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OECD Global Forum on Competition

THE OPTIMAL DESIGN OF A COMPETITION AGENCY

-- UNITED STATES --

This note, previously circulated to the WTO Working Group on the Interaction between Trade and Competition Policy, is submitted by the United States under Session I (Part 2) of the Global Forum on Competition to be held on 10-11 February 2003.

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**Working Group on the Interaction
between Trade and Competition Policy**

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COMMUNICATION FROM THE UNITED STATES

The following communication, dated 8 June 2000, has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

**CREATING A CULTURE OF COMPETITION:
ISSUES INVOLVED IN ESTABLISHING AN EFFECTIVE ANTITRUST AGENCY**

INTRODUCTION

Among the three agreed areas of focus for discussions in this Working Group (Group), as confirmed by the General Council in December 1998, is "approaches to promoting cooperation and communication among Members, including in the field of technical cooperation". While this submission does not strictly address or recommend any particular "approach" to promoting cooperation or communication, it is aimed at contributing to such cooperation and communication by setting forth what we hope are some useful observations on the formulation and application of antitrust laws and competition policies, particularly for Members which have had limited experience in this area.

In previous meetings, the Group has discussed the benefits and problems associated with implementing different types of competition policies. This discussion is detailed in the WTO Secretariat's Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, prepared for the Group in 1998.¹ To summarize:

The wide-ranging discussion of issues concerning the relationship of trade and competition to development and economic growth in the [Group] reflects significant developments in Members' national legal and policy frameworks. In the past decade, a large number of

¹ WT/WGTCP/W/80 (18 September 1998) (Secretariat Synthesis Paper).

developing and transition countries have implemented or strengthened national competition legislation and related enforcement policies. Often, this has been done as an element of a broader package of market-oriented policy reforms. On the other hand, a number of countries, particularly in Asia and Africa, have not as yet seen fit to adopt comprehensive competition legislation (though they may, at least in some cases, have adopted elements of competition policy).²

In this submission, the United States explores some of the issues that should be addressed when a Member decides to enact an antitrust law and create an antitrust agency to enforce it. We do not judge whether every Member *should* enact an antitrust law. Indeed, we will discuss ways in which Members can begin to create a "culture of competition" in the absence of antitrust legislation. (As the Secretariat's Synthesis Paper explains, creating a "culture of competition" - a concept we owe to our Latin American antitrust colleagues - involves "a process of public education to facilitate acceptance of competition policy principles as a central element of national economic policy, both politically and within the national business community".³) But we do proceed from the assumption, based on the experience of numerous Members, that there is little intrinsic value merely in enacting an antitrust law and leaving it a formality. Nor are legal structures enough to create a culture of competition, even if they function smoothly. In order to assure the successful adoption and maintenance of pro-competitive policies throughout an economy, competition values must be understood and supported throughout society, including government, business, consumers, and academia.

Reflecting the experiences of many Members, and in the hope of assisting useful discussion in this year's Group meetings, we explore some of the opportunities and problems encountered by Members as they attempt to create and/or maintain a culture of competition in their national economies.

Some Issues Raised in Drafting an Antitrust Law

Substantive Provisions; Objectives; Scope and Coverage

The roughly 85 antitrust laws currently in force around the world provide many models of legislative drafting on which Members may draw in enacting their own new laws or amending current ones. Nearly all antitrust laws include, in some form, four basic substantive elements: provisions dealing, respectively, with agreements between and among competitors ("horizontal agreements"); agreements between producers and distributors ("vertical restraints"); abuses of dominance/unlawful monopolization; and anti-competitive mergers.⁴ This apparent convergence on broad substantive elements, however, conceals a wide range of significantly divergent views among nations concerning the proper objectives of antitrust laws.

There are several possible approaches to formulating the objectives of antitrust laws. A legislature may identify a single objective in a few words, as in the Mexican antitrust law: "[t]he purpose

² Id. at para.3.

³ Id. at para. 48.

⁴ See, e.g., WTO Annual Report for 1997, Special Study on Trade and Competition Policy 12-14 (1997)(Secretariat Special Study). There are important exceptions to this menu of substantive elements. For example, Peruvian antitrust law does not prohibit anti-competitive mergers as such and Argentine antitrust law did not do so until it was amended last year, while the Mexican Federal Competition Act does not contain a provision specifically directed at abuse of dominance/unlawful monopolization (although such conduct can be reached through other provisions of the law).

of this law is to protect the process of competition and free market participation, through the prevention and elimination of monopolies, monopolistic practices and other restraints on the efficient operation of goods and services markets".⁵ A legislature may specify a number of objectives, as in the Canadian law.⁶ Or, as in the United States, the legislature may say little about objectives in the statutory language itself, and instead provide broad statutory language and other evidence of legislative purpose that enable the antitrust agencies and courts, respectively, to enunciate appropriate enforcement policies and statutory interpretations over time.⁷

More important, there are widely differing views about the nature of appropriate antitrust objectives. In a 1997 study, the WTO Secretariat noted that "at the most basic level, a core objective of competition policy in most countries ... is to maintain a healthy degree of rivalry among firms in markets for goods and services".⁸ But the Secretariat then identified at least ten other "wider objectives" that appear in at least some antitrust laws, ranging from "promoting trade and integration within an economic union or free-trade area" to "protecting opportunities for small and medium-sized businesses".⁹ And legislatures identify additional objectives from time to time; for example, the Preamble to the South African Competition Act, 1998, provides that one of the Act's objectives is to "provide all South Africans equal opportunity to participate fairly in the national economy". In other words, a Member that is drafting an antitrust law must give careful consideration to what objectives it wishes to achieve.

⁵ Article 2 of the Mexican Federal Law of Economic Competition.

⁶ Section 1.1 of the Canadian Competition Act (1986) provides: "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".

⁷ As the US antitrust agencies' 1995 Antitrust Enforcement Guidelines for International Operations state (at p. 1): "For more than a century, the US antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources."

Or, as the head of the Department of Justice's (DOJ's) Antitrust Division recently explained: "The core principles of antitrust are actually what Adam Smith wrote about more than two centuries ago: that free and competitive markets result in maximum economic development, wealth creation, and consumer welfare, but that markets will not always remain free and competitive in the absence of effective government oversight. In the end, antitrust is all about market power - which every business understandably wants - and the limits on how it can be obtained, preserved, and extended". J. Klein, "Rethinking Antitrust Policies for the New Economy" (9 May 2000), at p. 2, *available on-line* at <http://www.usdoj.gov/atr/public/speeches/4707.htm>.

⁸ Secretariat Special Study, *supra* n.1, at 11. See WTO Secretariat's Background Note on The Fundamental Principles of Competition Policy, WT/WGTCP/W/127(7 June 1999) (Secretariat Principles Note), paras. 15-20.

⁹ Id. Ignacio de Leon, Superintendent of the Venezuelan antitrust agency, has explained: "The notion of competition is far from being settled in economic theory. That leads scholars to disagree on two essential theoretical questions that shape both competition rules and policy enforcement. The first source of disagreement concerns the nature of the business conduct that should be considered as restraints of trade, whether public or private, or both. The second one refers to the difficulties of incorporating in the conventional notion of competition certain business practices that seemingly restrict rivalry among competitors in the short run, yet they encourage the discovery of new products in the long run." I. de Leon, "International Competition Policy from the Perspective of Developing Countries" 4-5 (1998), *appended to* transcript of November 1998 International Competition Policy Advisory Committee (ICPAC) Hearings.

There is another, and related, basic policy choice to make: choosing the scope and coverage of a new antitrust law. Very few antitrust laws cover all aspects of a national economy. In the United States, for example, the antitrust laws apply to private conduct unless a particular economic sector or particular type of business conduct has been specifically exempted. But in some situations, our Congress has determined that antitrust law should be displaced by regulation, and thus has provided an explicit antitrust immunity; even where there is no explicit immunity, there may be an implied exemption where necessary to preserve the integrity of a regulatory scheme.¹⁰ Similarly, there are exemptions in US and other antitrust laws in situations involving certain types of government action, and antitrust laws often have one or more sectoral exemptions where the application of antitrust laws is deemed inappropriate; certain activities of professional baseball and the business of insurance are often-cited example in US antitrust law.¹¹ Finally, the laws of many Members (though not the United States) permit antitrust agencies to grant exemptions to particular transactions, on either an individual or a bloc basis. Accordingly, in drafting new antitrust laws, Members should give careful consideration to whether, and to what extent, they wish to displace antitrust disciplines with something else. While it is widely understood that antitrust exemptions should be minimized if a country is to reap the full benefits of a modern market economy, there may be far less agreement concerning the appropriate scope and coverage of antitrust laws in a particular national context.¹²

Finally, these decisions are not necessarily one-time affairs. Many Members frequently review their antitrust laws to ensure that they are effective competitive safeguards in today's global economy.¹³ In recent years, dozens of Members have amended their antitrust laws in some way to reflect new economic learning, fill perceived gaps (e.g., repeal antitrust exemptions in newly-deregulated sectors, as has happened in the United States and elsewhere), fix procedural problems, enhance investigative capabilities, provide more effective remedies for anti-competitive behaviour, and/or bring their laws into closer conformity with those of neighbouring states.¹⁴ As a senior DOJ official noted at a WTO/UNCTAD/World Bank symposium last year, speaking of the US experience of evolving antitrust understanding:

As our courts and antitrust agencies have learned more about the economic implications of particular interpretations of our antitrust laws, we have abandoned policies that did not, in the light of experience, promote consumer welfare; and we have adopted new ones that are better suited to do so. That process will continue as our economy changes and our economic learning advances.¹⁵

¹⁰ See US Submission, "The Impact of Regulatory Practices, State Monopolies, and Exclusive Rights on Competition and International Trade", WT/WGTCP/W/83 (28 July 1998), at 3-4.

¹¹ See OECD, ANTITRUST AND MARKET ACCESS: THE SCOPE AND COVERAGE OF COMPETITION LAWS AND IMPLICATIONS FOR TRADE (1996), which provides a comprehensive account of antitrust scope and coverage in OECD countries.

¹² See, e.g., Secretariat Special Study, *supra* n.4, at 19-20.

¹³ For example, the European Commission last year proposed significant changes to its substantive and procedural competition rules. See, e.g., Commissioner Mario Monti, "Modernisation of EU Competition Rules" (2 March 2000), available on DG Competition's website at: <http://europa.eu.int/comm/dg04/index>.

¹⁴ See, e.g., R. Pittman, Competition Law in Central and Eastern Europe: Five Years Later, 43 ANTITRUST BULL. 179 (1998).

¹⁵ D. Melamed, "International Cooperation in Competition Law and Policy: What Can Be Achieved at the Bilateral, Regional, and Multilateral Levels" (17 April 1999), at 16.

Indeed, some Members (e.g., the Netherlands, South Africa, and the United Kingdom) recently have largely or entirely replaced old antitrust laws with new ones, for some or all of the above reasons.

Institutional Provisions

Unless enactment of an antitrust law is to be a purely symbolic act, a Member will need to create an antitrust agency to enforce the law, and to set out to some degree the procedures the agency will follow, the agency's decision-making process, the remedies available under the law, the rights that citizens and firms will have with respect to the law, and rights to appeal agency actions in the courts. All of these institutional matters raise important issues that must be resolved sensibly if the antitrust law and agency are to be effective. And, largely in contrast to the broad economic policy issues discussed previously, these institutional decisions should be made with a country's particular political and legal culture in mind. An organizational structure that is effective in one political culture may fail in another, just as legal techniques that work well in one country may be quite ineffective in another.

Organizationally, most antitrust agencies are administrative agencies with decision-making powers, although some (like the US Department of Justice (DOJ)) are prosecutorial agencies that must seek remedial orders in court.¹⁶ Similarly, some antitrust agencies (like the US Federal Trade Commission (FTC)) are collegial bodies, while others have a single agency head and decision-maker. Both of these basic organizational decisions tend to vary with the political and legal cultures of the country in question, and neither decision, once made, tends to engender great controversy.

Turning to a more problematic issue, it is generally agreed that antitrust agencies (like other law enforcement agencies) should be "independent," that is, that their actions should be based on the facts and the law, and not on political considerations, and that they should not discriminate in favor of local firms or against foreign ones.¹⁷ But there is far less agreement as to how that should be accomplished as an organizational matter, or whether an agency that is wholly insulated from any connection with the rest of government is likely to be properly funded, have its views on competition issues respected by other government agencies, or be appropriately accountable in a democratic society. So, while many - perhaps most - antitrust agencies are organizationally independent in some way,¹⁸ many other agencies are clearly part of the executive branch of government.¹⁹ Indeed, the surprising (and sustained) multiplicity of organizational formats for antitrust agencies in many countries²⁰ suggests that there is little clear guidance on how they should be related formally to the rest of the government.²¹

¹⁶ In some countries with administrative-type antitrust agencies, like Canada and Japan, criminal antitrust violations such as price-fixing are pursued by prosecutors in the courts, and not before the agency.

¹⁷ The discussion in the Group thus far suggests that antitrust agencies generally apply non-discriminatory enforcement policies. See WTO Secretariat Fundamental Principles Paper, *supra*, para. 39; US Submission, Relevance of Fundamental WTO Principles to Competition Policy, WT/WGTCP/W/131 (June 1999), at 6-11; EU Submission, The Relevance of Fundamental WTO Principles of National Treatment, Transparency, and Most-Favored Nation to Competition Policy and Vice-Versa, WT/WGTCP/W/115 (May 25, 1999).

¹⁸ *E.g.*, the US FTC, and the Australian, Canadian, German, Japanese, Mexican, Polish, South African, and Venezuelan antitrust agencies.

¹⁹ *E.g.*, the US DOJ, Brazil's three antitrust agencies, the EU's DG-Competition, France's DGCCRF, and the United Kingdom's Office of Fair Trading.

²⁰ *E.g.*, the United States, Brazil, France, Portugal, Spain, and the United Kingdom.

²¹ See W. Kovacic, Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 BROOKLYN J. INT'L L. 403, 424 (1997).

Another significant issue in the drafting of an antitrust law is how to provide means for private persons (both domestic and foreign) that are aggrieved by anti-competitive conduct to obtain relief from either the new antitrust agency or the courts. The methods of doing so vary greatly among countries and legal systems. In the United States, Australia, and New Zealand, for example, there are well-developed private rights of action available to persons who believe that they have been victimized by anti-competitive conduct; these rights are quite independent of any action taken by the antitrust agencies.²² Such rights either do not exist or are much more limited in most other countries.²³ Instead, many antitrust laws provide procedures whereby private persons may complain to the antitrust agency about alleged illegal conduct. Decisions on this issue obviously are dependent in part on the overall legal system and culture of the country concerned, and where proposed new judicial remedies are concerned, account necessarily needs to be taken of the general characteristics of private litigation in the country in determining whether any particular private right of action is likely to be effective.

There are many other institutional issues that must be addressed in enacting an antitrust law and creating an antitrust agency. These include, but are not limited to: creating a decision-making process for antitrust matters, together with an appropriate process of judicial review of antitrust agency actions; ensuring that the antitrust agency has effective powers for gathering the information it needs to do its job; and ensuring that the antitrust agency has effective remedies available to it when it determines that a violation of the law has occurred. All these matters are complex, and their resolution by a Member drafting an antitrust law will be influenced by the legal system and culture in which the agency must operate, taking into account the experience of other systems and jurisdictions. We leave a detailed discussion of these matters for another day, and now turn to some of the practical problems facing a new antitrust agency (or, if there is no agency, the government) as it begins to create a culture of competition in a developing or transitional economy.

Building an Antitrust Agency

Funding, Size of Agency, Hiring and Retaining Qualified Agency Officials

Once a Member has enacted an antitrust law and created the necessary statutory framework for the creation and functioning of an antitrust agency, the new agency (and the government as a whole) will face some difficult practical issues. We now discuss a few of the most important ones.²⁴

²² Private rights of action in antitrust matters in the United States are discussed in detail in I American Bar Ass'n, ANTITRUST LAW DEVELOPMENTS (FOURTH) 757-926 (1997). See R. J. Roberts, "International Comparative Analysis of Private Rights of Access" (18 April 2000), a study commissioned by the Canadian Competition Bureau, available on the Bureau's website at <http://strategis.ic.gc.ca//SSG/ct01713e.html> (compares private rights of action in Australia, Ireland, New Zealand, the United Kingdom, and the United States).

²³ The antitrust laws of Japan, Peru, and Thailand, for example, provide private rights of action in certain circumstances. See, e.g., H. Iyori & A. Uesugi, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 238-245 (1994) (Japan); B. Boza, ed., DOING BUSINESS IN PERU: THE NEW LEGAL FRAMEWORK 289 (2d ed.1994)(Peru); S. Supanit, *Thailand: Implementation of Competition Law*, 27 INT'L BUS. LAW 497 (1999). Indeed, Japan amended its antitrust law just last month to provide private persons with a right to seek injunctive relief in some cases, in addition to the right to seek damages that Japanese law has long provided.

²⁴ There is a considerable literature on the practical problems facing new antitrust agencies. E.g., D. Baker, *Building a Competition Law that Works*, GLOBAL COMP. REV. (Oct.-Nov.1999) 23 (1999); Kovacic, *Getting Started*, supra n. 21; W. Kovacic, *Perilous Beginnings: the Establishment of Antimonopoly and*

Creating an agency on paper is one thing; giving it adequate resources to do its job is something else, particularly in a world where government resources are often constrained. Funding problems are, of course, especially acute in developing and transitional economies, and these concerns have been discussed in prior sessions of this Group and related WTO symposia.²⁵ Moreover, new antitrust agencies are, by definition, "new". Financial resources for them thus must ordinarily be taken from existing programs or new revenues - a difficult task in any context, and one that will tend to limit the resources that a new antitrust agency can expect to receive. Some countries have sought to maximize the resources provided to antitrust agencies by finding special sources of funding. "User fees" are one possibility. For example, for some years the United States antitrust agencies' appropriated funds have come from the pre-merger notification filing fees received by the agencies (though much of these fees are used for other government purposes); other countries (e.g., Romania) impose user fees for processing applications for exemptions in particular transactions. Still other countries have awarded the antitrust agencies a portion of the fines they collect in enforcement actions; one problem with this funding mechanism, however, is that it may give the antitrust agency incentives to take inappropriate actions in order to augment its budget, and whether or not that is true in any particular case, it might be thought by the public (including the business community) to taint many of the agency's actions.²⁶ In any case, funding issues will influence nearly every major issue facing a new antitrust agency.

One of the first tasks facing the management of a new antitrust agency is to determine how many employees the agency should have, and what the employees' qualifications should be. Once again, a review of agencies around the world yields no clear answer to either question. With respect to size of agency, there are enormous differences. The Russian Federation's antitrust agency is by far the largest, with roughly 2,000 employees; the two US federal agencies have a total of roughly 1,000 people doing antitrust work; other examples range from Japan (with c. 530 employees), to the European Commission (c.500), Turkey (c. 300), Canada (c. 250), Mexico (c. 150), Sweden (c. 120), Hungary (c. 100), Switzerland (c. 40), and Venezuela (c. 25). But it is difficult to identify optimum sizes for antitrust agencies in countries with vastly different economic circumstances and legal structures. Indeed, in small economies - and most Members that do not already have antitrust laws *are* small economies - one might ask how one would go about deciding that 5, 10, or 100 employees are sufficient to staff an effective antitrust agency in the context of a particular country.

Antitrust agencies also have reached rather different conclusions concerning the basic qualifications of the antitrust officials they hire. In the United States, not surprisingly, by far the greatest number of the antitrust agencies' professional employees are attorneys. But, since antitrust is an economics-based discipline, both DOJ and FTC also employ many economists with doctorates, and civil

Consumer Protection Programs in the Republic of Georgia, 43 ANTITRUST BULL. 15 (1998); OECD, COMPETITION LAW AND POLICY IN THE BALTIC COUNTRIES (1999)(OECD BALTIC STUDY); "Antitrust in Israel," GLOBAL COMP. REV.(Feb./March 2000) 8-9, 14-15 (2000); "Competition in Colombia," GLOBAL COMP. REV. (April/May 1999) 30-31 (1999).

²⁵ See, e.g., Presentation of Gesner Oliveira, President of Brazil's CADE, at the WTO's Third Symposium on Competition Policy and the World Trading System (1999)(charts suggesting that CADE receives, on a relative basis, only one-sixth of the funding provided to US antitrust agencies). As President Oliveira has explained elsewhere: "[t]here is a tendency for underfunding of competition bodies. There are no vested interests which will support . . . independent competition agencies at the national level. . . [T]here are vested interests which are willing to support the regulatory agencies." International Competition Policy Advisory Committee (ICPAC) Hearings, Nov. 2-4, 1998, at 112.

²⁶ See, e.g., Kovacic, *Perilous Beginnings*, *supra* n.25, 43 ANTITRUST BULL. at 19.

investigations at both agencies are handled by attorney/economist teams.²⁷ A different approach is taken by the EU's DG-Competition, which employs a broader mix of attorneys, economists, and generalists hired by the Commission on the basis of rigorous competitive examinations. Other agencies have varying combinations of attorneys, economists, generalists, and - in many transition economies - engineers, reflecting some combination of the government culture of the particular country, the legal system in which the antitrust agency must operate, and the going salary rate for different types of professional employees.²⁸ But those are not the only possible considerations. For example, when the Venezuelan antitrust agency was created in 1991, the first Superintendent of the agency determined that, given limited resources, she should hire a relatively small number of young economists and attorneys - some just out of university - who would be both content with the relatively low salaries available and dedicated to the agency's mission of spreading a competition culture among a public long accustomed to extensive government intervention in the economy. The result was an agency with great policy cohesiveness and high morale.

If attracting qualified personnel to a new antitrust agency is difficult, retaining them may be more difficult still.²⁹ It is generally the case in most Member jurisdictions, including the United States, that salaries for qualified attorneys and economists are higher in the private sector than in government. Accordingly, highly valued employees often leave the US antitrust agencies for private law firms and economic consulting firms. But while such losses are often painful to the agency in the short term, the fact is that many well-qualified people are attracted to the US agencies in the first place in the expectation that they will receive sound training in antitrust and then, eventually, employ those skills in the private sector, at a higher salary.³⁰ These same factors influence employee hiring and retention in new antitrust agencies, with the important differences that (1) new agencies are especially vulnerable to losses of qualified people to the private sector, not least because employees of antitrust agencies who receive hands-on training in market-oriented concepts may be at a premium in an economy where only a relatively small number of professionals are well-versed in such concepts, and (2) in a small agency, significant employee turnover may create serious problems of institutional continuity.³¹ While a new antitrust agency probably cannot avoid this problem, it can at least recognize that it is likely to be a problem, try to ensure that its employees are compensated at least at a rate comparable to other government agencies, and - if nothing else - not take its employees for granted.

Finally, a word about physical facilities. Ideally, a new agency will have money for a sound physical plant, modern telecommunications and computer systems, including internet access, and a library of relevant legal and economic literature. Sometimes, as in the case of the new South African agency,

²⁷ In contrast, DOJ's criminal price-fixing investigations are ordinarily handled by teams of DOJ attorneys and agents from the Federal Bureau of Investigation.

²⁸ See, e.g., OECD BALTIC STUDY, *supra* n.25, at 55-56, 89-90, and 124-125. In some developing and transition economies, for example, economists are relatively inexpensive to hire and experienced attorneys are quite expensive, so a new agency might well decide to hire more economists and fewer attorneys.

²⁹ See, e.g., OECD BALTIC STUDY, *supra* n.25, at 24-25. Kovacic, *Getting Started*, *supra* n.21, 23 BROOKLYN J. INT'L L. at 431-34. In a recent survey by the American Antitrust Institute (AAI) of antitrust agencies (including many in developing and transition economy countries), 16 of 22 responding agencies stated that retention of professional staff was a "serious problem." American Antitrust Institute, Report on the Survey of Competition Policy Agencies Concerning the Establishment of an International Academy of Competition Policy" 13-14 (25 April 2000), available on AAI's website at: www.antitrustinstitute.org.

³⁰ Conversely, some senior attorneys and economists in the US private sector value the public service option of taking management positions in US antitrust agencies at an appropriate time in their careers.

³¹ A. Rodriguez & M. Williams, Recent Decisions by the Venezuelan and Peruvian Agencies: Lessons for the Export of Antitrust, 43 ANTITRUST BULL. 147, 151 n.7. (1998).

funding for such facilities will be provided. But very often, some or many of these things will be lacking, and the antitrust agency's performance may suffer.

Transparency and Due Process

If a new antitrust agency is going to be effective, achieve public respect, and make a significant contribution to creating a competition culture over time, it will need to ensure that its procedures and actions are appropriately transparent, that it provides due process to the firms and individuals involved in its law enforcement activities, and that its officials properly protect the confidentiality of business information and otherwise are governed by high ethical standards.³² There are at least two important aspects to this task: first, there should be readily accessible written guidelines, regulations, or other public guidance on these matters; and second, the agency should take care that it follows its guidelines/regulations. In numerous developing and transition economy countries, antitrust agencies have set good examples for other government agencies in all these respects. For example, as a senior Brazilian antitrust official recently stated: CADE "has been working very hard to build a new kind of institution based on transparency, predictability, accountability, and simplicity. These principles are our cornerstone and guide a process of reputation building".³³

At an earlier session, the Group discussed and reviewed written submissions on the fundamental WTO principles of transparency, national treatment and most-favoured-nation treatment,³⁴ and we do not propose to repeat those observations here. Suffice it to say that in the United States and many other countries, there is a vast and rapidly increasing amount of public information about antitrust laws, enforcement policies, administrative and judicial decisions, and other relevant information about antitrust law and policy. The Internet has made it amazingly easy both to disseminate and to obtain information on a wide variety of antitrust agencies; the US antitrust agencies' websites alone contain links to the websites of nearly 40 other agencies around the world, including many in developing and transition economy countries.³⁵ Information available on agency websites may include the full text of the law itself (*e.g.*, Poland),³⁶ proposals for amending the law (*e.g.*, India and South Africa),³⁷ descriptions of how to make a complaint to the agency (*e.g.*, Costa Rica and South Africa),³⁸ press releases on agency actions (*e.g.*, Argentina),³⁹ texts of agency decisions and reports (*e.g.*, Slovakia and Venezuela),⁴⁰ agency statistics (*e.g.*, Hungary),⁴¹ and even the agency telephone directory (*e.g.*, Slovakia).

³² See, *e.g.*, Secretariat Principles Note, *supra* n.8, paras. 36-39.

³³ Commissioner L. H. Salgado, "Doing Business in Brazil with the New Competition Law Framework" 2 (1999), *available at*: <http://www.mj.gov.br/cade>.

³⁴ See papers cited at n.16, *supra*.

³⁵ Some antitrust agencies (*e.g.*, the German Federal Cartel Office) arrange automatically to send their new press releases by internet e-mail to anyone who requests them. See <http://www.bundeskartellamt.de/contact.html>.

³⁶ See <http://www.uokik.gov.pl>.

³⁷ See <http://www.nic.in/dca/comp> (India); <http://www.compcom.co.za> (South Africa).

³⁸ See <http://www.meic.go.cr> (Costa Rica); <http://www.compcom.co.za> (South Africa).

³⁹ See <http://www.mecon.gov.ar/cndc>.

⁴⁰ See <http://www.antimon.gov.sk> (Slovakia); <http://www.procompetencia.gov.ve> (Venezuela).

⁴¹ See <http://www.gvh.hu>.

Indeed, a new antitrust agency should make it a priority to explain - to the public at large, to affected businesses and, not least, to its own staff - what its priorities are, how it investigates and makes decisions, and the reasoning behind its enforcement and policy decisions.⁴² An agency can do this through formal regulations, speeches, media interviews, or posting material on its website - preferably, all of these things.⁴³ At the same time, the manner in which an antitrust agency can and should pursue transparency is necessarily limited in the law enforcement process, for much of the information obtained in antitrust enforcement proceedings is ordinarily required (by the laws of nearly all countries) to be kept strictly confidential. An agency's reputation for probity with respect to handling confidential information is absolutely crucial both to the agency's ability to continue to obtain the confidential business information it needs to enforce its laws, and to the agency's general reputation for seriousness and reliability in pursuing its statutory goals.⁴⁴

Training

Meaningful employee training is an important part of building and maintaining the effectiveness of any government agency. Antitrust agencies in developed countries spend significant resources in training their own employees in relevant legal and economic concepts, on a continuing basis, and on both conceptual and practical levels. Not surprisingly, new antitrust agencies in developing and transition economy countries sometimes have special training needs that grow out of their countries' historical lack of competition cultures. As one observer suggests:

The agency will need to begin immediately to increase the intellectual capital of top management and to train new employees in the concepts and practical techniques of competition law. In substance, the agency needs to undertake two types of training. The first consists of a basic introduction to the microeconomic principles and legal concepts underlying the operation of a competition policy system. The second takes the form of workshops in which the agency's professionals participate in role-playing, problem-solving exercises based on competition problems that commonly arise in the [country in question] or transition economies generally.⁴⁵

A wide variety of training resources are available to new antitrust agencies, in addition to what they can provide for themselves.⁴⁶ Many developed Members - the United States, Canada, the EU, France, Germany, and Japan, just to name a few - have long had substantial programs of bilateral technical assistance, usually provided on an antitrust agency-to-antitrust agency basis. During the past nine years, the US antitrust agencies alone have sent roughly 220 missions to dozens of countries on five continents to work with officials of new antitrust agencies in a variety of contexts, including both short-term trips on

⁴² See Kovacic, *Getting Started*, *supra* n.21, 23 BROOKLYN J. INT'L L. at 421-22, 435-36.

⁴³ To take one example of the potential comprehensiveness of formal regulations, in the past few years, Brazil's CADE has enacted or proposed regulations, *inter alia*, on: its internal adjudicative process; internal investigative rules; fine collection; interpretative consultations with private parties; and a code of ethics for employees. See Oliveira, *supra* n.21 at n.24. See also Rodriguez & Williams, *supra* n.31, 43 ANTITRUST BULL. at 158 (discussion of Venezuelan merger guidelines).

⁴⁴ See Kovacic, *Getting Started*, *supra* n.21, 23 BROOKLYN J. INT'L L. at 435 (new agency must create safeguards to ensure that "confidential information will not be disclosed. A lapse in such safeguards early in the agency's existence could raise doubts about its competence").

⁴⁵ *Id.* at 432.

⁴⁶ According to a recent survey, many agencies - including those in developing and transition economy countries - use in-house personnel to provide training. American Antitrust Institute, Report, *supra* n. 29, at 14-15. This survey discusses agencies' experience with several training formats. *Id.* at 14-17.

specific subjects and long-term advisory missions largely based on funding by the US Agency for International Development. We also have hosted scores of antitrust officials from many countries on internships at DOJ/ FTC.⁴⁷

Of course, significant assistance in drafting and enforcing new antitrust laws has been provided by other countries with experienced antitrust agencies, as well as by multilateral organizations such as the WTO, OECD, the World Bank, UNCTAD, and APEC.⁴⁸ And it also is important to recognize that some of the most valuable assistance a new antitrust agency can receive is advice from agencies in other developing and transition economy countries, which are well aware of the problems encountered by agencies like themselves. But whatever else we can say about technical assistance, we can all recognize that the significant - and sometimes unmet - needs of Members' antitrust agencies for meaningful staff training will continue, and that such training will continue to be a high priority for new agencies, as it is for well-established ones.⁴⁹

Establishing Agency Priorities

Once a new antitrust agency is established - indeed, while it is being organized - the management of the new agency will have to identify its initial priorities. The answer to that question will, of course, depend heavily on some of the issues we have already discussed: available financial and personnel resources, the state and structure of the country's economy, and the legal system, among other things. Once again, there are many different views on appropriate priorities for a new agency, as it begins to build a culture of competition in its country. These include educating the public about the value of competition generally, competition advocacy on a more focused basis, and law enforcement actions.⁵⁰

Educating Society about Competition

Whatever else the agency does, it certainly should begin by educating the general public, local businesses, and the courts about the new law and new agency, and more broadly about the valuable role that competition plays in a market economy. In our earlier discussion of transparency, we have already mentioned ways - regulations, guidelines, speeches, media interviews, websites - in which a new agency can effectively explain what it does and why. In particular, the new agency might want to organize conferences in cities around the country to explain the law to businesspeople, and to explain why - even though some people may well be apprehensive about the new, pro-competitive economic policies - competitive markets are good for businesses as well as consumers. This will take a lot of time and work by senior agency officials, although there are likely to be natural allies in the business community, including new entrants in deregulating industries, importers, and small businesses. Indeed, depending on the recent economic and regulatory history of the economy in question, the new agency may need to begin by educating the public about basic principles of market economics, demonstrating how free markets benefit

⁴⁷ A summary of DOJ/FTC technical assistance programs is found in Annex 6-A of the recent ICPAC Final Report, *available on-line at*: <http://www.usdoj.gov/atr/icpac/finalreport.htm>.

⁴⁸ This multilateral assistance often involves antitrust officials from member antitrust agencies, as well as from the various multilateral secretariats.

⁴⁹ See American Antitrust Institute, Report, *supra* at n.24, at 17-25.

⁵⁰ See generally Brazil's Submission to this Group, "Competition Policy in Brazil: Aspects of the Country's Recent Experience," WT/WGTCP/W/93 (24 July 1998); see also WTO Secretariat Synthesis Paper, *supra* n. 1, at paras.44-48.

society.⁵¹ Such an educational programme is instrumental in establishing public support for both the new government policy of encouraging competition; it is one of the foundations of a culture of competition.

One particularly important aspect of an educational programme is explaining the purpose and framework of the new law and agency procedures to the local courts that will apply the law. This task is of obvious importance in a context where judges who previously have had no occasion to think about antitrust issues (or perhaps other market-based economic issues) suddenly find themselves reviewing agency decisions or private lawsuits under the new law.⁵² Speeches by agency officials to judicial organizations, special antitrust conferences for judges, and careful agency explanations in judicial review proceedings themselves are possible ways of beginning this aspect of creating a culture of competition.

Competition Advocacy

Previous discussions in the Group have stressed the importance of competition advocacy activities to creating a culture of competition.⁵³ (As some of these discussions have emphasized, a country does not actually need to have an antitrust law or an antitrust agency in order to have an effective competition advocacy program, so long as an agency with appropriate expertise is charged with acting as an articulate advocate for competition.) There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. As a recent OECD report explained:

In virtually every Member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This "advocacy" . . . can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting.⁵⁴

In countries where privatization of state-owned enterprises is a significant government program, new antitrust agencies often make it a high priority to review the competitive aspects of proposed privatizations.⁵⁵ These reviews may occur on an *ad hoc* basis and involve informal discussions between the antitrust agency and other relevant government agencies (as has been the case in Hungary), or (as in Poland) they may involve formal oral or written presentations by the antitrust agency, and sometimes the antitrust agency has a formal statutory right of reviewing privatization proposals. In either case, expert views from a new antitrust agency sometimes can be crucial in avoiding the exchange of a state-owned monopoly for a privately-owned one in a context where a competitive solution is feasible.

⁵¹ One sometimes difficult, but crucial, point to impress upon the public in a recently-deregulated economy is that in competitive markets, prices sometimes go up as well as down.

⁵² In November 1998, for example, Brazil's CADE had 70 cases under review in federal and state courts in Brazil. Remarks of CADE President Oliveira, ICPAC November 1998 Hearings at 14. As President Oliveira observed: "[W]hat would be interesting would be to emphasize and to focus more on the dissemination of competition culture among courts. . . .It's hard to overemphasize the importance of this. . . ." Id.; see Kovacic, *Getting Started*, *supra* n.21, 23 BROOKLYN J. INT'L L. at 420-21, 431-32.

⁵³ See Secretariat Synthesis Paper, *supra* n.1, para.27.

⁵⁴ OECD, 2 OECD REPORT ON REGULATORY REFORM 265 (1997).

⁵⁵ See, e.g., G.K. Lipimile, "Addressing Anti-Competitive Practices in a Developing Country Setting: the Case of Zambia" (25 July 1998)(WTO Symposium) at 4-5.

Another important possible focus of competition advocacy is for the new antitrust (or other) agency to participate in proceedings before national regulatory agencies, in order to argue for pro-competitive outcomes in regulated markets, and - as appropriate - before legislatures, in order for pro-competitive legislation and against anti-competitive proposals.⁵⁶ Once again, such activities have been discussed in prior sessions of the Group, and we will not repeat that discussion here, except to emphasize the potentially high value for consumers and creation of a culture of competition that successful competition advocacy may have.

Enforcing the New Law

There are more diverse views concerning the value of law enforcement actions by a new antitrust agency. On the one hand, some observers and agencies have taken the view that, where the enactment of an antitrust law constitutes a radical departure from previous government economic policy, it is inappropriate for the new agency immediately to begin to take enforcement actions against private firms for doing what until recently had been not only lawful, but perhaps required by government law and policy. Moreover, antitrust investigations are often complex and resource-intensive, particularly for new agencies with investigative procedures as yet untried and employees as yet unpracticed in antitrust enforcement. Finally, the effectiveness of law enforcement actions will depend to some degree on the effectiveness of the judicial system. In some situations, therefore, it might be prudent to defer enforcement action until the agency's internal procedures are well-defined and its officials trained in basic antitrust concepts and investigative techniques, as discussed above.⁵⁷

On the other hand, it may be difficult to justify failing to enforce the new law in the face of flagrant violations; such inaction may seriously damage the new agency's credibility and undermine public confidence, not only in the agency, but in the overall value of pro-competitive economic policies. Rather, an appropriately exercised prosecutorial discretion might lead a new agency to select for enforcement action one or a few cases of clear legal violations, with clear implications for consumers, that are likely to have strong educational value for business, the courts, and the general public alike. Sound case selection is always important, but may be especially so for new agencies that must establish their credibility. Good examples of such enforcement actions include the Peruvian antitrust agency's prosecutions of nationwide or regional schemes by producers to fix the prices of flour and broiler chickens, respectively.⁵⁸ In these cases, the alleged business conduct - price-fixing - was of a sort generally understood to be anti-competitive, the evidence of illegal activity was strong, and effects of the alleged conduct on consumers was easily understood.⁵⁹ In any event, the issue here is not - or should not be - *whether* to enforce a new antitrust law, but *when* to begin to do so in a systematic way, consistent with the goal of effectively creating a culture of competition in a particular country.

⁵⁶ See, e.g., discussion of competition advocacy with respect to regulated sectors in Venezuela and Poland ICPAC November 1998 Hearings at 52, 259-60. See generally J. Ordovery, R. Pittman & P. Clyde, *Competition Policy for Natural Monopolies in a Developing Market Economy*, 2 ECON. OF TRANSITION 317 (1994).

⁵⁷ See, e.g., Kovacic, *Perilous Beginnings*, *supra* n.21, 43 ANTITRUST BULL. at 26.

⁵⁸ See Rodriguez & Williams, *supra* n.31, 43 ANTITRUST BULL. at 172-77.

⁵⁹ See B. Boza, "Trade Liberalization and Competition Policy: the Peruvian Experience" (WTO Symposium)(July 1998).

The Role of Academia, Consumer Groups, and the Private Bar in Creating a Culture of Competition

Academia, consumer groups, and the private bar (or other private legal professional associations) also can make important contributions to creating a culture of competition, and the new antitrust agency should encourage them to do so. As noted above, one of the difficulties a new agency will face in many developing and transition economy countries is that there may be only a small number of professionals trained, even at the university level, in market economics, and almost certainly very few people specially trained in antitrust law and competition policy. Accordingly, new agencies should work - as Brazil's CADE, for example, has done - to encourage local universities to create courses and programs in competition law and economics and help to develop curricula.⁶⁰ Such courses and programs not only offer valuable recruiting grounds for antitrust agencies, but creating academic interest in competition has additional important benefits. For example, in the United States and elsewhere, academics think and write about legal and economic antitrust subjects in ways that improve the overall quality of antitrust debate, may offer independent perspectives on issues that might otherwise be dominated by government and business, and generally maintain a broader level of societal interest in competition.

In much the same way, consumer groups can make a significant contribution to improving public consciousness about competition issues. New antitrust agencies should reach out to such groups through speeches, seminars, and the like, both in order to inform consumer groups about the new law works and to explain to such groups how the new agency plans to protect consumer interests.⁶¹

Finally, a new antitrust agency should encourage the potentially important contribution of the private bar in creating a culture of competition. Many antitrust agencies in developed countries already have learned this lesson: "[t]he organized bar and other professional groups perform a valuable function in the antitrust system by disseminating information about government policies and instructing business operators about how to comply with the law".⁶² Bar groups in many countries hold conferences and seminars that providing continuing education for their members, and private attorneys often contribute articles to bar publications, law reviews, and other publications.⁶³ In addition, private counsel may provide important enforcement-related information to antitrust agencies in cases where their clients are the victims of anti-competitive conduct, and, in countries where there is a private right of action, represent their clients in private antitrust lawsuits. Accordingly, officials of new antitrust agencies should consider speaking at bar conferences and other appropriate fora, in order to educate the bar about the new law and the new agency's procedures and priorities. In this way, the goals of transparency and the growth of a competition culture are advanced simultaneously.

⁶⁰ In part as a result of CADE's efforts, nearly a dozen Brazilian universities now offer such courses and programs. See also Kovacic, *Getting Started*, *supra* n.21, 23 BROOKLYN J. INT'L L. at 419-20, 440-41.

⁶¹ *Id.*, 23 BROOKLYN J. INT'L L. at 440.

⁶² *Id.*, 23 BROOKLYN J. INT'L L. at 411.

⁶³ The American Bar Association's Antitrust Section, for example, has approximately 3,000 members. The Section publishes a wide variety of monographs on antitrust subjects, and its meetings provide US antitrust officials and private counsel alike with formal and informal opportunities for discussion of antitrust issues.

CONCLUSION

A Member's decision to enact an antitrust law is only the beginning of a long and complex process of resolving both policy and practical issues in legal drafting, institution-building, and making the new law meaningful through agency action. We hope that this paper will assist the Group in its discussions of these issues, and that the Group's discussions, in turn, will help Members that are considering antitrust legislation to make informed and appropriate decisions.
