer are neither representation nor agency as well as explications that the systems CONTACT and "Anelik" are related to the operations through correspondent accounts of the banks - participants and so they can't be classified as similar to Western Union. Nevertheless the reasons stated by the banks the LLC "Western Union" were annulling the Contracts with banks if they were uphold to their position without further negotiations and explanations on clause 4.2.8.

Taking into consideration all stated in the decision reasons and consequences after the analyses of the materials submitted and hearing of the both parties the Commission of the MAP Russia following the articles 22; 23; 30 of the Federal Law "On Protection of Competition on the Financial Services Market",

DECIDED:

1. To recognize that the provisions of clause 4.2.8 of the model contract between that the LLC "Western Union" and the Russian banks are making according to which bank, while the Contract is in force, don't have a to act as an agent or representative of other companies that

are providing services of immediate money transfers in forms similar to those used in the system Western Union, don't correspond to article 6 of the Federal Law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market", prohibiting to make agreements that have as a result or may have as a result limitation of competition on the finance services market including the limitation of access to the finance services market of other finance organizations.

2. To qualify the actions of the LLC "Western Union" to include clause 4.2.8 to the model contract and the demand to stop relations between banks and other organizers of the systems of individuals' money transfers without opening bank accounts together with the threat to annul the Contract between the bank and the LLC "Western Union" due to the infringement of clause 4.2.8 of the Contract as unfair competition prohibited by article 15 of the Federal Law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market".
3. To issue to the LLC "Western Union" the prescription to stop the infringement of the antimonopoly legislation before 10.11.2003 and to inform the MAP Russia on measures which were carried out before 15.11.2003.

This decision can be considered as an illustration how enforcement against private anticompetitive conduct has safeguarded the development of the money transfer systems in Russian Federation, which serves not only the promotion of competition on the financial services market but contributes to the economic progress as well.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from South Africa

-- Session IV --

This contribution is submitted by South Africa under Session IV of the Global Forum on Competition, to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

A BRIEF OVERVIEW OF THE SOUTH AFRICAN EXPERIENCE

*Jointly submitted by the Competition Tribunal of South Africa
and the Competition Commission of South Africa*

Introduction

1. South Africa established a new competition enforcement regime little over four years ago. This new order comprises a statute – the Competition Act – and three institutions, namely, the Competition Commission, the investigative and prosecutorial authority; the Competition Tribunal, an administrative Tribunal which is the decision making body in respect of all allegations of anticompetitive conduct and in respect of all mergers above a certain threshold; and the Competition Appeal Court, a special division of the High Court which hears appeals from the decisions of the Tribunal.
2. In common with many other competition regimes, the jurisdiction of the South African competition authorities extends over all mergers above a designated threshold and over anticompetitive conduct. Anticompetitive conduct consists of a range of horizontal and vertical agreements and abuses perpetrated by a dominant firm. The Commission is able, under highly specified circumstances, to exempt certain otherwise anticompetitive conduct although this decision may be appealed to the Tribunal.
3. The following sections will examine selected aspects of the South African experience in dealing first with mergers and secondly with anticompetitive practices.

1. Merger Regulation

4. It is sometimes argued that developing country competition authorities should, in the early years of their existence, shy away from merger regulation. It is argued that merger regulation is time consuming and involves the utilisation of scarce resources, particularly human resources, which may be better deployed in the more important task of preventing anticompetitive conduct. Another argument suggests that in relatively small markets merger regulation inhibits the growth of domestic firms capable of competing in international markets. However, our experience does not support these arguments.
5. All mergers above a designated threshold must be notified to the Competition Commission. The Commission is empowered to approve (conditionally or unconditionally) or prohibit all transactions below a second threshold. These decisions may be appealed to the Tribunal. In respect of all mergers above the second threshold – so-called ‘large mergers’ – the Commission submits a recommendation to the Tribunal which, after hearing the parties, the commission and other interested parties decides whether to approve or prohibit the transaction. A merger may not be implemented without the permission of the competition authorities.
6. Merger investigation and analysis has proved to be a powerful source of learning for the competition authorities. It has not only honed the general investigative skills of the commission staff but has also immersed the commission staff as well as the Tribunal members and staff in cutting-edge competition analysis. Several merger decisions of the Tribunal have been appealed to the Competition

Appeal Court and this experience has equally assisted the judges in their efforts to tackle this new and complex area of the law.

7. In addition, the role of the competition authorities in merger regulation has performed a powerful advocacy function. Merger hearings are held in public – with due regard to the need to protect confidential information – and interested parties are, in addition to the Commission and the merging parties, entitled to make submissions to the Tribunal. The Minister of Trade and Industry and the trades unions representative of employees of the merging parties are furnished with merger notifications and they, too, are entitled to make submissions to the Tribunal. Representatives of the media regularly attend and report on merger hearings and the outcomes of these decisions – all of which are fully reasoned and publicly available – are widely publicised and debated.

8. Obviously more important than its learning or advocacy function, merger regulation has made a major contribution to maintaining and improving the competitive structure of key markets. This is not to say that many mergers have been prohibited or have had conditions imposed on their approval. South Africa's ratio of approved to conditionally approved or prohibited transactions accords with other jurisdictions. But several transactions have been disallowed or conditionally approved and these have had important consequences.

1.1 For example

9. The Tribunal prohibited a proposed merger between two of the country's largest retail furniture chain stores. These are key institutions in the South African economy not only because furniture is a major element in the basket of many low income consumers but because the furniture chains have long been the pre-eminent sources of credit to that large part of the South African community that have little access to the formal banking system. After an elaborate hearing which involved significant contestation over the boundaries of the relevant market, the Tribunal decided to prohibit the transaction. There is little doubt that, had the transaction been approved, low income South African consumers would be paying more for some basic elements of their consumption package. Interestingly, the period since the prohibition has seen something of a downturn in this sector. The upshot has been that several of the chains who were identified by the would-be merging parties as their key post-merger competitors, have found themselves in deep financial trouble due, in large part, to poor management of their debtors' books. We are now left with the situation that the two parties that were prevented from merging are, without doubt, the most significant competitors in this important market.

10. The Tribunal recently approved a merger in the wine and spirits industry on condition that the merged entity divest itself of certain key spirits brands. South Africa's liquor markets are unusually concentrated largely in consequence of a notorious market sharing arrangement concluded in the 'sixties and 'seventies between the country's monopoly brewer and the largest producers of wines and spirits. The conditions imposed on this merger will ensure that the merged entity terminates long-standing arrangements to distribute and market key brands belonging to competitor companies. The upshot is that the competitors – one a large South African wine and brandy producer, the other a large spirits multinational – will now enter the market with these successful brands thus laying the basis for robust competition into the future.

11. In summary then merger regulation has provided a key learning platform for our fledgling competition authorities. It has also served to introduce competition issues to the broader population who, partly as a result of the procedures employed, view the competition authorities as transparent institutions. Most important it has prevented further concentration of already concentrated market structures and, in certain instances – for example, the liquor industry – has enabled the authorities to facilitate new entry into important markets. There is, also, clear evidence of corporations factoring merger regulation into their

business decisions – certain transactions are no longer entertained precisely because of the reality of competition review.

2. Anticompetitive practices

12. Regulation of anticompetitive conduct has proved more difficult than merger regulation. Many of the reasons for this are, with the benefit of hindsight, obvious. The competition authorities are charged with administering a powerful and far-reaching new statute, one that impacts significantly on fundamental property rights. In addition the constitutional and administrative law framework has changed dramatically. The upshot is that many of the procedures and powers of the competition authorities have inevitably been subject to rigorous constitutional and administrative scrutiny. While the competition authorities have frequently prevailed in the face of this scrutiny, in other instances important errors have been identified. Judgments handed down by the higher courts, including the Supreme Court of Appeal and the Constitutional Court, enable the competition authorities to proceed with greater certainty and confidence and will undoubtedly speed up the prosecution of anticompetitive practices.

13. However, these difficulties notwithstanding, important advances have been made. For example:

14. The South African agricultural sector has long been dominated by producer co-operatives and statutory single-channel marketing arrangements. With the lowering of international trade barriers and the introduction of market disciplines into the agricultural sector many of these co-operative and marketing boards were converted into privately owned corporations that sought nevertheless to maintain the exclusivity in the provision of key distribution and other services to their erstwhile members, the farmers and exporters of agricultural producers. This has inhibited the entry of new service providers into the agricultural sector. In two important cases involving, respectively, the markets for raisins and citrus fruit, the Tribunal has struck down anticompetitive arrangements in the articles of association governing the new corporate entities. This has assisted in developing a market for the provision of key services – for example, the provision of key agricultural inputs and export marketing services. This outcome has permitted new entry into a number of important markets to the considerable benefit of both these new entrants and the consumers of their services, namely the farmers previously denied the right to seek the best price and best quality service.

15. The Tribunal has recently levied its first significant administrative penalty in a case involving the practice of minimum resale price maintenance perpetrated by a large US multinational active in the market for automobile braking equipment. In another case, the Tribunal confirmed a settlement between the Commission and a grouping of attorneys accused of fixing the price of conveyancing services in Pretoria. A long standing investigation involving the US Webb-Pomerene association in the Soda Ash industry has resolved the question of the extra-territorial reach of the Competition Act and has confirmed the per se nature of the Act's proscription of hard core cartels.

16. There are several important cases in the pipe-line involving allegation of anticompetitive practices. These include alleged loyalty schemes in the air travel market, allegations of price fixing in important segments of the health care sector and allegations of excessive pricing in the pharmaceutical sector.

17. Again it seems reasonably clear that private parties have begun to factor the existence of competition regulation into their business conduct. However, there is little doubt that over the coming period the authorities will be increasingly measured by their ability to effectively identify and constrains anticompetitive conduct. While they will be helped in this task by closer attention to their procedures and the limits of their powers, greater focus on training and on attracting experienced litigators into the ranks of the authorities is a significant challenge.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from Sweden

-- Session IV --

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PROHIBITION OF FREQUENT FLYER POINTS ON COMPETITIVE DOMESTIC ROUTES – A CASE ON ABUSE OF A DOMINANT POSITION

Executive summary

- The Swedish Competition Authority and the Swedish Market Court prohibited SAS from using its Frequent Flyer Program (FFP) on domestic competitive routes.
- The case illustrates that behaviour that constitutes abuse of dominance, such as predatory pricing and fidelity rebates, is often popular with the dominants' customers.
- Hence, the advocacy role may be particularly difficult for competition authorities that devote a large part of their resources on fighting abuse of dominance.
- According to the Authority's evaluation, which is available in English, this particular FFP increased fares by approximately 10 per cent.

1. On February 27, 2001, the Swedish Market Court partially prohibited Scandinavian Airline System (SAS) from awarding passengers in within its Frequent Flyer Program (FFP). The prohibition became effective as of October 27 the same year. However, the prohibition only applies to *domestic* routes where SAS faces competition from another airline. An econometric evaluation of fares during periods with and without FFPs indicates that the effect of SAS's FFP program was to increase prices by approximately 10 per cent.

2. FFPs have been discussed previously in OECD meetings. For two reasons, the Swedish Competition Authority has chosen to present a case that relates to bonus programs. First, the case highlights the paradoxical situation that abuse of dominance may be perceived by consumers as beneficial. This may, e.g., be the case for fidelity rebates and predatory pricing. Hence, although the prohibition against abuse of dominance is central to competition law enforcement, it is sometimes a challenge to communicate the long-term benefits of such policies. Second, an extensive analysis of the case and the effect of the prohibition on the market is available in English.

1. The Swedish air-travel market

3. The domestic Swedish airline market was deregulated in 1992. Before the deregulation, SAS and its sister/daughter company Linjeflyg held a de facto monopoly position. After the deregulation, a couple of entrants challenged SAS's position. Initially, the entrants were relatively successful, gaining a combined market share of approximately 25 per cent within a few years and putting pressure on prices. However, SAS and its allied regional carrier Skyways regained most of what had been lost, and the pre-deregulation price level was re-established – or even surpassed.

4. Due to Sweden's geography, the domestic air travel market is relatively large – with a total number of passengers corresponding to one third to one half of the domestic passenger volumes in countries like France, Germany, Italy, Germany and Spain. In contrast to those countries, however, the traffic is almost completely concentrated to one national hub – Stockholm. Approximately 97.5 per cent of all passengers have Stockholm as the point of departure or destination, or change aircraft in Stockholm.

5. In 2001, five routes had annual passenger volumes in excess of 400 000 pax, while five additional routes had passenger volumes of at least 200 000 pax. The prevailing view has been that 200-400 000 passengers is enough for at least two operators to be viable on a domestic route.¹

2. Frequent-flyer programs

6. Frequent-flyer programs (FFPs) award passengers with “bonus points” for each paid trip they make. Longer trips give more points and business-fare tickets give more points than leisure-fare tickets of equal length. Bonus points are accumulated on individual accounts. Subsequently, accumulated points can be used for free-of-charge air travels, hotel stays, car rentals et cetera. The ratio between the points earned and the points required for a free trip varies. Typically, the ratio is more favourable for the passenger on long and competitive routes. In Sweden, 5 to 10 business-fare round-trip tickets have yielded enough points to earn a free leisure-class round-trip ticket for a flight of approximately equal length.

7. FFPs were introduced by US carriers in the 1980s and by European carriers in the 1990s. SAS’s bonus program, Eurobonus, was introduced in 1992. When the Star alliance was created in 1997, with SAS as one of the founders, SAS extended its FFP to domestic flights.

8. One of the purposes of FFPs is to make customers loyal to the airline. In order to receive maximum benefit from the bonus offers, the customer has an incentive to concentrate his or her air travels to one airline – or at least one alliance.

9. Bonus programs exist in other industries, such as the food retailing and gasoline retailing. Often, the bonus level is much lower than the typical level found in FFPs. An additional aspect is that points are often earned on flights paid for by the employer, while the points may be used for leisure travels.

3. The competitive assessment of the Swedish Competition Authority and the Market Court

10. An FFP awards a customer’s fidelity towards a single airline (or a single alliance of airlines). In order for a customer to earn sufficient points for a free trip, the customer needs to make a certain number of paid trips with the same carrier before the points begin to expire. This creates a progressivity in FFPs, which is reinforced if the customer values exotic trips relatively more, or wishes to use points for his or her spouse as well.

11. The progressivity, in turn, puts a dominant carrier in a favourable position. If the customer rationally shall concentrate his or her flights to one carrier, in order to derive maximum personal benefit, it is best to choose the carrier that dominates the customer’s local hub. Hence, FFPs serve to reinforce the position of a carrier that is already dominant.

12. SAS, which is in alliance with the regional carrier Skyways and with the other major carriers within the Star alliance, dominates the domestic airline market and the Stockholm/Arlanda hub. SAS’s share of the domestic market was, at the time of the decision, approximately 70 per cent, while Skyways had 15 per cent of the domestic market. In addition, SAS and its international allies had almost 50 per cent of the international traffic to and from Sweden. Between them, the airlines of Star alliance had traffic on almost all of the top 20 international routes (by passenger volumes) from Stockholm, while other alliances were active at, at the most, a handful of the top routes.

13. Relative to bonus programs in many other industries, the market value of the bonus is high. In addition, a large share of the bonus points are generated on trips paid for by the passenger’s employer. At least from a Swedish perspective, this makes FFPs different from methods governing normal competition in products or services based on traders’ performance.²

14. The FFP of SAS had much the same effect as such fidelity-rebate schemes as have been found in violation of Article 82 of the EC Treaty. Given the dominance of SAS and the functioning of the Swedish domestic air-travel market, there was a substantial risk that a continued use of Eurobonus for domestic travels would have eliminated the competition that still remained in the market.

15. On the other hand, it was undeniably the case that from an *international* perspective, the use of an FFP was not unique to SAS, or not even an uncommon practice. Hence, SAS argued that FFPs was an element of normal competition.

16. Largely, the Market Court's reasoning followed that of the authority, although the scope of the prohibition was reduced.

4. The decision

17. In 1998, the Swedish Competition Authority initiated an investigation of the anticompetitive effect of SAS's FFP. Following complaints from one of SAS's competitors, the authority suspected that the bonus system amounted to an abuse of the airline's dominant position on the market for domestic air travel. In its decision, December 12, 1999, the authority established that SAS had indeed violated the Swedish Competition Act, and prohibited SAS from awarding bonus points on domestic trips. However, before the prohibition became effective, the Swedish Market Court inhibited the decision.

18. After court proceedings in the Market Court, the Court found, on February 27, 2001, that SAS's use of an FFP on the domestic market constituted an abuse. The Court *partially* prohibited Scandinavian Airline System (SAS) from awarding passengers in within its Frequent Flyer Program (FFP). The prohibition became effective as of October 27 the same year. However, the prohibition only applies to *domestic* routes where SAS faces competition from another airline.

19. This means that SAS is still able to award passengers FFPs on all international routes, as well as on domestic monopoly routes. (If there is entry on a route where SAS previously was a monopolist, it will immediately have to stop giving FFPs on that route.) In addition, even on competitive domestic routes, SAS can award passengers FFPs, as long as these points cannot be exchange for free trips, hotel stays *et cetera*. In other words, bonus points earned on competitive domestic routes can only be used for upgrading the card status.

5. International positions on FFPs

20. Since August 2002, SAS is prohibited from awarding any points for domestic air travel in Norway. It appears the Sweden and Norway are the only countries that have prohibited FFPs. However, it is generally accepted that FFPs induce loyalty, although some would argue that FFPs may, in spite of this and at least in some circumstances, be pro-competitive. The European Union and Germany have suggested that FFPs can constitute an entry barrier and have, in particular instances, required that incumbents' FFP are opened up to new entrants.

6. The effect of the prohibition

21. The fact that the partial prohibition of SAS's Eurobonus on the Swedish market became effective just a few weeks after September 11, 2001, makes ex-post evaluation more difficult. Immediately after September 11, domestic air fares increased by 3 per cent. However, during the following 12 months, average leisure fares increased, while business fares fell back to the price level of September 1. Although it is difficult to disentangle the effect of September 11, this suggests a relatively more intense competition in the business segment, consistent with what one would expect if loyalty schemes focused on business passengers became less effective.

22. Since autumn 2001, at least four new carriers have entered the domestic Swedish market and the position of the main challenger, Malmö Aviation, appears to have stabilised. There are now at least two carriers on the five routes with the highest number of passengers, as well as on a few smaller routes. In addition, there are some signs of competition between SAS and Skyways.

23. In general, competition in the market appears to have been re-vitalised after the Court's decision. These observations are further underpinned by an econometric study of the effect of the prohibition of Eurobonus which the Swedish Competition Authority commissioned from PhD Fredrik Carlsson, Göteborg University. According to this study, Eurobonus increased the price level by approximately 10 per cent.

24. The study is based on quarterly list prices on individual domestic routes and exploits two regime shifts. In May 1997, Eurobonus was introduced on all domestic routes. In October 2001, Eurobonus was abolished on those routes where SAS faced at least one actual competitor. Although the latter regime shift coincides with the September 11 events, which had implications for the demand for air travel, there is enough variation in the data to enable statistical identification of an effect.

25. The analysis acknowledges that prices and the number of departures are both set by the carriers. Technically, the effect of the FFP is estimated in a 2SLS regression model, which includes up to 15 control variables (distance, population, competition from train et cetera). According to the model, SAS's prices increased by 8 per cent during periods with FFP on competitive routes, while the competitors' prices fell by 4 per cent during these periods. On non-competitive routes, no statistical effect of the FFP was found.

26. Using a completely different econometric technique, the lock-in effect of SAS's bonus program was estimated to be, on average, 500 SEK per business passenger, corresponding to approximately 25 per cent of an average business fare.

7. Discussion

27. The competitive situation on the domestic air-travel market in Sweden was (and is), to some extent, atypical. Due to Swedish geography, passenger flows were concentrated to and from Stockholm, while competition from ground transport is weak on most long-distance routes. Although the dominance of the incumbent airline was not exceptional to Sweden, the fact that SAS was dominant in three neighbouring countries, with large passenger flows between them, is quite exceptional.

28. Relative to other major carriers, a large fraction of SAS's passengers are business passengers. This tends to make an FFP more effective, since business passengers whose tickets are paid for by their employers are likely to give more weight to the personal benefits that can be derived from free bonus travels.

29. Although FFPs are likely to have lock-in effects in most or all market conditions, and although they are under most circumstances likely to contribute towards making entry more difficult, their effects may be less pronounced in other markets. Hence, the decisions taken by the Swedish and Norwegian competition authorities, and by the Swedish Market Court, may be seen as controversial even within the competition community.

30. From a passenger point-of-view, the benefits of a partial or total prohibition of a bonus program may not be evident. At least in the short run, passengers lose a popular benefit, while a more intense competition in prices may only come about in the long run. If the ticket is paid for by the employer, the passenger may perceive a loss even in the long run. According to a research project funded by the Swedish Competition Authority, a clear majority of important Swedish actions against abuse of dominance have focused on behaviour by the dominant which aimed at discouraging customers to abandon the dominant. In many cases, customers were given attractive offers in order to induce loyalty.

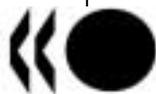
31. It is relatively simple to communicate the benefits of detecting, prosecuting and preventing cartels to consumers. However, it may be more difficult to communicate the long-run benefits of policies that are intended to preserve a competitive market situation. In particular, this appears to be the case for enforcement actions against predatory pricing and loyalty schemes, as such behaviour may result in short-term benefits (lower prices, loyalty rebates et cetera) for consumers. Nevertheless, preventing incumbent firms from choking competition is an essential element of competition policy. As suggested by the OECD Secretariat in its background paper, it may even be the most important element of competition enforcement in transition economies.

NOTES

1. In 2001, the Swedish Civil Aviation Authority published a comparative study of eight European domestic markets. In four of the countries, domestic routes with at least 200 000 passengers were in general operated by at least two carriers. In Germany, routes with at least 400 000 passengers were in general competitive, while Finland, France and Sweden appeared, at that time, to be the least competitive domestic markets of those included in the sample.
2. Cf. the definition of abuse, as expressed by the EC Court in *AKZO* (62/86) [1991] E.C.R.I-3359, para. 70.

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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution of Chinese Taipei

-- Session IV --

This contribution is submitted by Chinese Taipei under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. Introduction

1. In the past two decades, Chinese Taipei has gone through a series of reforms to bring its economy closer to a market-oriented one where competition rather than the state dictates the rules. This process of economic liberalisation has several dimensions which coincide with elements of competition policy, including trade liberalisation, de-regulation, privatisation, and competition law.

2. In the early phase of economic liberalisation, the primary objectives of competition policy, *i.e.* efficient allocation of resources and better choices for consumers, can be effectively pursued by trade liberalisation, de-regulation, and supplemented by privatisation. Trade liberalisation and de-regulation tend to be very effective to restructure those sectors which are overly concentrated.

3. However, when a specific sector has been sufficiently liberalised by way of introducing new competitors into the market, competition law and its enforcement would play a primary role in maintaining the market order as well as avoiding distortion caused by private anti-competitive practices.

4. In this paper we present Chinese Taipei's experience in restructuring the market for house-use liquefied petroleum gas (LPG) with the implementation of competition policy. This example could illustrate how vigorous enforcement of competition law may work alongside trade liberalisation and de-regulation to facilitate the healthy function of a newly liberalised market, as well as to contribute to economic development.

2. LPG Market and its Liberalisation

5. Chinese Taipei started to produce and consume LPG in 1958. Soon LPG was deemed to be a household necessity. In 1971, the total consumption volume (including industrial usage and household usage) of LPG was 176,200 tons. Thirty years later, the total consumption volume of LPG was 1.6 million tons, and the turnover of the sector was well above NT\$ 40 billion. In 2001, there were around 3.5 million households, over half of the total number of households in Chinese Taipei, using LPG as their primary fuel.

6. In the past, the state-owned enterprise Chinese Petroleum Corporation (the CPC) was the only body charged with exploring, producing, importing, refining, and marketing petroleum and natural gas. Consequently, the CPC had been the only supplier of LPG until the market was liberalised in 1999.

2.1 Distribution Market

7. After 1961, the CPC began to grant sole dealership to other companies. In 1978, in order to provide more employment opportunities for veterans, the Government set up the Liquefied Petroleum Gas Supply Division (the LPGSD) under the Veterans Affairs Commission (the VAC), and requested the CPC to designate the LPGSD as its sole dealer of LPG.

8. The economic policy adopted by the Government at that time did not favour market rules in public utilities, including the LPG market. Since 1973, the sole dealers of the CPC, including the LPGSD, took the following measures to discourage competition in downstream distribution markets:

- restrict new entrants into the bottling and transport markets;

- stopped issuing new retail license;
- the prohibition of existing retailers moving their business location or changing their its business area;
- setting a purchase quota for each retailer; and
- setting the retail price.

9. The freezing of new entrants into the bottling, transport and retail markets kept the ratio between bottling companies to retailers steady at 1 to 30 from 1973 to 1993. Meanwhile, the demand for LPG increasing four times in twenty years made the distribution businesses acquire an unduly high profit without devoting much effort. Limiting the numbers of retail licenses also meant the licenses themselves could be sold at a very high price.

10. Nevertheless, the retailers and their trade associations jointly contributed to establish the LPG Retail Businesses Research and Development Fund in 1990 to further monopolise the distribution market and prevent any competition. The Fund subsidised retailers that had difficulties in running businesses to survive, or helped them to retreat from the retail market, so as to prevent them from engaging in price or services competition with other retailers.

2.2 *The Fair Trade Act and the Distribution Market*

11. After nearly 10 years of policy debate, Chinese Taipei decided in 1991 to establish a legal framework to strengthen the implementation of its competition policy. The Fair Trade Act's broad coverage was a reflection of the legislators' perception of the pervasiveness of anticompetitive and unfair business practices in the economy.

12. In early February 1992, the Fair Trade Act was enacted and established the Fair Trade Commission (the FTC). The newly established competition authority soon received numerous complaints regarding the LPGSD's misuse of monopolistic power. After conducting comprehensive investigations, in February 1993, the FTC reached the following conclusions and informed the regulator of the CPC, the Ministry of Economic Affairs (the MOEA) and the VAC:

- the CPC and the LPGSD enjoyed monopolistic positions in the supply and distribution markets of LPG respectively;
- the exclusive dealing arrangement between them would otherwise breach the Fair Trade Act, considering the contract was signed long before the enactment of the Act;
- the CPC shall not renew such exclusive dealing arrangement with the LPGSD or grant sole dealership to any single company after expiry of the current contract with the LPGSD in February 1993; and
- the CPC shall, within a reasonable period of time, publish the supervisory regulations for its distributors which must contain feasible and reasonable distributor qualification requirements, in conformity with the Fair Trade Act.

13. In September 1993, the CPC promulgated the qualification requirements for its LPG distributors and formally opened up the LPG distribution markets, including: dealership, bottling, transport, and retail.

By the end of April 1994, new entrants including 1 bottling company, 7 transport companies and 39 retailers were allowed to enter into this market. Further, by the end of 1994, there were already 4 dealers contracted to the CPC. Since then, along with the liberalisation of the whole petroleum products markets, new investments have been continuously devoted to this market.

2.3 *Liberalisation of the Supply Market*

14. In June 1996, the Government decided to permit the establishment of privately owned and operated petroleum refinery enterprises. This move gave these new firms with self-owned and operated refineries the right to produce, import, export, and market petroleum products, including LPG. The LPG import market was further opened in January 1999 to companies that did not own or operate petroleum refineries. Since then, the LPG market has been fully liberalised.

15. By the end of 2001, the number of LPG suppliers, including producers and importers, had increased to four, and the number of dealers had increased to ten. However, at this time there are still nearly 100 bottling and transport companies and slightly more than 3,000 retailers, while the ratio between bottling and transport companies and retailers is not much different than before the liberalisation of the LPG market.

3. *Economic Implication of the Liberalisation of LPG Market*

16. Before the house-use LPG distribution markets were de-regulated, the price of LPG and the gross profit of distributors at each level were decided by the Government. The sole dealer LPGSD earned NT\$0.9 from the CPC for every kilo of LPG it sold to downstream businesses at the price posted by the CPC. The retailers also sold bottled LPG to end-customers at the retail prices set by the Government. The retail prices varied between regions according to transportation costs, rent costs, labour costs and the reasonable level of profit taken into account by the Government.

3.1 *Competition in the Dealer Markets*

17. The CPC's storage tanks for locally-produced and imported LPG are located in the north (in Taoyuan and Keelung) and in the south (in Kaohsiung) respectively. Before the supply market was liberalised, the CPC required the existing ten dealers to draw LPG from the storage tank closest to their business location. This requirement grouped the dealers within two geographic markets, with three of them located in the north and the other seven in the south. In addition to the CPC's requirement, the difference in transportation costs between south and north, NT\$1.0 per kilo, which was higher than the gross profit the dealer received, also made the barrier between northern and southern dealer markets unbreakable.

18. The situation in the two dealer markets was quite different, however. In the south, the seven dealers competed with each other intensively. High rebate was offered by dealers to attract bottling and transport companies and caused the gross profit of dealers to decrease to only NT\$0.2 or NT\$0.3 per kilo of LPG. However, in the north, the three dealers did not really compete with each other, before the supply market was liberalised in mid-1999. Consequently the gross profit could still remain at NT\$0.9 or even increase to NT\$1.2 per kilo. Apparently, competition in the southern dealer market benefited the downstream bottling and transport companies. However, the dealer market did not work well in the north, possibly because of local oligopoly.

3.2 *Competition in the Supply Market*

19. In May 1999, new LPG importers began to enter into the supply market. To compete with the incumbent CPC, new suppliers paid a high rebate to dealers and made a gross profit of up to NT\$1.7 per

kilo for dealers that traded with them, much higher than the CPC's offer of NT\$0.9 per kilo. Price competition started to change the once solid market structure.

20. Meanwhile, due to new entrants into the transport market, transportation costs between south and north decreased from NT\$1.0 to NT\$0.8 or NT\$0.7 per kilo which was lower than the dealers' new gross profit of NT\$1.7 per kilo. Dealers in the south can then sell their LPG to the north market and still make profit. The boundary between the two dealer markets therefore gradually disappeared. The merging of the two dealer markets transformed the oligopoly in the north into a state of intensive competition. Since July 1999, the three dealers in the north began to raise their rebate to the bottling companies and decrease their own profit. In the long term, gross profit of all dealers is expected to stay at a competitive level, probably around NT\$0.2 or NT\$0.3 per kilo of LPG.

21. On the other hand, to ease storage pressures in the southern market caused by new competitors, from July 2000 the CPC started to subsidise its dealers in the north to draw LPG from storage tanks in the south. In October 2000, due to another new supplier entering into the supply market in the central region, the CPC decided to largely increase its rebate after March 2001. Thereafter, the bottling companies began to receive the rebate up to NT\$1.0 per kilo from the CPC.

3.3 *Competition in the Bottling and Retail Markets*

22. De-regulation and trade liberalisation introduced new entrants into the supply market and the dealer market and changed their structures and concentration ratio. The benefit enjoyed by the dealers and the bottling and transport companies was expected to pass on to the retailers and eventually to the consumers. However, the FTC found out that was not the case.

23. To comply with the regulations in the fire code concerning LPG businesses, the retailers need to obtain high-pressure gas storage permits as a prerequisite for operation. But to raise the necessary capital to acquire storage yards was quite difficult for such small sized businesses. Retailers depend on the larger scaled bottling companies to provide them with the necessary capital or with storage permits. This market practice generated a long-standing asymmetry of market power between the bottling companies and the retailers. The LPG bottling companies could thereby use their advantageous position to engage in anti-competitive practices to fix or raise prices.

4. Enforcement against Cartels in LPG Distribution Market

24. In August 2000, a retailer filed a complaint with the FTC alleging possible cartel monopolisation of a retail market, preventing it from entering into the northern market. This retailer was newly established in August 1999 and failed to find any of the LPG bottling companies willing to trade with it. Instead this retailer sought to obtain supply from other retailers. However soon other retailers were under pressure from bottling companies to prevent them from offering LPG to the new retailer.

25. After conducting comprehensive investigations in March 2003, the FTC concluded that 30 LPG bottling and transport companies in five neighbouring cities and counties in the north, some of whom were vertically integrated with upstream dealers, formed two regional cartels to monopolise the bottling and retail markets and thus violated the Fair Trade Act.

26. In April 1999, the FTC discovered that 16 LPG bottling companies in Keelung city, Taipei city and Taipei county and 14 in Taoyuan and Hsinchu counties formed two separate cartels, known as the Taipei Management Committee and the Taoyuan Management Committee respectively. Both of them used very similar tactics to monopolise the regional markets.

27. The cartels' members held meetings on an irregular basis to decide issues relating to the control of their respective market. Agreements they reached during the period of cartels included the following:

- preventing bottling companies from conducting price competition within their own business regions, or conducting cross-region competition;
- requesting retailers to trade with certain bottling companies and prohibiting them from switching trading counterparts freely;
- fixing or raising the price of the bottled LPG sold to the retailers, and demanding that retailers maintain or raise the resale prices;
- contributing to so-called market stabilisation funds and establishing joint bank accounts to manage the funds; and
- using market stabilisation funds to support a team to constantly monitor the practices of concerned bottling companies and retailers.

28. The FTC also found out, measures taken by the cartels to implement their decisions and to punish retailers not following the demands included:

- using market stabilisation funds to subsidise bottling companies which had difficulties in running their businesses, so as to prevent them conducting price competition;
- dispatching personnel to resolve disputes between retailers regarding competition for customers;
- deploying predatory pricing against any retailer who switched to another bottling company or reduced retail prices to compete for customers. The Committees would use their own employees and transport vehicles to sell LPG in this retailer's business area at an even lower price to force it to follow the cartel members' decisions; and
- threatening the suspension of supply if retailers refused to raise the retail price.

29. The two cartels covered more than 90% of LPG bottling and retail markets in the north. The market mechanism in the north for LPG was severely impaired and the rights and interests of millions of consumers infringed. The FTC believed the national economy, the consumer welfare and LPG market had been adversely affected in the following ways:

- national economy: once the cartels raised NT\$1.0 per kilo for bottling and transport fees or retail price, they could make NT\$1.05 million for every 700 tons of LPG. Considering that monthly trading volume of LPG in the said areas were over 20,000 tons, and the duration the cartels were in existence was more than 33 months, the undue profit received by cartel members was estimated to be in excess of NT\$1 billion;
- consumer welfare: the cartels forced retail prices to be raised to and maintained at an unreasonable high level and restricted the consumers' ability to choose a more desirable bottled LPG supplier, thus harming the consumers' interests directly;
- new investment in the distribution market: the cartels preventing any new entrants into the

distribution sector discouraged new investment in this sector and impaired the benefits produced by the liberalisation of the LPG market; and

- unfair competition in distribution market: some vertically integrated distribution enterprises could use undue profit received to engage in cross-subsidy to conduct or deepen unfair competition in the dealer market and further to harm market function in the whole distribution market.

30. In its decision, the FTC issued a cease-and-desist order to all cartel members, and imposed administrative fines on each member in accordance with their business scale, undue profit received, and co-operative attitude during the investigations. However, the ceiling of administrative fines stipulated in the Fair Trade Act on each violator per offence is NT\$25 million; therefore the total amount of the fine was only NT\$343.75 million. Still, once those members form a cartel again, each one of them will have to face the risk of criminal sanctions, including both criminal fines up to NT\$50 million and imprisonment up to three years.

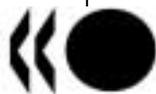
5. Conclusion

31. In this paper, we have detailed how certain elements of competition policy, including de-regulation and trade liberalisation, have changed the structure of the household LPG market in Chinese Taipei. However, we have also illustrated how hard core cartels, the most egregious violations of competition law, according to the OECD Council's Recommendation, have distorted the function of a newly liberalised market, thus decreasing the benefits brought by economic liberalisation and harming consumers.

32. We have seen in this case that solely relying on market liberalisation was not enough to guarantee a healthy market function and the benefits produced thereby. It is the vigorous enforcement of another indispensable element of competition policy, competition law, which can halt anticompetitive practices, restore market function and contribute to economic development.

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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution of Thailand

-- Session IV --

This contribution is submitted by Thailand under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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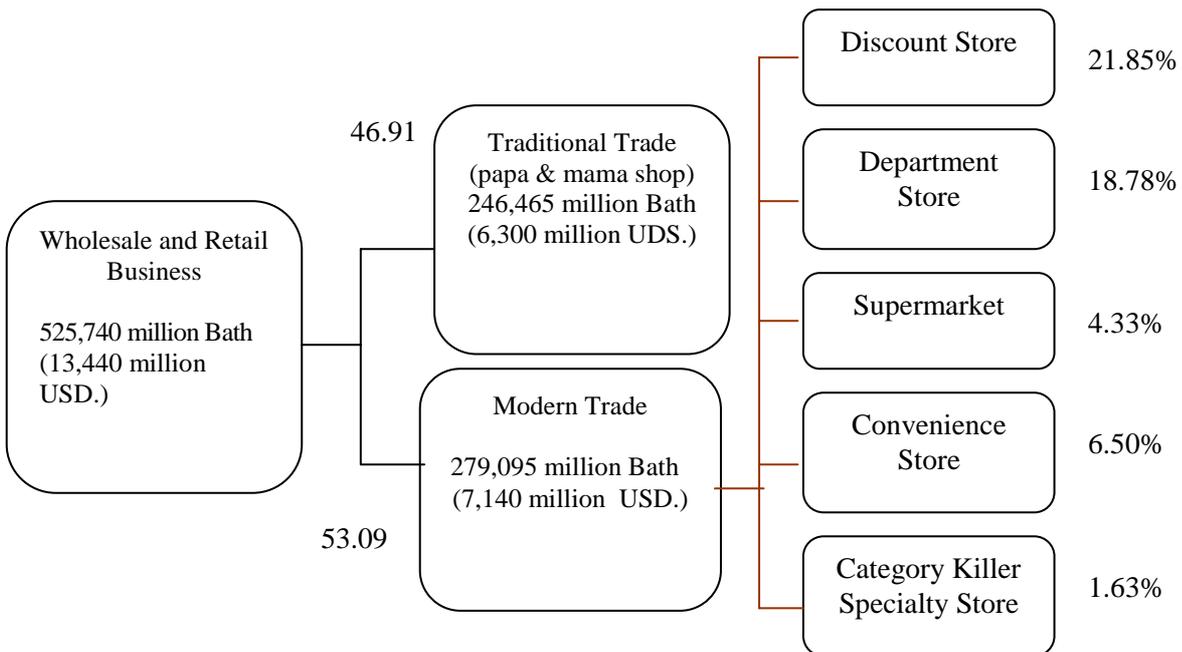
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**THE ENFORCEMENT OF LAW ON UNFAIR TRADE PRACTICES
IN THE WHOLESALE AND RETAIL BUSINESSES IN THAILAND¹**

1. Owing to the Thai Trade Competition Act has just come into force for only 4 years. The enforcement of the Law in order to supervise unfair trade practices in the wholesale and retail businesses in Thailand is a new experience.

1. Briefing of the whole sale and retail businesses in Thailand

2. In the year 2002, the market volume of whole sale and retail sale businesses was approximately 525,740 million Bath. (13,440 million USD.) The market could be divided into 2 groups. One was Traditional Trade (traditional papa & mama shops) with the trade volume of 246,645 million Bath, (6,300 million USD.) which was 46.91 % of the total trade volume. Another one was Modern Trade with the trade volume of 279,095 million Bath, (7,140 million USD.) which was 53.09 % of the total trade volume. The Modern Trade group could be divided into 5 categories namely 1) Discount Store 2) Department Store 3) Supermarket 4) Convenience Store 5) Specialty Store or Category Killer. Among them, the Discount Store was the market leader. There were 4 different chains of Discount Store in Thailand i.e. Tesco Lotus, Big C, Carrefour and Macro.



3. From the chart, it can be seen that the market volume of wholesale and retail businesses in Thailand was very large. It also has had a very high growth rate, this can be seen from the increasing of registered capital of the Discount Store group from 7,599 million Bath (195 million USD.) in 1996 to 54,550 million Bath (1}395 million USD)in 2003 and the increasing of number of chain stores of Discount Store from 36 in 1996 to 126 in 2003.

2. Complaints on the unfair trade practices

4. There were complaints on the unfair trade practices in the wholesale and retail business in Thailand. The complaints were made by suppliers on discount stores concerning the unfair trade practices, which were not usual trade practices in the area of Entrance Fee, Rebate, House Brand, Delist, B2B E-Commerce, Distribution Center, Roll Back etc.

3. Unfair Trade Practice under section 29 of Thai Trade Competition Act

5. Section 29 of Thai Trade Competition Act prescribe that “ A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business”

6. It is not clearly defined in the Act of the characteristics of practices or actions that violate to the Act. So that, the Trade Competition Commission has set up a Specialized Sub-Committee to study the guidelines for the consideration of unfair trade practices. The purpose of the study is to specify that what trade practices are usual and what trade practices are unusual. The study is carried out base on the information from business operators in country and guidelines from foreign countries. The Specialized Sub-Committee has met the preliminary conclusion that the principle of fair trade in wholesale and retail businesses are 1) no coercion 2) no discrimination 3) clear criteria 4) advanced agreement 5) no restriction and fair competition. And the guidelines for consideration of what practices can be regarded as unfair trade practices are as follows

1. Setting unfair sale price
2. Using dominant power the exercise of powerful bargaining power that trade advantage of others without appropriate reason in a manner that destroys , intervenes, obstructs or limits others business or that prevent other from doing their business or forces them to leave the scene.
3. Coerce or persuading customers to do business with wholesaler/retailer without any appropriate reason.
4. Unequal treatment of diligent suppliers where is an active of price discrimination or wholesaler/retailer refuses to do business with certain suppliers without appropriate reason.
5. An act of acquiring trade information, business secret, supplier’s technology and unfairly using it to compete with suppliers.

7. The guideline was introduced to the public in September 2003 and there were various opinions from relevant sectors such as wholesale businesses, retail businesses, The retail association etc. The opinions are focused on the words, phrases and sentences have broad meaning, so they have to be clarified e.g. “without proper rationality”, and the existed practices should be regarded as usual trade practices e.g. Entrance Fee, Delist, House Brand etc.

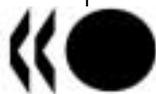
Summary

8. It is certain that modern retail businesses introduce more efficiency in distribution networks which are directly beneficial to the consumer. The wholesale and retail businesses in Thailand have a large market volume businesses which have direct and indirect impact on employment in supply chain. At the same time they are mostly small and medium businesses, which are the foundation of economic and have important role in the growth of GDP of the country.

9. The objective of setting the guideline for consideration of unfair trade practices in wholesale and retail businesses are to supervise the fair competition in wholesale and retail businesses, to prevent wholesale and retail business operators from using their market status to carry out any action which is not fair to their trade partners. This will be the development of trade competition to be beneficial to economic of the country. It is common practice of most countries. Recently is the period for public hearing from relevant sectors, which can be regarded as the transparency of law enforcement. So that, the setting of the guideline for consideration of unfair trade practices in wholesale and retail businesses will be base on the benefits of Thai economy as a whole.

NOTE

- ¹ This contribution was prepared by Ms. Prattana Hasamin, Director of Foreign Affairs Units, the Trade Competition Bureau, Thailand.



**CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES**

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**COMMENT LE PROGRES ECONOMIQUE S' EST ACCELERE EN AGISSANT
CONTRE LES COMPORTEMENTS PRIVES ANTICONCURRENTIELS**

Contribution de l'Ukraine

-- Session IV --

Cette contribution est soumise par l' Ukraine au titre de la Session IV du Forum Mondial sur la Concurrence qui doit se tenir les 12 et 13 février 2004.

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COMMENT LE PROGRES ECONOMIQUE S'EST ACCELERE EN AGISSANT CONTRE LES COMPORTEMENTS PRIVES ANTICONCURRENTIELS

*Contribution de M Serguei CHERNENKO
Vice-Président, Comité Antimonopole
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1. Le développement économique de l'Ukraine pendant les dernières dix années a été lent. Nous avons survécu à la diminution de la croissance à long terme et à la baisse considérable des principaux indicateurs économiques. Cependant, durant les trois dernières années, le rythme de la croissance économique en Ukraine a été plus élevé que celui des autres pays en transition. Durant la période 2000-2002, le produit intérieur brut a augmenté de 20,9 pour-cent, le volume de la production industrielle de 38,4 pour-cent, celui de la production agricole de 23, 3 pour-cent, et celui de la circulation des marchandises de 43 pour-cent.
2. Le développement du climat concurrentiel en Ukraine résulte de l'adoption de la législation de la concurrence et de la création d'une institution spécialisée, le Comité Antimonopole d'Ukraine. Aujourd'hui, en Ukraine, le principe de la protection par l'Etat de la concurrence et de l'activité entrepreneuriale est garanti par la Constitution. Les mesures concrètes favorisant le développement de la concurrence par étapes successives figuraient dans le Programme d'Etat sur la démonopolisation de l'économie (1993) et les décrets d'application suivants du Président de l'Ukraine : « *Sur les directions principales de la politique de la concurrence pour 1999-2000 et les mesures de leur réalisation* » (1999) et « *Sur les directions principales de la politique de la concurrence pour la période 2002-2004* » (2001).
3. Dans les conditions d'économie en transition qui caractérisent l'Ukraine, le Comité Antimonopole exerçait et continue à exercer les fonctions qui sont propres à ses homologues dans les pays développés d'économie de marché, comme la prévention des infractions à la législation de la concurrence, le contrôle des concentrations ou le contrôle des actions concertées des acteurs économiques récemment mis en place. Mais le Comité joue également un rôle actif dans la formation des relations concurrentielles en étant l'initiateur ou l'arbitre des principes de concurrence. A notre initiative, les principes de concurrence sont présents dans plus de 2000 textes législatifs et réglementaires. Dans plus de 300 cas, le Comité a pu empêcher l'adoption de textes susceptibles d'avoir des conséquences négatives pour la concurrence. Au cours des dix dernières années, 13000 infractions ont été mises à jour et sanctionnées. Les auteurs de ces infractions ont versé environ 196 millions UAH d'amendes. Par ailleurs, le Comité a examiné plus de 7500 dossiers de concentrations.
4. Les quatre dernières années ont confirmé d'une manière évidente un fait mondialement reconnu: la concurrence est la condition la plus importante pour un développement économique dynamique. Dans les branches de l'industrie où la concurrence existe pour la moitié des activités, telles que l'industrie alimentaire, l'industrie du bois ou l'industrie légère, le rythme de croissance est de 1,2 à 2 fois plus élevé que dans l'industrie en général. Il est intéressant de comparer le développement de la production sur les marchés d'une même branche, dont une partie est monopolisée et une autre partie ouverte à la concurrence. Par exemple, au cours des trois dernières années, sur les marchés ouverts à la concurrence du transport automobile des passagers, la croissance du transport a été presque 6 fois plus élevée que celle du transport par chemin de fer en situation de monopole. Sur les marchés de la communication en situation de monopole (services généraux) le volume des services est demeuré pratiquement inchangé ces derniers temps tandis que, dans les secteurs en concurrence (communication par téléphones portables), le volume des services a augmenté de 1,3 fois.

5. Dans certains cas, il est vrai que l'on constate également des rythmes élevés d'accroissement de la production même dans des secteurs où un faible nombre de grandes entreprises sont en concurrence. Mais ce fait signifie seulement que la concurrence est un phénomène beaucoup plus compliqué et profond et qu'il ne s'explique pas seulement par la présence sur le marché d'une grande quantité d'acteurs économiques. Pour apprécier le niveau de concurrence, il faut tenir compte des possibilités d'accès au marché et de l'influence de la concurrence potentielle, y compris de la concurrence internationale.

6. Le Comité prête une attention particulière aux secteurs des facilités essentielles. Les tarifs exagérés des prestations de services, leur très mauvaise qualité, les entraves aux accès aux réseaux empêchent le développement de la concurrence et de l'économie en général. La conciliation des intérêts des secteurs de facilités essentielles, de leurs consommateurs et de la société toute entière est du ressort de la régulation de l'Etat. Les bases juridiques du système de régulation actuel ont été établies par la Loi de l'Ukraine « Sur les facilités essentielles », qui a été adoptée en 2000. Mais ce système n'a malheureusement pas été mis en pratique.

7. Les institutions de régulation existantes réglementent souvent elles-mêmes les revenus superflus des monopoles. Par exemple, des tarifs de l'électricité ont été « autorisés » alors qu'ils couvraient certains coûts non-efficaces de sociétés distributrices d'énergie, par exemple des dettes irrécupérables ou des créances plutôt douteuses. Pour 6 des 27 sociétés existantes et distributrices d'énergie « oblenargo », la somme des dépenses facturées aux consommateurs s'est élevée à environ 150 millions UAH. Il appartient au Comité Antimonopole de corriger les défauts du système de régulation par l'Etat des facilités essentielles. Les facilités essentielles représentent la moitié des cas d'abus de position dominante condamnés par le Comité. Récemment, le Comité, en coopération avec d'autres institutions d'Etat, a réussi à réviser les comptes entre les entreprises qui fournissent de l'énergie et de l'eau et leurs consommateurs en isolant les prestations de services non fournies à ces derniers dans la pratique. La somme totale récupérée sur deux ans représente 1,2 milliard UAH.

8. Quand on évalue l'état de la concurrence, des monopoles et leur influence sur le développement, il faut tenir compte de ce que la transition du système administratif et du pouvoir vers une économie de marché est un processus trop compliqué, et à plusieurs niveaux, pour qu'il puisse être interprété selon des cadres analytiques élaborés à partir d'expériences étrangères, même s'ils sont de bonne qualité. Ceci concerne, en particulier, la nature des monopoles dans l'économie en transition de l'Ukraine. Ils diffèrent considérablement des monopoles dans les pays à économie de marché développée. Dans ces pays, le type principal est constitué de monopoles résultants des conditions économiques : de la concentration de la production et du capital, de la différenciation de la production, des effets d'échelle de la production. On pourrait désigner ce type de monopole comme « un monopole de production ». Ce type existe aussi en Ukraine mais un autre type de monopole prédomine. Il a comme fondement des « conditions de jeu » inégales entre les différents acteurs sur le marché. En partant de la conception de l'économiste américain très connu, le lauréat du prix Nobel, M Norte (dans laquelle il nomme les institutions « les règles de jeu dans la société »), il convient de désigner ce type de monopole comme un « monopole institutionnel ». Les sources et les manifestations du « monopole institutionnel » prennent des formes très variées, par exemple la réservation pour certains acteurs économiques de droits exclusifs pour l'activité déterminée, un régime différent de taxation, un accès avantageux aux ressources financières et aux matières premières, etc. La gravité du problème lié aux restrictions « institutionnelles » de la concurrence peut être illustrée par le témoignage suivant : au cours des dix dernières années, le Comité a identifié comme contraires aux dispositions de la législation de la concurrence près de 3000 actions des organes des pouvoirs exécutifs et des administrations autonomes locales. Dans le plupart des 3000 cas, le Comité s'est opposé aux décisions de ces organes qui pouvaient avoir des conséquences anticoncurrentielles ou leur a demandé d'introduire des changements dans ces décisions.

9. La remise en ordre du système des aides de l'Etat aux entreprises figure parmi les tâches immédiates liées à la restriction et à l'élimination du monopole « institutionnel ». Il faut que les mécanismes de distribution des aides de l'Etat soient transparents et n'aient pas d'effets négatifs sur la concurrence. Le Comité Antimonopole d'Ukraine a préparé un projet de loi en ce sens et qui en est au stade de la mise au point.

10. La coopération avec nos collègues de l'Union des Etats Indépendants et de la Communauté Européenne témoigne que nous avons beaucoup d'intérêts communs dans la protection et le développement de la concurrence. Compte tenu de certaines complexités de l'application unilatérale du droit de concurrence, limitée par la juridiction nationale, un rôle majeur revient à la coopération multilatérale dans le domaine de la politique de la concurrence car celle-ci se fonde sur la confiance mutuelle, des intérêts communs et des principes juridiques plus détaillés.

11. La globalisation des marchés mondiaux nécessite une coordination des efforts des institutions de concurrence dans tous les pays du monde. Le Comité Antimonopole d'Ukraine est un organisme relativement nouveau parmi les structures qui, dans le monde, protègent la concurrence libre, transparente et légale et qui luttent contre les pratiques transnationales anticoncurrentielles. Le Comité pourrait, avec l'assistance de OCDE - une des institutions les plus réputées en Europe--, entrer dans cette famille, enrichi de son expérience et muni des outils que ses experts pourraient nous transmettre.



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**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE
CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

Contribution from Ukraine

-- Session IV --

This contribution is submitted by Ukraine under Session IV of the Global Forum on Competition, to be held on 12-13 February 2004.

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

*By Mr. Serguei CHERNENKO
Deputy Chairman, Antimonopoly Committee
(Ukraine)*

1. Economic development in Ukraine over the past ten years has been slow. We have survived the decline in long-term growth and a considerable drop in our leading economic indicators. Over the past three years, however, Ukraine has seen faster economic growth than the other countries in transition. In 2000-2002, GDP rose by 20.9%, industrial output by 38.4%, farm output by 23.3% and the flow of goods by 43%.

2. The development of a competitive climate in Ukraine stems from its recent competition legislation and the newly established Antimonopoly Committee of Ukraine. The principle of State protection for competition and entrepreneurship is now guaranteed under the country's Constitution. Practical measures to phase in competition in successive stages featured in the State Programme on the Demonopolisation of the Economy (1993) and the subsequent implementing Decrees of the President of Ukraine: "*On the Basic Orientation of Competition Policy for 1999-2000 and implementing measures*" (1999) and "*On the Basic Orientation of Competition Policy for 2002-2004*" (2001).

3. In the context of Ukraine's economy in transition, the Antimonopoly Committee has always played the same role as its counterparts in developed market economies, i.e. preventing breaches of competition law, and exercising control over concentrations and over concerted action by recently established economic players. But the Committee is also actively involved in establishing competitive market relations, either by initiating the principles of competition or by arbitrating in their application. At our instigation, the principles of competition have now been incorporated into over 2 000 legislative and regulatory instruments. In over 300 cases, the Committee has prevented the adoption of instruments that would have undermined competition. Over the past ten years, 13 000 breaches of the law have been identified and those responsible penalised, bringing in a total of around UAH196 million in fines. The Committee has also examined over 7 500 cases involving concentration.

4. The past four years have clearly confirmed a fact now acknowledged worldwide: competition is the most crucial factor for strong economic development. In branches where at least half of all business is subject to competition, such as food, timber or light industry, growth is 1.2 to 2 times higher than in industry as a whole. It is worthwhile comparing the development of output in two different markets in the same branch, one a monopoly and the other open to competition. Over the past three years, for example, our road passenger transport market, which is open to competition, has seen almost six times the growth of the rail transport market, run as a monopoly. And in our communications market (general services) which is monopoly-based, service output has remained virtually unchanged in recent times, unlike the competitive sector (mobile phone services) where it has increased by a factor of 1.3.

5. Admittedly there is some evidence of high output growth in certain sectors where few major enterprises are in competition. But this just goes to show that competition is a highly complex and deep-rooted phenomenon that cannot be put down solely to the presence of numerous economic players in the marketplace. Any measurement of the level of competition should take into account potential market access and the influence of potential competitors, including those abroad.

6. The Committee pays particular attention to basic utility companies. Over-priced, poor-quality services and market barriers curb the development of competition and the economy in general. It is up to the State regulator to reconcile the interests of the basic utilities, their customers and society at large. The legal foundations of the current regulatory system were laid with the Law of Ukraine “*On basic utilities*”, passed in 2000. Unfortunately the system has not been enforced.

7. The country’s regulatory agencies often take it upon themselves to manage the extra revenue captured by these monopolies. For instance, they have “authorised” electricity prices that pass on to customers the supplier’s inefficiency costs, including bad debt and some rather questionable financial claims. Six of the 27 *Oblenergo* energy suppliers have passed on to users a total of some UAH150 million in expenditure. It is up to the Antimonopoly Committee to remedy the shortcomings of the State utility regulating system. Basic utilities account for half of all the cases identified by the Committee as abuse of dominant position. Recently the Committee, in co-operation with other State agencies, has managed to review the energy and water bills sent out to customers and deduct quantities that were never actually received. A total of UAH 1.2 billion was recouped in this way over a period of two years.

8. Any assessment of competition or monopolies and their influence on development should allow for the fact that the transition of administration and government to a market economy is too complicated a process – at several levels – to be interpreted from the perspective of foreign experience, however excellent. This is particularly true of the type of monopolies found in Ukraine’s economy in transition. They differ considerably from those in developed market economies, where the predominant type of monopoly is a product of the economic environment, i.e. concentrated production and capital, differentiated output, and economies of scale. This is what we might call a “production monopoly”. It is found in Ukraine, but another type predominates. It is based on an uneven playing field, or unfair rules of the game. According to the theory developed by the renowned American economist and Nobel prize-winner D. North (who defines institutions as the rules of the game in a society), this type falls into the “institutional monopoly” category. These “institutional monopolies” have a variety of causes and come in a variety of forms, for instance when specific economic players enjoy exclusive rights to an activity, a different tax regime, or easier access to financial resources and raw materials. To demonstrate just how serious these “institutional” barriers to competition can be, over the past ten years the Committee has identified some 3 000 actions by the executive and autonomous local authorities as being in breach of the provisions of competition law. In most of those cases, the Committee either opposed their decisions on the grounds that they might undermine competition, or requested that the decisions be changed.

9. Sorting out government support schemes for enterprises is one of the most pressing items on the agenda to restrict and do away with “institutional monopolies”. The allocation mechanisms used for State support should be transparent and should not adversely affect competition. The Antimonopoly Committee of Ukraine has drawn up draft legislation to that end, currently being finalised.

10. Co-operation with our colleagues in the Commonwealth of Independent States and the European Union has shown that it is very much in our common interests to protect and develop competition. Given some of the complexities of enforcing competition law unilaterally, within the confines of our national jurisdiction, multilateral co-operation has a major role to play with regard to competition policy, for it is based on mutual trust, common interests and more specific principles of law.

11. The globalisation of world markets calls for co-ordination on the part of competition agencies around the world. The Antimonopoly Committee of Ukraine is a relative newcomer among the global institutions that protect free, transparent and legal competition and combat cross-border anticompetitive conduct. With the assistance of the OECD – one of the most renowned institutions in Europe – our Committee could join this group, richer for its experience and armed with its expertise.

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OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from the United States

-- Session IV --

This contribution is submitted by the United States under Session IV of the Global Forum on Competition to be held on 12 and 13 February 2004.

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English - Or. English

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. This paper provides brief descriptions of past enforcement actions by the US antitrust agencies and of the economic effects of these actions. The first section describes FTC enforcement in the healthcare sector; the second describes DOJ enforcement in the telecommunications sector.

2. The U.S. Federal Trade Commission's Antitrust Enforcement Program in Health Care: the *American Medical Association Case* and Its Progeny

Introduction

3. One of the most noteworthy developments in U.S. competition policy in the 1970s was the decision of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to devote significant resources to law enforcement involving restraints of trade in the professions.¹ In a substantial number of antitrust cases initiated in this decade, the federal enforcement agencies opposed restrictions on pricing, advertising, and marketing that associations of professionals imposed upon their members.²

4. As a vehicle for considering the economic impact of antitrust enforcement against private trade restraints, this paper reviews one of the FTC's most influential contributions to competition policy involving the professions -- an administrative case brought in 1975 against the American Medical Association (AMA). The paper first summarizes the content and outcome of the proceeding and then considers its economic consequences.

1. The American Medical Association Litigation

5. Measured by total membership and its influence on the standards of practice for the medical profession, the AMA is the leading U.S. professional association for physicians. As the principal professional group in the field, the AMA and its policies play a major role in determining how markets for health care function in the United States. As described below, the FTC's decision to challenge the AMA's practices had major implications.

1.1 Background and Resolution of the AMA Case

6. In December 1975, the FTC issued an administrative complaint against the AMA and alleged that the association unreasonably had restrained trade by imposing ethical restrictions on advertising, solicitation, and other various activities of its members. Following an elaborate administrative trial and review by the Commission, the FTC found many of the restrictions in question to be illegal horizontal restraints of trade.³ The Commission issued an order that, among other provisions: directed the medical association to cease any actions that forbade members from soliciting clients by advertising or submitting bids; interfered with the setting of fees; characterised as unethical the use of a closed panel or other health care delivery plans; or characterised as unethical the participation by non-physicians in the ownership or management of health care organisations that provide the services of physicians. The FTC decision accompanying the order emphasised that the Commission would not upset AMA initiatives to curb deceptive advertising and marketing activities.

7. The AMA contested the FTC's ruling on two fronts. The first was to seek appellate review in the courts. The Commission's decision was upheld in 1980 by a divided panel of the court of appeals and affirmed by a 4-to-4 vote of the U.S. Supreme Court in 1982.⁴ The second front was to pursue a

legislative exemption from FTC oversight. In the late 1970s and early 1980s, the AMA and various other professional societies mounted a vigorous campaign to persuade the U.S. Congress to withdraw the FTC's jurisdiction to challenge anticompetitive behaviour involving the professions.⁵ Following contentious debate, Congress declined to enact a dispensation for the professional groups.⁶

1.2 Related Developments at the FTC

8. The prosecution of the *AMA* case catalysed far-reaching developments at the FTC. The case led the FTC to devote increasing resources to challenging anticompetitive restrictions imposed by other health care associations and other professionals.⁷ Since the mid-1970s, health care cases have constituted the largest component of FTC non-merger enforcement, and this emphasis endures today.⁸ The concern with competitive restrictions adopted by health care professionals also led the FTC to use its consumer protection authority to adopt trade regulation rules to attack anticompetitive restrictions on advertising. The most important initiative of this type, adopted in the late 1970s, was the "Eyeglasses Rule," which preempted state laws restricting the price advertising of eyeglasses and eye examinations and forbade advertising bans established by professional and trade associations.⁹

2. Economic Consequences of the *AMA* Case and Related Matters

9. The FTC historically has conducted or sponsored relatively few projects to assess the effects of its antitrust cases. In the late 1970s and the early 1980s, the FTC contracted with academic economists to evaluate the effects of several past FTC vertical restraints cases and one dominant firm matter. The Commission published the vertical restraints studies¹⁰ and authorised the author of the dominant firm study to publish his results.¹¹ In the 1990s, the FTC published studies by members of its professional staff concerning FTC merger enforcement in the soft drink industry¹² and the implementation of divestiture decrees obtained by the agency in merger cases.¹³ More recently, FTC staff members or academic consultants have authored or co-authored papers that assess the effects of hospital mergers.¹⁴ The staff of the FTC presently is conducting retrospective assessments of the effects of the agency's merger enforcement policy involving the hospital and petroleum sectors.

10. The FTC has not undertaken an empirical study of the effects of its *AMA* case. Nonetheless, a substantial body of empirical work provides an informative perspective on the economic effects of the FTC's decision to bar the AMA from adopting or enforcing ethical guidelines that forbid advertising or restrict price competition by physicians. Since the early 1970s, a large number of researchers (some affiliated with the FTC, but most being outside academics who published papers based on their own work) have performed empirical studies and have shown that restrictions upon truthful advertising by professions tend to increase the prices for such services.¹⁵ From this body of work one reasonably can infer that the FTC's cases against professional association practices that suppress truthful advertising have tended to benefit consumers.

3. Postscript: The Role of Ex-Post Evaluation in Competition Policy Making

11. Ex-post analysis provides a valuable means for a competition agency to improve the quality of its enforcement program by developing a more confident basis for judging what works and what does not.¹⁶ Nonetheless, for a number of reasons, an agency might regard retrospective assessments with suspicion – because they pose difficult methodological challenges, because evaluations divert resources from new cases or investigations, or because evaluations could show that specific cases had no impact or yielded perverse results. The methodological challenges are formidable, but researchers have made encouraging progress in trying to surmount them. Resource constraints are likewise important, though spending funds on evaluations perhaps ought to be viewed as a necessary element of the enforcement process itself – the

collection of feedback that shows whether the agency's enforcement priorities and analytical tools are sound.

12. The concern that ex-post studies may show that the agency achieved poor results is understandable, but it is not a persuasive basis for declining to ask, and seek answers to, difficult questions about enforcement effects. It would be dismaying to the public and to business operators to know that a competition agency avoided retrospective assessments because it feared the results. A competition agency's conscientious pursuit of an analytically rigorous, well-disciplined system for selecting cases ex ante ought to help ensure over time that evaluations of effects reveal outcomes that, more often than not, improved consumer well-being. As the OECD Secretariat's background note suggests, the long-term legitimacy of a competition system may depend substantially on its willingness to make this dimension (enforcement consequences) of its operation more transparent and to show empirically that enforcement delivers good economic results.¹⁷

Local and Long Distance Telecommunications

13. It is often difficult to identify with specificity the broad economic impact of individual antitrust enforcement actions, particularly in a sector, such as telecommunications, that is characterised by extensive state and federal regulation and in which there are continuous technological advances. That said, sound enforcement of the U.S. antitrust laws has played a critical role in lowering the cost of telecommunications services in the United States; this, in turn, has contributed significantly to economic progress and enhanced consumer welfare. In addition to the role of federal and state regulation, the implementation of consent decrees resulting from Department of Justice antitrust enforcement actions has helped to shape local and long distance telecommunications markets in the U.S. For long distance services, competition was originally fuelled by the 1982 Modification of Final Judgment ("MFJ"), which ended the Antitrust Division's case against AT&T and resulted in spin-offs from AT&T of what became the seven Regional Bell Operating Companies (RBOCs). Among other things, the MFJ prohibited the RBOCs from providing long distance services.

14. Building on the MFJ, the Telecommunications Act of 1996 completely rewrote the landscape. The 1996 Act established a process for the RBOCs to gain authority to provide long distance service to customers within their local areas. Competition has intensified since 2001 as the RBOCs have sought this authority. Consumers have enjoyed a steady decline in prices over time.¹⁸ According to FCC data, average revenue per minute fell from 32 cents at the time of the MFJ to about 10 cents in 2001,¹⁹ even before widespread RBOC entry. While investors worry about the profitability of the long distance services sector, consumers have continued to benefit. The RBOCs have received authority to provide long distance service in 46 (of our 50) states and the District of Columbia since January of 2001. (Authority in New York and Texas was granted earlier.) The Department of Justice has played a major role in this process. First, the Department provided extensive comments to assist the FCC in developing appropriate standards to use in reviewing applications. The Department also interacted with state regulators, competitive local exchange carriers (CLECs), RBOCs, and the FCC to discuss and resolve issues raised in applications, and filed evaluations with the FCC that analysed the potential for competition by examining whether the local market was fully and irreversibly open to competition. Under the Act, the FCC was required to give substantial weight to the Department's evaluations.

15. Since gaining this authority, the RBOCs have captured significant numbers of customers from long distance providers, especially residential customers.²⁰ For example, FCC data shows that from 2000 until 2002, one RBOC's (Verizon's) share of households for long distance services increased from 13 to 28% in the northeast region.²¹ Another RBOC (SBC) increased its share in the Southwest region from 3% to 24% over the same period.²² These regions include the states in which these RBOCs respectively first gained the new long distance authority. Other RBOCs appear to be making similar gains in their regions.²³

The RBOC entry has also stimulated changes in marketing tactics, including the proliferation of bundled offerings by both RBOCs and long distance carriers. Consumers in many areas can now buy local, long distance, and in some cases, high-speed Internet and wireless services from one provider at a discounted, flat rate.

16. At the time of the 1996 Act, the RBOCs provided virtually all local telecommunications services. The advent of competition in this sector has been slow but steady.²⁴ FCC figures suggest that by 2002, CLECs served over 13% of local lines nationwide.²⁵ This represents all modes of entry allowed by the Act, including resale, use of unbundled network elements ("UNEs"), and facilities-based. In many areas and for some customers, the numbers are significantly higher. In some states, CLECs now serve over 33% of business customers using their own facilities.²⁶

NOTES

1. The origin of these initiatives is difficult to identify precisely, but a formative event was the lawsuit initiated by DOJ in the first half of the 1970s to challenge restrictions on competitive bidding by a major professional association, the National Society of Professional Engineers. The DOJ case generated a landmark ruling of the U.S. Supreme Court that, in the course of striking down the challenged restrictions, expressed acute skepticism about the defendant's arguments that the competition ethic embodied in the U.S. antitrust laws posed a serious social and economic danger if it were allowed to govern the supply of professional services. *See* National Society of Professional Engineers v. United States, 435 U.S. 679, 692-96 (1978) (considering and rejecting the argument of the defendant professional association that uninhibited competitive bidding "would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." The decision marked a major turning point in modern U.S. horizontal restraints jurisprudence and the application of competition policy to professional groups. The significance of these developments in modern U.S. competition law is examined in William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *Journal of Economic Perspectives* 43 (2000).
2. *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *Antitrust Law Journal* 377, 426-30 (2003) (highlighting the DOJ and FTC's professions cases of the 1970s as a major ingredient of the U.S. trend toward making horizontal restraints the centerpiece of government civil non-merger enforcement).
3. American Medical Association, 94 F.T.C. 701 (1979).
4. American Medical Association v. Federal Trade Commission, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).
5. The lobbying campaign by the AMA and other professional associations to persuade Congress to exempt them from FTC jurisdiction is described in Joe Sims & Tom Smith, *FTC Assault: A Modern-day Roman Circus*, *Legal Times*, Dec. 10, 1979, at 18.
6. The main legislative proposal would have terminated pending FTC matters (including the AMA case) involving the legal, medical, and dental professions. *See* Senator Proposes Limitations on FTC's Jurisdiction Over Professional Groups, 938 Bureau of National Affairs Antitrust & Trade Regulation Reports A-22 (Nov. 8, 1979). The professional associations marshaled substantial political support. The measure to deny the FTC jurisdiction over the professions failed by two votes to gain the approval of the U.S. Senate. *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *Tulsa Law Journal* 587, 664-67 & n. 442 (1982) (describing legislative deliberations).
7. Several FTC cases inspired by the AMA litigation deeply affected U.S. jurisprudence. *See, e.g.*, California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756 (1999) (rejecting FTC attack on advertising restrictions imposed by dentists' group); Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding FTC decision to condemn boycott by attorneys seeking to force local government to raise fees paid for representing indigent criminal defendants); Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447 (1986) (upholding FTC ban upon professional association's efforts to prevent its members from fulfilling requests of insurance companies to obtain patient x-rays to evaluate insurance claims).
8. *See* Timothy J. Muris, Chairman, U.S. Federal Trade Commission, "Everything Old Is New Again: Health Care and Competition in the 21st Century" (Nov. 7, 2002) (remarks before 7th Annual Competition in Health Care Forum, Chicago) (reviewing FTC competition policy health care agenda), *available at* <http://www.ftc.gov/speeches/muris/murishealthcarespeech0211.pdf>.

9. On the FTC Eyeglasses Rule, see Dorsey D. Ellis, Jr., *Legislative Powers: FTC Rule Making*, in *The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior* 161, 166-68 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981).
10. See Federal Trade Commission, *Impact Evaluations of Federal Trade Commission Vertical Restraints Cases* (Ronald N. Lafferty et al. eds., 1984) (vertical restraints studies).
11. See Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 *American Economic Review* 15 (May 1985) (presenting results of impact evaluation sponsored by FTC concerning consequences of abuse of dominance case brought against Xerox).
12. Harold Saltzman et al., *Transformation and Continuity: The U.S. Carbonated Soft Drink Bottling Industry and Antitrust Policy Since 1980* (Bureau of Economics Staff Report, FTC, Nov. 1999), *available at* <http://www.ftc.gov/reports/softdrink/softdrink.pdf>.
13. Staff, Bureau of Competition, Federal Trade Commission, *A Study of the Commission's Divestiture Process* (1999), *available at* <http://www.ftc.gov/os/1999/9908/divestiture.pdf>.
14. See Martin Gaynor & William B. Vogt, *Competition Among Hospitals*, 34 *RAND Journal of Economics* 764 (2003) (effects of hospital merger in California); Michael G. Vita & S. Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, 49 *Journal of Industrial Economics* 63 (2001) (effects of consummated hospital merger in California).
15. See, e.g., Lee Benham & Alexandra Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 *Journal of Law & Economics* 421 (1975) (prices were 25-40% higher in markets with greater professional information controls, including advertising restrictions); Ronald S. Bond et al., *Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (Bureau of Economics, Federal Trade Commission, Sept. 1980) (price for combined eye exam and glasses was \$29 less in cities with least restrictive advertising regimes); Roger Feldman & James Begun, *The Welfare Cost of Quality Changes Due to Professional Regulation*, 34 *Journal of Industrial Economics* 17 (1985) (total consumer welfare loss from state regulations governing optometrists that, *inter alia*, banned price advertising was \$156 million); Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 *Journal of Law & Economics* 165 (1986) (prices were 26-33% lower in which markets in optometrists advertised using price and non-price media); William W. Jacobs et al., *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (Bureau of Economics, Federal Trade Commission, Nov. 1984) (restrictions on attorney advertising resulted in prices that were 5-10% higher); John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 *American Economic Review* 211 (1984) (prices of eye exams were \$11-\$12 lower in markets with advertising than in markets with advertising restrictions); James H. Love & Frank H. Stephen, *Advertising, Price and Quality, in Self-Regulating Professions: A Survey*, 3 *International Journal of Econ. Bus.* 227 (1996) (reviewed 17 studies; restrictions on advertising generally found to have effect of raising prices paid by consumers).
16. The discussion here draws upon the rationales presented in William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 *George Mason Law Review* 843 (2001).
17. See Robert A. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* 205 (1980) (“[W]ithout studies indicating whether antitrust policy is technologically capable of achieving various economic goals, government is vulnerable to the charge that antitrust is a charade or a lightning rod that absorbs the frustrations of those who might otherwise push for greater state intervention in the economy.”).
18. FCC, *Trends in Telephone Service*, Report at 13-6 Table 13.4 (August 7, 2003).

19. *Id.*
20. FCC, *Statistics of the Long Distance Telecommunications Industry*, Report at 29 Table 15 (May 2003).
21. *Id.*
22. *Id.*
23. Griff Witte, *An Evolutionary Edge; Local Phone Firms Pass Long-Distance Companies*, Wash. Post, Dec. 3, 2003, at E1.
24. FCC, *Local Telephone Competition: Status as of December 31, 2002*, at Table 1 (June 2003) (for 1999-2002, CLECs shares calculated as percentage of total ILEC and CLEC end users switched access lines); FCC, *Local Competition: August 1999*, at 23; and FCC, *Local Competition*, at 6 (December 1998).
25. *Id.*
26. *See, e.g.*, U.S. Department of Justice Section 271 Evaluation for New Mexico, Oregon, and South Dakota, Feb. 20, 2003; U.S. Department of Justice Section 271 Evaluation for Minnesota, May 2, 2003.