



# Competition Enforcement Strategy Toolkit for ASEAN Competition Agencies

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# CONTENTS

<b>Contents</b> .....	3
<b>A. Introduction</b> .....	7
<b>B. Competition Enforcement Strategy 101</b> .....	9
<b>Module B1: What is a Competition Enforcement Strategy?</b> .....	10
Key Points .....	10
Definitions .....	10
Competition Enforcement Strategy in the Context of the Overall Strategic Plan.....	11
Evolution of the Competition Enforcement Strategy.....	12
References and Useful Resources .....	13
<b>Module B2: Why have a Competition Enforcement Strategy?</b> .....	14
Key Points .....	14
Benefits of Strategic Planning .....	14
The Virtuous Cycle of a Competition Enforcement Strategy .....	17
References and Useful Resources .....	18
<b>C. The New Authority Phase</b> .....	19
<b>Module C1: Formulating a Competition Enforcement Strategy</b> .....	20
Key Points .....	20
Setting the Goals for Competition Enforcement .....	20
Formulating the Competition Enforcement Strategy .....	22
References and Useful Resources .....	32
<b>Module C2: Preparing to Implementing the Competition Enforcement Strategy</b> .....	33
Key Points .....	33
External-Facing Implementation Initiatives.....	34
Internal-Facing Implementation Initiatives.....	37
References and Useful Resources .....	44
<b>Module C3: Common Implementation Feature –     Phasing Competition Enforcement / Prioritisation     by Type of Competition Law Prohibition</b> .....	45
Key Points .....	45
Phased Implementation by Prohibitions .....	45
Transitional Provisions .....	46
References and Useful Resources .....	49

<b>Module C4: Common Implementation Feature – Sector Prioritisation</b> .....	50
Key Points .....	50
How to Select Sectors .....	50
Example of Prioritised Sectors .....	52
Communicating Prioritised Sectors.....	55
Review of Prioritised Sectors.....	56
References and Useful Resources .....	57
<b>Module C5: Common Implementation Feature – Case Prioritisation</b> .....	58
Key Points .....	58
Why should a Competition Authority Prioritise Cases .....	58
Process of Designing a Prioritisation Framework .....	59
Review of Prioritised Cases and Framework.....	64
References and Useful Resources .....	64
<b>D. The Young Authority Phase</b> .....	65
<b>Module D1: Operationalising the Enforcement Strategy</b> .....	66
Key Points .....	66
Enforcement "Experimentation".....	66
Observations: Early Enforcement Experience .....	68
References and Useful Resources .....	69
<b>Module D2: Cartel Enforcement</b> .....	70
Key Points .....	70
Cartel Detection Stage.....	71
Pre-Investigation Stage.....	82
Investigation Stage .....	87
References and Useful Resources .....	91
<b>Module D3: Unilateral Conduct/Abuse of Dominance</b> .....	93
Key Points .....	93
Abusive Conduct Detection Stage .....	94
Pre-Investigation Stage.....	99
Investigation Stage .....	103
References and Useful Resources .....	107
<b>Module D4: Mergers</b> .....	108
Key Points .....	108
Anti-competitive Merger Detection Stage .....	109
Pre-Investigation Stage.....	112
Investigation Stage .....	116
References and Useful Resources .....	118

<b>Module D5: Weighing Competition Enforcement and Competition Advocacy</b> .....	119
Key Points .....	119
Complementarity of Competition Advocacy and Enforcement .....	119
Alignment of Competition Advocacy with Competition Policy and Law Development Stage .....	121
References and Useful Resources .....	122
<b>Module D6: Due Process and Procedural Fairness</b> .....	123
Key Points .....	123
Rules of Natural Justice, Transparency and Confidentiality Protection .....	123
Engagement with Entities Under Investigation .....	125
Engagement with Third Parties .....	126
Engagement with the Press.....	126
References and Useful Resources .....	127
<b>Module D7: Information Collection and Investigation Tools</b> .....	128
Key Points .....	128
Principles for Information Collection .....	128
Types of Investigation Tools.....	129
Written Responses versus Oral Interviews.....	129
References and Useful Resources .....	131
<b>E. Ongoing Review of the Competition Enforcement Strategy</b> .....	132
<b>Module E1: Institutionalising the Review of the Competition Enforcement Strategy</b> .....	133
Key Points .....	133
Definition .....	133
Why Review the Effectiveness of the Competition Enforcement Strategy? .....	134
Ongoing Review Mechanisms.....	135
International Practices: Competition Authorities' Experience .....	136
References and Useful Resources .....	140
<b>Module E2: Competition Enforcement Strategy Evaluation Tools</b> .....	142
Key Points .....	142
Data Collection .....	142
Self-Assessment Tools.....	146
External Assessment Tools.....	151
References and Useful Resources .....	152

<b>Module E3: Updating the Competition Enforcement Strategy</b> .....	153
Key Points .....	153
Communicating the Updated Competition Enforcement Strategy .....	153
Reviewing and Amending the Competition Law .....	154
References and Useful Resources .....	156
 <b>References</b>	
Key Definitions and Terms .....	157
List of Figures .....	159
List of Case Study .....	161
Comparative Table on Competition Law Enforcement Frameworks in Asean .....	162
Footnotes .....	165

Strategic Goal 2 of the Association of Southeast Asian Nations (“**ASEAN**”) Competition Action Plan (“**ACAP**”) 2025 is concerned with building institutional and enforcement capacities of ASEAN competition authorities. Specifically, it foresees the Initiative 2.4. to “Develop enforcement strategies tailored to ASEAN economies to facilitate the effective implementation of competition policy and law in the region”. This comprises the Outcomes 2.4.1 concerning the development of a “Toolkit or checklist for formulating national strategies”, as the basis for subsequently devising national strategies in all Member States.

This Toolkit on Enforcement Strategies (“**Toolkit**”) is intended not as a binding reference for the ASEAN Expert Group on Competition (“**AEGC**”), but to provide orientation for ASEAN competition authorities to “pick and choose” the enforcement tools and templates, as they see fit to adopt or adapt. It is also a “live document” which allows for additions. This Toolkit aims to assist ASEAN competition agencies with competition enforcement.

The table below sets out the content summaries of Sections B, C, D and E, and their sub modules.

Section	B: Competition Enforcement Strategy 101	C: The New Authority Phase	D: The Young Authority Phase	E: Ongoing Review of the Competition Enforcement Strategy
<b>Content Summary</b>	This Section explains the fundamentals of what is a competition enforcement strategy and why competition authorities should implement a competition enforcement strategy.	This Section sets out the steps to formulating a competition enforcement strategy, and how to implement it. It also highlights some of the common prioritisation framework that competition authorities use when implementing their competition enforcement strategy.	This Section explains enforcement strategies in relation to the three common prohibitions of competition law, namely, anti-competitive agreements (i.e. cartels), unilateral conduct/abuse of dominance, and merger control. It further emphasizes the importance of procedural fairness, due process, and accountability when enforcing competition laws.	This Section explains the fundamentals of competition enforcement strategy review, in particular, why and how competition authorities review and update their competition enforcement strategy.
<b>Content most relevant to</b>	Newly established competition authorities in jurisdictions that are soon to commence competition enforcement.		Competition authorities that just commenced competition enforcement or have competition enforcement experience.	

Section	B: Competition Enforcement Strategy 101	C: The New Authority Phase	D: The Young Authority Phase	E: Ongoing Review of the Competition Enforcement Strategy
<b>Number of Modules</b>	2	5	7	3
Modules	Module B1: What is a Competition Enforcement Strategy?  Module B2: Why have a Competition Enforcement Strategy?	Module C1: Formulating a Competition Enforcement Strategy  Module C2: Preparing to Implementing the Competition Enforcement Strategy  Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition  Module C4: Common Implementation Feature – Sector Prioritisation  Module C5: Common Implementation Feature – Case Prioritisation	Module D1: Operationalising the Enforcement Strategy  Module D2: Cartel Enforcement  Module D3: Unilateral Conduct/Abuse of Dominance  Module D4: Mergers  Module D5: Weighing Competition Enforcement and Competition Advocacy  Module D6: Due Process and Procedural Fairness	Module E1: Institutionalising the Review of the Competition Enforcement Strategy  Module E2: Competition Enforcement Strategy Evaluation Tools  Module E3: Updating the Competition Enforcement Strategy

**Figure 1:** Toolkit Summary

This Toolkit deals only with the public enforcement of competition laws, i.e., activities undertaken by a competition authority in relation to anti-competitive activities that are prohibited by competition laws. It does not deal with the “private enforcement” of competition laws, where private applicants, i.e. non-public authorities such as private individuals, businesses, and other organisations who are aggrieved by anti-competitive conduct to seek compensation for losses suffered as a result of an infringement of competition laws.

"To be effective, a competition agency, be it old or new, must have a conscious process for setting goals and planning steps to accomplish them. To do otherwise is to be the passive captive of external demands, whether in the form of complaints from consumers or business operators, or requests for action by public bodies such as legislatures or government ministries....."

ASEAN Self-Assessment Toolkit  
on Competition Enforcement and  
Advocacy

To be effective, a competition authority must design and implement a competition enforcement strategy setting out its enforcement goals and its plans to accomplish them.

The purpose of this section is to explain the fundamentals of what a competition enforcement strategy is (**Module B1: What is a Competition Enforcement Strategy?**) and why competition authorities should implement a competition enforcement strategy (**Module B2: Why have a Competition Enforcement Strategy?**).

## Module B1: What is a Competition Enforcement Strategy?

### Key Points

- A competition enforcement strategy refers to the competition authority's action plan of activities that is designed to effectively administer competition laws.
- A competition enforcement strategy is a key constituent of a competition authority's overall strategic plan.
- A competition enforcement strategy should evolve over time, as the competition authority gains enforcement experience.

1. The contents of this module are adapted from the ICN Agency Effectiveness Working Group's ("ICN AEWG's") "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation" and the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN.

### Definitions

2. **Competition Enforcement.** Enforcement or competition enforcement refers to the administering of competition laws by competition authorities to address and deter prohibited anti-competitive conduct in the economy. Examples of such enforcement activities include, but are not limited to, investigations, reviewing notifications, leniency applications, advocacy and market/sector studies.
3. **Strategic Planning and Strategy.** The ICN AEWG highlights the following benefits of strategic planning:
  - (i) It can increase the likelihood of an agency successfully achieving its objectives by clearly identifying those objectives and providing a basis for an agency to measure and assess its progress in achieving them.
  - (ii) It facilitates effective resource allocation and activity prioritisation, which is particularly important given the scarcity of resources available to agencies.
  - (iii) It allows competition authorities to be more proactive when developing their work programs.
  - (iv) It can facilitate communication and accountability, and enhance public understanding of the agency's purpose and functions.
  - (v) It can motivate and guide staff members.
4. The ICN AEWG also explains that in order to develop effective competition enforcement objectives, competition authorities will need to realistically predict their future needs. However, planning too far into the future makes the assessment of such needs impossible, resulting in unrealistic objectives, and unduly limit its future activities. On the other hand, competition authorities should also be wary of developing objectives that addresses only short term needs as the purpose of strategic planning is to provide more of a long term vision for the competition authority.
5. The purpose of strategic planning is the purpose of strategic planning is to enable an organisation to achieve its desired results in an unpredictable environment. Put another way, strategic planning is about how to make decisions today about a future that is inherently uncertain - the science of making good decisions about the future.

6. Relatedly, the following are the four misconceptions about strategic planning. Defines strategic planning as a “*continuous process of making present risk-taking decisions systematically and with the greatest knowledge of their futurity; organising systematically the efforts needed to carry out these decisions; measuring the results of these decisions against the expectations through organised, systemic feedback.*”
7. Relatedly, Peter Drucker (1973) also listed four misconceptions about strategic planning:
- (i) It is not a box of tricks, a bundle of techniques.<sup>1</sup>
  - (ii) It is not forecasting.<sup>2</sup>
  - (iii) It does not deal with future decisions.<sup>3</sup>
  - (iv) It is not an attempt to eliminate risk.<sup>4</sup>
8. **Competition Enforcement Strategy.** Taking the two definitions together, a competition enforcement strategy refers to the competition authority’s action plan of activities that is designed to effectively administer competition laws.
9. It details a competition authority’s analytical thinking, and the allocation and commitment of its resources to competition enforcement activities. Put another way, it deals with the “how” i.e. how a competition authority will go about conducting its competition enforcement activities on an ongoing basis.

### Competition Enforcement Strategy in the Context of the Overall Strategic Plan

10. A competition enforcement strategy is a key constituent of a competition authority’s overall strategic plan which typically includes competition advocacy strategy, institutional capacity building strategy, human resource strategy, and international affairs engagement strategy.
11. While it appears that the competition enforcement strategy is a distinct strategy, it is important to note that it interacts/overlaps with the other strategies in the wider strategic plan of the competition authority.

1 Peter Drucker (1973) explained that “[Strategic Planning] It is analytical thinking and commitment of resources to action. Many techniques may be used in the process – but then again, none may be needed..... Quantification is not planning. To be sure, one uses rigorous logical methods, as far as possible – if only to make sure that one does not deceive oneself.....Strategic planning is not the application of scientific methods to business decisions ..... It is the application of thought, analysis, imagination, and judgment. It is responsibility, rather than technique.”

2 Peter Drucker(1973) explained that “We must start out that forecasting is not a respectable human activity and not worthwhile beyond the shortest of periods. Strategic Planning is necessary precisely because we cannot forecast. Another, even more compelling, reason why forecasting is not strategic planning is that forecasting attempts to find the most probable course of events or, at best, a range of probabilities. But the entrepreneurial problem is the unique event that will change the possibilities; the entrepreneurial universe is not a physical but a social universe. Indeed the central entrepreneurial contribution, which alone is rewarded with a profit is to bring about the unique event or innovation that changes the economic, social or political situation.”

3 Peter Drucker (1973) explained that “[Strategic Planning] deals with the futurity of present decisions. Decisions exist only in the present. The question that faces the strategic decision -maker is not what the organisation should do tomorrow. It is ‘What do we have to do today to be ready for an uncertain tomorrow?’ The question is not what will happened in the future. It is ‘What futurity do we have to build into our present thinking and doing , what time spans do we have to consider, and how do we use this information to make a rational decision now?’”

4 Peter Drucker (1973) explained that “Whilst it is futile to try to eliminate risk, and questionable to try to minimise it, it is essential that the risks taken be the right risks. The end result of successful strategic planning must be capacity to take a greater risk, for this is the only way to improve entrepreneurial performance. To extend this capacity however, we must understand the risks we take. We must be able to choose rationally among risk-taking courses of action rather than plunge into uncertainty on the basis of hunch, hearsay, or experience, no matter how carefully quantified.”



**Figure 2:** Components of a Competition Authority's Strategic Plan

12. When engaging in competition enforcement strategic planning, a competition authority should attempt to answer the following questions:
- (i) What are the competition authority's competition enforcement goals? (These issues are addressed in **Module C1: Formulating a Competition Enforcement Strategy**).
  - (ii) What does the competition authority want to achieve through these competition enforcement goals over a given period of time? How will the competition authority achieve these competition enforcement goals? (These issues are addressed in **Module C2: Preparing to Implementing the Competition Enforcement Strategy**).
  - (iii) Where will the competition authority focus its resources in order to achieve these competition enforcement goals? (These issues are addressed in **Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition, Module C4: Common Implementation Feature – Sector Prioritisation and Module C5: Common Implementation Feature – Case Prioritisation**).
  - (iv) How will the competition authority measure the success of its competition enforcement strategy? (These issues are addressed in **Module E: Ongoing Review of the Competition Enforcement Strategy**).
  - (v) How does the competition enforcement strategy fit into the competition authority's wider strategic plan?

### Evolution of the Competition Enforcement Strategy

13. Competition enforcement strategic planning should not be a one-off exercise. The ICN AEWG defines strategic planning as a periodic decision-making process.
14. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN further emphasise that based upon experience, institutional building (in relation to competition enforcement) is not a one-off activity. Competition enforcement strategic planning takes place in phases that extend over years:
- (i) For a new competition authority, the development of a competition enforcement strategy is set against the backdrop of a newly introduced competition law, and identifying specific and realistic entry-points for competition enforcement - these issues are addressed in **Module C: The New Authority Phase**.

- (ii) The competition authority then acquires “basic survival skills and tries to make the best possible use of its limited resources” to enforce the law - these issues are addressed in **Module D: The Young Authority Phase**.
- (iii) Later, more experience and knowledge make it possible for the competition authority to better organise its priorities and tackle more complex enforcement issues. Finally, the competition law goes through a period of significant statutory revisions, based on the experience acquired, to overcome its limits and shortcomings, leading to more informed legislation - these issues are addressed in **Module E: Ongoing Review of the Competition Enforcement Strategy**.
15. Based on international experience, these phases evolve in cycles and all ASEAN Member States are, or may be in the future, interested in all aspects of the three phases. Pertinently, ASEAN competition authorities are at different stages of development in respect of their competition policy and law thinking and application. As such, they do not necessarily fall neatly into one of the three phases above.
16. It is worth emphasising again that the purpose of this Toolkit is to provide orientation for ASEAN Member States to “pick and choose” the enforcement tools and templates, as they see fit to adopt or adapt.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Evolution of the Competition Enforcement Strategy	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN	<a href="https://asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean">https://asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean</a>
ICN	Definitions, Evolution of the Competition Enforcement Strategy	Agency Effectiveness Working Group’s “Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation”	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/</a>
Peter Ferdinand Drucker	Definitions	Management: Tasks, Responsibilities, Practices  First published by Butterworth-Heinemann in 1974 with revised edition in 2011 by Routledge	Online access unavailable.

## Module B2: Why Have a Competition Enforcement Strategy?

### Key Points

- A competition enforcement strategy can increase the likelihood of successfully achieving competition enforcement goals.
- A competition enforcement strategy facilitates effective allocation of scarce resources.
- A competition enforcement strategy allows the competition authority to be more proactive when developing enforcement work programmes.
- A competition enforcement strategy facilitates communication and accountability.
- A competition enforcement strategy motivates and guides staff members of the competition authority.

1. The contents of this module are adapted from the ICN AEWG's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation", the ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy, and "How does your agency measure up?" Kovacic et. al (2011).
2. As defined in **Module B1: What is a Competition Enforcement Strategy?**, a competition enforcement strategy refers to a competition authority's action plan of activities that is designed to effectively administer competition laws. This module discusses the general benefits of strategic planning.

### Benefits of Strategic Planning

3. The ICN AEWG highlights the following general benefits of strategic planning:
  - (i) It can increase the likelihood of a competition authority successfully achieving its objectives by clearly identifying those objectives and providing a basis for the competition authority to measure and assess its progress in achieving them.
  - (ii) It facilitates effective resource allocation and activity prioritisation, which is particularly important given the scarcity of resources available to the competition authority.
  - (iii) It allows the competition authority to be more proactive when developing work programmes.
  - (iv) It can facilitate communication and accountability, and enhance public understanding of the competition authority's purpose and functions.
  - (v) It can motivate and guide staff members of the competition authority.

#### a) Increases the Likelihood of Successfully Achieving Competition Enforcement Goals

4. The formulation of a competition enforcement strategy is guided by the competition authority's competition enforcement goals.
5. As defined in **Module B1: What is a Competition Enforcement Strategy?**, competition enforcement strategy can also be defined as a clear action plan that details a competition authority's analytical thinking, allocation and commitment of its resources to competition enforcement activities. These issues are addressed in **Module C1: Formulating a Competition Enforcement Strategy**.

6. A competition authority without a competition enforcement strategy would be “rudderless” i.e. lacking a clear sense of direction with regard to its competition enforcement goals. Indeed, Kovacic et. al (2011) opined that:

*The allocation of a competition authority’s resources should flow from a conscious strategy that identifies most serious distortions in the competitive process and identifies the best mix of policy solutions. Without an effective process to set strategy, a competition agency can become a purely reactive observer caught up in the unfolding of events and buffeted by demands for action by various external bodies, especially the legislature.*

7. Put another way, compared to a competition authority with a well-defined competition enforcement strategy, a competition authority without one will be less likely to succeed in its enforcement initiatives as it will become merely a “reactionary” actor that is not guided by a clear action plan.

#### **b) Efficient Allocation of Scarce Resources**

8. A competition authority generally faces two main types of resource constraints: financial resources and human resources. As previously highlighted in the ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy:

*To be effective, a competition agency, be it old or new, must have a conscious process for setting goals and planning steps to accomplish them. To do otherwise is to be the passive captive of external demands, whether in the form of complaints from consumers or business operators, or requests for action by public bodies such as legislatures or government ministries. Even the most modestly funded competition agency must develop a strategic plan that defines what it will seek to achieve in the coming year or series of years.*

9. A competition enforcement strategy would promote the efficient allocation of the competition authority’s scarce resources. It will ensure that the competition authority’s scarce resources are directed to the “right enforcement activities” in order to achieve its enforcement goals. For example, competition authorities have during their “new competition authority” phase, chosen to focus their enforcement efforts on:

- (i) Prohibited activities. These issues are addressed in **Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition.**
- (ii) Certain specified sectors. These issues are addressed in **Module C4: Common Implementation Feature – Sector Prioritisation.**
- (iii) Types of cases. These issues are addressed in **Module C5: Common Implementation Feature – Case Prioritisation.**

#### **c) Allows the Competition Authority to Be More Proactive When Developing Enforcement Activity Programmes**

10. It is important to note at this juncture that competition laws may impose mandatory obligations on competition authorities to investigate certain types of conduct or agreement i.e. non-discretionary

activities. As such, this can limit the possibility for competition authorities to plan their “discretionary enforcement activities”, and consequently the strategic options available to them.

11. Examples of non-discretionary activities include:

- (i) A mandatory merger notification regime where competition authorities are obliged to review notifiable mergers. Competition authorities may be required to complete their review within a stipulated time frame.
- (ii) Conducting market studies or investigations when requested by the government or the Minister.

12. Nevertheless, the ICN AEWG observed that many competition authorities faced with a high proportion of non-discretionary activities are able to, through strategic planning, develop tools to achieve some flexibility when pursuing discretionary activities. For example, many competition authorities introduced simplified procedures to deal with some non-discretionary matters that are unlikely to raise competition concerns. Like financial and human resource constraints, competition authorities should take non-discretionary activities into consideration when devising strategic options.

#### **d) Facilitates Communication and Accountability, and Enhances Public Understanding of the Competition Authority’s Purpose and Functions**

13. Competition authorities can choose to communicate their competition enforcement strategy externally, e.g., issuing a press release, publishing an article on the adoption of the competition enforcement strategy, publishing its plans online.

14. Public dissemination of the competition authority’s competition enforcement activity will enhance the general public’s knowledge of the role of the competition authority, paving the way for successful competition advocacy and the promotion of a more informed competition culture. Pertinently, if it is known what the competition authority plans to do, it can be held accountable if these plans are not met. These issues are further addressed in **Module C2: Preparing to Implementing the Competition Enforcement Strategy: External-Facing Implementation Initiatives**.

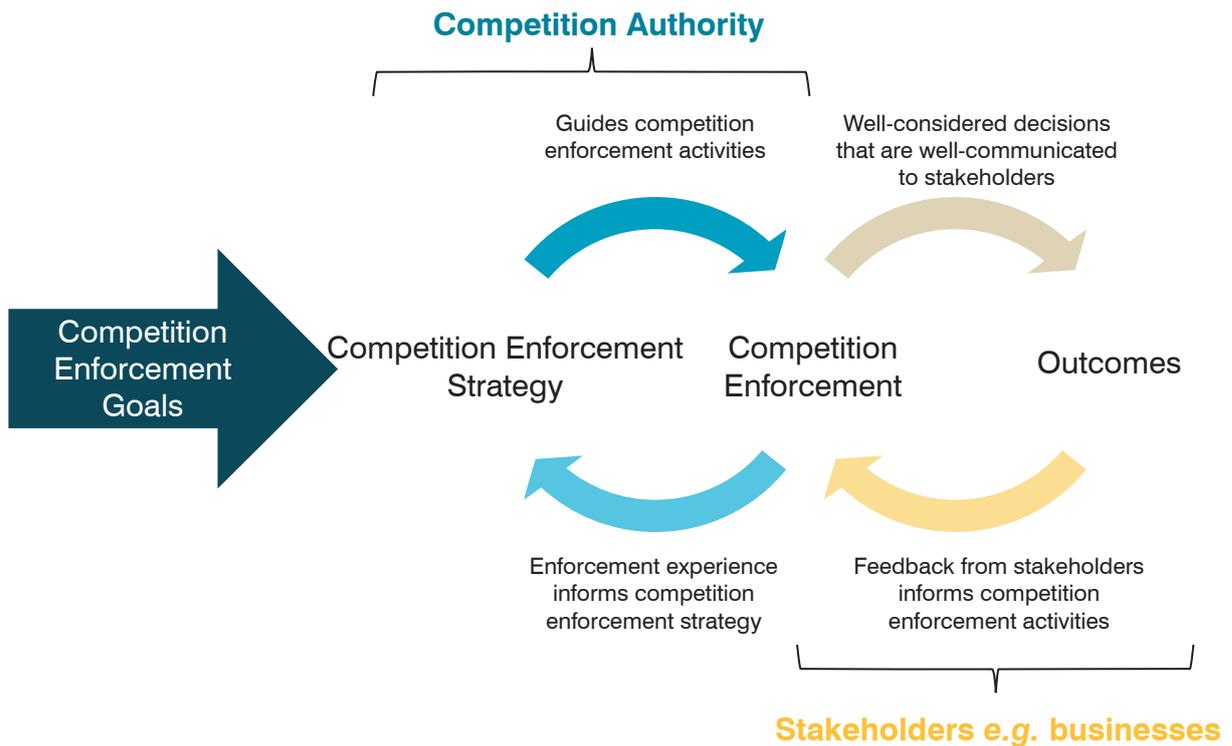
15. For example, the competition authority’s mission and vision statements enhance transparency and legitimacy as they help external stakeholders understand the competition authority’s purpose. For external stakeholders, they shape their understanding of why and how they should collaborate with the competition authority. Similarly, they should also be communicated effectively within the competition authority in order to achieve buy-in of the competition authority’s staff.

#### **e) Motivate and Guide Staff of the Competition Authority**

16. A competition enforcement strategy is a concrete action plan for implementing competition enforcement-related initiatives and operations. It helps staff know what they need to do, or what resources will be required to deliver the performance and results that management expects. Further, the ICN AEWG observed that informed and motivated staff are more effective and may require less monitoring to ensure that they contribute to the attainment of the objectives of the competition authority. This contributes to more sustainable performance in the longer term. These issues are discussed in detail in **Module C2: Preparing to Implementing the Competition Enforcement Strategy: Internal-Facing Implementation Initiatives**.

### The Virtuous Cycle of a Competition Enforcement Strategy

17. As noted in **Module B1: What is a Competition Enforcement Strategy?**, competition enforcement strategic planning should not be a one-off exercise. It is an ongoing process which takes place in phases that extend over years.
18. The benefits that arise from implementing a competition enforcement strategy create a “feedback loop” (termed as the “Competition Enforcement Strategy Virtuous Cycle”) which is represented diagrammatically below:



**Figure 3:** The Competition Enforcement Strategy Virtuous Cycle

19. As competition enforcement strategy guides a competition authority’s enforcement activities, and leads to successful enforcement outcomes, external stakeholders such as businesses will become more aware of prohibited business conduct and agreements under competition laws.
20. These enforcement outcomes will in turn encourage increased compliance by businesses, e.g., a cartel enforcement case may serve as a wake-up call to businesses that are currently engaged in cartel activities, prompting them to end their participation. Some businesses may even decide to file leniency applications to the competition authority. Other businesses that are affected by cartel activities will become more vigilant, and become the competition authority’s “second pair of eyes” by reporting such activities.
21. Ultimately, the enforcement experience will inform and shape the future iterations of the competition enforcement strategy when the competition authority reviews the effectiveness of its current competition enforcement strategy. This topic is further discussed in **Module E: Ongoing Review of the Competition Enforcement Strategy**.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	General Benefits of Strategic Planning	ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy	<a href="https://asean-competition.org/read-publication-asean-self-assessment-toolkit-on-competition-enforcement-and-advocacy">https://asean-competition.org/read-publication-asean-self-assessment-toolkit-on-competition-enforcement-and-advocacy</a>
ICN	General Benefits of Strategic Planning	Agency Effectiveness Working Group's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation"	<a href="http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf">http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf</a>
William E. Kovacic, Hugh M Hollman and Patricia Grant (2011)	General Benefits of Strategic Planning	How does your competition agency measure up?	<a href="https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf">https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf</a>

"As a young agency, **building up a strong enforcement track record was an immediate priority**. At the same time, the need for speed had to be balanced with the need to ensure that sufficient time, effort and rigor were dedicated to our investigations and decisions."

Competition and Consumer  
Commission of Singapore CPI  
Antitrust Journal, May, 2010

The purpose of this section is to set out the steps to formulating a competition enforcement strategy (**Module C1: Formulating a Competition Enforcement Strategy**) and how to implement it (**Module C2: Preparing to Implementing the Competition Enforcement Strategy**).

**Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition**, **Module C4: Common Implementation Feature – Sector Prioritisation**, and **Module C5: Common Implementation Feature – Case Prioritisation** highlight the common prioritisation frameworks that competition authorities use when implementing their competition enforcement strategies.

## Module C1: Formulating a Competition Enforcement Strategy

### Key Points

- There is no one-size-fits-all solution when formulating a competition enforcement strategy.
- Setting competition enforcement goals is the necessary first step to formulating a competition enforcement strategy.
- There are five steps to formulating a competition enforcement strategy: (1) analyse the current situation; (2) devise strategic options; (3) decide on a strategic option; (4) elaborate on the strategy; and (5) integrate the strategy into operations.

1. The contents of this module are adapted from the ICN AEWG’s “Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation”; ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy; and the GIZ’s “Cooperation Management for Practitioners: Managing Social Change with Capacity WORKS” Toolkit.
2. As previously stated in the ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy:

*To be effective, a competition agency, be it old or new, must have a conscious process for setting goals and planning steps to accomplish them. To do otherwise is to be the passive captive of external demands, whether in the form of complaints from consumers or business operators, or requests for action by public bodies such as legislatures or government ministries.*

3. The necessary first step is to set the goals for competition enforcement, and thereafter, plan the strategy to accomplishing these goals. The ICN AEWG highlighted that the process of strategic planning typically varies from one competition authority to another. This is due to differences between competition authorities’ legal, institutional, political, and resource constraints, their internal processes, and the ways in which they choose to involve external stakeholders in the strategic planning process.
4. There is no “one-size-fits-all” solution when it comes to formulating a competition enforcement strategy. What is important is that the competition authority has a strategic approach towards enforcement and has taken constructive actions to achieve the enforcement goals it has set for itself. It is important to keep this caveat in mind when considering and applying the tools in this module.

### Setting the Goals for Competition Enforcement

5. Legislative provisions typically define the competition authority’s legislative mandate and the intended outcome for competition enforcement. For example:
  - (i) The preamble to the Malaysia’s Competition Act 2010 describes itself as “*an Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith.*”
  - (ii) The long title of Brunei Darussalam’s Competition Order 2015 states that the legislation is “*An Order to promote and protect competition in markets in Brunei Darussalam, to promote*

*economic efficiency, economic development and consumer welfare; and to provide for the functions and powers of the Competition Commission of Brunei Darussalam and to provide for matters connected therewith.”*

6. Competition authorities should take reference from legislative provisions when setting their goals for competition enforcement. These goals should be consistent with the legislative provisions. Put another way, these provisions constrain the strategic planning possibilities of the competition authorities. However, the ICN AEWG also observed that in some cases, the legislative mandate may be so broad (or spread across several different pieces of legislation) that the competition authority will have wide discretion for strategic planning.
7. Further, these legislative provisions are typically relied on when competition authorities draft their mission statements (refer to **Module C2: Preparing to Implementing the Competition Enforcement Strategy: External-Facing Implementation Initiatives** below). The mission statement defines a competition authority’s agency purpose, and the overarching goals that it seeks to achieve. Competition authorities should also ensure that their goals for competition enforcement are aligned with their mission statement.

### **Singapore**

Section 6 of the Singapore Competition Act (Cap. 50b) provides for the functions and duties of the Competition and Consumer Commission of Singapore. The competition law-related functions and duties from the Competition Act are set out below:

6.—(1) Subject to the provisions of this Act, the functions and duties of the Commission shall be —

- (a) to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
- (b) to eliminate or control practices having adverse effect on competition in Singapore;
- (c) to promote and sustain competition in markets in Singapore;
- (d) to promote a strong competitive culture and environment throughout the economy in Singapore;
- (e) to act internationally as the national body representative of Singapore in respect of competition matters and consumer protection matters;
- ...
- (f) to advise the Government, any public authority or any consumer protection organisation on national needs and policies in respect of competition matters and consumer protection matters generally; and
- (g) to perform such other functions and discharge such other duties as may be conferred on the Commission by or under any other written law.

The CCCS’s mission statement is *“Making markets work well to create opportunities and choices for businesses and consumers in Singapore.”*

### **Case Study 1: Setting the Goals for Competition Enforcement**

8. Competition agencies that are more closely integrated into government may also be required to align their strategic objectives with government strategy, or their strategy may be part of a government strategy. Sometimes, the competition authority's competition enforcement work may be part of the planning cycle of a government or a quasi-governmental organisation. Broader political priorities may also influence the determination of competition enforcement goals.
9. Apart from the considerations above, the ICN AEWG recommends the following good practices that competition authorities should consider adopting when setting goals for competition enforcement:
  - (i) These goals should be easy to articulate to staff and external stakeholders, they should not be vague or conflicting. Kovacic et. al (2011) highlighted that the clear definition of goals increases transparency and facilitates public discussion about the competition authority's performance (in relation to this toolkit – competition enforcement).
  - (ii) These goals should focus on outcomes (such as consumer welfare, economic development, economic efficiencies) rather than outputs (such as the number of cases concluded).

"...the articulation of goals serves important aims beyond guiding the agency's staff and allocating resources to address the most serious obstacles to competition. The clear definition of goals increases transparency and facilitates public discussion about the agency's performance."

Kovacic et. al (2011) "How does your competition agency measure up?"

10. The ICN AEWG noted that most competition authorities agree that in principle, objectives and priorities should be set by the leadership, in consultation with staff. However, these competition authorities also engage in some form of collective consultations or decision making on strategic planning. Ultimately, the leadership will make the decision on which goals and priorities are incorporated into the strategic plan, and communicate the plan for implementation at the conclusion of the process.

### Formulating the Competition Enforcement Strategy

11. After setting the goals of competition enforcement, competition authorities should determine the strategies to achieve them. These strategies should be set out in a strategic plan which will provide a framework to guide competition enforcement, e.g., prioritisation, resource allocation, policy initiatives, commencement and closure of investigations.
12. While the step-by-step application is drafted from the perspective of a new competition authority, young or established competition authorities can use the same steps when updating their competition enforcement strategies. This strategy loop is adapted from GIZ's "Cooperation Management for Practitioners: Managing Social Change with Capacity WORKS" Toolkit.
13. The development of a competition enforcement strategy can be represented either as a loop or a linear process.



Figure 4: Strategy Development as a Loop Process

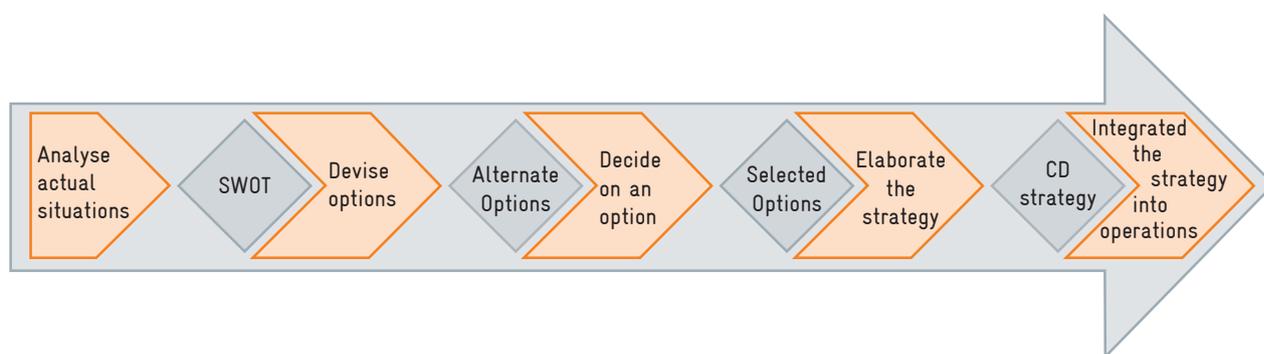


Figure 5: Strategy Development as a Linear Process

### a) Step 1: Analyse the Current Situation

14. It is important to note that analyses of the current situation only ever represent those perspectives/assumptions of the individuals or groups involved in preparing it. It is therefore good practice to evaluate the accuracy of these perspectives/assumptions.
15. **General conditions in the jurisdiction.** Competition authorities should consider the external conditions, in particular, political, economic and socio-cultural factors, when analysing the current situation.
16. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN highlighted that adopting an effective competition law has significant political and practical implications which may create difficulties, especially in transitional economies. Transitional economies are typically dominated by small, powerful, wealthy business constituencies or elites that are often closely connected to the government and/or the military. Is it realistic to assume that these groups would accept an effective competition law, which would almost inevitably disrupt the power of dominant firms and cartels controlling most of the economy? Unsettling the existing arrangements should result in a win-win outcome in a competitive economy; yet, in practice this outcome is far from self-evident as most people are by nature conservative and tend to fear change. It is a challenge to initiate or raise support for the opportunity that arises from significant change.

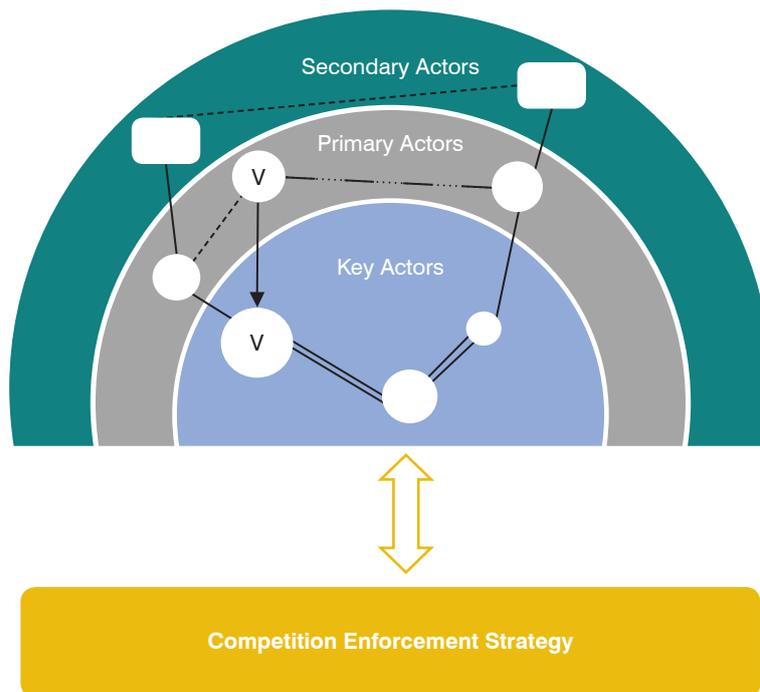
17. These difficulties may become even more apparent when commencing enforcement activities. For example, Kovacic (1997) observed that “*anti-reform constituencies can apply strong pressure on a new antimonopoly agency to pursue an enforcement agenda that reduces growth and otherwise inhibits economic liberalization.*”
18. As a first step, competition authorities should consider responses to public consultations from the initial drafts of the competition legislation through to its enactment. Responses received during the initial competition advocacy phase (prior to enforcing competition laws) should also be considered.
19. Apart from conducting an internal survey of the general conditions in the jurisdiction, competition authorities should also look “outwards” and consider the early enforcement experience of other competition authorities from comparable jurisdictions.
20. **Map of Actors.** The next item to consider when analysing the current situation is to identify the actors. There are four types of actors generally:
- (i) Primary actors: Actors who are directly affected by competition enforcement, e.g., businesses to which competition laws apply.
  - (ii) Secondary actors: Actors whose involvement in competition enforcement is indirect, e.g., government agencies, and consumers.
  - (iii) Key actors: Actors who are able to use their skills, knowledge or position of power to significantly influence the competition enforcement strategy, e.g., board members, senior management and staff of the competition authority.
  - (iv) Veto actors: Actors without whose support and participation, the competition enforcement strategy cannot be effectively implemented. These actors may even be able to veto its implementation. They can be key, primary or secondary actors.
21. After identifying the key actors, it is important to consider the interests that they have in relation to competition enforcement. It is helpful to consider four dimensions for each relevant key actor using the working aid below:

Competition enforcement: Issues at stake				
Key actor	What interest does the key actor have in relation to competition enforcement?	To what extent do these interests comply with competition laws?	What are the effects of compliance or lack of compliance with competition laws? Possible effects include harmony, dissonance, and indifference.	Strategic options available to the competition authority to win support for competition enforcement.
Actor 1				
Actor 2				
...				
Actor n				

**Figure 6:** Stakeholder/Actor Assessment Matrix

22. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN also highlights that it is important to establish a consensus amongst all the relevant stakeholders (also known as actors) on the beneficial effects of introducing a competition law, illustrating that there are win-win outcomes that provide real benefits for consumers and society as a whole. Competition enforcement demonstrates the “theoretical beneficial effects” promulgated during the introduction of competition law.

23. The ICN AEWG observed that some competition authorities may be legally obliged to consult externally with actors during the strategic planning process. The ICN AEWG recommends that external consultations be targeted at law and policy makers (e.g., executive government bodies, legislative bodies and sector regulators), the industry, the bar, consumers, academia, and the judiciary. External consultations can be beneficial because they:
- (i) provide the competition authority with helpful information on these actors' concerns and the general conditions in the jurisdictions;
  - (ii) help the competition authority gauge how much support it will have if it were to commence enforcement in a particular area;
  - (iii) allow the competition authority to better identify areas of possible future competition problems, and establish relationships with these actors which can facilitate future requests for information;
  - (iv) gather support amongst actors (in particular, veto actors), the absence of which can erode the perceived legitimacy of the competition authority; and
  - (v) help spread competition culture among external stakeholders and the general public.
24. However, the ICN AEWG also cautioned that competition authorities be careful when conducting external consultations and considering the responses from such consultations:
- (i) Consultations with different actors may need to be conducted and considered in different ways. This is because not all actors have the same knowledge of the competition authority and its operations, and not all actors need to receive the same information in order to provide meaningful input. Examples of consultation methods include bilateral or multilateral interviews and workshops which can be conducted on an ad-hoc or regular basis.
  - (ii) Inputs can be biased as actors represent their own interests, some of which may be contrary to those of the competition authority. For example, actors may oppose certain enforcement goals.
  - (iii) In summary, the competition authority must, while considering information from actors following external consultations, make the ultimate decision on its strategic enforcement goals. The competition authority should not be totally reliant on inputs from external consultations.
25. Thereafter, draw up a map of actors to determine the relationships between actors and their relative importance to the competition enforcement strategy. The map of actors can be visualised using a semi-circular diagram. In the sample diagram below, actors are represented by circles and oblong rectangles while lines represent relationships between the actors. Veto actors are represented by the letter "V" in a circle. Types of relationships are differentiated by line style (e.g., dotted, double lines), and the relative importance of an actor is differentiated by the size of the circle.



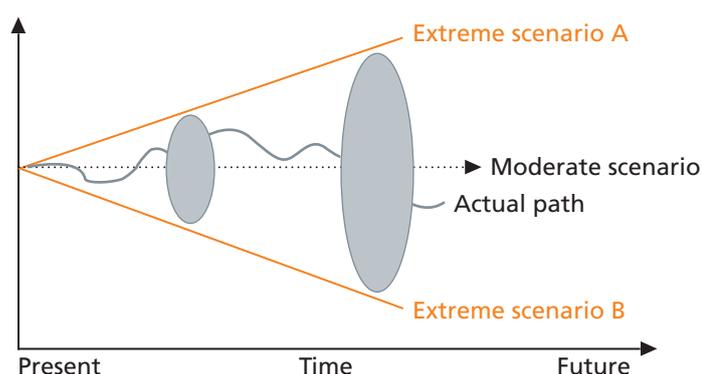
**Figure 7:** Stakeholder Relationship Mapping

- 26. Competition authorities should also rely on previous iterations of the map of actors for comparison purposes, and to evaluate the accuracy of perspectives/assumptions relied upon when drafting the map of actors. For example, previous versions of the map of actors may have been drawn up when formulating and introducing competition legislation.
- 27. **Scenario Planning.** Scenarios help describe and compare various paths towards competition enforcement. Unlike forecasting, scenario planning does not attempt to predict the future, but seeks to identify future events and developments involving the competition authority and the map of actors. In other words, scenario planning creates a link between the uncertainty of the future when competition enforcement commences, and the need to take decisions on competition enforcement strategy today.
- 28. Evaluate the information on the general conditions in the jurisdiction and map of actors in terms of their importance and the probability that they will occur.

<b>Importance</b>	High	Volatile trends and key factors (including negative factors)	Major Known factors that must be taken into account
	Low	Volatile trends that have little effect right now	Factors that today are largely known but have no effect
		Low	High
<b>Probability</b>			

**Figure 8:** Scenario Planning Matrix

29. Thereafter, focus on factors that are high in importance first and consider how they will influence future competition enforcement developments, e.g., government agencies/regulators opposing competition enforcement actions taken by the competition authority in certain markets or on certain industry players. Once that is done, proceed to identify four to six main factors.
30. Thereafter, formulate two coherent, plausible visions of the future in the form of two contrasting scenarios – a best-case scenario and a worst-case scenario, based on the identified main factors. A third “probable” scenario can also be drafted based on these two extremes. Each scenario should present a vision of a possible future that is plausible (that can happen), coherent (that is logical), and credible (that can be explained).



**Figure 9:** Contrasting Scenarios

31. Likewise, these scenarios are approximations based on existing knowledge and experience of the individuals or groups who devise them. Competition authorities should therefore validate the accuracy of the perspectives/assumptions. For example, competition authorities can look “outwards” and consider the early enforcement experience of other competition authorities from comparable jurisdictions.
32. **SWOT Analysis.** Lastly, proceed to conduct a Strengths, Weaknesses, Opportunities and Threats (“**SWOT**”) analysis to assess the competition authority’s capacity for competition enforcement.
33. The main factors that define what a competition authority can do are its competency and power.
34. The competition authority should consider its organisational strengths and weaknesses. There are two main types of resource constraints: financial and human . These constraints influence the possibility of implementing the competition enforcement strategy and the attainment of the planned goals:
- (i) 63% of young competition authorities that responded to a 2019 ICN survey on their competition enforcement experience acknowledged that they experienced challenges relating to financial resources. Additionally, Kovacic (1997) observed that most transition economy governments have fewer resources to fund new competition authorities. Financial resources are required to hire sufficient personnel, consult with outside experts, and fund the physical and information technology infrastructures required to implement the competition enforcement strategy.
  - (ii) 59% of young competition authorities that responded to the 2019 ICN survey on their competition enforcement experience acknowledged that they experienced challenges relating to human resources. Additionally, Kovacic (1997) observed that new transition economies do not enjoy a vast pool of specialists with academic training or practical experience in the law or economics

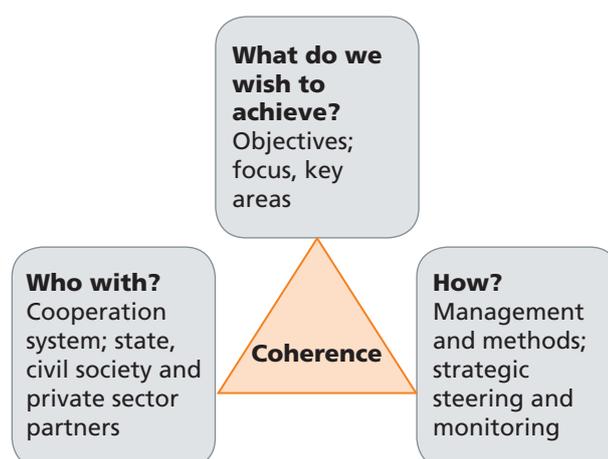
of competition policy. At best, a new competition authority can hope to start with a handful of professionals with relevant experience who can guide the activities of colleagues who are completely new to the field. Other examples of limitations related to human resources include the number of staff, the ease with which the competition authority can hire or dismiss staff, the composition of staff, and staff development.

35. The competition authority should also consider the strengths and weaknesses of the competition legislation, from which it derives its competition enforcement powers. For example, while powers to conduct unannounced searches allow the competition authority to gather more complete evidence from potential cartelists in a timely manner, the exercise of such powers are not without drawbacks. Parties under investigation may raise judicial challenges against the exercise of such powers – particularly in terms of scope, relevance and reasonableness. And where successful challenges are mounted, the competition authority’s latitude to design and implement its enforcement procedures may be restricted by the courts.
36. The competition authority should consider how it can best exploit the opportunities and mitigate the threats that arise from actors, trends and general conditions in the jurisdiction. Using the same example on the exercise of powers to conduct unannounced searches in the earlier paragraph, the competition authority should weigh the costs and benefits of exercising such powers against other information gathering options (such as conducting searches with notice or conducting simultaneous formal interviews with key personnel who have knowledge of the cartel activity, depending on the scope of such powers) to determine the best course of action.

#### b) Step 2: Devise Options for Competition Enforcement Strategic Plan

37. Strategic options cannot be merely inferred from the analysis in step 1. They are rather the result of an intentional creative act. Strategic options should be ambitious, and should not be constrained by potential limitations caused by a lack of resources or resistance. That said, they should not drift into the realm of being completely unrealistic.
38. **Discretionary versus non-discretionary activities.** It is important to note at this juncture that competition laws may impose mandatory obligations on competition authorities to investigate certain types of conduct or agreement i.e. non-discretionary activities. As such, this can limit the possibility for competition authorities to plan their “discretionary enforcement activities”, and consequently the strategic options available to them.
39. Examples of non-discretionary activities include:
  - (i) A mandatory merger notification regime where competition authorities are obliged to review notifiable mergers. Competition authorities may be required to complete their review within a stipulated time frame.
  - (ii) Conducting market studies or investigations when requested by the government or the Minister.
40. Nevertheless, the ICN AEWG observed that many competition authorities faced with a high proportion of non-discretionary activities develop tools for achieving some flexibility. For example, many competition authorities introduced simplified procedures to deal with some non-discretionary matters that are unlikely to raise competition concerns. Like financial and human resource constraints, competition authorities should take non-discretionary activities into consideration when devising strategic options.

41. When devising options, the possible traps are too little diversity, too little ambition and goals that are too modest. Ideally, both officers at the leadership and staff levels should be involved in devising these options. Without strong support from the leadership, the strategic planning exercise will be treated as bureaucratic “make-work”, and will not draw support from staff. Similarly, strategic planning will acquire legitimacy only if staff understand the value and are committed to the competition authority’s enforcement goals. The ICN AEWG observed the following:
- (i) In top-down planning systems, a broad policy framework is developed by the leadership in consultation with the senior managers who head up the various departments of the competition authority. Staff involvement is also possible; for example, staff can be consulted through middle management.
  - (ii) In bottom-up planning systems, issues originate at the staff level and would then be approved by the leadership. Ideas are gathered from the lower levels, and work their way up to the leadership.
42. The “triangle of coherence” is a working aid that a competition authority can utilise when designing strategic options. Coherent answers to these three basic questions will make a strategic option clear and convincing.



**Figure 10:** Triangle of Coherence

43. Strategic options should describe different ways of achieving competition enforcement goals. The following working aid will help depict the key characteristics of each strategic option in a uniform manner.

Strategic options	Description			
	Symbol/image	Work packages	Key actors	Processes (output/cooperation/ learning/support and/or steering processes) that provide a good starting point
Heading for strategic option 1				
Heading for strategic option 2				
Heading for strategic option 3				
...				
...				

Figure 11: Strategic Options Matrix

### c) Step 3: Decide on an Option for the Competition Enforcement Strategic Plan

44. The first step is to agree on the assessment criteria. The assessment criteria will vary, depending on the context, and should be agreed between the decision makers. They could include:
- (i) Willingness of the key actors to cooperate;
  - (ii) Feasibility of the strategic option against the backdrop of the general conditions in the jurisdiction;
  - (iii) Feasibility of the strategic option against the backdrop of the capacities within the competition authority;
  - (iv) Compatibility of the strategic options with enforcement goals;
  - (v) Risk probability;
  - (vi) Funding required; and
  - (vii) Compatibility with the over-arching government strategy.
45. Where possible, assign benchmarks for the assessment criteria using the following working aid.

	Assessment criterion A	Assessment criterion B	Assessment criterion C	Assessment criterion D	Assessment criterion E	Etc. ...
Strategic option 1						
Strategic option 2						
Strategic option 3						
Etc. ...						

Figure 12: Strategic Options Assessment Matrix

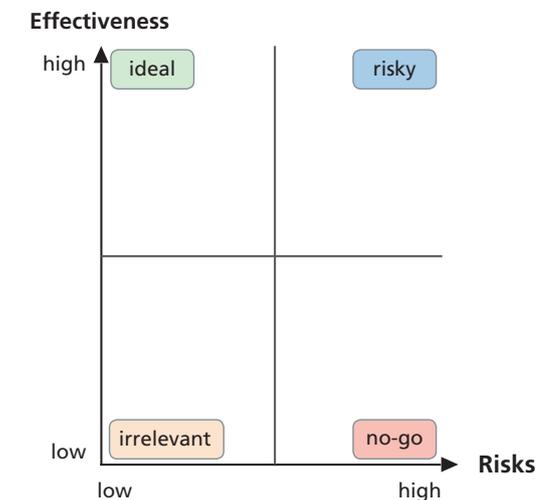
46. Rating systems, e.g., traffic light system or a scale from 0 to 10 can be used to facilitate the assessment.
47. Thereafter, assess the strategic options, considering their advantages, disadvantages, results, and the risks anticipated. The following risk assessment matrix can be utilised in addition to the assessment criteria matrix above.

**Ideal:** Effective results with low risk:  
ideal scenario

**Risky:** Effective results with high risk:  
risky scenario that requires  
precautionary risk-management  
measures to be taken and cut-off  
points to be defined

**Irrelevant:** Less effective, low-risk results:  
these options represent less-relevant  
alternatives that could still be  
implemented, however

**No go:** Less effective, high-risk results:  
these options are to be avoided



Working aid 6: Effectiveness/risk matrix

**Figure 13: Effective/Risk Matrix**

48. After setting out and assessing all possible strategic options, decision makers in the competition authority will need to ask themselves which strategic option will enable its competition enforcement activities to achieve the maximum effect with its limited resources.

#### d) Step 4: Elaborate on the Competition Enforcement Strategic Plan

49. The ICN AEWG recommends that a competition enforcement strategic plan should comprise of the following:
- Address each aspect of the competition authority's activities including merger review, cartel enforcement, unilateral conduct and other conduct investigations.
  - Contain a clear statement of the priorities for the period covered by the competition enforcement strategic plan.
  - Provide an indication of how resources will be allocated.
  - Identify how the competition enforcement strategic plan can be evaluated to measure progress made towards achieving the objectives (refer **Module E1: Institutionalising the Review of the Competition Enforcement Strategy**).
  - Allow for flexibility for the competition authority to react to unexpected events while, at the same time, ensuring continuity over the intended implementation period of the competition enforcement strategic plan.
50. It is also important to identify a planning horizon i.e. a time period for which the general strategic plan is envisioned to apply. The ICN AEWG observed that:

- (i) Some competition authorities have a multi-year strategy document, e.g., five years, or the duration of the key senior management officers or board members' mandate(s).
- (ii) Other competition authorities combine long-term multi-year plans (two to five years) with a short-term or medium-term plan sometimes called a work programme, which covers a shorter time period, e.g., a 12- to 18-month period.
- (iii) There are also competition authorities that engage in strategic planning annually or over other shorter time frames.
- (iv) Lastly, for some competition authorities, the design of their work programme is part of the national budgeting cycle, and constitutes a bid for resources on the part of the competition authority. In such cases, the timeline follows the national budgeting cycle.

## e) Step 5: Operationalising the Competition Enforcement Strategy

51. The competition enforcement strategy should be implemented reasonably close to the completion of the competition enforcement strategic planning cycle. This is so that the competition enforcement strategy does not risk being out-of-date even before being implemented.
52. Refer to **Module C2: Preparing to Implementing the Competition Enforcement Strategy** for details on how to operationalise the competition enforcement strategy.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Formulating the Competition Enforcement Strategy	ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy	<a href="http://asean.org/wp-content/uploads/2012/05/ASEAN-Self-Assessment-Toolkit-ver-Upload_3May17.pdf">http://asean.org/wp-content/uploads/2012/05/ASEAN-Self-Assessment-Toolkit-ver-Upload_3May17.pdf</a>
ICN	Formulating the Competition Enforcement Strategy	Agency Effectiveness Working Group's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation"	<a href="http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf">http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf</a>
ICN	Formulating the Competition Enforcement Strategy	Lessons to be learnt from the experience of young competition agencies	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf</a>
GIZ	Setting the Goals for Competition Enforcement and Formulating the Competition Enforcement Strategy	"Cooperation Management for Practitioners: Managing Social Change with Capacity WORKS" Toolkit	<a href="https://www.springer.com/gp/book/9783658079048">https://www.springer.com/gp/book/9783658079048</a>
William E. Kovacic (1997)	Setting the Goals for Competition Enforcement and Formulating the Competition Enforcement Strategy	Getting Started: Creating New Competition Policy Institutions in Transition Economies	<a href="https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/">https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/</a>
William E. Kovacic, Hugh M Hollman and Patricia Grant (2011)	Setting the Goals for Competition Enforcement	How does your competition agency measure up?	<a href="https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf">https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf</a>

## Module C2: Preparing to Implementing the Competition Enforcement Strategy

### Key Points

- The competition enforcement strategy should be effectively communicated to both external and internal stakeholders. Mission and vision statements are examples of implementation initiatives that cut across both groups of stakeholders.
- Guidelines that set out how the competition authority will interpret the generally applicable competition law provisions, and/or intends to enforce the law to specific markets and situations, should be published.
- Internal procedure manuals that translate the conceptual frameworks in the guidelines into operational criteria and internal protocols should be drafted and promulgated within the competition authority.
- A plan of operations identifying the key packages of tasks, decisions, responsibilities and milestones for implementing the competition enforcement strategy should also be drafted and promulgated within the competition authority.
- Capacity building initiatives, and knowledge management systems will ensure that individual staff expertise are turned into accessible, institutional assets for current and future staff at the competition authority.

1. The contents of this module are largely adapted from ICN AEWG's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation", the ICN Recommended Practices for Investigative Process, the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN; and the GIZ's "Cooperation Management for Practitioners: Managing Social Change with Capacity WORKS" Toolkit.
2. This module picks up from **Step 5: Operationalising the competition enforcement strategy** in Module C1: **Formulating the Competition Enforcement Strategy**.
3. Importantly, the competition enforcement strategy should be implemented reasonably close to the completion of the competition enforcement strategic planning cycle. This is so that the competition enforcement strategy does not risk being out-of-date even before being implemented.
4. The contents of this module are divided into two categories of initiatives that competition authorities should implement when operationalising the competition enforcement strategy: "external-facing implementation initiatives" and "internal-facing implementation initiatives".

### External-Facing Implementation Initiatives

5. The ICN AEWG highlights the following benefits of communicating the implementation initiatives externally:
  - (i) Contributes to the competition authority's accountability: if it is known what the competition authority plans to do, it can be held accountable if the plans/objectives are not met.
  - (ii) Paves the way for successful advocacy efforts and the promotion of competition culture by raising awareness.

- c. Encourages/stimulates compliance, e.g., by announcing that the competition authority is planning to step up its fight against cartels may serve as a wake-up call to businesses.
6. We highlight the common external-facing implementation initiatives in this section. It is important to note at this juncture that unlike internal-facing implementation initiatives which are targeted at stakeholders within the competition authority i.e. management and staff, external-facing implementation initiatives are targeted at key actors identified using the map of actors tool found in **Step 1: Analyse the Current Situation** of Module C1: **Formulating the Competition Enforcement Strategy**.

#### a) Communication Platforms and Best Practices

7. Competition authorities can rely on one or all of the following platforms to communicate the competition enforcement strategy externally:
- (i) Issuing a press release or publishing an article on the adoption of the competition enforcement strategy;
  - (ii) Publishing the strategic plan on the competition authority's website;
  - (iii) Delivering a public speech on the competition enforcement strategy;
  - (iv) Organising workshops or seminars where the competition enforcement strategy is communicated and discussed; and/or
  - (v) Establishing links with key media personnel who will work with the authority to disseminate the information.
8. The ICN AEWG recommends the following best practices when engaging in external communications:
- (i) Adapting the communication message to suit different target groups such as consumers, industry players, or the legislative body. For example, some competition authorities host or participate in workshops or seminars that are tailored to each separate target group.
  - (ii) Setting up a specialised communication team (often recruited from communication specialists more than competition specialists). Competition authorities that do not have sufficient financial resources can consider working with other public bodies to help with the expenses. That said, the ICN AEWG also noted that many competition authorities are also able to effectively communicate their strategy without specialised communication teams.

#### b) Mission and Vision Statements

9. **Mission.** A mission statement defines the competition authority's purpose, and the overarching goals that the competition authority seeks to achieve. Competition authorities should ensure that the goals for competition enforcement are aligned with their mission statement. The ICN AEWG highlighted the following defining features of an effective mission statement:
- (i) Clearly articulated;
  - (ii) Consistent with the competition authority's legislative mandate;
  - (iii) Focuses on outcomes (such as consumer welfare) rather than outputs (such as the number of enforcement cases commenced/concluded);
  - (iv) Enjoys broad-based support over the long-term reflecting common values;

- (v) Sufficiently broad and flexible to allow the competition authority to respond to new issues and changing market conditions; and
- (vi) Consistent with the competition authority's skills and resources.
10. Externally, a mission statement furthers transparency and legitimacy as it helps external stakeholders understand the competition authority's purpose. While the mission statement is categorised as an "external-facing" implementation initiative, it should also be communicated effectively within the competition authority. The ICN AEWG highlighted three internal actors-related benefits of having a mission statement:
- (i) Provides the basis for formulating more specific strategic enforcement goals.
  - (ii) Helps the competition authority select and prioritise their activities and thereby prevent spending resources on enforcement activities that are not aligned with the strategic enforcement goals.
  - (iii) Helps the competition authority's staff understand how their day-to-day work fits into the competition authority's "bigger picture", thereby motivating and guiding their activities.
11. **Vision Statement.** While a mission statement determines the competition authority's purpose, a vision statement defines what it intends to become in the future. For external stakeholders, it shapes their understanding of why they should collaborate with the competition authority. For staff, it gives a direction about how they are expected to behave, and inspires them to give their best.
12. Ideally, the competition authority's mission and vision statements should reflect its competition enforcement goals. The table below sets out mission and vision statements from some of the ASEAN competition authorities.

Competition Authority	Mission Statement	Vision statement	Link
Brunei The Department of Competition and Consumer Affairs, Department of Economic Planning Development (DEPD) in the Ministry of Finance and Economy	Competition Developing a more efficient market through deterring anti-competitive conducts and fostering competition.	Efficient market and enhanced consumer welfare.	<a href="http://www.depd.gov.bn/SitePages/Competition%20and%20Consumer%20Affairs.aspx">http://www.depd.gov.bn/SitePages/Competition%20and%20Consumer%20Affairs.aspx</a>
Indonesia Indonesian Competition Commission (ICC) [Formerly known as the Commission for the Supervision of Business Competition (Indonesian acronym: KPPU)]	<ul style="list-style-type: none"> <li>- Advocacy of fair competition values;</li> <li>- Enforcing competition law;</li> <li>- Supervising the implementation of partnership between large companies and MSMEs;</li> <li>- Implementing good governance principles;</li> <li>- Building sustainable synergies with our stakeholders.</li> </ul>	Guarding fair competition and partnership to create sustainable and equitable economic condition which will improve people's prosperity.	<a href="https://www.kppu.go.id/tentang-kppu/visi-dan-misi/">https://www.kppu.go.id/tentang-kppu/visi-dan-misi/</a>
Malaysia Competition Commission	To execute our mandate efficiently and effectively with a commitment to ensure a conducive competition culture to make markets work well for consumers businesses and the economy.	To be the leading competition authority in Malaysia.	<a href="https://www.mycc.gov.my/corporate-info">https://www.mycc.gov.my/corporate-info</a>

Competition Authority	Mission Statement	Vision statement	Link
Philippine Competition Commission	The Philippine Competition Commission (PCC) shall prohibit anti-competitive agreements, abuses of dominant position, and anti-competitive mergers and acquisitions. Sound market regulation will help foster business innovation, increase global competitiveness, and expand consumer choices to improve public welfare.	The Philippine Competition Commission (PCC) aims to be a world-class authority in promoting fair market competition to help achieve a vibrant and inclusive economy, and advance consumer welfare.	<a href="https://phcc.gov.ph/about-us/phcc-mission/">https://phcc.gov.ph/about-us/phcc-mission/</a>
Competition and Consumer Commission of Singapore	Making markets work well to create opportunities and choices for businesses and consumers in Singapore.	A vibrant economy with well-functioning and innovative markets.	<a href="https://www.cccs.gov.sg/about-cccs/what-we-do/vision-mission-values">https://www.cccs.gov.sg/about-cccs/what-we-do/vision-mission-values</a>

**Figure 14:** Competition Authorities' Mission and Vision Statements

### c) Guidelines

13. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN recommend that a competition authority develop and publish a set of interpretative measures, usually in the form of guidelines. These guidelines should set out how the competition authority will interpret the generally applicable competition law provisions, and/or intends to enforce the law in specific markets and situations.
14. In preparing these guidelines, Kovacic (1997) highlighted that the process forces the new competition authority to understand and resolve issues concerning how to translate and interpret competition enforcement concepts to practice.
15. The following benefits are enumerated in the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN:
  - (i) Binding the competition authority to respect enforcement criteria established in advance, guaranteeing consistent application of competition law;
  - (ii) Providing businesses with a better understanding of how the law has been and will be applied in specific instances, thus facilitating self-compliance.
16. The following international best practices and experience on the contents covered by guidelines are observed in the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN:
  - (i) Procedural aspects, such as the notification of mergers or agreements; the handling of complaints; the conduct of proceedings; leniency programmes; application of fines and other remedies;
  - (ii) Vertical restriction of competition (i.e., different type of distribution contracts and clauses);
  - (iii) Specific forms of abuses of dominance / monopolisation (e.g., exclusionary practices, such as refusal to deal; predatory pricing; tying); and
  - (iv) Different aspects of merger control (such as jurisdiction and scope of application; application of remedies etc.).
17. As to the structure of content in each set of guidelines, the following substantive aspects are observed:

- (i) A general explanation of the object and scope of the main competition law provision;
- (ii) A list of practices which are likely to fall within the scope of the application of the relevant provision;
- (iii) A list of practices which are likely to fall outside the scope of the application of the relevant provision;
- (iv) An explanation of how the competition authority has interpreted and/or will interpret a relevant provision in specific cases. This part will generally refer to the competition concerns and the possible benefits derived from the anti-competitive practices.

### Internal-Facing Implementation Initiatives

18. The goal of internal-facing implementation initiatives is to communicate the competition enforcement strategy to ensure that management and staff at the competition authority are aware of, and aligned with the plan when implementing the operations. The ICN AEWG highlights the following benefits of effective internal communications:

- (i) Makes it easier to translate the competition enforcement strategy into specific projects. It helps staff know what they need to do, or what resources will be required to deliver the performance management expects.
- (ii) Informed and motivated staff are more effective and may require less monitoring to ensure that they contribute to the attainment of the objectives of the competition authority. This contributes to sustainable performance.

19. We highlight the common internal-facing implementation initiatives in this section.

#### a) Communications Platforms and Best Practices

20. Competition authorities can rely on one or all of the following platforms to communicate the competition enforcement strategy:

- (i) Special agency-wide events to discuss and disseminate the strategy, e.g., annual town halls, staff events, annual days, away days or retreats. Additionally, events such as these allow management to gather input from staff, thereby facilitating staff participation in the process of strategic planning.
- (ii) Intranet pages announcing and summarising the strategy. Some competition authorities make the strategy the “default homepage” on the intranet, while others publish the strategy as “screensavers” on staff computers.
- (iii) Emails that disseminate and explain the strategy.
- (iv) Select enforcement projects as “show-pieces” that link the principles of the strategy with its implementation.

21. The ICN AEWG recommends the following best practices when engaging in internal communications:

- (i) The leadership should communicate the competition enforcement strategic plan to staff implementing the plan. The leadership should set the tone for how staff should execute the plan of operations.
- (ii) Keep the communications simple. Staff should not be inundated with vast quantities of information.

- (iii) Setting up a team that focusses on communicating the strategy. Some competition authorities use the same team for external and internal communications, while others use the human resource team, the management team, or a combination of these.

## b) Plan of Operations

22. A plan of operations is a document that identifies key packages of tasks, decisions, responsibilities and milestones for implementing the competition enforcement strategy over a specific time frame. A time frame of one year is generally advisable.
23. The plan of operations essentially sets out who will do what and when. The following working aid will help provide a rough overview of the milestones where tasks need to be carried out.

Plan of milestone				
Work packages	Activities	Milestone (point in time)	Responsibility	Resources & Budget

**Figure 15:** Plan of Milestones

24. In some cases, a planned milestone will suffice for implementation. The following working aid is a more detailed version that documents the specific activities that have to be executed in order to achieve the planned milestones.

Plan of operations - Planning period:																				
Project/line of action/work package ResultL												Use of resources								
#	Activity	Indicator/ interim results	Schedule												Responsible	Personnel - from the project - other personnel		Cost of materials	Other costs	Comments
			J	F	M	A	M	J	J	A	S	O	N	D		Project	Additional personnel			
...																				
...																				
...																				
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Figure 16: Plan of Operations

25. The plan of operations will provide an important basis for implementation and for monitoring the effectiveness of the enforcement strategy (refer to Module E: **Ongoing Review of the Competition Enforcement Strategy** below).

**c) Internal Procedure Manuals**

26. The ICN Recommended Practices for Investigative Process recommends that competition authorities document their internal procedures and practices in internal procedure manuals. The following benefits are enumerated:

- (i) Supports informed decision making;
- (ii) Improves the quality of enforcement actions;
- (iii) Increases likelihood of effective enforcement outcomes; and
- (iv) Strengthens the competition authority’s credibility.

27. An Internal procedure manual serves the purpose of translating the conceptual framework found in the **Module C2: Preparing to Implementing the Competition Enforcement Strategy: External-Facing Implementation Initiatives: Guidelines** into internal operational criteria i.e. the “nuts-and-bolts” of how the competition authority’s staff will apply the competition enforcement concepts in practice. It is therefore important that the procedures set out in these manuals do not contradict the guidelines.

28. These manual should be drafted, updated regularly (based on enforcement experience and international best practices) and made available to all staff. They ensure that the enforcement processes are applied consistently by all enforcement staff and that enforcement is conducted impartially.
29. For example, the ICN Recommended Practices for Investigative Process recommends that an internal procedure manual on investigation procedures dictate that investigation teams maintain a thorough case file or record during the investigation (including relevant evidence, correspondence, and analysis to support informed decision making). All evidence and information, whether exculpatory or inculpatory, obtained during an investigation should receive appropriate consideration during the decision-making process. Parties under investigation should also be provided with an opportunity to address the merits of an investigation, and to respond to allegations of infringement prior to the issuance of a decision by the competition authority. Sufficient time must also be set aside for these parties to make meaningful submissions to the competition authority, and the investigation team and key decision makers at the competition authority should review these submissions.
30. Similarly, Kovacic (1997) recommended that these internal procedures contain internal protocols and operational criteria which consist of methodologies, check-lists, and other highly practical guides for staff to utilise in gathering and interpreting information about specific business practices or agreements that may be anti-competitive. For example, the competition authority could prepare an investigation protocol that a lawyer or an economist could use for market definition. The internal protocol would suggest questions that the staff might pose in an interview with industry participants, or identify data sources that the staff should consult and review.
31. Lastly, these internal procedure manuals should be underpinned by strong principles of ethics and integrity. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN recommend the development and inculcation of staff ethics and integrity, considering that the daily management of competition enforcement activities has inherent risks related to information leaks and conflicts of interest. Rules and checks should be developed on staff ethics and integrity. The following aspects are of particular relevance:
  - (i) Ethics should be perceived as a basic organisational value;
  - (ii) The competition authority needs to establish an easily accessible code of ethics;
  - (iii) Staff particularly those more involved with potential conflicts of interest and/or dealing with sensitive and confidential information – should receive adequate and regular training;
  - (iv) Staff ethics should be assessed as part of each member’s annual review, as well as part of the daily communication within the organisation;
  - (v) A recording system should be established in which case handlers taking up any new file or duty, fill in specific standard forms; and
  - (v) Clear rules on confidentiality should be established for staff leaving the organisation.

#### **d) Prioritisation Framework**

32. A prioritisation framework is also an important aspect when operationalising the competition enforcement strategy:
  - (i) It helps the competition authority deliver on the objectives it has set forth in its strategic plans (including the competition enforcement strategy).
  - (ii) It allows the competition authority to establish an optimal portfolio of activities.

(iii) It provides a mechanism to help the competition authority allocate resources to the most relevant projects (including competition enforcement-related projects, e.g., investigations, market studies, and competition-advocacy projects). The ICN AEWG's Competition Agency Manual highlighted that, without exception, there will always be more potential projects that a competition authority could do than the resources available to work on them.

33. Guided by the strategic plan, a prioritisation framework acts as a filter to help a competition authority consider each case/project in light of its overall portfolio and resources. This is represented diagrammatically below.



Figure 17: Prioritisation Framework

34. The common prioritisation frameworks are set out in the following modules: **Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition**, **Module C4: Common Implementation Feature – Sector Prioritisation**, and **Module C5: Common Implementation Feature – Case Prioritisation**.

#### e) Capacity Building

35. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN observed that a new competition authority faces a major constraint when hiring staff. Kovacic (1997) similarly observed that new transition economies do not enjoy a vast pool of specialists with academic training or practical experience in the law or economics of competition policy. At best, a new competition authority can hope to start with a handful of professionals with relevant experience who can guide the activities of colleagues who are completely new to the field.

36. As such, a competition authority's effectiveness can be affected by skills shortages (such as where case handlers have limited or no experience of competition law and economics), low public-sector pay and risks of corruption and regulatory capture. These issues are of particular relevance for new, smaller competition authorities, as they are especially vulnerable to losing qualified staff to the private sector (as initially there are only a small number of qualified professionals available) and high employee turnover can create serious issues for institutional continuity.

37. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN recommends the adoption of the following measures to balance the above-mentioned risks and increase staff competencies:
- (i) Long term staff: maintaining long-term careers within the competition authority (by avoiding short-term staff rotation with other governmental agencies) contributes to developing internal competencies and know-how. This step avoids experience being lost through staff turnover and/or rotation. By contrast, some internal staff rotation (i.e. within a department) helps share knowledge within the organisation and ensures that regulatory “capture” is restricted to the minimum. In this respect, it is particularly appropriate that adjudicators are changed through a staggered office-tenure system;
  - (ii) Targeted training (described further below) and, in the longer run, strong relationships with academic institutions such as universities;
  - (iii) Team building: competition law case work is handled through team work and staff should be prepared and trained to work in teams. To minimise unhealthy rivalry between staff, tasks should be assigned in a clear and fair way by taking into account each staff member’s skills and experience. It is important that the priorities of the organisation are perceived as the individual staff member’s priorities. In this context, it is useful to design a career review system, which takes account of each staff member’s contribution to common objectives, as well as to cases assigned to each case handler.
38. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN also recommend regular staff training. Training should be conducted both in the form of general and practical training.
39. General training should involve:
- (i) The basic legal principles of competition law;
  - (ii) The economic (in particular, microeconomic) concepts underlying the application of the competition law framework; and
  - (iii) The procedural framework for competition enforcement (e.g., the competition authority’s powers and obligations, the parties’ rights etc.).
40. Practical training might take the form of case studies or specific role playing or problem solving exercises based on common competition issues.
41. As training resources are scarce, new competition authorities should consider relying on technical assistance programmes from developed countries and cooperation programmes with other developing countries or transitional economies. General training is also available via organisations like the International Competition Network and the OECD.

**India**

For the Competition Commission of India, Enforcement of the Competition Act requires officers proficient in Competition Law to carry out complex investigations of competition cases and effective enforcement. It is expected that officers having prior knowledge in field of Competition Law and Economics would join CCI. Since competition law in India is at nascent and developing phase, very limited formal courses are available in field of Competition law and Economics. Therefore, most of new officers join CCI without prior formal degree in competition law.

To combat this challenge, the Competition Commission of India (CCI) has been regularly conducting training programs & workshops for newly inducted officers and also arranging various capacity building programs for senior officers of the Commission. These programs are conducted by international staff/experts from overseas multilateral agencies and competition authorities, as well as domestic experts and organizations specialized in the field of Competition law and economics. CCI holds in-house training and peer to peer sessions to ensure interdivision sharing of knowledge and information.

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

*Source: ICN, Lessons to be learnt from the experience of young competition agencies*

**Case Study 2: Capacity Building (India)****f) Knowledge Management System**

42. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN recommend that competition authorities set up a knowledge management system. In the context of staff turnover, it is important that as much individual staff expertise (such as know-how and experience) is turned into an accessible, institutional asset now and in the future. Expertise acquired in previous cases should be available to other current and future staff. This institutional knowledge management requires developing tools facilitating easy access to precedents (in particular by junior staff), while ensuring confidentiality of information where necessary.
43. Similarly, Kovacic (1997) observed that in a number of new competition authorities, the first generation of leaders and staff have moved on to private sector jobs in which they appear before the competition authority or the courts on behalf of business clients. As personnel can change frequently, it is therefore important to develop manuals to ensure that valuable institutional know-how does not “leave the competition authority” with management and staff resignations.
44. The Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN recommend the following features for knowledge management system:
- (i) an Intranet;
  - (ii) electronic document management and document-flow systems (all the case documents are entered and registered);
  - (iii) specific applications to facilitate storing, retrieving and sharing large volumes of data (e.g., in the framework of an investigation or for merger control purposes);

- (iv) the use of shared folders; and
- (v) a central unit or contact person(s) in charge of knowledge management.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	External-Facing Implementation Initiatives and Internal-Facing Implementation Initiatives	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN	<a href="https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf">https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf</a>
GIZ	Internal-Facing Implementation Initiatives	“Cooperation Management for Practitioners: Managing Social Change with Capacity WORKS” Toolkit	<a href="https://www.springer.com/gp/book/9783658079048">https://www.springer.com/gp/book/9783658079048</a>
ICN	External-Facing Implementation Initiatives	ICN Agency Effectiveness Working Group’s “Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation”	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/</a>
ICN	Internal-Facing Implementation Initiatives	Lessons to be learnt from the experience of young competition agencies	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf</a>
ICN	Internal-Facing Implementation Initiatives	ICN Recommended Practices for Investigative Process	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf</a>
William E. Kovacic (1997)	External-Facing Implementation Initiatives and Internal-Facing Implementation Initiatives	Getting Started: Creating New Competition Policy Institutions in Transition Economies	<a href="https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/">https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/</a>

## Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition

### Key Points

- Competition authorities should consider phasing competition enforcement by type of competition law prohibitions.
- The prohibition of anti-competitive agreements may be introduced first, or together with the prohibition of abuse of dominant position, and the prohibition of anti-competitive mergers may be introduced last.
- A phased implementation of competition law prohibitions can help a resource-limited competition authority get up to speed with the basics of competition enforcement, gaining experience before pursuing enforcement initiatives that are more technically advanced and resource intensive.
- Transitional provisions can be introduced to give businesses more time to renegotiate their agreements or restructure their business operations to comply with competition law.

1. The contents of this module are largely adapted from the ASEAN Regional Guidelines on Competition Policy and the Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN.
2. This module discusses how phasing by type of competition law prohibition and implementation of transitional provisions work when prioritising competition enforcement. It also explores the reasoning behind why competition authorities choose to phase enforcement and looks at the experience of those that have done so.

### Phased Implementation by Prohibitions

3. The ASEAN Regional Guidelines on Competition Policy recommend that ASEAN Member States consider implementing competition law in phases. For example, the different prohibitions may be implemented in phases within a realistic time-frame, the prohibition of anti-competitive agreements may be introduced first, or together with the prohibition of abuse of dominant position, and the prohibition of anti-competitive mergers may be introduced last, because of the complexity in analysing merger cases.
4. The Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN highlights that essentially competition law has two primary objectives, to ensure that businesses:
  - (i) Compete for customers based on price, quality, service, convenience and other desirable qualities; and
  - (ii) Do not take actions (other than producing, cheaper, better products and services) intended to eliminate competitors or prevent new businesses from becoming competitors.
5. The Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN defines these two objectives as the basis of competition law, and constitute the aspects that competition authorities must first take into account when introducing competition law for the first time. The first objective is met by enforcing the prohibition against anti-competitive agreements,

while the second objective is met by enforcing the prohibition against the abuse of a dominant position. Merger control (i.e. the prohibition against anti-competitive mergers or acquisitions) is generally considered the “third pillar” of competition law.

6. The Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN cite the example of the European Union, which did not have merger control for a long time and dealt with anti-competitive mergers under the two basic prohibitions of anti-competitive agreements and abuse of dominance. It later introduced merger control without a specific legal basis in the EU Treaties, with reference to its Treaty Articles on anti-competitive agreements and abuse of dominance. Furthermore, the Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN observe that the implementation of a merger control system is very costly and labour intensive. It involves technical economic analysis of the likelihood of what will happen in the future market place. Such an approach was adopted by the EU (as described above) and Indonesia, which established a merger review programme after over ten years from first introducing competition law.
7. In summary, a phased implementation of competition law prohibitions can help a resource-limited competition authority get up to speed with the basics of competition enforcement, gaining experience before pursuing enforcement initiatives that are more technically advanced and resource intensive.

### **Singapore**

'Sir, we will implement the competition law in phases. The phased approach will allow time for the Commission and for businesses to prepare for the implementation of the law. In the first phase which will commence on 1st January 2005, only the provisions establishing the Commission will come into force. There will then be a 12-month transition period before the provisions on anti-competitive agreements, decisions and practices; abuse of dominance; enforcement; appeals processes; and the other miscellaneous areas which will take effect on 1st January 2006. This would be the second phase. In the third phase, which is likely to be 12 months thereafter, the remaining provisions relating to mergers and acquisitions, which are more complex and technical, will come into force. During the transitional period, the Commission will carry out more outreach programmes to raise the level of awareness and understanding of the law.'

*Source: Dr. Vivian Balakrishnan, Second reading of the Competition Bill, 19 October 2004*

### **Case Study 3: Phased Implementation by Prohibitions (Singapore)**

### **Transitional Provisions**

8. Relatedly, the ASEAN Regional Guidelines on Competition Policy also note that ASEAN Member States could consider including “transitional provisions” or “sunset clauses”.
  - (i) Transitional provisions refer to legislation provisions governing the application of the new law during a specified period of time, such as providing that the competition authority will not impose any penalties for anti-competitive agreements that took place prior to or soon after the prohibition was introduced, within a specified period of time.
  - (ii) Sunset clauses refer to legislation provisions which may allow the anti-competitive agreement or conduct to enjoy immunity from penalties and sanctions by the competition regulatory body, up to a specified period of time.

9. They are aimed at giving parties in the jurisdiction time to renegotiate their agreements or restructure their business operations to comply with competition law. This is particularly important since their conduct was once permitted or tolerated but which will become prohibited or criminalised when competition law comes into force.
10. Some competition authorities have also provided avenues for businesses to seek further extension of the applicability of the transitional period. For example, the then Competition Commission of Singapore allowed parties to agreements that were made on or before 31 July 2005 and who are unable to comply with the prohibition against anti-competitive agreements in the Competition Act by 30 June 2006 (the transitional period deadline provided by regulations) to apply for more time to comply. The prohibition against anti-competitive agreements came into force on 1 January 2006.

### **Philippines**

Sec. 53. Transitional Clause. — In order to allow affected parties time to renegotiate agreements or restructure their business to comply with the provisions of this Act, an existing business structure, conduct, practice or any act that may be in violation of this Act shall be subject to the administrative, civil and criminal penalties prescribed herein only if it is not cured or is continuing upon the expiration of two (2) years after the effectivity of this Act: Provided, That this section shall not apply to administrative, civil and criminal proceedings against anticompetitive agreement or conduct, abuse of dominant position, and anti-competitive mergers and acquisitions, initiated prior to the entry into force of this Act: Provided, further, That during the said two (2)-year period, the government shall undertake an advocacy program to inform the general public of the provisions of this Act.

*Source: Philippine Competition Act*

#### **Case Study 4: Transitional Provisions – Transitional Clause (Philippine)**

11. Based on competition agencies' enforcement experience, businesses have sought to rely on arguments that their conduct fell within the transitional period and therefore should not have been penalized for infringing competition law. As such, competition authorities should also ensure that the end of the transitional period is communicated clearly and in a timely fashion to businesses.

### **Philippines**

The PCA's 2-year "grace period" for businesses ends on August 8.

The Philippine Competition Act ("PCA") provides for a two-year transitory period to allow companies time to restructure their businesses, change their practices, or revisit their existing contracts and agreements to comply with the provisions of the PCA. This period ends on August 8, 2017. After August 8, any continuing business structure, practice, or agreement that may be in violation of the PCA shall be subject to investigation and prosecution. A person found to be in violation may suffer criminal, civil, and administrative liabilities. Penalties include fines ranging from 100 Million Pesos to 250 Million Pesos, payment of damages, and imprisonment.

*Source: 8 things to know about the Philippine Competition Act by August 8*

#### **Case Study 5: Transitional Provisions – Grace Period (Philippine)**

## Singapore

Modelling agencies' price fixing had adverse effect on market

MONDAY'S report ("Agencies which fixed prices had 'noble goals'") raises several points about the price-fixing case by modelling agencies that were members of the Association of Modelling Industry Professionals (AMIP) with Mr. Calvin Cheng as president. Many of these points have been dealt with by the Competition Appeal Board in its published decision.

The Competition Commission of Singapore is very active in engaging the business community to explain to small and medium-sized enterprises the Competition Act and the sort of compliance programmes they should put in place, so that management and staff do not inadvertently commit illegal anti-competitive activities.

There are many educational and outreach activities with trade associations and businesses to promote awareness of competition law compliance as part of good corporate governance.

We will continue to be active on this front, and we invite any interested association or party to approach us if they need more information.

The Competition Act was enacted in 2004. When the Section 34 prohibition in the Act came into force on Jan 1, 2006, companies were given an additional six-month transitional period to get up to speed on the Act, put in place compliance programmes and terminate their unlawful conduct. The transitional period also allowed businesses sufficient time to discontinue any existing anti-competitive practices. They had immunity from any penalty for infringing activities during the transitional period.

In fact, we did not impose any penalty on a particular modelling agency as it had exited the cartel before June 30, 2006, which fell within the transitional period. The other cartel members under AMIP did not make use of the transitional period and ended their anti-competitive practices only in July 2009, which was more than three years after the period.

Mr. Cheng stated that the intent of the modelling agencies was to raise the rates paid to models. However, the price-fixing agreement increased the prices that customers paid, which also increased the amount of commission due to the modelling agencies. The agencies' actions were found by the Competition Appeal Board to have an appreciable adverse effect on the market. Price fixing is one of the most serious forms of infringement of competition law, and companies should take proactive steps to ensure that their management and staff understand and comply with the law.

*Source: CCS' reply to Straits Times report on 6 May titled "Agencies which fixed prices had 'noble goals'"*

### Case Study 6: Transitional Provisions (Singapore)

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Transitional Provisions	ASEAN Regional Guidelines on Competition Policy	<a href="https://www.asean-competition.org/file/post_image/Regional%20Guidelines%20on%20Competition%20Policy.pdf">https://www.asean-competition.org/file/post_image/Regional%20Guidelines%20on%20Competition%20Policy.pdf</a>
ASEAN	Phased Implementation by Prohibitions	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN	<a href="https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf">https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf</a>
Competition and Consumer Commission of Singapore	Transitional Provisions	CCS's reply to Straits Times report on 6 May titled "Agencies which fixed prices had 'noble goals'"	<a href="https://www.cccs.gov.sg/media-and-consultation/newsroom/forum-letter-replies/ccss-reply-to-straits-times-report-on-6-may-titled-agencies-which-fixed-prices-had-noble-goals">https://www.cccs.gov.sg/media-and-consultation/newsroom/forum-letter-replies/ccss-reply-to-straits-times-report-on-6-may-titled-agencies-which-fixed-prices-had-noble-goals</a>
Philippine Competition Commission	Transitional Period	2017 Annual Report : Mainstreaming Competition Policy, Building Partnerships	<a href="https://phcc.gov.ph/wp-content/uploads/2017/08/2017PCC_AR_LowRes.pdf">https://phcc.gov.ph/wp-content/uploads/2017/08/2017PCC_AR_LowRes.pdf</a>

## Module C4: Common Implementation Feature – Sector Prioritisation

### Key Points

- Competition agencies should consider the views of their key stakeholders, namely, businesses, government, and consumers when determining their sector priorities.
- Internal considerations for sector prioritisation should be based on the associated risks and costs, the institutional significance, and the timeliness of enforcement activities in the sector.
- Sector priorities can be communicated via internally-generated channels, e.g., reports, press releases, and externally-generated channels, e.g., presentations at conferences, interviews with media outlets.
- It is good practice to periodically review the priority status of previously prioritised sectors.

1. The contents of this module are largely adapted from the ICN AEWG Competition Agency Manual.
2. The ICN AEWG defines prioritisation as:

*“the process of translating strategic objectives into operational priorities. It essentially involves deciding which projects or types of projects not to do and which projects or types of projects to do.”*

3. Prioritisation is important because:
  - (i) It helps the competition authority achieve strategic objectives in order to support its mission and vision.
  - (ii) It provides a mechanism for the competition authority to allocate scarce resources, e.g., finances, personnel, to the most relevant projects. The ICN AEWG highlights that, without exception, there are always more potential projects, whether investigations, advocacies or research activities, a competition agency could do than the resources available to pursue them.
  - (iii) It allows the competition authority to establish an optimal portfolio of enforcement and advocacy activities.
4. That said, the ASEAN Regional Guidelines on Competition Policy cautions that the prioritisation framework should not allow for *de facto* exemptions. Even where a sector has been established, the competition authority should maintain its enforcement initiatives in sectors that are not prioritised, within the limits of its resources.

### How to Select Sectors

5. It is useful to consider the selection of sectors for prioritisation from two perspectives: external (i.e. outside of the competition authority) and internal (i.e. the competition authority).

#### a) External Considerations

6. Competition agencies should consider the views of the following key stakeholder groups when identifying priority sectors: government agencies, consumers and businesses i.e. how enforcement will address their concerns. Addressing the concerns of key stakeholders, especially in the early

stages of a competition authority taking on enforcement activities, will generate support for the competition authority.



**Figure 18:** External Stakeholders' Considerations

7. References can also be drawn from the OECD Workshop on the Selection and Prioritisation of Sectors for Market Studies. The strategic considerations for selecting sectors for market studies include:

- (i) Government priority sectors are a common strategic choice for competition authorities to conduct market studies. Such studies can help inform the policy process. For example, by informing policy-makers, thereby preventing the adoption of new measures with unnecessarily negative competitive impacts or by identifying opportunities for regulatory reform. Study recommendations regarding government priority sectors may also be more likely to be adopted relative to recommendations for sectors that are not a focus of policy-maker attention. One challenge reported by participants with respect to preparing studies for government priority sectors is timing: an authority can be challenged to anticipate sectors that will be priorities by the time the market study is complete (often between 6-12 months from the selection of a particular sector).
- (ii) Sectors undergoing significant change can also offer strategic opportunities for competition authorities to conduct market studies. In particular, market changes can give rise to potential future enforcement concerns, lead to regulatory challenges or result in mergers for which an authority may wish to acquire some expertise. Market studies focusing on these changes can clarify for market participants the types of conduct that the authority considers anti-competitive, and may also give rise to follow-up studies on new issues that are uncovered. Some participants highlighted the risk of intervening too early in changing sectors, however, which could have unintended consequences.

#### **b) Internal Considerations**

8. In addition to external considerations, competition agencies also decide to prioritise certain projects based on the risks and costs associated with a project, the institutional significance of a project, and a project's timeliness.
9. **Likelihood of success: risks and costs.** Some considerations include the likelihood of gathering sufficient evidence for meeting the standard of proof, litigation risks, and the sector know-how within the competition authority. Competition agencies should prioritise sector-related projects where it is more likely to involve competition law infringements based on an initial assessment, e.g., market share thresholds, its past experience in and intelligence of the sector, and the experience of overseas competition agencies.

10. **Institutional significance.** On a related note, there are a few “usual suspects” sectors, e.g., bid-rigging and price-fixing cartels in the construction sector, which competition authorities typically prioritise during their early enforcement days.
11. The OECD Workshop on the Selection and Prioritisation of Sectors for Market Studies similarly recommends that competition agencies prioritise sectors in which there have been numerous antitrust cases. These can also be good candidates for market studies. A study into one of these sectors could uncover factors that contribute to the underlying competition problems, such as conduct that facilitates collusion or a lack of clarity regarding whether a given type of conduct is permitted by competition law. Sectors that have been studied in other jurisdictions can similarly be an effective area for competition authorities to focus on, although some participants noted there is a risk of herding if competition authorities do not sufficiently consider unique circumstances in their own jurisdictions.
12. Sector prioritisation is typically tied to a selection of areas of enforcement where a high impact on the economy can be achieved. Sometimes, there are certain (alleged) competition cases or products that are at the centre of public attention, thus requiring urgent action on the part of the competition authority.
13. **Timeliness of the project.** Timeliness refers to the effectiveness and intended impact of the enforcement action in the sector. For example, competition agencies should prioritise action against ongoing anti-competitive conduct rather than those that have already ended. As time passes, the impact of anti-competitive conduct that has ended is likely to be less significant than ongoing conduct. Further, the quality and availability of evidence would have decreased.

### Example of Prioritised Sectors

14. The ICN AEWG Competition Agency Manual notes that competition agencies have prioritized the following sectors:
  - (i) Sectors with market failures;
  - (ii) Regulated sectors and complex network industries (e.g., energy and telecommunications sectors);
  - (iii) Sectors with strong links to other sectors of the economy (e.g., infrastructure);
  - (iv) Problematic sectors (i.e., sectors with a history of anti-competitive conduct);
  - (v) Sectors that show a tendency towards concentration (e.g., for the purposes of merger control);
  - (vi) Sectors the functioning of which have a significant impact on public finances;
  - (vii) Sectors the functioning of which have a significant impact on consumers;
  - (viii) Sectors in crisis; and
  - (ix) Sectors in development.

15. The table below summarises some of the common reasons for prioritising these sectors.

Sectors	Common Reason(s)
a. Sectors with market failures	Market failures may be due to anti-competitive practices in the industry. As such, restoring the process of competition will rectify the market failure situation.
b. Regulated sectors and complex network industries (e.g., energy and telecommunications sectors)	These sectors are more susceptible to anti-competitive practices as they tend to be more concentrated. The impact of anti-competitive practices are wide-reaching as market players in the sectors have strong market power.
c. Sectors with strong links to other sectors of the economy (e.g., infrastructure)	The spill-over effects of anti-competitive practices may be wide-ranging. Addressing such anti-competitive practices has a higher impact on the economy.
d. Problematic sectors (i.e. sectors with a history of anti-competitive conduct)	These are typically the “usual suspects” sectors i.e. “low-hanging fruit” that a competition authority can look into to commence enforcement as anti-competitive practices are more commonplace.
e. Sectors that show a tendency towards concentration	Concentrated sectors may facilitate cartel conduct, and are more susceptible to abusive conduct. Consolidation may require merger control scrutiny.
f. Sectors the functioning of which have a significant impact on public finances	This addresses government agencies’ concerns as they are an important stakeholder group.  Competition enforcement against anti-competitive conduct, e.g., bid-rigging conduct can lead to savings for public money (as future public procurements are no longer affected by cartel overcharge, and cartel overcharge from affected public procurement can be compensated by way of financial penalties).
g. Sectors the functioning of which have a significant impact on consumers	This addresses consumers’ concerns as they are an important stakeholder group. Some competition laws specifically provide for the protection of consumer welfare as an objective of competition law.
h. Sectors in crisis	Crisis-related anti-competitive conduct, e.g., merger transactions due to failing firms, “crisis-cartels” where businesses call for a relaxation of enforcement against price-fixing and production control may arise.
i. Sectors in development	Enforcement action can bolster market competition reforms which accelerate the development of the sector.

**Figure 19: Common Reasons for Prioritising Sectors**

### ***EU DG Competition***

#### **Prioritising enforcement action in the energy sector - a case study by DG Competition**

In the course of a 19-month-long sector inquiry into the energy sector, DG Competition’s Energy and Environment Unit identified a number of potential antitrust infringement cases. One of these involved an alleged abuse of a dominant position by an energy company in the form of a refusal to supply.

Following discussions on the merits of the case within the Energy and Environment Unit, the case team, by way of a note, requested the Commissioner responsible for competition policy for consent to carry out unannounced inspections. Following formal agreement by the Commissioner, inspections were carried out in May 2006.

Following the examination of inspection materials and having assessed the replies to additional requests for information sent to companies, the case team, in January 2006, prepared an Initial Case Report setting out the preliminary assessment of the infringement, the proposed actions and the priority assessment of the case. The Initial Case Report was discussed with the Directorate responsible for Policy, the Chief Economist Team and the assistant to the Director General. The Initial Case Report was then submitted to and approved by senior management (consisting of the Director General, the Deputy Directors General, the Directors, the Chief Economist and the Assistants to the Director General).

Following approval by the Director General, the case team, by way of a note including the Initial Case Report and after having informally discussed with the Legal Service of the European Commission, requested the Commissioner to grant priority status to the case and to open formal proceedings. Following agreement by the Commissioner, formal proceedings were opened by the Commission in April 2007. The initiation of proceedings was made public by way of a press release.

The prioritisation was based on a positive balance of arguments for pursuing this case.

**Arguments for undertaking the case included:**

- the case related to the Commission's strategic policy choice to enforce competition in the energy sector;
- network foreclosure by vertically integrated energy companies has been identified as one of the main competition concerns in the energy sector inquiry and the case offered a significant precedent value in demonstrating how competition law applies to different types of network foreclosure behaviour;
- the case could further develop and clarify the legal concept of a refusal to deal;
- the case was of significant economic importance, as it concerned the second largest gas network in a large Member State of the EU, on which millions of customers depend; and
- the case could show how competition law could be an effective tool to address the market problems stemming from the conduct concerned when regulation did/could not prevent some vertically integrated energy companies from abusing their dominance in the past.

**Arguments against undertaking the case included:**

- the case required a very complex investigation involving the collection of highly technical information;
- the case was resource-intensive; and
- the case was legally ambitious as there had been no direct legal precedents for some aspects of the case.

*Source: ICN AEWG Competition Agency Manual, Paragraph 3.6.3*

**Case Study 7: Prioritised Sectors (EU)**

## Communicating Prioritised Sectors

16. The reasons for and against communicating prioritised sectors are set out in the table below.

For	Against
Provides transparency of the competition authority's work. This reduces the misconceptions or uncertainties as to how the competition authority prioritises its work.	Such communications may risk revealing "too much" which could give undue warning signals to companies in these sectors, currently engaged in anti-competitive conduct to hide or destroy evidence.
Builds stronger relationships with different stakeholders, and a strong network of partners to promote competition culture.	Creates false expectations by the stakeholders, e.g., as to the delivery of the projects. Disclosure of pending or ongoing investigations, disclosure of related information may unfairly damage the reputation of entities under investigation or violate confidentiality obligations.
Improves the quality of complaints by encouraging complaints that reflect the priorities of the competition authority.	

**Figure 20:** Reasons for and Against Communicating Prioritised Sectors

17. There are multiple channels that a competition authority can rely on in order to communicate these priorities. Examples include, externally-generated communications channels such as interviews with media, speeches, and presentations at conferences. On the other hand, examples of internally-generated communications channels include press releases, press conferences, annual reports, websites and brochures.

### Malaysia

Communicating sector priorities through a strategic plan report.

**STRATEGIC PLAN FOR COMPETITION ADVOCACY AND COMMUNICATION 2018-2020**

**Priority Sectors:**

The Commission priorities sector based on its own and other government agencies' experiences as well as its general knowledge of existing market conditions in Malaysia, particularly sectors in which hard core cartels appear to be taking place that affecting essential goods or services, and matters that are fundamentally critical to consumer's quality of life.

Some of the priority sectors identified below are a continuation from the last two plans as work on these areas are ongoing and complaints on the inefficiency of the sectors are still forthcoming. The priority sectors identified can or will be modified depending on the circumstances and needs. The **priority sectors for 2018 - 2020** are as follows

Source: MyCC, *Strategic Plan for Competition Advocacy and Communication 2018-2020*

### Case Study 8: Communicating Sector Priorities (Malaysia)

## Review of Prioritised Sectors

18. The ICN AEWG's Competition Agency Manual recommends that competition agencies review the priority status of a sector to see whether it warrants continued commitment of resources. Further, timely review of prioritisation can help prevent a competition authority's interventions from having limited impact on the sector in question.
19. The fact that a sector has been prioritised does not mean that it should continue to be prioritised until the completion of all sector-related projects. The following are some examples where the priority status of a sector may warrant review:
- (i) Political changes, e.g., following an election, which may lead to changes in priorities or new approaches to particular sectors of the economy;
  - (ii) Regulatory changes, e.g., introduction of new regulations which directly impact the sector concerned;
  - (iii) Macro-economic changes, e.g., worldwide financial crises which directly impact the sector concerned;
  - (iv) New evidence uncovered during the sector review may suggest that the likelihood of finding an infringement is much smaller than at the beginning of the review, or *vice versa*;
  - (v) Change in the behaviour of companies in the sector may make the competition authority's action less urgent; and
  - (vi) Changes in the budget, development of the competition authority's overall experience, and the arrival of new and more important cases.

"There are essentially two mistakes you can make (when reviewing the priority status): de-prioritising a promising case too early or clinging on to an unpromising case for too long"

ICN AEWG Competition Agency Manual (2010)

20. The periodic review of the status of prioritisation can be conducted by the same committee that is responsible for deciding on the priority status initially or the team responsible for the sector review. The procedure can be formal or informal, and can take place at one or several points in the lifecycle of the sector review. In summary, competition agencies should "hardwire" the procedure of reviewing the priority status of a sector to ensure that the review is conducted.

## References and Useful Resources

Source	Relevant Section	Title	Access
ICN	Examples of prioritized sectors	ICN Training on Demand Module V-3 Competition Assessment: Case Selection & Prioritization	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/04/ITODtranscriptV-3CompAssessCaseSelectionPriorities.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/04/ITODtranscriptV-3CompAssessCaseSelectionPriorities.pdf</a>
	Examples of prioritized sectors, How to select sectors, Ongoing review of prioritised sector	ICN Agency Effectiveness Competition Agency Manual: Strategic Planning & Prioritization	<a href="http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf">http://icn.flywheelsites.com/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf</a>
MyCC	Case study	Strategic Plan for Competition Advocacy and Communication 2018-2020	<a href="https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Latest_Strategic%20Plan%20MyCC%20%282018-2020%29.pdf">https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Latest_Strategic%20Plan%20MyCC%20%282018-2020%29.pdf</a>
OECD	How to select sectors	Workshop on the Selection and Prioritisation of Sectors for Market Studies	<a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)49&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)49&amp;docLanguage=En</a>

## Module C5: Common Implementation Feature – Case Prioritisation

### Key Points

- Competition agencies should introduce a set of prioritisation criteria to determine in an objective and consistent manner which investigations are to be pursued with priority.
- The prioritisation framework is an implementation tool that follows from the competition enforcement strategy. There is no “one-size-fits-all” solution.
- A prioritisation framework has generally two constituents: a case prioritisation criteria, and a hierarchy of prioritisation criteria.
- The prioritisation framework and prioritised projects should be regularly reviewed to ensure that they are congruent with the competition enforcement strategy.

1. The contents of this module are largely adapted from the ICN AEWG’s “Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation”, the ASEAN Regional Guidelines on Competition Policy, and the Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN.
2. This module discusses why competition authorities should put in place a case prioritisation framework, looks at the processes that competition authorities should consider when designing a case prioritisation framework, and identifies common case prioritisation criteria.

### Why Should a Competition Authority Prioritise Cases

3. The ASEAN Regional Guidelines on Competition Policy recommend that competition agencies adopt “prioritisation criteria” to determine in an objective and consistent manner which investigations are to be pursued with priority.
4. The ICN AEWG defines the prioritisation as:

*“the process of translating strategic objectives into operational priorities. It essentially involves deciding which projects or types of projects not to do and which projects or types of projects to do.”*

5. In general, case prioritisation is important because:
  - (i) It helps the competition authority achieve strategic objectives in order to support its mission and vision.
  - (ii) It allows the competition authority to establish an optimal portfolio of enforcement and advocacy activities.
  - (iii) It provides a mechanism for the competition authority to allocate scarce resources, e.g., financial, personnel, to the most relevant projects. The ICN AEWG’s Competition Agency Manual highlighted that, without exception, there are always more potential projects, whether investigations, advocacies or research activities a competition authority could do than the resources available to pursue them.

6. That said, the ASEAN Regional Guidelines on Competition Policy caution that the prioritisation framework should not allow for *de facto* exemptions. Even where prioritisation criteria have been established, the competition authority should maintain its engagement on non-priority cases, within the limits of its resources.

### Process of Designing a Prioritisation Framework

7. The ICN AEWG observed that the process of deciding whether or not to grant priority to an individual project varies from one competition authority to another i.e. there is no “one-size-fits-all” solution when formulating a prioritisation framework.
8. The ICN AEWG recommends that competition authorities consider the following when determining decision-making for case prioritisation:
- What dictates the prioritisation process?;
  - What is the proper scope of the competition authority’s prioritisation process? Should it involve division-by-division planning or should it be an authority-wide exercise?;
  - Should prioritisation be centralised within the competition authority? For example, should there be a panel or board within the competition authority to oversee the process?; and
  - Should there be specific procedures in place to develop the prioritisation criteria? Or can prioritisation take place more informally?
9. A prioritisation framework has generally two constituents: a case prioritisation criteria, and a hierarchy of prioritisation criteria.

#### a) Case Prioritisation Criteria

10. It is important to stress that the case prioritisation framework is an implementation tool that follows from the competition enforcement strategy, which in turn is guided by the competition enforcement goals. This is represented diagrammatically below:



Figure 21: Prioritisation Framework

11. The table below classifies the ASEAN Regional Guidelines on Competition Policy suggested prioritisation factors into three categories:

- (i) Case-specific considerations: what are the facts of the case and how are the competition concerns likely to be resolved?;
- (ii) Resource considerations: how much resources do the competition authority require to pursue the case?; and
- (iii) Strategic considerations: what is the strategic significance of the case in relation to the competition authority's enforcement objectives and plans?

Case-specific considerations	Resource considerations	Strategic-intervention considerations
The type of agreement, conduct and apparent seriousness of an infringement and its impact on the relevant market, e.g., per se illegal infringements.	The extent or complexity of the investigations required, e.g., international cross-border cartel investigations requiring coordination with overseas competition regulatory bodies.	The likelihood of establishing an infringement.
The cessation or modification of the conduct complained of, e.g., the undertaking has made commitments to the competition regulatory body to cease anti-competitive aspects of the conduct.	Whether the complaint concerns specific legal issues already in the process of being examined (or already examined by the competition regulatory body) in one or several other cases, and/or subject to proceedings before a judicial authority.	The impact of the competition authority's possible intervention, e.g., on consumer welfare.
The possibility of the complainant bringing the case before judicial authority, e.g., the case can be the subject of private enforcement in a parallel right of private action.	Whether the resource requirements of the work are proportionate to the benefits from doing the work.	Whether the work fits into the strategic significance of the competition authority's plans.

**Figure 22:** Prioritisation Factors

### **United Kingdom**

A manufacturer in the UK was alleged to have abused its dominant position in a market or markets by taking action to prevent effective competition to its product. In exercising its discretion over whether or not to pursue the case, the then UK Office of Fair Trading ("OFT") applied a published set of principles that it uses to make prioritisation decisions (the Prioritisation Principles).

The OFT developed and applied the Prioritisation Principles in the context of its mission to make markets work well for consumers. The OFT generally prioritises its work according to the following principles:

**Impact:** What would be the likely direct effect on consumer welfare in the market or sector where the intervention takes place? What would be the likely indirect effect on consumer welfare? What would be the expected additional economic impact on efficiency/productivity?

**Strategic significance:** Does the work fit with the OFT's strategy as set out in the current annual plan and/or with other OFT objectives? Is the OFT best placed to act? What would be the impact of the new work on the balance of the OFT's current portfolio of work?

**Risks:** What is the likelihood of a successful outcome?

**Resources:** What are the resource implications of doing the work?

Where appropriate, the OFT may also take account of other relevant factors. Account is also taken of whether the OFT has a legal duty to act once certain circumstances have materialised.

The factors that the OFT took into account in its prioritisation assessment of this specific case included the following:

**Impact:** Similar practices in the sector in question were understood to be long-standing, and give rise to widely recognised concern. As a result action would have a significant deterrent effect, discouraging others from engaging in similar types of conduct in the future, as well as bringing about behavioural changes in relation to current conduct in the sector. Furthermore, such practices potentially involved a high cost to consumers, and a significant impact on potential innovation and entry to the market. They could also create costs to the public purse.

**Strategic significance:** The case concerned an area of high international interest, where the case law was being developed with related cases in a number of other jurisdictions. As such, the case presented an opportunity to contribute to cutting-edge antitrust assessment, and assist international convergence and impact. In considering whether the OFT was best placed to act, the OFT took account of the fact that private actions were possible. However, if settled in private, these would fail to provide any precedent, or realise much of the deterrence effect that could be established by an OFT decision, and would undermine the potential for other follow-on damages claims.

**Risks:** The allegations related to an area characterised by relatively little case law relating to the specific practice, though this was balanced against a persuasive theory of harm, and strong arguments based on established legal principles.

**Resources:** Resources were available to take on a significant unilateral conduct case and existing knowledge of the sector could be utilised and expanded. As an innovative unilateral conduct case, it also presented an opportunity to develop the knowledge and capabilities of OFT staff which would be valuable in taking forward other cases in this and other sectors.

As in other cases, all relevant principles were balanced in the round, and the OFT also considered the timing and resource requirements of its work to ensure that its duties were appropriately met within the confines of the resources available to the OFT.

*Source: ICN AEWG "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation"*

#### **Case Study 9:** Case Prioritisation Criteria (United Kingdom)

12. These priorities may remain confidential to the competition authority or be made public through annual plans or the annual report. The ICN AEWG highlights the following considerations that competition authorities have when deciding whether to communicate these priorities publicly.

For	Against
Provides transparency of the competition authority's work. This reduces the misconceptions or uncertainties as to how the competition authority prioritises its work.	Such communications may risk revealing "too much" which could give undue warning signals to companies in these sectors, currently engaged in anti-competitive conduct to hide or destroy evidence.
Builds stronger relationships with different stakeholders, and a strong network of partners to promote competition culture.	Creates false expectations by the stakeholders, e.g., as to the delivery of the projects. Disclosure of pending or ongoing investigations, or disclosure of related information may unfairly damage the reputation of entities under investigation or violate confidentiality obligations.
Improves the quality of complaints by encouraging complaints that reflect the priorities of the competition authority.	

**Figure 23:** Reasons for and Against Communicating Case Prioritisation Criteria

## b) Hierarchy of Prioritisation Criteria

13. A competition authority can define a hierarchy of prioritisation criteria.
14. However, the ICN AEWG observed that there is no commonly accepted "hierarchy" of prioritisation criteria. For example, some competition authorities rely on a simple ranking of "high, medium, low" for each project. Others use more complex systems such as prioritisation matrix where a value is assigned to each prioritisation criteria.
15. We highlight three categories of cases which should generally rank higher in the prioritisation framework.

### i. Cases That Have Statutorily Mandated or Competition Authority Prescribed Deadlines

16. Such cases are referred to as "non-discretionary" activities in **Module C1: Formulating a Competition Enforcement Strategy** above. Competition laws may have obligations on competition authorities to investigate certain types of conduct or agreement i.e. non-discretionary activities.
17. Examples of non-discretionary activities include:
  - (i) A mandatory merger notification regime where competition authorities are obliged to review notifiable mergers. Competition authorities may be required to complete their review within a stipulated time frame.
  - (ii) Conducting market studies or investigations when requested by the government or the Minister, for example.
18. Competition agencies should, as a matter of priority, strive to meet all deadlines that are mandated by law or set out as the competition authority's administrative rules. For example, some competition regimes have legislation that prescribe a time period for assessing merger notifications from the initial filing to the completion of the competition authority's assessment.
19. It is important to meet these enforcement deadlines to ensure business certainty. Failure to meet these deadlines may also lead to challenges by businesses on procedural grounds against the competition authority.
20. That said, the ICN AEWG recommends as a good practice that competition agencies also put in place internal procedures to ensure that cases that fall under the "discretionary enforcement activities"

category are being completed within a reasonable time, appropriate to their circumstances and complexities.

## ii. Cases That Are Linked to Institutional and Procedural Considerations

21. The ICN AEWG observed that a project may have institutional and procedural significance if it:
  - (i) applies an innovative approach;
  - (ii) can establish legal precedents;
  - (iii) tests new legal and/or economic approaches;
  - (iv) builds credibility of the agency; and/or
  - (v) is useful for the purposes of capacity building.
22. Taking on such cases are also particularly useful for new and young competition authorities that are looking to gain competition enforcement experience. That said, competition authorities should also balance this consideration with the associated risks and costs, in particular, the likelihood of successfully delivering the project, and the resources required.
23. The “timeliness” of the project is also important. In general, enforcement actions against anti-competitive conduct that are still ongoing should be prioritised over infringements that have already ended.

## iii. Cases That Are Aligned with National Priorities and Plans

24. As noted in **Module C1: Formulating a Competition Enforcement Strategy** competition agencies that are more closely integrated into government may also be required to align their competition enforcement strategic objectives with government strategy, or their strategy may be part of a broader government strategy. Sometimes, the competition authority’s competition enforcement work may be part of the planning cycle of a government or a quasi-governmental organisation. Broader political priorities may also influence the determination of competition enforcement goals.
25. Given that the case prioritisation framework is an implementation tool that is guided by the competition enforcement goals, cases that relate to these national priorities and plans may therefore generally rank higher in the prioritisation framework. As national priorities and plans are typically operationalised using a sector-approach, the prioritisation framework in **Module C4: Common Implementation Feature – Sector Prioritisation** would be an appropriate reference for competition authorities.

## Review of Prioritised Cases and Framework

"There are essentially two mistakes you can make (when reviewing the priority status): de-prioritising a promising case too early or clinging on to an unpromising case for too long"

ICN AEWG (2010)

26. The ICN AEWG recommends that competition agencies review the priority status of cases to see whether they warrant continued commitment of resources. Further, timely review of prioritisation can help prevent the competition authority's interventions from having limited impact on the market. More generally, the prioritisation framework should also be reviewed regularly, to ensure that the criteria and hierarchy are congruent with the competition enforcement strategy.
27. The fact that a project, e.g., investigation has been prioritised does not mean that it should continue to be prioritised until its completion. The following are some examples where the framework, and the priority status of a project may warrant review:
- (i) Political changes, e.g., following an election, which may lead to changes in priorities;
  - (ii) Regulatory changes, e.g., introduction of new regulations which directly impact the investigated conduct;
  - (iii) New evidence reviewed during the investigation may suggest that the likelihood of finding an infringement is much smaller than at the beginning of the investigation, or *vice versa*;
  - (iv) Changes in the behavior of companies investigated against may make the competition authority's intervention less urgent; and/or
  - (v) Changes in the budget, development of the competition authority's overall experience, and arrival of new and more important cases.
28. The review can be conducted by the same committee that is responsible for deciding on the priority status initially or the investigation team. The procedure can be formal or informal, and can take place at one or several points in the lifecycle of the case. In summary, competition agencies should "hardwire" the procedure of reviewing the priority status of a case.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Why should a competition authority prioritise cases, Process of designing a prioritisation framework.	ASEAN Regional Guidelines on Competition Policy	<a href="https://www.asean-competition.org/file/post_image/Regional%20Guidelines%20on%20Competition%20Policy.pdf">https://www.asean-competition.org/file/post_image/Regional%20Guidelines%20on%20Competition%20Policy.pdf</a>
ICN	Why should a competition authority prioritise cases, Process of designing a prioritisation framework, Review of Prioritised Cases.	ICN Agency Effectiveness Working Group's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation"	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/</a>

## THE YOUNG AUTHORITY PHASE

D

"As a young agency, **building up a strong enforcement track record was an immediate priority**. At the same time, the need for speed had to be balanced with the need to ensure that sufficient time, effort and rigor were dedicated to our investigations and decisions."

Competition and Consumer  
Commission of Singapore (CPI  
Antitrust Journal May 2010)

The purpose of this section is to provide inspiration to a young authority looking to implement enforcement strategies in relation to the three common prohibitions of competition laws, namely, anti-competitive agreements (i.e. cartels), unilateral conduct/abuse of dominance, and merger control. It further emphasizes the importance of procedural fairness, due process, and accountability when enforcing competition laws.

Establishing a strong enforcement track record should be the immediate priority of a young authority as this will instil confidence in the key stakeholders.

Each module includes suggested “good practices” which summarise enforcement assessment frameworks that are acknowledged for their usefulness for effective enforcement by competition authorities. However, no single approach answers the need(s) for every situation, for example, certain enforcement assessment frameworks may not be feasible due to legal or policy constraints. Young authorities are encouraged to refer to, and adapt these good practices accordingly so that they are “fit for purpose”.

## Module D1: Operationalising the Enforcement Strategy

### Key Points

- A lag between implementation of competition enforcement strategy and effective enforcement should be expected. Reports on early competition enforcement experience reveal that it takes time to achieve competition enforcement success.
- Considerable experimentation is required to build a new competition regime. Experimentation helps a young competition authority become more proficient in enforcement.
- Competition authorities should expect to succeed and fail in their attempts at competition enforcement. Competition authorities progress because they learn and improve through a three-step process of “experimentation, evaluation and refinement”.

1. The contents of this module are drawn largely from William E. Kovacic and Marianela Lopez-Galdos (2016) “Lifecycles of competition systems: Explaining variation in the implementation of new regimes”.
2. This module discusses the importance of enforcement experimentation, for new and young competition authorities that are just enforcing competition laws. It also highlights findings from studies on early competition enforcement experience in the extant literature on competition law.

### Enforcement “Experimentation”

3. While young competition authorities may for all intents and purposes be eager to enforce competition laws, there will invariably be a lag between the effective date of the implementation of the enforcement strategy and effective competition enforcement. This means that considerable “experimentation” is required to build a new competition regime.
4. Kovacic and Lopez-Galdos (2016) observed that “*all new competition agencies must work through an initial period where they apply their powers for the first time. Inevitably, there will be a lag (sometimes substantial) between the new competition law’s effective date and when its implementing agency becomes proficient*”. Kovacic and Lopez-Galdos (2016) added that it is “*one thing to sit in a training seminar,... it is entirely another to identify a potential target for prosecution, prepare a case, and carry it through a series of judicial appeals*”.
5. Further, competition authorities should expect to succeed and fail in their attempts at competition enforcement. However, such experimentation will help a young competition authority become more proficient in enforcement. Kovacic and Lopez-Galdos (2016) observed that successful competition authorities progress because they learn and improve through a three-step process of “experimentation, evaluation and refinement”.



Figure 24: Three Step Process

6. Underpinning this three-step process what is Kovacic and Lopez-Galdos (2016) term as a culture of “critical self-assessment and a commitment to doing better in the future”. Capacity building - discussed in **Module C2: Preparing to Implementing the Competition Enforcement Strategy** - is an integral part of supporting and promoting such a culture within the competition authority.

### **Singapore**

The Competition and Consumer Commission of Singapore (“CCCS”) initiated 59 cases (preliminary enquiry and investigations) and completed 48 of them between 1 January 2006 to 31 March 2010. During the same period, the CCCS issued two infringement decisions (one against a price fixing cartel, another against a bid-rigging cartel), and two proposed infringement decisions (one against abuse of dominance, another against a bid-rigging cartel).

The CCCS shared that it was able to build up this track record swiftly because, from the outset, it had formed a good team of case officers and implemented policies and procedures based on international best practices. Internal procedure manuals were prepared on the proper use of investigation powers and to ensure that officers were familiar with the investigation process. A case work-flow was also designed to monitor the investigation process, to ensure robust and rigorous investigations and decisions.

For background, the prohibitions against anti-competitive agreements and abuse of dominance in the Singapore Competition Act came into force on 1 January 2006, while the CCCS was established a year before, on 1 January 2005. The CCCS's first infringement decision against a bid-rigging cartel commenced on 17 October 2006 and the decision was issued on 9 January 2008.

*Source: CCS' reply to Straits Times report on 6 May titled "Agencies which fixed prices had 'noble goals'"*

### **Learning points:**

- While the prohibition against anti-competitive agreements came into effect on 1 January 2006, the CCCS's first infringement decision was only issued 2 years later. Therefore, a lag between the effective date of competition law and effective enforcement should be expected.
- As demonstrated by the CCCS's early enforcement experience, not all cases commenced (whether preliminary enquiries where formal investigative powers are not exercised, or investigations) led to infringement decisions. Some of these cases were closed without further action by the CCCS i.e. experimentations. These experimentations helped the CCCS become more proficient in competition enforcement as they allowed CCCS's officers to work on evidence collection and analysis. They also improved the CCCS's institutional knowledge as the documented evidence and analysis could be referred to when similar issues arise in the future.

### **Case Study 10: Enforcement Experimentation Experience (Singapore)**

### Observations: Early Enforcement Experience

7. The Journal of Antitrust Enforcement “Agency Effectiveness Study” (2016) interviewed current and former heads of both young and more established competition authorities and staff, and asked for their views on a wide range of topics including enforcement experience. Some of the key findings from interviews with young competition authorities concerning their early competition enforcement experience are highlighted below:
  - (i) When pursuing enforcement, a “trade-off” between “low-hanging fruits” on the one hand and important but difficult cases on the other hand may sometimes be necessary.
  - (ii) Starting with the *per-se* cases may risk creating the impression that the competition authority is going after the small boys.
  - (iii) More specific goals are particularly important where the competition authority’s head is establishing a new competition authority or where the competition authority is relatively young.
  - (iv) When asked to reflect on “significant mistakes” made while managing the newly established competition authorities, heads of these competition authorities highlighted three things of particular importance:
    - i. first, persuading policymakers to allow the competition authority more discretion to set enforcement priorities;
    - ii. two, creating tailor-made in-house training programmes rather than investing in training programmes abroad; and
    - iii. three, making bolder demands and compromising less during the establishment of the competition authority.
  
8. Kovacic and Lopez-Galdos (2016) observed the following challenges that new and young competition authorities face when pursuing competition enforcement:
  - (i) In nearly every jurisdiction with a competition law, initial enforcement efforts have elicited robust challenges in courts from investigated parties. Most of these competition authorities spend at least a decade defending challenges to every significant aspect of their authority, including the power to gather information, the mandate to challenge business conduct, and the power to impose sanctions.
  - (ii) It can take up to two decades for a competition authority to obtain judicial rulings – often from the jurisdiction’s highest court in order to sustain the competition authority’s efforts to exercise its enforcement powers, or make clear that legislative reforms are needed.
  - (iii) Judges, especially during the early enforcement period are likely to regard competition law with “wariness or ambivalence” as few of them will have familiarity with competition law concepts. As a result, they tend to focus closely on apparent deviations from procedural requirements established in the competition law or imposed by the jurisdiction’s administrative procedure code.
  
9. Kovacic and Lopez-Galdos (2016) observed three principal implementation trajectories based on the accumulated experience of new systems since the late 1980s.

Trajectory	Description	Examples
Early Ascent Followed By Decline	Promising start and then entering a sustained period of decline. In some cases, the first period consisted of a sharp vertical ascent followed by a descent almost as dramatic as the initial climb.	Venezuela, Egypt.
The Flat Line	Some new systems never get off the ground after the adoption of the law and the formation of the competition authority. For various reasons, they are unable to apply their nominal powers to enforce the law or perform advocacy tasks.	Paraguay, Dominican Republic.
General Upward Progression	Generally upward progression with fluctuations upward and downward. The slope of progress can vary: some systems' slopes are steep while others are more gradual.	Examples of steep slopes include: Brazil, Singapore, and South Africa; examples of gradual slopes include: Barbados, Chile, Indonesia, Jamaica, Kenya, and Mexico.

**Figure 25:** Competition System Trajectories

10. Lastly, Kovacic and Lopez-Galdos (2016) cautioned against the “embracing of unrealistic expectations” of what a new competition law system is likely to achieve in its first decade or two. Competition authorities that are weakly funded and poorly staffed will need to take a more gradual approach towards implementing competition law. Even a well-resourced competition authority will need considerable time to become proficient at competition enforcement tasks. They opined that “there is no such thing as an ‘easy’ cartel case or ‘simple’ dawn raid for a competition authority that has never done one”. Put another way, it simply takes time for a competition authority to achieve competition enforcement success.

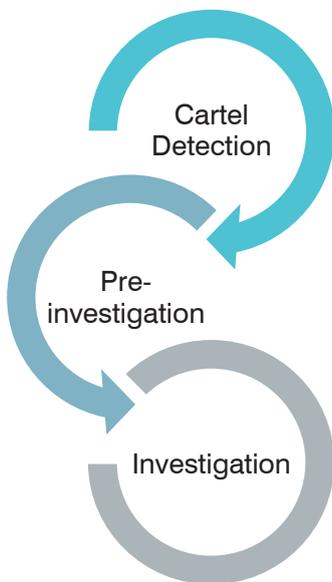
## References and Useful Resources

Source	Relevant Section	Title	Access
CCCS	Enforcement Experimentation	Building up a Young Competition Commission: The Competition Commission of Singapore’s Experience	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/journal/antitrust-chronicleccsmay-2010.pdf">https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/journal/antitrust-chronicleccsmay-2010.pdf</a>
William E. Kovacic and Marianela Lopez-Galdos	Enforcement Experimentation and Observations: Early Enforcement Experience	Lifecycles of competition systems: Explaining variation in the implementation of new regimes	<a href="https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4804&amp;context=lcp">https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4804&amp;context=lcp</a>
Journal of Antitrust Enforcement	Observations: Early Enforcement Experience	Agency Effectiveness Study	<a href="https://ora.ox.ac.uk/objects/uuid:51fccdf2-b3e8-4343-b5b6-771df6114755#:~:targetText=Journal%20of%20Antitrust%20Enforcement%20Agency%20effectiveness%20study.in%20which%20they%20are%20addressed.">https://ora.ox.ac.uk/objects/uuid:51fccdf2-b3e8-4343-b5b6-771df6114755#:~:targetText=Journal%20of%20Antitrust%20Enforcement%20Agency%20effectiveness%20study.in%20which%20they%20are%20addressed.</a>

## Module D2: Cartel Enforcement

### Key Points

- Competition agencies should rely on both reactive and proactive tools to detect cartels.
- Competition agencies should put in place internal procedures for receiving information on and assessing alleged cartel conduct. They should also set up electronic databases to archive information received and their assessment.
- Enforcement prioritisation is needed as there will be more cases of alleged cartel conduct than available resources will allow competition agencies to pursue enforcement. Young competition agencies should consider prioritising investigations against the four types of hard-core cartels: price-fixing, market sharing, bid-rigging and production control.
- A dedicated case team should be appointed, and an investigation plan and evidence matrix should be drawn up during the investigation stage.

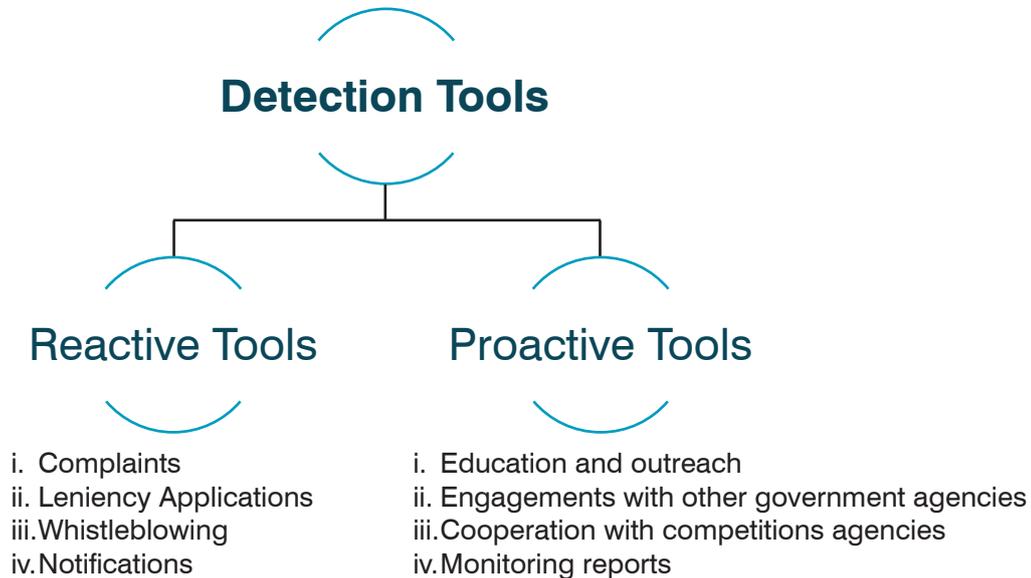


**Figure 26:** Cartel Enforcement Stages

1. The contents of this module are drawn largely from the ICN Cartel Working Group's Anti-Cartel Enforcement Manual chapter on "Enforcement Techniques".
2. It is helpful to consider cartel enforcement cases in three key stages:
  - (i) **Cartel Detection Stage:** how a competition authority might detect signs of cartel conduct.
  - (ii) **Pre-investigation Stage:** how a competition authority should evaluate evidence about an alleged cartel conduct when deciding whether to commence investigation or not.
  - (iii) **Investigation Stage:** how a competition authority should conduct an investigation against an alleged cartel conduct.

### Cartel Detection Stage

3. There are a variety of tools that a competition authority can rely on to detect cartel activities. They can be broadly classified as proactive, and reactive tools.



**Figure 27:** Cartel Detection Tools

4. These two types of tool complement each other. Competition agencies should therefore employ a variety of these two types of tools to detect cartels, and not rely on a single type of tool.

#### a) Reactive Tools

5. These tools rely on some external event i.e. outside of the competition authority to take place before the competition authority becomes aware of an alleged cartel conduct. This section highlights three of the most common reactive cartel detection tools, namely, complaints, leniency applications, and whistleblowing.

##### i. Complaints

6. A competition authority may become aware of an alleged cartel conduct through a complaint filed by a competitor, supplier, customer or a member of the general public.
7. Complaints are the predominant method of cartel detection worldwide. However, they may not be most efficient tool for cartel detection as competition agencies' experience show that while they may receive many complaints, most of them are closed without taking further action.
8. Nevertheless, competition agencies are encouraged to put in place a complaint system to receive, handle and respond to complaints. The system will help the competition authority filter out complaints that are without merit, which helps avoid the diversion of resources that could otherwise be deployed for investigating genuine anti-competitive conduct. The basic features of a complaint system (both internal and external facing) are set out in the table below.

Features of a complaint system	Internal-facing (for competition authority officers)	External-facing (for complainants)
<p><b>Receiving complaints</b></p> <p>Note: common channels for receiving complaints include walk-ins, email, telephone, and written/online forms.</p>	<p>The Internal Procedure Manual (“IPM”) should set out the procedures for receiving complaints from each of the complaint channels.</p> <p>For example, the IPM should prescribe the number of competition authority officers present when hearing walk-in complaints, explain how to assess the fields of information in the prescribed complaint form, and how to treat complainants with courtesy and consideration.</p> <p>Should complainants request that their identities be kept confidential, the IPM should set out the procedures for recording file notes and collecting further information from the market without inadvertently revealing their identities.</p>	<p>The ways in which a competition authority receives complaints should be <b>communicated clearly</b>, e.g., on the competition authority’s website, and <b>accessible</b> to would-be complainants, e.g., downloadable complaint forms.</p>
<p><b>Handling complaints and responding to complainants</b></p>	<p>The IPM should set out the procedures for assessing the complaint, and responding to complainants on the status/outcome of their complaints.</p> <p>It is recommended that the IPM prescribe an internal timeline for assessing a complaint, and responding to a complainant once a decision on whether to progress a complaint, e.g., to commence investigation has been taken.</p> <p>A knowledge management system should also be put in place to record all complaints received by the competition authority and the reasons for advancing a complaint to investigation or closing a complaint without further action.</p>	<p>As competition agencies may require further information in order to assess the merits of a complaint, competition officers should explain to complainants that they might be expected to assist with collecting/ providing more relevant information.</p> <p>Complainants should also be updated regularly on the progress of their complaints and the outcome of the competition authority’s assessment, e.g., commencing investigation or closing the complaint without further action.</p>

**Figure 28:** Elements and Features of a Complaint System

9. Complaints that are without merit arise because complainants are confused between illegal cartel conduct and legitimate business activities. Such complaints often lack evidence on the alleged cartel conduct, and in rare instances, are part of an attempt to “cause trouble” for competitors.
10. Competition agencies should also consider methods to influence the focus/nature of complaints. For example, competition agencies can publish collaterals that explain what a cartel is, how to identify cartel conduct, e.g., identical price quotes and typographical errors in bid documents may indicate the existence of bid-rigging cartel conduct, and how to report such conduct to the competition authority, e.g., complaints.

### Malaysia

#### Agreements Deemed Anti-Competitive by CA 2010

Any agreement, be it horizontal or vertical, that has the object or the effect of significantly preventing, restricting or distorting competition is an infringement of the CA 2010.

There are some agreements that the CA 2010 regards as more serious. The following horizontal agreements are in every instance deemed to have the object of significantly reducing competition and are therefore prohibited:



The **Complaint Form** can be downloaded from the MyCC website at [www.mycc.gov.my](http://www.mycc.gov.my). The completed **Complaint Form** may be submitted to the MyCC in any of following ways:

**By E-mail:**  
[complaints@myccgov.my](mailto:complaints@myccgov.my)

**By Post:**  
Address mail to:  
**Level 15, Menara SSM@Sentral,  
No. 7, Jalan 5 tesen Sentral 5,  
Kuala Lumpur Sentral,  
50623 Kuala Lumpur**

**By Fax:**  
**Address to CEO and fax to +603-2272 2293 / +603-2272 1692**

**In Person:**  
Complainants may also in person at the MyCC office to fill in and submit the **Complaint Form**

For assistance regarding complaints, please contact MyCC at **+603-2273 2277** or by e-mail at [enquiries@mycc.gov.my](mailto:enquiries@mycc.gov.my).

For more information, visit our website: [www.mycc.gov.my](http://www.mycc.gov.my)



**THE COMPETITION ACT 2010**  
Promoting Competition, Protecting You.



Source: MyCC, Competition Act 2010, Handbook for General Public

#### Case Study 11: Collaterals on Filing Complaints (Malaysia)

### Philippines

#### Report violations

of the PCA



If you know of any business that is behaving in an anti-competitive manner, report to PCC by calling 7719 722 or by emailing [queries@phcc.gov.ph](mailto:queries@phcc.gov.ph). You may also come to our office at 25/F Vertis North Corporate Center 1, North Avenue, Quezon City 1105.

Examples of anti-competitive agreements



**PRICE FIXING**  
This involves restricting competition as to price, or components thereof, or other terms of trade. This happens when competitors agree on the prices of goods or services, rather than independently setting their respective prices points



**MARKET SHARING**  
This is a collusive agreement by two or more competing businesses to divide or allocate the market. Market sharing not only includes territories, but also customers, volume of sales or purchases, and type of goods or services, among other considerations.



**SUPPLY RESTRICTION**  
This is an agreement by two or more competing businesses to set or limit production levels to create artificial supply shortage, thereby raising prices. Similar forms of anti-competitive agreements include restrictions in markets, technical development, and investment



**BIDDING IN PROGRESS**  
**BID RIGGING**  
This involves fixing prices at an auction or any form of bidding, including cover bidding, bid suppression, bid rotation, and market allocation, among others. Bid rigging usually occurs when parties participating in tender coordinate their bids rather than submit independent proposals.

Source: MyCC, Competition Act 2010, Handbook for General Public

#### Case Study 12: Collaterals on Filing Complaints (Philippines)

## Singapore

### ANTI-COMPETITIVE AGREEMENTS

Section 34 of the Competition Act prohibits agreements which prevent, restrict or distort competition within Singapore. This applies regardless whether the agreements are entered into within, or outside, of Singapore.

Examples of such agreements include



#### Directly or indirectly fixing prices of goods and services

Competitors can breach the law by agreeing to increase or maintain prices. They may also indirectly fix prices by, for example, agreeing to offer the same discount or credit terms.



#### Bid-rigging

The most common form of tender manipulation is bid-rigging where competitors do not bid independently for a tender. Instead, bids submitted are a result of collusion or co-operation among competitors



#### Market sharing

Competitors agree to divide turfs by not competing for one another's customers who are segmented either by territory, type or size of customers. As a result, customers are not able to choose the best deals as there are fewer suppliers willing to transact with new customers.

#### Limitation of output or control of production or investment

Competitors agree to limit or control their output, production or investment. By controlling the level of supply of goods or services, the competitors are able to influence the prices of the goods or services in the market



*There four types of agreements are amongst the most serious forms of anti-competitive activity that bring about substantial harm to businesses and consumers.*

### FILE A COMPLAINT WITH CCCS

If you suspect that any business, company, or organisation is engaged in an agreement or conduct that infringes the Competition Act, please file a complaint with CCCS.

Complaints can be lodged if you believe there has been an infringement of any of three prohibitions under the Competition Act:

- Agreements, decisions and practices that prevent, restrict or distort competition
- Abuse of dominant position
- Mergers and acquisition that substantially lessen competition

CCCS will evaluate the complaints to see if there are sufficient grounds to commence an investigation.

In particular, CCCS is interested in hearing from persons with useful information on cartel activity in Singapore. If you are aware of cartel activities, please contact CCCS with relevant information by writing, emailing or calling CCCS hotline at 1800-325-8282. Examples of relevant information include:

- Information about companies/businesses involved;
- A brief description of cartel activity
- The nature of industry where the cartel is operating; and
- Any other relevant information and supporting documents evidencing the agreements, decisions or practices of the cartel i.e. records of a tender and all communications with the tenderers.

CCCS undertakes to keep your identity and any information that may lead to your identification strictly confidential. Our officers will talk to you to obtain as much detail as possible. If CCCS assesses that you have information that is likely to be of value, we will invite you to discuss the information in more detail. While the CCCS is reviewing the matter, please refrain from discussing your suspicions with the suppliers involved as this may jeopardise any investigation that CCCS may undertake.

If requirements for offering a reward are met, a monetary reward can be paid to informants for providing information leading to infringement decisions against cartel members.

You should note that complaints may not be pursued if agreement, conduct or merger is excluded or exempted from the Competition Act.



To make a complaint, in general, CCCS will need you to provide the following information:

- Information about you and the organisations you represent (if applicable);
- Information about the party or parties involved;
- A brief description of the agreement, conduct or merger that you are complaining about; and
- Any other relevant information and supporting documents.

Source: CCCS's collateral on "Key Prohibition under the Competition Act Explained".

### Case Study 13: Collaterals on Filing Complaints (Singapore)

## ii. Leniency Applications

11. This is another reactive tool that a competition authority can rely on to detect cartels. Leniency regimes typically provide leniency applicants with full immunity from, or significant reduction in financial penalties for engaging in cartel conduct. Due to the secret nature of cartel activities, the leniency regime incentivizes cartelists to come forward and provide information to the competition authority.
12. Compared to complaints, leniency applications generally provide direct access to information on the cartel conduct, and as such, may be a more resource-effective tool than complaints. Generally, to receive lenient treatment information provided must be sufficient for competition authority to commence investigation or to add significant value to ongoing ones. On the other hand, information received from complainants may require further screening and follow-up.
13. Competition agencies typically prescribe guidelines that set out the benefits of and procedures for applying for leniency to encourage leniency applications. This provides transparency to the leniency regime, and ensures that the leniency regime is consistently and predictably implemented by the competition authority. Contents of these guidelines generally include the following:

- (i) Eligibility conditions for filing a leniency application for total immunity from financial penalties or reduction of financial penalties.
  - (ii) Procedures for applying for leniency, e.g., contact persons at the competition authority, channels available to file a leniency application.
  - (iii) A description of the marker system which protects a leniency applicant's place in the queue for immunity or reduction of financial penalties.
  - (iv) Information required in a leniency application, e.g., the market affected by the cartel conduct, the impact of the cartel conduct on the relevant market, the duration of the cartel conduct, and parties to the cartel conduct.
  - (v) A waiver of confidentiality for the competition authority to share information submitted by a leniency applicant with another competition authority which has received the same leniency application.
  - (vi) Conditions for granting immunity.
14. Apart from prescribing a set of guidelines, competition agencies are encouraged to put in place a system to receive, handle and respond to leniency applications. The basic features of a leniency system (both internal and external facing) are set out in the table below.

Features of a leniency regime	Internal-facing (for competition authority officers)	External-facing (for leniency applicants)
<b>Receiving leniency applications</b>	<p>The IPM should set out the internal procedures for receiving leniency applications and issuing markers to leniency applicants.</p> <p>Should complainants request that their identities be kept confidential, the IPM should set out the procedures for recording file notes and collecting further information from the market without inadvertently revealing their identities.</p> <p>Some competition agencies may further restrict access to information on ongoing leniency applications to a select group within the competition authority, e.g., the enforcement unit, or senior management team.</p>	<p>The ways in which a competition authority accepts leniency application should be communicated clearly. The benefits of making a leniency application should also be spelt out to motivate would-be leniency applicants to file an application.</p> <p>Competition agencies generally specify a particular personnel, e.g., the head of the legal unit or enforcement who should be contacted when applying for leniency.</p>
<b>Handling queries from leniency applicants and responding to leniency applicants</b>	<p>The IPM should set out the internal procedures for handling queries from the leniency applicant and communicating with the leniency applicant on the progress and the outcome of the leniency application.</p> <p>Generally, a case team should be formed to assess the leniency application. It is recommended that a member of the case team be the point of contact whom the leniency applicant can communicate with to request for information and updates.</p>	<p>As competition agencies may require further information in order to assess the merits of a complaint, competition officers should explain to leniency applicants that they might be expected to assist with collecting/providing more relevant information, in order to "perfect their leniency markers".</p> <p>Leniency applicants should also be updated regularly on the progress and the outcome of the leniency application, e.g., if the marker is perfected and if an investigation has been commenced following the leniency application.</p>

Features of a leniency regime	Internal-facing (for competition authority officers)	External-facing (for leniency applicants)
<b>Coordination with overseas competition agencies</b>	Where a waiver of confidentiality is provided by the leniency applicant, the IPM should set out the types of information that can be exchanged with the overseas competition authority, and how such information should be communicated with and transmitted to the overseas competition authority.	The extent of information covered under a confidentiality waiver should be discussed and agreed upon with the leniency applicant.

**Figure 29:** Elements and Features of a Leniency System

### iii. Whistleblowing

15. Competition agencies may become aware of cartel conduct from an informant or a whistle-blower. Whistle-blowers may be employees who become aware of their employer's involvement in a cartel. They may also be ex-employees who have become disgruntled and decide to report the cartel conduct to the competition authority. In such situations, competition agencies should bear in mind the potential biases when assessing the information received.
16. Competition agencies should have personnel who are specially trained to handle whistle-blowers/informants for the following reasons:
  - (i) The informant/whistle-blower may be requested by the competition authority to work undercover, and undertake further covert information gathering on the cartel conduct.
  - (ii) The informant/whistle-blower may face potential repercussions for telling on the cartel conduct.
  - (iii) Monetary rewards can be paid to the informant/whistle-blower for providing information.
17. The principles for the effective functioning of a whistleblowing system are similar to those of a complaint system and leniency application i.e. a competition authority should put in place internal and external facing elements.

Features of a whistleblowing system	Internal-facing (for competition authority officers)	External-facing (for leniency applicants)
<b>Receiving whistleblowing or informant reports</b>	<p>The IPM should set out the internal procedures for receiving whistleblowing or informant reports. As noted above, personnel should be specially trained to handle whistle-blowers/informants.</p> <p>The whistle-blowers' identity should generally be kept confidential as they may face potential repercussions for telling on the cartel conduct. The IPM should therefore set out the procedures for recording file notes and collecting further information from the market without inadvertently revealing their identities.</p> <p>Competition agencies generally restrict access to information on ongoing whistleblowing reports to a select group within the competition authority, e.g., enforcement unit, senior management team.</p> <p>Further, some jurisdictions may provide whistle-blowers with legal protection from victimization and dismissal. As such, the competition authority's policies for handling whistle-blowers should take into consideration such relevant legislation.</p>	<p>The ways in which a competition authority receives whistleblowing or informant reports should be communicated clearly. Further, as whistle-blowers may face potential repercussions for telling on the cartel conduct, competition agencies should explain how their identities, and information provided that may positively identify them will be treated with confidence.</p> <p>The benefits of filing whistleblowing reports, typically financial rewards, should also be spelt out to motivate would-be whistle-blowers to file a report.</p> <p>Competition agencies generally specify a particular personnel, e.g., the head of the legal unit or enforcement who should be contacted.</p>

Features of a whistleblowing system	Internal-facing (for competition authority officers)	External-facing (for leniency applicants)
<b>Handling queries from whistle blowers and responding to whistle-blowers</b>	<p>The IPM should set out the internal procedures for handling queries from the whistle-blowers and communicating with the whistle-blowers on the progress and the outcome of their report, e.g., whether investigations are commenced.</p> <p>It is recommended that the “first contact” competition authority officer who is trained to handle whistle-blowers be the main interface with the whistle-blower.</p>	<p>As competition agencies may require further information in order to assess the merits of a report, the whistle-blower’s handler should explain to whistle blowers that they might be expected to assist with collecting/providing more relevant information.</p> <p>Whistle-blowers should also be updated regularly on the progress and the outcome of their report and if they remain eligible for financial rewards (if applicable).</p>

**Figure 30:** Elements and Features of a Whistleblowing System

#### iv. Notifications

18. Some jurisdictions have competition laws that prescribe a notification regime, where businesses can notify their agreements/conduct which may potentially infringe cartel provisions to the competition authority. The internal and external facing elements of notification regimes are discussed in this subsection.
19. **External facing elements.** The ways in which a competition authority receives notifications should be communicated clearly, e.g., on the competition authority’s website, and the information should be publicly accessible. Businesses generally rely on the assistance of counsel and other experts when filing a notification with the competition authority.
20. Businesses are typically required to submit information based on a form prescribed by the competition authority when filing a notification. These forms generally include the following types of requirement fields:
  - (i) Information needed for administrative purposes, e.g., names, contact details of the businesses, and relevant third parties such as customers, suppliers, and competitors.
  - (ii) Information about the entities’ business.
  - (iii) A description of the agreement/conduct, an explanation on the business rationale for entering into the agreement/conduct, and copies of relevant documents.
  - (iv) Reasons as to why the businesses find that the agreement/conduct is likely to infringe the cartel provisions.
  - (v) Information that will assist the competition authority’s competition assessment of the agreement/ conduct. The businesses’ views on the impact of the agreement/conduct on the relevant market(s) defined, customers, suppliers, competitors, and any other relevant stakeholders are typically required.
  - (vi) Notwithstanding the requirement of field (d) set out above, information on valid defences or exemptions/exclusions under the competition law which apply to the agreement/conduct should also be provided.
21. Competition agencies are encouraged to consider mechanisms that provide for flexibility to reduce initial notification burdens. Competition agencies should consider engaging businesses in pre-notification discussions to discuss the content of the forms, and the timing of their notifications.

Businesses can also discuss the possibility of exemptions from certain information requirement fields that may not be applicable for the competition authority's assessment, prior to submitting their notification formally.

22. **Internal facing elements.** Competition agencies should promote consistency of procedures through internal rules or practices when receiving and reviewing notifications. These internal rules or practices can be documented in an internal procedure manual which agency officers can refer to. For example, as a starting point, the internal procedure manual should also contain checklists to assist agency officers with determining whether an initial form is complete.
23. The internal procedure manual should also include templates for routine requests and recommendations on how to deal with “frequently encountered requests” during the course of reviewing the notification, e.g., requests for deadline extension for the provision of documents/information.
24. As some jurisdictions may charge fees for reviewing notifications, the internal procedure manual should set out how and when the fee payment should be received and processed.
25. Lastly, the internal procedure manual should be a “live” document that is updated regularly to reflect the agency's notification review experience and align the internal procedures with international best practices.

## b) Proactive Tools

26. These tools are initiated by the competition authority. This section highlights four of the most common proactive cartel detection tools, namely, education and outreach, liaison with other government agencies, liaison with other competition agencies and monitoring reports.

### i. Education and Outreach

27. Competition agencies looking to start enforcing the law should make it a priority to engage in education and outreach efforts to raise awareness about the illegality of cartel conduct, and how such conduct can be reported to the competition authority. The key stakeholders that competition agencies should reach out to are businesses and consumers.
28. The ICN Cartel Working Group noted that “*education and outreach should not be underestimated as a tool to generate significant leads*”.
29. Common tools for education and outreach include: speaking at public seminars, agency publications, press articles, organizing and giving presentations. For recommended practices on education and outreach, refer to the Toolkit for Competition Advocacy in ASEAN.

### ii. Engagement with Other Government Agencies

30. Competition agencies should consider engaging with three types of government agencies, government agencies engaged in public procurement activities, industry regulators and anti-corruption agencies.
31. A key reason for engaging with government agencies is to detect cartel activities in public procurement. These agencies may engage with the competition authority at various levels:
  - (i) Filing a complaint against a suspected cartel activity.

- (ii) Providing information on bid prices, and tender documents which can be useful for screening/ detecting cartel activities.
- (ii) Implementing procurement practices recommended by the competition authority to detect and reduce the risk of cartel conduct such as bid-rigging.

### **Singapore**

The CCCS's investigation against motor vehicle traders for engaging in bid-rigging at public auctions of motor vehicles was commenced following information received from government agencies.

#### **A. The Parties**

1. **Following information received from other government agencies**, on 31 May 2010, the Competition Commission of Singapore ("CCS") commenced investigations into an anti-competitive arrangement in respect of the submission of bids in the public auctions of motor vehicles by the Land Transport Authority ("LTA"), the National Environment Agency ("NEA"), the Singapore Civil Defence Force ("SCDF"), Singapore Customs ("Customs") and the Singapore Police Force ("SPF"). CCS' investigations indicated that the following undertakings (each a "Party", collectively, the "Parties") have breached the prohibition under section 34 ("the section 34 prohibition") of the Competition Act (Cap. 50B) ("the Act"), by engaging in an agreement to bid-rig at public auctions of motor vehicles conducted by various government agencies: ....

*Source: CCCS, Paragraph 1, Notice of Infringement Decision "Bid Rigging by Motor Vehicle at Public Auctions of Motor Vehicles"*

#### **Case Study 14: Engagement with other government agencies (Singapore)**

32. Further, it is helpful to engage with industry regulators as they are key stakeholders whom the competition authority can tap on for industry-related knowledge. These industry regulators are able to provide useful contact on industry players, and general information on market development trends.
33. Lastly, the ICN Cartel Working Group identified that "many competition agencies have found that there is a causal link between competition and corruption – that is to say more competition results in less corruption while, conversely, increased corruption results in decreased competition." Competition and anti-corruption agencies in the respective jurisdictions should team up and warn public procurement officials, who facilitate bid-rigging conduct that they may be prosecuted. Both agencies can also explore ways to support each other's enforcement efforts, and advocate ways to improve public procurement practices to mitigate the risk of corrupt and anti-competitive practices.

### **iii. Cooperation with Other Competition Agencies**

34. With closer economic integration between ASEAN member states, it is anticipated that cartel activities will have multi-jurisdictional impact in the ASEAN region. Competition agencies should tap on existing co-operation platforms such as ASEAN Competition Enforcers' Network ("ACEN") to

generate leads for cross-border cartel activities. The ACEN was set up in October 2018 to encourage information sharing between competition authorities, and enable mutual understanding of each other's enforcement goals and objectives.

35. Competition agencies can also consider entering into bilateral or multilateral cooperation agreements with other competition agencies. For example, the CCCS-KPPU Memorandum of Understanding facilitates cooperation on competition enforcement. Pertinently, paragraph 3 of the Memorandum of Understanding provides that:

*3.1 Each competition authority will notify the other competition authority of any enforcement activity that it conducts that the notifying competition authority considers may affect the important interests of the other competition authority.*

*3.2 Provided that it is not contrary to the laws and regulations of the country of the notifying competition authority and does not adversely affect any enforcement activity being carried out by the notifying competition authority, notification pursuant to subparagraph 3.1 will be given as promptly as possible when the notifying competition authority becomes aware that its enforcement activities may affect the important interests of the other competition authority.*

36. Other ways of liaising with other competition agencies include: visits between competition agencies to share cartel enforcement experience, staff secondment to cartel enforcement departments, and informal discussions between competition agency officials on cartel detection and case generation.

### **Singapore**

34. ***Co-operation with other Agencies in Cross-border Cartel Cases.*** *CCCS has found, from its past experience, that co-operation (sharing of information) with other agencies can be greatly beneficial in cross-border cartel cases both for CCCS as well for the undertakings (including the leniency applicant) under investigation.*

35 ***For example, in CCCS's investigation into the price-fixing cartel between freight forwarding companies, CCCS communicated with other competition agencies (which had already begun their investigations by the time CCCS opened its investigation) after obtaining substantive waivers from the leniency applicants in the case. This proved extremely useful in scoping the most effective way to gather evidence from the investigated undertakings. Ultimately, this made the investigation less costly (in terms of time and expense) for CCCS as well as the undertakings and individuals involved.***

*Source: CCCS, Paragraphs 34 and 35, OECD Roundtable on challenges and co-ordination of leniency programme-Note by Singapore, May 2018*

### **Case Study 15: Cooperation with other government agencies (Singapore)**

#### **iv. Monitoring & Intelligence**

37. It is recommended that competition agencies monitor reports, e.g., daily news, industry association reports. Competition agencies have in the past, relied on such reports to commence investigations against cartels. Apart from being a good source for identifying potential cartel behaviour, e.g., frequent complaints, the information contained in these reports is also useful for informing

competition agencies of general market/industry trends. Some competition agencies have even made “daily news scan” or monitoring of reports an integral part of their daily operations.

38. The ICN Cartel Working Group (Anti-Cartel Enforcement Manual on Enforcement Techniques) identified the following types of alleged cartel conduct that might be found from such reports:

- Allegations of price-fixing, market sharing, non-competing, bid rigging and/or exchange of price information (e.g., a magazine interviews a company which alleges that others are engaged in such activities or maybe contains a letter from a disgruntled customer who thinks he’s the victim).
- One company putting prices up (or perhaps down) and other(s) doing exactly the same around the same time (of course this can be due to price following), or covert price increases, for example by a coordinated reduction of the size of the packaging.
- A company losing business to others, combined with an indication of collusive activity (e.g., the other companies may be engaging in concerted action).
- Apparent coordination of supply (this will drive up the price).
- Coordinated or temporally suspicious (i.e. around the same time) activities such as introduction of similar discounts and/or incentive schemes.
- Publicised statements or interviews including comments such as “it’s time the industry took action to increase its margins”.

### **Malaysia**

The MyCC commenced its investigation against 15 members of the Sibü Confectionery and Bakery Association for engaging in price fixing after a local news outlet reported on price hikes.

#### *3.1 The Investigation*

***9. In November 2013, the Commission initiated an investigation under section 14(1) of the Act based on the article entitled “Announcement of price hike draws attention of MyCC” published by Borneo Post Online on the 20 November 2013.***

*Source: MyCC, Paragraph 9, Infringement of section 4(2)(a) of the Competition Act 2010 by Fifteen (15) Members of the Sibü Confectionery and Bakery Association.*

### **Case Study 16: Monitoring and Intelligence (Malaysia)**

### **Singapore**

The CCCS commenced its investigation against financial advisors after local media reports covered the news of iFast withdrawing its Fundsupermarket Offer “due to unhappiness in the industry”.

#### *C. Investigation and Proceedings*

***29. In the early afternoon of 3 May 2013, iFAST limited the Fundsupermarket Offer to a one-month offer. Later in the afternoon of 3 May 2013, iFAST withdrew the Fundsupermarket Offer with immediate effect.***

30. **CCS noted media reports about the withdrawal of the Fundsupermart Offer, which suggested that iFAST withdrew the Fundsupermart Offer due to unhappiness in the industry.** CCS also received a complaint on this matter which highlighted the concern expressed by AFA to iFAST as reported in the media.
31. **On 28 August 2013, CCS commenced an investigation** under section 62 of the Act as there were reasonable grounds for suspecting that the section 34 prohibition of the Act had been infringed. CCS sent requests for information under section 63 of the Act in September and December 2013 to iFAST, and carried out interviews with representatives of iFAST in September and December 2013.

Source: CCCS, Paragraphs 29 to 31, *Infringement of the section 34 prohibition in relation to the distribution of individual life insurance products in Singapore.*

### Singapore

The CCCS commenced its investigation against employment agencies for fixing the monthly salaries of new Indonesian foreign domestic workers after local media outlets covered the news story.

#### C. Investigation and Proceedings

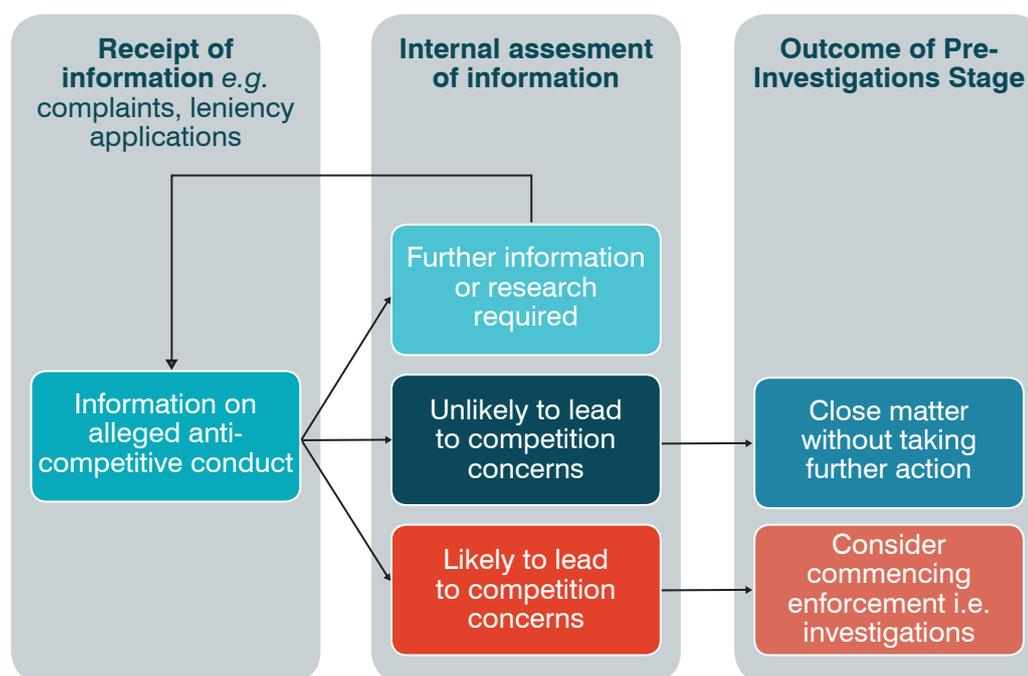
31. **On 19 January 2011, the Today newspaper and Channel News Asia (“CNA”) reported that 17 major EAs in Singapore were going to increase the monthly salaries for new Indonesian FDWs to \$450.** On 20 January 2011, CCS commenced investigations as to whether there had been a breach of the section 34 prohibition of the Act.

Source: CCCS, Paragraph 31, *Notice of Infringement Decision Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore*

### Case Study 17: Monitoring and Intelligence (Singapore)

#### Pre-Investigation Stage

39. The pre-investigation stage can be broadly separated into three sub-stages namely:
- (i) Receipt of information,
  - (ii) Internal assessment of information, and
  - (iii) Outcome of pre-investigation stage.



**Figure 31:** Pre-Investigation Stages (Cartel Enforcement)

#### a) Receipt of Information

40. Competition agencies should establish procedures to screen and process information on alleged anti-competitive conduct. It is recommended that competition agencies set up electronic databases to systematically register and catalogue all information received.
41. The ICN Cartel Working Group noted that electronic databases and searchable electronic files are particularly valuable devices for competition agencies for the following reasons:
- They allow competition agencies to consolidate multiple complaints or sources of evidence concerning the same alleged cartel conduct.
  - They provide resources for competition agency staff to draw on institutional knowledge/expertise or prior cases to assist in assessing and reviewing new complaints. This is particularly useful for competition agencies with geographically dispersed staff.
42. It is also recommended that competition agencies standardize the procedures for receiving information on alleged cartel conduct, and the processes should be communicated clearly to the relevant stakeholders. The external elements of complaint systems, leniency application systems and whistleblowing systems were discussed in the preceding section on cartel detection stage “reactive tools”.

#### b) Internal Assessment of Information and Outcome of Pre-investigation Stage

43. Competition agencies should establish methodologies and procedures for the early verification and assessment of cartel allegations during the pre-investigation phase. The initial assessment of the information received should cover the following:
- Whether the alleged conduct is likely to be an infringement of the cartel provision in the competition law i.e. the theory of harm,

- (ii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged conduct.
44. The screening and process of such information is typically completed by agency officers who have good knowledge of the cartel provisions in competition law. Some competition agencies have screening committees that meet on a regular basis to screen complaints against cartels expeditiously and in a routine manner. As discussed earlier, an electronic database will provide resources for competition agency staff to draw on institutional knowledge/expertise or prior cases to assist in assessing and reviewing new complaints, especially if they are similar to prior cases.
  45. When evaluating cartel allegations, the ICN Cartel Working Group recommends that competition agencies consider the following factors:
    - (i) Credibility/accuracy of complaint/complainant
    - (ii) Possibility and/or availability of further persons with knowledge
    - (iii) Identity of possible/potential witnesses
    - (iv) Possible extent/seriousness of the illegal activity
    - (v) Previous or similar complaints regarding the sector
    - (vi) Structure of the sector or market, and the position of the alleged cartel within the market
    - (vii) Any international dimension to the complaint or those complained of.
  46. Three possible interim outcomes arise in this sub-stage. The competition authority may require further information or research on the alleged cartel conduct before it is able to advance its internal assessment of the information. The competition authority's internal assessment of the information may reveal that the alleged cartel conduct is unlikely or likely to lead to competition concerns.

#### **i. Further Information or Research Required**

47. Where initial information provided by leniency applicants, complainants, or whistle-blowers are insufficient to inform internal assessment, competition agencies should request for further information from these sources at the first instance. Competition agencies can also rely on third party sources, e.g., news reports, internet research, industry association reports, where available, to fill information gaps.
48. It is also important the competition authority verify or corroborate allegations before deciding on the next steps, as information may be biased. For example, whistle-blowers may be ex-employees who have become disgruntled and decided to report the cartel conduct to the competition authority. As such, third party sources are helpful to verify or corroborate these allegations.
49. That said, when verifying these allegations, care must be taken to preserve the secrecy of the competition authority's assessment, especially when the alleged cartel may still be in operation and the cartelists are still unaware of the fact that the competition authority has knowledge of the cartel. This will ensure that the element of surprise is preserved until the appropriate moment when enforcement actions, e.g., dawn raids, investigations are taken. For example, it may not be appropriate to approach industry associations for information, especially if the alleged cartelists are members of the industry associations and have representatives in the executive committee of the industry association.

## ii. Unlikely to Lead to Competition Concerns – Close Matter Without Taking Further Action

50. When it becomes clear that the alleged cartel conduct is unlikely to infringe competition laws, competition agencies should promptly close the matter so that scarce resources can be re-assigned to work on other enforcement matters. Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer who is tasked to screen the complaint/leniency application/whistleblowing report, or by a group of agency officers (e.g., screening committee).
51. The decision to not take further action should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future.
52. As a rule of thumb, the ICN Cartel Working Group noted that decisions to not take further action are generally made within a period of a few days to a few weeks.
53. As an aside, while the competition authority may decide to not take further action as the allegation is unlikely an infringement, it should consider whether the alleged "wrong-doing" should be investigated by another enforcement agency. For example, given the close connection between bid-rigging conduct and corruption, competition agency should consider referring the matter to the anti-corruption agency. Competition agencies should consider establishing working relations with other enforcement agencies, e.g., referral mechanisms, or co-operation arrangements, to facilitate such referrals.

## iii. Likely to Lead to Competition Concerns – Consider Commencing Enforcement i.e. Investigation

54. If it becomes clear that an alleged cartel conduct is likely to infringe competition laws, competition agencies should consider commencing enforcement i.e. investigation. Relevant information reviewed during the course of the competition authority's assessment should be collated and marked out for easy access. This will help facilitate further deliberation on whether to commence enforcement.
55. Some jurisdictions have competition laws that only allow for investigations to be initiated when relevant statutory thresholds are met, e.g., where there are reasonable grounds to suspect that an infringement of the law has occurred. Competition agencies from these jurisdictions should therefore consider at this stage if the relevant statutory thresholds are met.
56. **Prioritisation.** The ICN Cartel Working Group recommends that a competition agency have a policy for, or approach to, undertaking case selection and prioritization with easily measureable objective criteria that reflect the particular legal, economic and regulatory environment within which the agency investigates cartel conduct and enforces its competition law. This is because competition agencies' experience reveal that they often become aware of more cases of alleged cartel conduct than available resources will allow them to pursue enforcement.
57. The ICN Cartel Working Group recommends that competition agencies prioritise cartel investigations using the following principles:
  - (i) **Seriousness of the conduct.** For a young competition agency, prioritising investigations against the four types of hard-core cartels i.e. price-fixing, market sharing, production control and bid-rigging over other types of anti-competitive agreements, e.g., information sharing in the early days of enforcement is recommended. This is because these four types of hard-core

cartels are considered by many to be the most egregious competition law infringements, and successful enforcement will have a deterrent effect.

- (ii) **Economic impact.** Alleged cartel conduct that is more widespread, e.g., industry-wide, affecting greater the volume of commerce, and longer in duration, are more likely to be prioritized.
  - (iii) **Consumer detriment.** The greater the consumer detriment, e.g., price increase, types of consumer groups affected by the alleged conduct, the more likely the alleged cartel conduct will be prioritized.
  - (iv) **Public interest.** Alleged cartel conduct that is likely to generate greater public interest should be prioritised e.g. whether consumers and businesses are likely to be interested, how the enforcement action may affect public confidence in the competition authority.
  - (v) **Strategic Considerations.** Relevant considerations include, general economic sector priorities, whether the alleged cartel conduct raise novel legal/economic issues, and whether the enforcement is likely to be successful and lead to general and specific deterrence.
  - (vi) **Weighing the desired enforcement outcome against available resources, e.g., time, financial resources and personnel.** If the weighing process indicates that pursuing the case would be an efficient and effective use of the agency’s time and resources, then the alleged cartel should be prioritised for full scale investigation.
58. However, a young competition agency should, where resources permit, undertake a wide range of cartel investigations for alleged cartel conduct that are likely to lead to competition concerns. This will allow the competition authority’s officer to get “on-job-training” as they implement investigation procedures. The competition assessment and general learning points from the investigation should also be documented and archived to form the competition authority’s institutional knowledge. Refer to **Module D1: Operationalising the Enforcement Strategy** on “enforcement experimentation” for more information.
59. **Recommendation.** The recommendation to commence enforcement, i.e., investigation should comprise of the following:
- (i) Relevant information received by the competition authority, e.g., description of the parties involved, the alleged cartel conduct,
  - (ii) Assessment as to why the alleged cartel conduct is likely to lead to competition concerns, i.e., the theory of harm,
  - (iii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged conduct, and
  - (iv) Why the case against the alleged cartel conduct should be selected and/or prioritized.
60. The recommendation should be documented in a report, and archived in the competition authority’s electronic database. It should be archived in a manner that allows for easy access in the future. Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer who is tasked to screen the complaint/leniency application/ whistleblowing report, or by a group of agency officers (e.g., screening committee).
61. Should the competition authority decide to not commence enforcement, it can also consider whether other non-enforcement type actions, e.g., advocacy or cooperating with another enforcement agency, should be taken instead. Refer to **Module D5: Weighing Competition Enforcement and Competition Advocacy** for more information.

## Investigation Stage

62. This sub-section highlights the “nuts and bolts” of how to start and progress an investigation.

### a) Formation of the Case Team

63. As a first step, a case team should be formed to work on the investigation. The size and experience of the case team will depend on the complexity of the case.

64. A typical case team structure will comprise of a case team leader (who is usually a senior or experienced investigator) and at least one or two case team members who will assist the case team leader with the day-to-day running of the investigation.

65. Case teams typically include personnel with legal and/or economic skills.

### b) Planning and Tracking Investigations

66. **Investigation Plan.** An investigation plan is usually prepared by the case team leader with inputs from the case team members.

67. The ICN Cartel Working Group noted that for some competition agencies, an investigative plan is an essential planning tool, used throughout the life of the investigation to identify, and track the completion of work. Whilst some other competition agencies use the investigation plan as a starting point, to track high level issues, or as a reporting tool. In either case, an investigation plan should be a flexible and forward looking document that can be updated as the investigation develops

68. The ICN Cartel Working Group recommends that an investigation plan include some or all of the following:

- (i) A theory of harm;
- (ii) Aims of the investigation, and strategies for achieving these aims;
- (iii) Actions required to meet the aims of the investigation, e.g., interviews with parties involved, dawn raids, request for information from relevant parties, internal reporting and updating senior personnel;
- (iv) (If applicable) How any leniency applicants/whistle-blowers/complainants should be dealt with;
- (v) Consideration of whether any external legal and/or economic advice is likely to be required;
- (vi) Information to be gathered, including identifying sources to be explored and third parties to be approached, and when and how this will happen;
- (vii) Details of any cooperation and/or coordination with local enforcement agencies and overseas competition agencies, when and how this is likely to take place;
- (viii) Timeframes and milestones for key action/events to occur; and
- (ix) Resources required for the investigation (e.g. financial budget for engaging expert consultants, additional manpower for the case team).

69. The ACCC’s AANZFTA CLIP Toolkit for Senior Competition Investigator suggests the following template for an investigation action plan:

**Sample Investigation Plan Template**

**Identification**

Matter	^Trader name or other relevant title^	Reference Number: ^number^
Team	^Names of team member and any internal advisor^	
Office	^Location, branch name^	
Date plan update	^DD MONTH YYYY^	
Current Status	^Evidence gathering: Final assessment: Preparing for resolution/litigation^	

**Alleged conduct**

Basic Allegation	^Concise statement of alleged conduct^	
Section	^Section number and title of alleged contravention^	
Case Theory	^Insert^	
Objectives	^Objectives are more than possible remedies: What difference do we seek to make in intervening in a particular matter?^	

**Strategic alignment**

Priority	^State reasons why intervention is required. Is it a priority area for the authority?^	
Other factors	^Are there other factors why intervention is required?^	

**Authority oversight**

First appearance before decision makers: ^within 6 month commenced^	Last appearance: ^Date^	Next appearance: ^Date^
Last Decision: ^Insert^		

**Key dates**

Date initial investigation commenced: ^As initial investigation^	Relevant KPIs for Initial investigation finalisation: ^Insert^
Date in-depth investigation commenced: ^As in-depth matter^	Relevant KPIs for In-depth investigation finalisation: ^Insert^
Estimated completion date: ^Review periodically^	

**Action plan**

**Next two months**

Step	^Major steps to be completed within the next two months. Once completed steps should remain on the plan with the corresponding completion date listed.^	Person responsible: ^name^
Step		Person responsible:

**Broad investigation plan**

Start date	^Date^	
Month 1	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 2	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 3	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 4	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 5	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 6	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^

**Figure 32: Investigation Action Plan Template**

70. **Evidence Matrix.** It is recommended that the case team set out an evidence matrix based on the information relied upon to commence the investigation, and identify information gaps at the start of an investigation. Likewise, the evidence matrix should be a “live document” like the investigation plan and should be updated contemporaneously during the course of the investigation whenever evidence is received, as it will support informed decision making.
71. The ACCC’s AANZFTA CLIP Toolkit for Senior Competition Investigators suggests the following template for an evidence matrix:

**Evidence matrix**

Section	Elements	Evidence to obtained to prove	Further evidence required	Evidence gathering logistic - how obtained by whom, and when
	A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.			

**Figure 33: Evidence Matrix Template**

72. The evidence collected should essentially help to answer the following questions:
- (i) Whether the alleged conduct is likely to be an infringement of the cartel provisions in the competition law i.e. the theory of harm; and
  - (ii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged conduct.
73. Case teams should also be guided by the senior management of the competition authority, and coordinate with other relevant parts of the competition authority (e.g. another investigation case team looking at the same type of cartel conduct in an adjacent industry). Key investigative actions that can benefit from this oversight and coordination include: compulsory information requests,

evidence evaluation and recommendations to the competition authority's decision makers. Regular internal meetings between the case teams, senior management, and other relevant agency officers can help guide and reassess the investigative progress, strategies and theories.

### c) Investigation Outcomes

74. **If the competition authority determines that the alleged conduct is likely to infringe competition law.** An investigation may culminate in the competition authority issuing an infringement decision (in an administrative system), or referring the alleged cartel conduct for prosecution (in a prosecutorial system). Apart from demonstrating that the alleged cartel conduct infringes competition law, a competition agency will need to consider how to:
- (i) Remedy the situation such that the process of competition is restored e.g. order that entities bring the alleged cartel conduct to an end or take certain actions to undo the harm to competition;
  - (ii) Deter future conduct from the entities involved e.g. impose financial penalties on the entities involved;
  - (iii) Deter future/similar conduct in the jurisdiction generally, e.g. marking up financial penalties imposed;
  - (iv) Communicate the decision to the general public and interested parties e.g. leniency applicants, complainants, and government agencies to demonstrate the importance and relevance of competition enforcement; and
  - (v) Manage the risks of an appeal against the infringement decision (in an administrative system) and counter arguments that entities will raise (in a prosecutorial system).
75. Some competition agencies have also introduced “fast-track” procedures to incentivize entities to admit liability for infringing competition law. For example, the CCCS’s fast track procedure enables the CCCS to achieve procedural efficiencies and resource savings through streamlined administrative procedures that results in an earlier infringement decision. Entities who admit liability for infringement will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay.
76. Some competition agencies may also decide to not issue an infringement decision or pursue the route of prosecuting the alleged conduct on grounds of administrative priority. In such circumstances, they may issue warning letters to the entities involved or obtain an undertaking from the entities involved to end the alleged cartel conduct. This route is distinct from the fast track procedure route as entities do not typically admit any liability for infringement.

## Singapore

### CCS Stops Price Increase Agreement Between Four “Fa Gao” (发糕) Manufacturers

7 April 2018

1. The Competition Commission of Singapore (“the CCS”) swung into action when four “Fa Gao” producers jointly announced that they had discussed and agreed to a price increase of “Fa Gao”.

#### The Incident

2. The four “Fa Gao” producers are Thomson Cake & Confectionery, Lian Hup Huat Food Manufacturer, Sin Hong Huat Food Stuffs Manufacturing and Hup Yew Confectionery. On 21 March, they announced that they would increase the prices of “Fa Gao” uniformly, with effect from 1 April 2008. The CCS made enquiries and confirmed that the four manufacturers had reached an agreement to increase prices of “Fa Gao”. The agreement between the four manufacturers would likely infringe the section 34 prohibition of the Competition Act against price-fixing.
3. On 31 March 2008, the owners of the four manufacturers assured the CCS that they would put an end to their agreement and set their prices independently. The CCS has since monitored the prices of the four manufacturers and found no indication to suggest that the agreement has been carried out.

#### CCS Action

4. **Had the CCS concluded its investigations and found that the manufacturers had infringed the section 34 prohibition, it could have issued an infringement decision and imposed financial penalties on the manufacturers. However, the CCS decided to take no further action on this case because it was able to prevent the agreement from taking effect.** Nonetheless, CCS will resume the investigation if there are further developments which suggest that the companies are still carrying out their agreements.

Mr Teo Eng Cheong, Chief Executive of CCS added, “In this instance, CCS believes that preventing an anti-competitive agreement from taking effect is a better outcome.”

*Source: CCCS, Media Release “CCS Stops Price Increase Agreement Between Four ‘Fa Gao’ (发糕) Manufacturers”*

#### Case Study 18: Investigation Outcomes (Singapore)

77. **If the alleged cartel conduct is unlikely to infringe competition law.** An investigation may also culminate in the competition authority taking no further action if the alleged cartel conduct does not have any anti-competitive effect.
78. The decision to not take further action should be documented in a report, and archived in the competition authority’s electronic database. It should be archived in a manner that allows for easy access in the future. Evidence collected during the course of the evidence should be similarly archived as they are useful reference for future assessments and general market intelligence.

79. In some jurisdictions, competition agencies may be required to publish their grounds for the non-infringement decision.
80. Lastly, due process and procedural fairness during the course of the investigation to its completion should be ensured. This is discussed in **Module D6: Due Process and Procedural Fairness**.

## References and Useful Resources

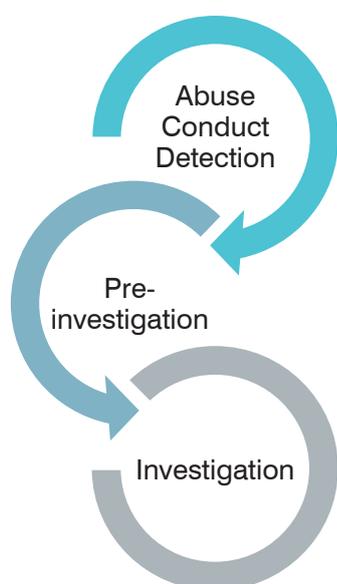
Source	Relevant Section	Title	Access
AACC for the AANZFTA Competition Law Implementation Program	Investigation Stage: Investigation Plan	Toolkit for senior competition investigators	<a href="https://asean-competition.org/file/post_image/Toolkit%20for%20senior%20competition%20investigators.pdf">https://asean-competition.org/file/post_image/Toolkit%20for%20senior%20competition%20investigators.pdf</a>
CCCS	Reactive tools: complaint	“Feedback/Complaint”	<a href="https://www.cccs.gov.sg/approach-cccs/making-complaints">https://www.cccs.gov.sg/approach-cccs/making-complaints</a>
	Reactive tools: leniency application	Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-leniency-treatment-for-undertakings-coming-forward-with-information-on-cartel-activity-2016.pdf?la=en&amp;hash=200FEDFC55E57559D0C3FE6E58D53C26B6614E17">https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-leniency-treatment-for-undertakings-coming-forward-with-information-on-cartel-activity-2016.pdf?la=en&amp;hash=200FEDFC55E57559D0C3FE6E58D53C26B6614E17</a>
	Reactive tools: complaint, leniency application, whistleblowing	Key Prohibitions under the Competition Act Explained	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/education-and-compliance/educational-resources/corporate-brochures/corporate-brochures-revised-mar-18/bklet-2-key-prohibitions-under-the-competition-act-explained-mar-18.pdf">https://www.cccs.gov.sg/-/media/custom/ccs/files/education-and-compliance/educational-resources/corporate-brochures/corporate-brochures-revised-mar-18/bklet-2-key-prohibitions-under-the-competition-act-explained-mar-18.pdf</a>
		Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-fast-track-procedure-for-section-34-and-section-47-cases.pdf?la=en&amp;hash=8F8B4CA2E1CA70DDDDA146A61A0FFA090AEC7973">https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-fast-track-procedure-for-section-34-and-section-47-cases.pdf?la=en&amp;hash=8F8B4CA2E1CA70DDDDA146A61A0FFA090AEC7973</a>
MyCC	Reactive tools: complaint	E-Complaint	<a href="https://www.mycc.gov.my/e-complaint">https://www.mycc.gov.my/e-complaint</a>
	Reactive tools: leniency application	Leniency Regime	<a href="https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Leniency%20regime%20BI_outline.pdf">https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Leniency%20regime%20BI_outline.pdf</a>
	Reactive tools: complaint	Competition Act 2010, Handbook for General Public	<a href="https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Handbook%20for%20General%20Public%20%28CA2010%29.pdf">https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Handbook%20for%20General%20Public%20%28CA2010%29.pdf</a>
ICN	Investigation Stage: Investigation Plan	Annotated ICN Guidance on Investigative Process	<a href="https://www.internationalcompetitionnetwork.org/portfolio/annotated-icn-guidance-on-investigative-process/">https://www.internationalcompetitionnetwork.org/portfolio/annotated-icn-guidance-on-investigative-process/</a>
	Cartel detection stage, pre-investigation stage and investigation stage	International Cartel Working Group “Subgroup 2: Enforcement Techniques March 2010, Chapter 4 Cartel Case Initiation	<a href="https://www.internationalcompetitionnetwork.org/portfolio/case-initiation/">https://www.internationalcompetitionnetwork.org/portfolio/case-initiation/</a>

Source	Relevant Section	Title	Access
	Reactive tools: leniency application	Checklist for efficient and effective leniency programmes (2017)	<a href="https://www.internationalcompetitionnetwork.org/portfolio/leniency-program-checklist/">https://www.internationalcompetitionnetwork.org/portfolio/leniency-program-checklist/</a>
	Reactive tools: leniency application	Waivers of Confidentiality in Cartel Investigations – Explanatory Note	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf</a>
	Reactive tools: leniency application, informant and whistleblowing	Worldwide Leniency Materials Country/Organization + Link(s) to Leniency Program Materials	<a href="https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/leniency-links/">https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/leniency-links/</a>
	Proactive tools: Liaison with government agencies	Relationships between Competition Agencies and Public Procurement Bodies	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMPublicProcurement.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMPublicProcurement.pdf</a>
	Cartel detection stage, pre-investigation stage and investigation stage	Compilation of “Good Practices” from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group 25 November 2016	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMGoodPractices.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMGoodPractices.pdf</a>
PCC	Reactive tools: complaint	File a Complaint	<a href="https://phcc.gov.ph/file-a-complaint/">https://phcc.gov.ph/file-a-complaint/</a>
	Reactive tools: complaint	Handbook “How the Philippine Competition Act affects consumers”	<a href="https://phcc.gov.ph/wp-content/uploads/2017/06/PCC-Handbook-2019.pdf">https://phcc.gov.ph/wp-content/uploads/2017/06/PCC-Handbook-2019.pdf</a>

## Module D3: Unilateral Conduct/Abuse of Dominance

### Key Points

- Investigating alleged abusive conduct can be among the most challenging and difficult tasks for a competition agency, as such conduct can qualify as abusive while also promoting efficiencies.
- While there is a risk of error i.e. over-enforcement, competition agencies should not be deterred from investigating unilateral conduct.
- Enforcement requires a “rule of reason” approach, where possible anti-competitive harm is weighed against possible efficiency benefits.
- Competition agencies should consider the abuse of dominance assessment as a step-wise process, and engage in a dialectic process during the investigation stage.
- During an investigation, a dedicated case team should be appointed, and an investigation plan and evidence matrix should be drawn up during the investigation stage.

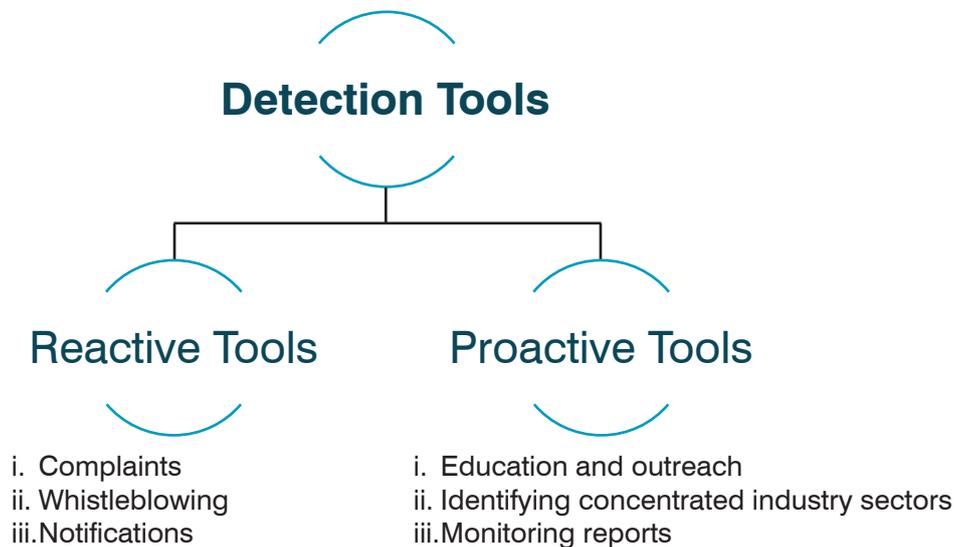


**Figure 34:** Abusive Conduct Enforcement Stages

1. The contents of this module are drawn largely from the OECD’s Framework for the Design and Implementation of Competition Law and Policy, Chapter 5: Abuse of Dominance, while the administrative frameworks are adapted from the ICN Cartel Working Group’s Anti-Cartel Enforcement Manual chapter on “Enforcement Techniques”.
2. It is helpful to consider cartel enforcement cases in three key stages:
  - (i) **Abusive conduct detection stage:** how a competition agency might detect signs of abusive business conduct.
  - (ii) **Pre-investigation stage:** how a competition agency should evaluate evidence about an alleged abusive conduct when deciding whether to commence investigations or not.
  - (iii) **Investigation stage:** how a competition agency should conduct an investigation against alleged abusive business conduct.

## Abusive Conduct Detection Stage

3. There are a variety of tools that a competition agency can rely on to detect abusive business conduct, where an entity is dominant. They can be broadly classified as proactive, and reactive tools.



**Figure 35:** Abusive Conduct Detection Tools

4. These two types of tools complement each other. Competition agencies should therefore employ a variety of these two types of tools to detect abusive conduct, and not rely on a single type of tool.

### a) Reactive Tools

5. Reactive tools rely on some external event i.e. outside of the competition authority to take place before the competition authority becomes aware of the alleged abusive conduct.

#### i. Complaint

6. Complaints are the most commonly used “reactive tool” that a competition agency relies on to become aware of alleged abusive conduct through a complaint filed by a competitor, supplier, customer or a member of the general public.
7. Competition agencies are encouraged to put in place a complaint system to receive, handle and respond to such complaints. The system will help the competition authority filter complaints that are without merit, which helps avoid the diversion of resources that could otherwise be deployed for investigating genuine anti-competitive conduct. The basic features of a complaint system (both internal and external facing) are discussed in **Module D2: Cartel Enforcement** (a) Reactive Tools subsection on **i. Complaint**, above.
8. As competition laws come in force, competition agencies may be inundated by complaints that are baseless and without merit. One key reason for this is because complainants are confused between abusive business conduct and legitimate business activities that are objectively justified. Competition agencies therefore consider methods to influence the focus/nature of complaints. For example, competition agencies can publish collaterals that explain what constitutes abusive business conduct, how to identify abusive business conduct, and how to report such conduct to the competition authority e.g. complaints.

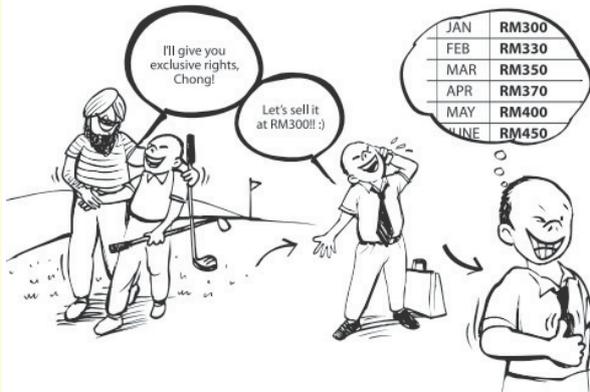
## Malaysia

### WHAT IS ABUSE OF DOMINANT POSITION?

The CA 2010 also addresses the conduct of dominant enterprise may through the process of competition become the industry leader with the largest market share or even a monopoly. The CA 2010 does not penalise an enterprise because of its dominance. It only prohibits any enterprise, independently or collectively with other enterprises, from engaging in any conduct that amounts to an abuse of dominance.

Abuse of dominant position usually occurs within the same industry, between the dominant enterprise and its distributors, suppliers or retailers.

The CA 2010 sets out examples of the kind of conduct that may amount to an abuse of dominance and are therefore prohibited.



The **Complaint Form** can be downloaded from the MyCC website at [www.mycc.gov.my](http://www.mycc.gov.my) The completed **Complaint Form** may be submitted to the MyCC in any of following ways:

**By E-mail:**  
[complaints@myccgov.my](mailto:complaints@myccgov.my)

**By Post:**  
Address mail to:  
**Level 15, Menara SSM@Sentral,  
No. 7, Jalan 5 tesen Sentral 5,  
Kuala Lumpur Sentral,  
50623 Kuala Lumpur**

**By Fax:**  
**Address to CEO and fax to +603-2272 2293 / +603-2272 1692**

**In Person:**  
Complainants may also in person at the MyCC office to fill in and submit the **Complaint Form**

For assistance regarding complaints, please contact MyCC at **+603-2273 2277** or by e-mail at [enquiries@mycc.gov.my](mailto:enquiries@mycc.gov.my).

For more information, visit our website: [www.mycc.gov.my](http://www.mycc.gov.my)



**THE COMPETITION ACT 2010**  
Promoting Competition, Protecting You.



Source: MyCC, Competition Act 2010, Handbook for General Public

### Case Study 19: Collaterals on Filing Complaints (Malaysia)

## Philippines

### Report violations of the PCA



If you know of any business that is behaving in an anti-competitive manner, report to PCC by calling 7719 722 or by emailing [queries@pcc.gov.ph](mailto:queries@pcc.gov.ph). You may also come to our office at 25/F Vertis North Corporate Center 1, North Avenue, Quezon City 1103.

#### Examples of abuse of dominance



**PREDATORY PRICING**  
Selling goods or services below cost to drive competitors out of market.



**PRICE DISCRIMINATION**  
Setting prices or terms that unreasonably exclude some sellers of customers of the same goods or services.



**RESTRICTING OR REFUSING TO SUPPLY**  
When the dominant business undermines its competitor's operations by refusing to provide them goods or services.



**EXPLOITATIVE BEHAVIOR TOWARD CUSTOMERS OR COMPETITORS**

Dominant companies use this position to exploit consumers and competitors by charging excessive or unfair purchase or sales prices, or by setting unfair trading conditions.



**BLOCKING COMPETITOR'S ACCESS TO GOODS AND RESOURCES**

A dominant business may purchase goods and resources that its competitor needs. By removing this access to much needed materials, a dominant business can force its competitors out of the market.

Source: PCC, Handbook "How the Philippine Competition Act affects consumers"

### Case Study 20: Collaterals on Filing Complaints (Philippines)

## Singapore

### **PREDATORY PRICING: Competitors are forced out of the market when they are not able to compete on loss-making prices**



An example of predatory behaviour is when a dominant firm sets prices below cost so as to force competitors out of the market. The dominant firm is deliberately incurring losses in the short run to hurt competitors, so that it can charge higher prices after they have exited the market. While consumers may benefit in the short run from lower prices, in the longer term, consumers will be worse off due to weakened competition which, in turn, results in higher prices, reduced quality and less choice. Potential competitors are also deterred from entering the market in the future, because they expect their entry to be met a similar aggressive response.

### **LOYALTY DISCOUNT/REBATE AND TYING SALES: Competitors are shut out of the market when loyalty-inducing discount or rebates or tying sales from a dominant competitor lock in all existing or potential customers**



Discount schemes are a legitimate form of price competition. However, there are certain types of discount schemes by dominant players that may harm competition. They include:

- Discount schemes that are used to bring prices down to predatory levels;
- Discounts that are conditional on buyers making all or a large proportion of their purchases from the dominant firm;
- Discounts that are conditional on the purchase of other products and services from the dominant firm.

### **REFUSAL TO SUPPLY: Competition cannot operate when the dominant supplier stops supplying key input and leaves them with no alternatives**



Businesses, including dominant businesses, generally have the freedom to decide whom they wish to deal or not to deal with. However, if refusal to supply by a dominant firm results in or is likely to result in substantial harm to competition, and such behaviour cannot be objectively justified, this may amount to an infringement of the law. Objective justification may include the buyer's poor credit worthiness, or capacity constraints of the supplier.

## **FILE A COMPLAINT WITH CCCS**

If you suspect that any business, company, or organisation is engaged in an agreement or conduct that infringers the Competition Act, please file a complaint with CCCS.

Complaints can be lodged if you believe there has been an infringement of any of three prohibitions under the Competition Act:

- Agreements, decisions and practices that prevent, restrict or distort competition
- Abuse of dominant position
- Mergers and acquisition that substantially lesson competition

CCCS will evaluate the complaints to see if there are sufficient grounds to commence an investigation.

In particular, CCCS is interested in hearing from persons with useful information on cartel activity in Singapore. If you are aware of cartel activities, please contact CCCS with relevant information by writing, emailing or calling CCCS hotline at 1800-325-8282. Examples of relevant information include:

- Information about companies/businesses involved;
- A brief description of cartel activity
- The nature of industry where the cartel is operating; and
- Any other relevant information and supporting documents evidencing the agreements, decisions or practices of the cartel i.e. records of a tender and all communications with the tenderers.

CCCS undertakes to keep your identity and any information that may lead to your identification strictly confidential. Our officers will talk to you to obtain as much detail as possible. If CCCS assesses that you have information that is likely to be of value, we will invite you to discuss the information in more detail. While the CCCS is reviewing the matter, please refrain from discussing your suspicions with the suppliers involved as this may jeopardise any investigation that CCCS may undertake.

If requirements for offering a reward are met, a monetary reward can be paid to informants for providing information leading to infringement decisions against cartel members.

You should note that complaints may not be pursued if agreement, conduct or merger is excluded or exempted from the Competition Act.



To make a complaint, in general, CCCS will need you to provide the following information:

- Information about you and the organisations you represent (if applicable);
- Information about the party or parties involved;
- A brief description of the agreement, conduct or merger that you are complaining about; and
- Any other relevant information and supporting documents.

Source: CCCS's collateral on "Key Prohibition under the Competition Act Explained".

### **Case Study 21: Collaterals on Filing Complaints (Singapore)**

## **ii. Whistleblowing**

9. Competition agencies may become aware of abusive conduct from an informant or a whistle-blower. Whistle-blowers may be employees who become aware of their employer's involvement in a cartel. They may also be ex-employees who have become disgruntled and decide to report the abusive conduct to the competition authority. In such situations, competition agencies should bear in mind the potential biases when assessing the information received.

10. Competition agencies should have personnel who are specially trained to handle whistle-blowers/informants for the following reasons:
- (i) The informant/whistle-blower may be requested by the competition authority to work undercover, and undertake further covert information gathering on the abusive conduct.
  - (ii) The informant/whistle-blower may face potential repercussions for telling on the abusive conduct.
  - (iii) Monetary rewards can be paid to the informant/whistle-blower for providing information.
11. Competition agencies are encouraged to put in place a whistleblowing system to receive, handle and respond to such complaints. The principles for the effective functioning of a whistleblowing system are similar to those of a complaint system and leniency application i.e. a competition agency should put in place internal and external facing elements. The basic features of a whistleblowing system (both internal and external facing) are discussed in **Module D2: Cartel Enforcement** (a) Reactive Tools subsection on **iii. Whistleblowing** above.

### iii. Notifications

12. Some jurisdictions have competition laws that prescribe a notification regime, where businesses can notify their agreements/conduct which may potentially infringe abuse of dominance provisions to the competition authority. The internal and external facing elements of notification regimes are discussed in this sub-section.
13. **External facing elements.** The ways in which a competition agency receives notifications should be communicated clearly e.g. on the competition authority's website, and the information should be publicly accessible. Businesses generally rely on the help of counsels and other experts when filing a notification with the competition authority.
14. Businesses are typically required to submit information based on a form prescribed by the competition authority when filing a notification. These forms generally include the following types of requirement fields:
- (i) Information needed for administrative purposes e.g. names, contact details of the businesses, and relevant third parties such as customers, suppliers, and competitors.
  - (ii) Information about the entities' business.
  - (iii) A description of the agreement/conduct, an explanation on the business rationale for entering into the agreement/conduct, and copies of relevant documents.
  - (iv) Reasons as to why the businesses find that the agreement/conduct is likely to infringe the abuse of dominance provisions i.e. is the abusive conduct exclusionary and/or exploitative.
  - (v) Information that will assist the competition authority's competition assessment of the agreement/conduct. The businesses' views on the industry trends; the impact of the agreement/conduct on the relevant market(s) defined, customers, suppliers, and competitors and any other relevant stakeholders; and whether they have market power in the relevant market(s) defined are typically required.
  - (vi) Information on valid defences under the competition law which apply to the agreement/conduct e.g. objective justifications.
15. Competition agencies are encouraged to consider mechanisms that allow for flexibility to reduce initial notification burdens. Competition agencies should consider engaging businesses in pre-

notification discussions to discuss whether a notification is required, the content of the forms, and the timing of their notifications. Businesses can also discuss the possibility of exemptions from certain information requirement fields that are not applicable for the competition authority's assessment, prior to submitting their notification formally.

16. **Internal facing elements.** Competition agencies should promote consistency of procedures through internal rules or practices when receiving and reviewing notifications. These internal rules or practices can be documented in an internal procedure manual which agency officers can refer to. As an example, the internal procedure manual should contain checklists to assist agency officers with determining whether an initial form is complete.
17. The internal procedure manual should also include templates for routine requests and recommendations on how to deal with “frequently encountered requests” during the course of reviewing the notification e.g. requests for deadline extension for the provision of documents/information, or requesting for information from relevant third parties.
18. As some jurisdictions may charge fees for reviewing notifications, the internal procedure manual should set out how and when the fee payment should be received and processed.
19. Lastly, the internal procedure manual should be a “live” document that is updated regularly to reflect the agency’s notification review experience and align the internal procedures with international best practices.

## b) Proactive Tools

20. These tools are initiated by the competition authority. This section highlights the more common proactive abusive conduct detection tools, namely, education and outreach, monitoring & intelligence reports and identifying concentrated industry sectors.

### i. Education and Outreach

21. Competition agencies looking to start enforcing the law should make it a priority to engage in education and outreach efforts to raise awareness about the illegality of abusive conduct, and how such conduct can be reported to the competition authority. For this purpose, the key stakeholders that competition agencies should reach out to are businesses and consumers.
22. Common tools for education and outreach include: speaking at public seminars, agency publications, press articles, and organizing and giving presentations. For recommended practices on education and outreach, refer to the Toolkit for Competition Advocacy in ASEAN.

### ii. Identifying Concentrated Industry Sectors

23. Competition agencies should identify industry sectors that are concentrated i.e. few players as they are more susceptible to abusive conduct. Concentrated industry sectors are more likely to exist in jurisdictions that are in transition from centrally planned economies to market economies. For example, recently privatized government-owned enterprises or government-created enterprises are likely to have near-monopoly or significant market power following the transition.

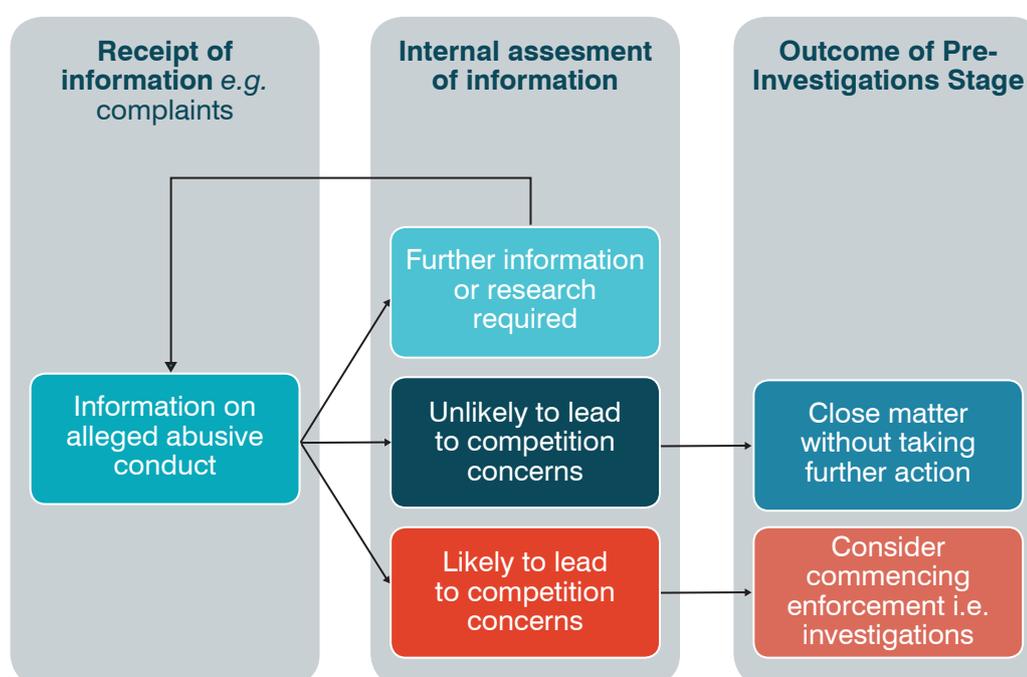
### iii. Monitoring & Intelligence Reports

24. Competition agencies should monitor reports that cover developments in the identified concentrated industry sectors. It is recommended that competition agencies also monitor reports generally e.g. daily news, industry association reports. Apart from being a good source for identifying potential abusive conduct e.g. frequent complaints, the information contained in these reports are also useful for informing competition agencies of general market/industry trends. Some competition agencies have even made “daily news scan” or monitoring of reports an integral part of their daily operations.

### Pre-Investigation Stage

25. The pre-investigation stage can be broadly separated into three sub-stages namely:

- (i) Receipt of information
- (ii) Internal assessment of information
- (iii) Outcome of pre-investigation stage



**Figure 36:** Pre-Investigation Stages (Abusive Conduct Enforcement)

#### a) Receipt of Information

26. Competition agencies should establish procedures to screen and process information on alleged abusive conduct. It is recommended that competition agencies set up electronic databases to systematically register and catalogue all information received. Electronic databases and searchable electronic files are particularly valuable devices for competition agencies for the following reasons:

- (i) They allow competition agencies to consolidate multiple complaints or sources of evidence concerning the same alleged abusive conduct.
- (ii) They provide resources for competition agency staff to draw on institutional knowledge/expertise or prior cases to assist in assessing and reviewing new complaints. This is particularly useful for competition agencies with geographically dispersed staff.

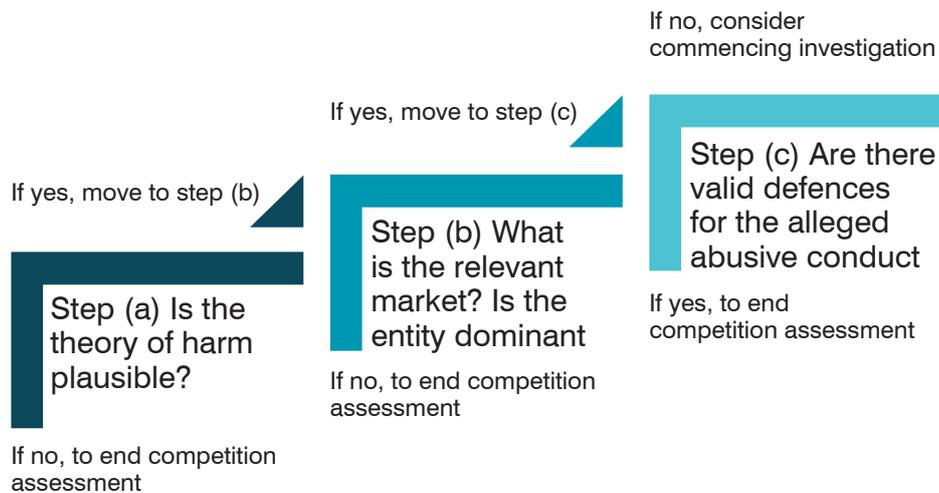
**b) Internal Assessment of Information and Outcome of Pre-investigation Stage**

27. Competition agencies should establish methodologies and procedures for the early verification and assessment of abusive conduct allegations during the pre-investigation phase. The initial assessment of the information received should cover the following:

Key Analytical Steps	Practical Considerations
a. Whether the theory of harm is plausible	<p><b>(Exclusionary abuse)</b> How does the alleged abusive conduct harm the process of competition? Examples of abusive exclusionary conduct include predatory pricing, exclusive agreements, and refusal to deal.</p> <p><b>(Exploitative abuse)</b> How is the alleged abusive conduct exploitative? Examples of abusive exploitative conduct include charging high prices to customers, discriminating among customers and paying low prices to suppliers.</p>
b. What the possible relevant market is and whether the entity engaging in the alleged abusive conduct is likely to be dominant in it	<p>What is the relevant product and geographic market? Are there precedents e.g. enforcement by overseas competition agencies which can be referred to when defining markets?</p> <p>Does the information available, e.g. market share, size of the entity, barriers to entry and expansion, indicate that the entity is dominant? Some competition agencies have market shares thresholds (typically ranging from 20% to 60% based on the relative size of the jurisdiction) that indicate when an entity is likely to become dominant.</p>
c. Whether there are valid defences for the alleged abusive conduct	<p>Does the alleged abusive exclusionary/exploitative conduct promote competition? If so, how do the pro-competition benefits weigh against the theory of harm?</p> <p>Are there good objective justifications for engaging in the alleged abusive conduct?</p>

**Figure 37:** Analytical Framework for Pre-investigation Abusive Conduct Enforcement

28. It is helpful to consider these key analytical steps in a step-wise process. This will help save valuable resources as some competition assessments can be concluded quickly.



**Figure 38:** Step-wise Decision Making Framework for Abusive Conduct Enforcement

29. For completeness, the steps of assessing the alleged abusive conduct pursuant to an investigation are the same as an assessment pursuant to a notification.
30. The screening and processing of such information is typically completed by agency officers who have good working knowledge of the abuse of dominance provision in the competition law. Agency officers should ideally have some knowledge of competition economics concepts as they are the main analytical tools for determining an entity's market power, and whether the conduct is likely to be abusive.
31. For more details on the analytical framework for abuse of dominance, competition agencies can refer to the ICN Unilateral Conduct Working Group's Unilateral Conduct Workbook, and the OECD's Framework for the Design and Implementation of Competition Law and Policy, Chapter 5: Abuse of Dominance.
32. Three possible interim outcomes arise at this sub-stage. The competition authority may require further information or research on the alleged abusive conduct before it is able to advance its internal assessment of the information. The competition authority's internal assessment of the information may reveal that the alleged abusive conduct is unlikely or likely to lead to competition concerns.

#### **i. Further Information or Research Required**

33. Where initial information provided by complainants is insufficient to make an internal assessment, competition agencies should consider requesting for further information at the first instance. Based on experience, complaints often lack details and supporting data, and may not at first blush, suggest that a conduct is abusive.
34. In any case, competition agencies should rely on third party sources, e.g. news reports, internet research, industry association reports, where available, to fill information gaps. It is also important that the competition authority verify or corroborate allegations before deciding on the next steps as information received from complainants may be biased. For example, the complainants may be motivated to protect competitors rather than the process of competition.

#### **ii. Unlikely to Lead to Competition Concerns – Close Matter Without Taking Further Action**

35. When it becomes clear that the alleged abusive conduct is unlikely to infringe competition laws, competition agencies should promptly close the matter so that scarce resources can be re-assigned to work on other enforcement matters.
36. Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer who is tasked to screen the complaint, or by a group of agency officers (e.g. screening committee).
37. The decision to not take further action should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future.

#### **iii. Likely to Lead to Competition Concerns – Consider Commencing Enforcement i.e. Investigation**

38. If it becomes clear that the alleged abusive conduct is likely to infringe competition laws, competition agencies should consider commencing enforcement i.e. investigation. Relevant information reviewed

during the course of the competition authority's assessment should be collated and marked out for easy access. This will help facilitate further deliberation on whether to commence enforcement.

39. Some jurisdictions have competition laws that only allow for investigations to be initiated when relevant statutory thresholds are met e.g. where there are reasonable grounds to suspect that an infringement of the law has occurred. Competition agencies from these jurisdictions should therefore consider at this stage if the relevant statutory thresholds are met.
40. **Prioritisation.** The principles for prioritising abuse of dominance investigations should be similar to those for prioritising cartel investigations:
- (i) **Seriousness of the conduct and economic impact.** Alleged abusive conduct that have wide ranging effect in the industry and/or adjacent industries, affecting greater the volume of commerce, and is longer in duration is more likely to be prioritized.
  - (ii) **Consumer detriment.** The greater the consumer detriment e.g. price increase, types of consumer groups affected by the alleged conduct, the more likely the alleged abusive conduct will be prioritized.
  - (iii) **Public interest.** Alleged abusive conduct that is likely to generate greater public interest should be prioritised e.g. whether consumers and businesses are likely to be interested, or how the enforcement action may affect public confidence in the competition authority.
  - (iv) **Strategic Considerations.** Relevant considerations include, general economic sector priorities, whether the alleged abusive conduct raise novel legal/economic issues, whether the enforcement is likely to be successful and lead to general and specific deterrence.
  - (v) **Weighing the desired enforcement outcome against available resources e.g. time, financial resources and personnel.** If the weighing process indicates that pursuing the case would be an efficient and effective use of the agency's time and resources, then the alleged abusive conduct should be prioritised for full scale investigation.
41. However, a young competition agency should, where resources permit, undertake a wide range of investigations for alleged abusive conduct that are likely to lead to competition concerns. This will allow the competition authority's officers to get "on-job-training" as they implement investigation procedures. The competition assessment and general learning points from the investigation should also be documented and archived to form the competition authority's institutional knowledge. Refer to **Module D1: Operationalising the Enforcement Strategy** on "enforcement experimentation" for more information.
42. **Recommendation.** The recommendation to commence enforcement i.e. investigation, should comprise of the following:
- (i) Relevant information received by the competition authority, e.g. a description of the entity involved, the alleged abusive conduct;
  - (ii) Assessment as to why the alleged abusive conduct is likely to lead to competition concerns i.e. the theory of harm;
  - (iii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged abusive conduct; and
    - d. Why the case against the alleged abusive conduct should be selected and/or prioritized.
43. The recommendation should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future.

Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer who is tasked to screen the complaint, or by a group of agency officers (e.g. screening committee).

44. Should the competition authority decide to not commence enforcement, it can also consider whether other non-enforcement type actions e.g. advocacy or cooperating with another enforcement agency, should be taken instead. Refer to **Module D5: Weighing Competition Enforcement and Competition Advocacy** for more information.

### Mexico's experience

Mexico's competition system illustrates the virtues of sustained incremental improvement. Mexico's competition agency is a success story, but it was not an overnight wonder. The agency did not mount a major assault on the dominant position of Telmex, the largest provider of telecommunications services in Mexico, and its politically powerful leader, Carlos Slim, until well into the second decade of its operations. Though the Telmex proceedings—which focused on conduct alleged to be an abuse of a dominant market position—did not accomplish all of its goals, the properly timed action catalyzed significant improvements in the country's telecommunications sector.

*Source: Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes, Kovacic and Lopez-Galdos (2016)*

### Case Study 22: Commencing Abusive Conduct Investigations (Mexico)

#### Investigation Stage

45. This sub-section highlights the “nuts and bolts” of how to start and progress an investigation.

#### a) Formation of the Case Team

46. As a first step, a case team should be formed to work on the investigation. The size and experience of the case team will depend on the complexity of the case.
47. A typical case team structure will comprise of a case team leader (who is usually a senior or experienced investigator) and at least one or two case team members who will assist the case team leader with the day-to-day running of the investigation.
48. The case team should ideally be staffed by agency officers who have good knowledge of competition economics concepts as they are the main analytical tools for determining an entity's market power, and whether a conduct is likely to be abusive.

#### b) Planning and Tracking Investigations

49. **Investigation Plan.** An investigation plan is usually prepared by the case team leader with inputs from the case team members.
50. An investigative plan is an essential planning tool, used throughout the life of the investigation to identify, and track the completion of work. Whilst some competition agencies use the investigation

plan as a starting point, to track high level issues, or as a reporting tool, an investigation plan should be a flexible and forward looking document that can be updated as the investigation develops.

51. An investigation plan (adapted from the ICN Cartel Working Group’s recommendation) should include some or all of the following:
- (i) A theory of harm;
  - (ii) Aims of the investigation, and strategies for achieving these aims;
  - (iii) Actions required to meet the aims of the investigation e.g. interviews with parties involved, request for information from relevant parties, internal reporting and updating senior personnel;
  - (iv) Consideration of whether any external legal and/or economic advice is likely to be required;
  - (v) Information to be gathered, including identifying sources to be explored and third parties to be approached, and when and how this will happen;
  - (vi) Timeframes and milestones for key action/events to occur; and
  - (vii) Resources required for the investigation (e.g. financial budget for engaging expert consultants, additional manpower for the case team).
52. The ACCC’s AANZFTA CLIP Toolkit for Senior Competition Investigators suggests the following template for an investigation action plan:

#### Sample Investigation Plan Template

##### Identification

Matter	^Trader name or other relevant title^	Reference Number: ^number^
Team	^Names of team member and any internal advisor^	
Office	^Location, branch name^	
Date plan update	^DD MONTH YYYY^	
Current Status	^Evidence gathering: Final assessment: Preparing for resolution/litigation^	

##### Alleged conduct

Basic Allegation	^Concise statement of alleged conduct^	
Section	^Section number and title of alleged contravention^	
Case Theory	^Insert^	
Objectives	^Objectives are more than possible remedies: What difference do we seek to make in intervening in a particular matter?^	

##### Strategic alignment

Priority	^State reasons why intervention is required. Is it a priority area for the authority?^	
Other factors	^Are there other factors why intervention is required?^	

##### Authority oversight

First appearance before decision makers: ^within 6 month commenced^	Last appearance: ^Date^	Next appearance: ^Date^
Last Decision: ^Insert^		

##### Key dates

Date initial investigation commenced: ^As initial investigation^	Relevant KPIs for Initial investigation finalisation: ^Insert^
Date in-depth investigation commenced: ^As in-depth matter^	Relevant KPIs for In-depth investigation finalisation: ^Insert^
Estimated completion date: ^Review periodically^	

#### Action plan

##### Next two months

Step	^Major steps to be completed within the next two months. Once completed steps should remain on the plan with the corresponding completion date listed.^	Person responsible: ^name^
Step		Person responsible:

##### Broad investigation plan

Start date	^Date^	
Month 1	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 2	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 3	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 4	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 5	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^
Month 6	^List Major steps for the investigation: Refer to guidance. You may also wish to list the phase of an investigation below the month.^	^Insert date completed^

Figure 39: Investigation Action Plan Template

53. **Evidence Matrix.** It is recommended that the case team set out an evidence matrix based on the information relied upon to commence the investigation, and identify information gaps at the start of an investigation. Likewise, the evidence matrix should be a “live document” like the investigation plan and should be updated contemporaneously during the course of the investigation whenever evidence is received, as it will support informed decision making.

54. The ACCC’s AANZFTA CLIP Toolkit for Senior Competition Investigators suggests the following template for an evidence matrix:

Evidence matrix

Section	Elements	Evidence to obtained to prove	Further evidence required	Evidence gathering logistic - how obtained by whom, and when
	A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.			

**Figure 40:** Evidence Matrix Template

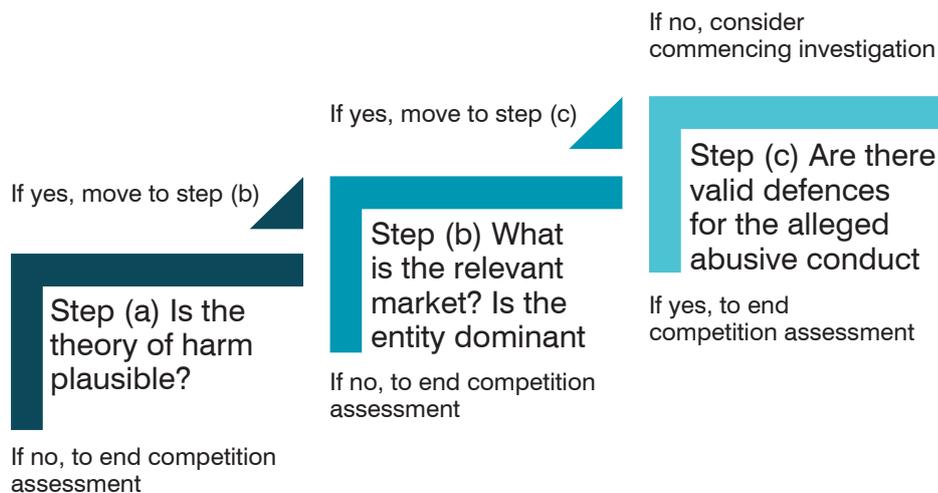
55. The evidence collected should essentially help to answer the following questions:

- (i) Whether the alleged conduct is likely to be an infringement of the abuse of dominance provisions in the competition law i.e. the theory of harm; and
- (ii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged conduct.

56. Case teams should also be guided by the senior management of the competition authority, and coordinate with other relevant divisions of the competition authority (e.g. another investigation case team looking at the same type of abusive conduct in an adjacent industry). Key investigative actions that can benefit from this oversight and coordination include: compulsory information requests, evidence evaluation and recommendations to the competition authority’s decision makers. Regular internal meetings between the case teams, senior management, and other relevant agency officers can help guide and reassess the investigative progress, strategies and theories.

**c) Investigation Outcomes**

57. As discussed above, it is helpful to consider the abuse of dominance assessment as a step-wise process. Refer to paragraph 27 above for details of the key analytical steps.



**Figure 41:** Step-wise Decision Making Framework for Abusive Conduct Enforcement

58. Given the higher possibility of error for intervening in abusive conduct, the ICN Unilateral Conduct Working Group suggests that competition agencies adopt a “dialectic process” at key stages of the competition assessment where:
- (i) One part of the competition authority acts as the prosecutor (usually the case team);
  - (ii) Another part of the competition authority acts as devil’s advocate; and
  - (iii) A third part of the competition authority acts as adjudicator.
59. The process will ensure that the risk of over-enforcement is minimized i.e. enforcing the abuse of dominance provision when the alleged abusive conduct is in fact not anti-competitive. It is recommended that the competition authority engages in the dialectic process during the investigation stage as it is more resource intensive. However, competition agencies can consider engaging in the dialectic process during the pre-investigation stage if there are sufficient resources.
60. **If the competition authority determines that the alleged conduct is likely to infringe competition law.** An investigation may culminate in the competition authority issuing an infringement decision (in an administrative system), or referring the alleged abusive conduct for prosecution (in a prosecutorial system). Apart from demonstrating that the alleged abusive conduct infringes competition law, a competition agency will need to consider how to:
- (i) Remedy the situation such that the process of competition is restored e.g. order that entities bring the alleged abusive conduct to an end, take certain actions to undo the harm to competition;
  - (ii) Deter future conduct from the entities involved e.g. impose financial penalties on the entities involved;
  - (iii) Deter future/similar conduct in the jurisdiction generally e.g. marking up financial penalties imposed;
  - (iv) Communicate the decision to the general public and interested parties e.g. complainants, government agencies to demonstrate the importance and relevance of competition enforcement; and
  - (v) Manage the risks of an appeal against the infringement decision (in an administrative system), and counter arguments that entities will raise (in a prosecutorial system).
61. Some competition agencies have also introduced “fast-track” procedures to incentivize entities to admit liability for infringing competition law. For example, the CCCS’s fast-track procedure enables the CCCS to achieve procedural efficiencies and resource savings through streamlined administrative procedures that result in an earlier infringement decision. Entities who admit liability for infringement will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay.
62. Some competition agencies may also decide not to issue an infringement decision or pursue the route of prosecuting the alleged abusive conduct on grounds of administrative priority. In such circumstances, they may issue warning letters to the entities involved or obtain an undertaking from the entities involved to end the alleged abusive conduct. This route is distinct from the fast-track procedure route as entities do not typically admit any liability for infringement.
63. **If the alleged abusive conduct is unlikely to infringe competition law.** An investigation may also culminate in the competition authority taking no further action if the alleged abusive conduct does not have any anti-competitive effect.

64. The decision not to take further action should be documented in a report, and archived in the competition authority’s electronic database. It should be archived in a manner that allows for easy access in the future. Evidence collected during the course of the investigation should be similarly archived as it makes for useful reference for future assessments and general market intelligence.
65. In some jurisdictions, competition agencies may be required to publish their grounds for the non-infringement decision.
66. Lastly, due process and procedural fairness during the entire course of the investigation should be ensured. This is discussed in **Module D6: Due Process and Procedural Fairness**.

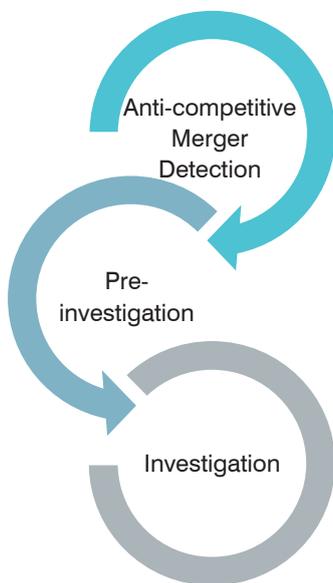
## References and Useful Resources

Source	Relevant Section	Title	Access
CCCS	Reactive tools: complaint	“Feedback/Complaint”	<a href="https://www.cccs.gov.sg/approach-cccs/making-complaints">https://www.cccs.gov.sg/approach-cccs/making-complaints</a>
	Reactive tools: complaint	Key Prohibitions under the Competition Act Explained	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/education-and-compliance/educational-resources/corporate-brochures/corporate-brochures-revised-mar-18/bklet-2-key-prohibitions-under-the-competition-act-explained-mar-18.pdf">https://www.cccs.gov.sg/-/media/custom/ccs/files/education-and-compliance/educational-resources/corporate-brochures/corporate-brochures-revised-mar-18/bklet-2-key-prohibitions-under-the-competition-act-explained-mar-18.pdf</a>
ICN	Pre-investigation stage: internal assessment	Unilateral conduct workbook, Chapter 2: Analytical Framework for Evaluating Unilateral Exclusionary Conduct	<a href="http://icn.flywheelsites.com/portfolio/uc-workbook-analytical-framework-for-evaluating-unilateral-exclusionary-conduct/">http://icn.flywheelsites.com/portfolio/uc-workbook-analytical-framework-for-evaluating-unilateral-exclusionary-conduct/</a>
	Investigation stage	ICN Training on Demand Module III-2: From complaint to intervention in abuse of dominance case: a case of predation	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/ITODtranscriptIII-2PredatoryPricing.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/ITODtranscriptIII-2PredatoryPricing.pdf</a>
MyCC	Reactive tools: complaint	E-Complaint	<a href="https://www.mycc.gov.my/e-complaint">https://www.mycc.gov.my/e-complaint</a>
	Reactive tools: complaint	Competition Act 2010, Handbook for General Public	<a href="https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Handbook%20for%20General%20Public%20%28CA2010%29.pdf">https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Handbook%20for%20General%20Public%20%28CA2010%29.pdf</a>
OECD	Pre-investigation and investigation stage	Framework for the Design and Implementation of Competition Law and Policy, Chapter 5: Abuse of Dominance	<a href="http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf">http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf</a>
PCC	Reactive tools: complaint	File a Complaint	<a href="https://phcc.gov.ph/file-a-complaint/">https://phcc.gov.ph/file-a-complaint/</a>
	Reactive tools: complaint	Handbook “How the Philippine Competition Act affects consumers”	<a href="https://phcc.gov.ph/wp-content/uploads/2017/06/PCC-Handbook-2019.pdf">https://phcc.gov.ph/wp-content/uploads/2017/06/PCC-Handbook-2019.pdf</a>

## Module D4: Mergers

### Key Points

- Most mergers do not give rise to competition concerns and are themselves part of the competitive process.
- Horizontal mergers are most likely to lead to competition concerns, whereas vertical and conglomerate mergers are less likely to.
- Competition agencies generally become aware of mergers that may lead to competition concerns through the notification regime.
- A dedicated case team should be appointed, and an investigation plan and evidence matrix should be drawn up during the investigation stage.



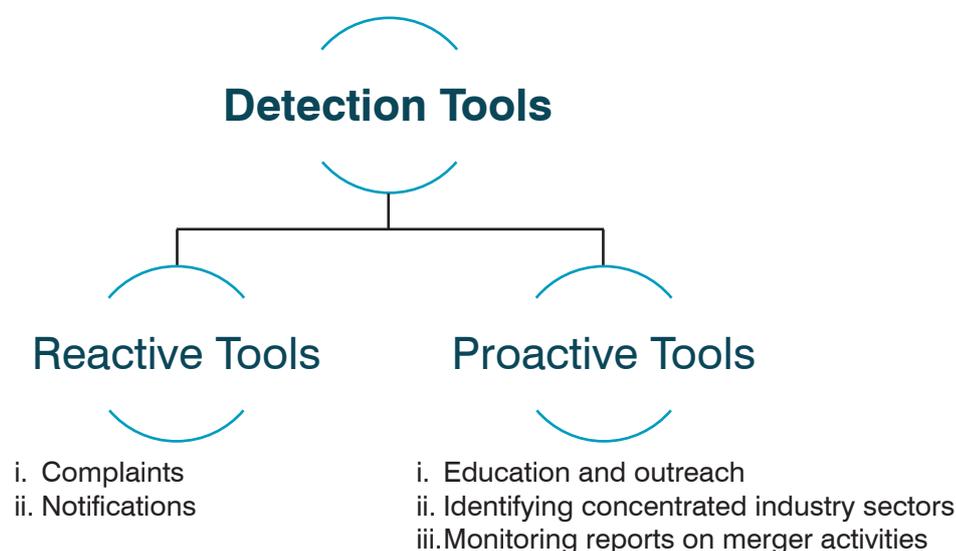
**Figure 42:** Merger Enforcement Stages

1. The contents of this module are adapted from the OECD's Framework for the Design and Implementation of Competition Law and Policy, Chapter 4: Mergers, and the ICN Investigative Techniques Handbook for Merger Review.
2. It is helpful to consider anti-competitive merger enforcement cases in three key stages:
  - (i) **Anti-competitive merger detection stage:** how a competition agency might detect signs of anti-competitive mergers;
  - (ii) **Pre-investigation stage:** how a competition agency should evaluate evidence about an alleged anti-competitive merger when deciding whether to commence investigation or not; and
  - (iii) **Investigation stage:** how a competition agency should conduct an investigation into an anti-competitive merger.

3. Based on competition agencies' experience reported by the OECD, most mergers do not give rise to competition concerns, and are themselves part of the competitive process. Competition agencies should therefore consider their enforcement against alleged anti-competitive mergers in light of this observation.

## Anti-competitive Merger Detection Stage

4. There are a variety of tools that a competition agency can rely on to detect anti-competitive merger activities. They can be broadly classified as proactive, and reactive tools.



**Figure 43:** Merger Enforcement Detection Tools

5. These two types of tools complement each other. Competition agencies should therefore employ a variety of these two types of tools to detect anti-competitive mergers, and not rely on single type of tool.

### a) Reactive Tools

6. Reactive tools rely on some external event i.e. outside of the competition authority to take place before the competition authority becomes aware of the alleged anti-competitive merger.

#### i. Complaint

7. Complaints are a “reactive tool” that a competition agency rely on to become aware of an anti-competitive merger through a complaint filed by a competitor, supplier, customer or a member of the general public.
8. Competition agencies are encouraged to put in place a complaint system to receive, handle and respond to such complaints. The system will help the competition authority filter complaints that are without merit, which helps avoid the diversion of resources that could otherwise be deployed for investigating genuinely anti-competitive mergers. The basic features of a complaint system (both internal and external facing) are discussed in **Module D2: Cartel Enforcement** (a) Reactive Tools subsection on **i. Complaint** above.
9. Competition agencies should consider methods to influence the focus/nature of complaints. For example, competition agencies can publish collaterals that explain what constitutes an anti-competitive merger, how to identify such merger transactions, and how to report such conduct to the competition authority, e.g. complaints.

## ii. Notification

10. There are two types of notification regimes: mandatory regimes and voluntary regimes. Competition agencies generally become aware of mergers that may lead to competition concerns through the notification regime. The internal and external facing elements of notification regimes are discussed in this sub-section.
11. **External facing elements.** The ways in which a competition agency receives notifications should be communicated clearly, e.g. on the competition authority's website, and the information should be publicly accessible. Businesses generally rely on the assistance of counsel and other experts when filing a notification with the competition authority.
12. Businesses are typically required to submit information based on a form prescribed by the competition authority when filing a notification. These forms generally include the following types of requirement fields:
  - (i) Information needed for administrative purposes, e.g. names, contact details of the merger parties, and relevant third parties such as customers, suppliers, and competitors.
  - (ii) Information about the entities' business.
  - (iii) A description of the merger, the merger parties' views on why the transaction constitutes a merger (defined under the competition law), an explanation on the business rationale for entering into the merger and copies of relevant documents.
  - (iv) Reasons as to why the businesses consider that the merger is unlikely to infringe the provision against anti-competitive mergers.
  - (v) Information that will assist the competition authority's competition assessment of the merger. The businesses' views on the industry trends; impact of the merger on the relevant market(s) defined, customers, suppliers, competitors, and any other relevant stakeholders; and whether the merged entity has market power in the relevant market(s) defined are typically required.
  - (vi) Information on valid defences under the competition law which apply to the agreement/conduct, e.g. efficiencies.
13. Competition agencies are encouraged to consider mechanisms that provide for flexibility to reduce initial notification burdens.
14. First, competition agencies should consider engaging businesses in pre-notification discussions to discuss the content of the forms, and the timing of their notifications. Businesses can also discuss the possibility of exemptions from certain information requirement fields that are not applicable for the competition authority's assessment, prior to submitting their notification formally.
15. Second, some competition agencies have also introduced different versions of forms to streamline and fast-track the assessment of notification. For example, shorter initial notification forms are prescribed for mergers that are deemed to be less problematic from the outset.
16. **Internal facing elements.** Competition agencies should promote consistency of procedures through internal rules or practices when receiving and reviewing merger notifications. These internal rules or practices can be documented in an internal procedure manual which agency officers can refer to. The internal procedure manual should also contain checklists to assist agency officers with determining whether an initial form is complete.

17. The internal procedure manual should also include templates for routine requests and recommendations on how to deal with “frequently encountered requests” during the course of reviewing the notification, e.g. requests for deadline extension for the provision of documents/information and requesting for information from relevant third parties.
18. As some jurisdictions may charge fees for reviewing notifications, the internal procedure manual should set out how and when the fee payment should be received and processed.
19. Lastly, the internal procedure manual should be a “live” document that is updated regularly to reflect the agency’s notification review experience and align the internal procedures with international best practices.
20. The steps of assessing a merger pursuant to an investigation (set out below) are the same as an assessment pursuant to a notification. Further, the OECD noted that since most mergers do not threaten competition, it is often possible to make a determination solely from the information received from the merger parties and other publicly available information. However, it is good practice for competition authorities to corroborate key pieces of information from the merger parties that are central to the competition assessment with relevant third practice to reduce the risk of under-enforcement, i.e. clearing a problematic merger unconditionally.

## **b) Proactive Tools**

21. These tools are initiated by the competition authority. This section highlights the more common proactive anti-competitive merger detection tools, namely, education and outreach, monitoring reports on merger activities and identifying concentrated industry sectors.

### **i. Education and Outreach**

22. Competition agencies looking to start enforcing competition law should make it a priority to engage in education and outreach efforts to raise awareness about the illegality of anti-competitive mergers, and how such conduct can be reported to the competition authority. The key stakeholders that competition agencies should reach out to are businesses and consumers.
23. Common tools for education and outreach include: speaking at public seminars, agency publications, press articles, organizing and giving presentations. For recommended practices on education and outreach, refer to the Toolkit for Competition Advocacy in ASEAN.

### **ii. Identifying Concentrated Industry Sectors**

24. Competition agencies should identify industry sectors that are concentrated i.e. few players as merger situations are more likely to lead to anti-competitive concerns. Concentrated industry sectors are more likely to exist in jurisdictions that are transitioning from centrally planned economies to market economies. For example, recently privatized government-owned enterprises or government-created enterprises are likely to have near-monopoly or significant market power following the transition.

### **iii. Monitoring & Intelligence Reports on Merger Activities**

25. Competition agencies should monitor reports that cover key industry developments in the identified concentrated industry sectors.

26. It is also recommended that competition agencies monitor reports on merger activities generally e.g. daily news, industry association reports. Apart from being a good source for identifying potential anti-competitive mergers, the information contained in these reports is also useful for informing competition agencies of general market/industry trends. Some competition agencies have even made “daily news scan” or monitoring of reports an integral part of their daily operations.
27. Competition agencies may write to merger parties following their review of such reports to request for information on their merger, highlighting the relevant merger provisions under the competition law, e.g. the general prohibition, notification regime, consequences of infringing the prohibition and the competition authority’s general powers of investigation.

### **Singapore**

About the CCCS’s market intelligence function:

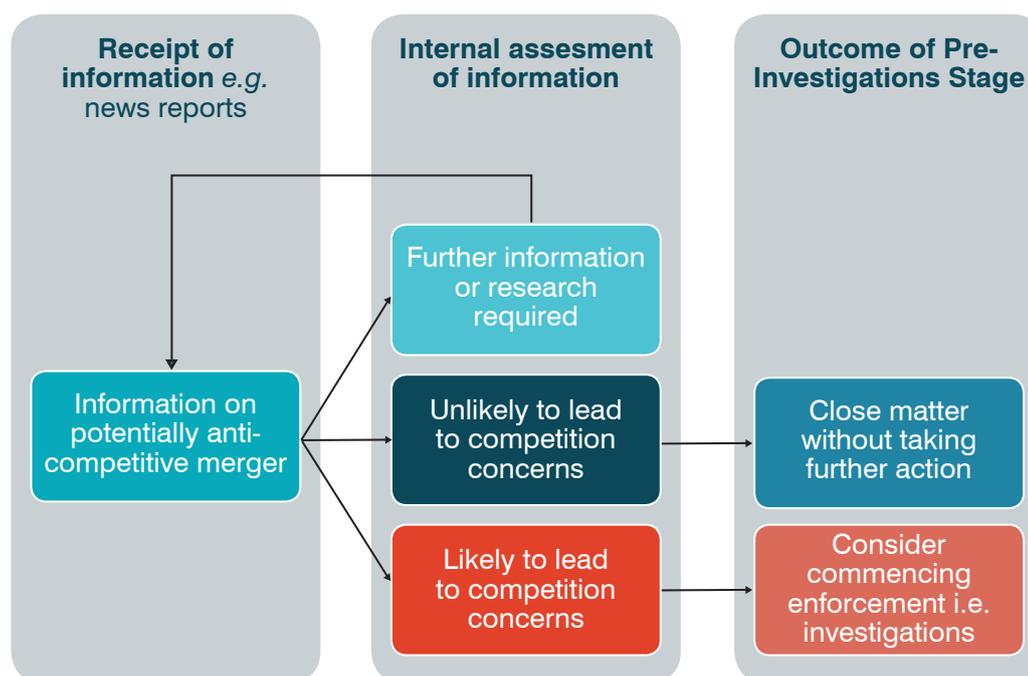
- 3.13 CCCS considers that a market intelligence function is an integral part of its voluntary merger notification regime. As part of its statutory remit in the context of merger control, CCCS keeps markets under review to ascertain which mergers and acquisitions are taking place. Where it identifies transactions that it considers may potentially raise concerns under the merger provisions of the Act, it approaches the merger parties to gather further information about the transaction and its effect on competition. It may also approach third parties in this regard. Parties and third parties are encouraged to respond promptly and comprehensively to any information requests.
- 3.14 In order to elicit information about particular mergers, CCCS may publish a notice on its website indicating that it is considering whether or not a completed or anticipated merger that has not been notified to it may raise concerns under the merger provisions of the Act.
- 3.15 If the response of the parties or third parties to CCCS’s enquiries, or any other information available to CCCS, indicates that there are reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, CCCS may use its statutory powers to investigate mergers that have not been notified to it.

*Source: CCCS, Paragraphs 3.13 to 3.15 Guidelines on Merger Procedures 2012*

### **Case Study 23: Monitoring & Intelligence Reports on Merger Activities (Singapore)**

#### **Pre-Investigation Stage**

28. The pre-investigation stage can be broadly separated into three sub-stages namely:
- (i) Receipt of information;
  - (ii) Internal assessment of information; and
  - (iii) Outcome of pre-investigation stage



**Figure 44:** Pre-Investigation Stages (Merger Enforcement)

#### a) Receipt of Information

29. Competition agencies should establish procedures to screen and process information on potentially anti-competitive mergers. It is recommended that competition agencies set up electronic databases to systematically register and catalogue all information received. Electronic databases and searchable electronic files are particularly valuable devices for competition agencies for the following reasons:

- (i) They allow competition agencies to consolidate multiple complaints or sources of evidence concerning the same alleged anti-competitive merger.
- (ii) They provide resources for competition agency staff to draw on institutional knowledge/expertise or prior cases to assist in assessing and reviewing new complaints. This is particularly useful for competition agencies with geographically dispersed staff.

#### b) Internal Assessment of Information and Outcome of Pre-investigation Stage

30. Competition agencies should establish methodologies and procedures for the early verification and assessment of anti-competitive concerns during the pre-investigation phase. The OECD recommends a five step assessment process:

- (i) Step 1: Market definition and description;
- (ii) Step 2: Identification of firms that participate in the relevant market and their market share;
- (iii) Step 3: Identification of potential adverse effects to competition from the merger (refer to table below setting out common competition concerns that arise in horizontal, vertical and conglomerate mergers);
- (iv) Step 4: Analysis of ease of market entry;
- (v) Step 5: Identification of efficiencies that might arise.

Type of Merger	Potential Competition Concerns	OECD's Comments
Horizontal merger: where firms that are actual or potential competitors on the same level of the supply chain merge	i. Unilateral effects; and/or	Among the three types of mergers, horizontal mergers are the "most suspect" as they reduce the number of independent competitors.
	ii. Coordinated effects.	Horizontal mergers that lead to unilateral effects are most frequently challenged by competition agencies.
Vertical merger: where firms on different levels of the supply chain merge	i. The merged entity acquiring market power to the detriment to competition and consumers; and/or	Vertical mergers are less likely than horizontal mergers to result in a loss of competition, as they do not reduce the number of competitors in the market.
	ii. The merger facilitating collusion among firms at a given level of the supply chain.	They are rarely challenged on the grounds that they facilitate collusion.
Conglomerate merger: where firms operating in unrelated markets merge	i. The merged entity becoming "so large" that they have an advantage over other firms in the competitive process, e.g. engage in predatory pricing;	Competition agencies rarely challenge conglomerate mergers.
	ii. The merged entity acquires "portfolio power" i.e. where the products acquired are complementary to the acquirers' products; and/or	
	iii. The merger facilitates collusion among firms at a given level of the supply chain.	

**Figure 45:** Types of Mergers and Competition Concerns

31. Mergers between firms with multi-products may simultaneously be horizontal, vertical, and conglomerate. Competition agencies should analyze each aspect of the merger separately to determine the competitive outcome.
32. Three possible interim outcomes arise in this sub-stage. The competition authority may require further information or research on the merger before it is able to advance its internal assessment of the information. The competition authority's internal assessment of the information may reveal whether the merger is unlikely or likely to lead to competition concerns.

#### **i. Further Information or Research Required**

33. Where initial information provided by complainants is insufficient to inform the internal assessment, competition agencies should consider requesting for further information at the first instance.
34. Unlike cartel investigations where an element of surprise is required, competition agencies can consider approaching the merger parties to request for further information. In any case, competition agencies can rely on third party sources, e.g. news reports, internet research, industry association reports, where available, to fill information gaps. It is also important that the competition authority verify or corroborate allegations before deciding on the next steps, as information received from complainants may be biased. For example, the complainants maybe motivated to protect competitors rather than the process of competition.

## ii. Unlikely to Lead to Competition Concerns – Close Matter Without Taking Further Action

35. When it becomes clear that the merger is unlikely to infringe competition laws, competition agencies should promptly close the matter so that scarce resources can be re-assigned to work on other enforcement matters.
36. Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer who is tasked to screen the complaint, or by a group of agency officers (e.g. screening committee).
37. The decision to not take further action should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future.

## iii. Likely to Lead to Competition Concerns – Consider Commencing Enforcement i.e. Investigation

38. If it becomes clear that an alleged anti-competitive merger is likely to infringe competition laws, competition agencies should consider commencing enforcement i.e. investigation. Relevant information reviewed during the course of the competition authority's assessment should be collated and marked out for easy access. This will help facilitate further deliberation on whether to commence enforcement.
39. Some jurisdictions have competition laws that only allow for investigations to be initiated when relevant statutory thresholds are met e.g. where there are reasonable grounds to suspect that an infringement of the law has occurred. Competition agencies from these jurisdictions should therefore consider at this stage if the relevant statutory thresholds are met.
40. **Prioritisation.** The principles for prioritising merger investigations should be similar to those for prioritising abuse of dominance, and cartel investigations:
  - (i) **Seriousness of the conduct and economic impact.** Mergers that have wide ranging effect in the industry and/or adjacent industries, affecting a greater volume of commerce, and longer in duration are more likely to be prioritized.
  - (ii) **Consumer detriment.** The greater the consumer detriment e.g. price increase, or types of consumer groups affected by the alleged conduct, the more likely the merger will be prioritized.
  - (iii) **Public interest.** Mergers that are likely to generate greater public interest should be prioritised e.g. whether consumers and businesses are likely to be interested, or how the enforcement action may affect public confidence in the competition authority.
  - (iv) **Strategic Considerations.** Relevant considerations include, general economic sector priorities, whether the merger raises novel legal/economic issues, and whether the enforcement is likely to be successful and lead to general and specific deterrence.
  - (v) **Weighing the desired enforcement outcome against available resources, e.g. time, financial resources and personnel.** If the weighing process indicates that pursuing the case would be an efficient and effective use of the agency's time and resources, then the merger should be prioritised for full scale investigation.

"The rationale for merger control is simple: it is far better to prevent firms from gaining market power than to attempt to control market power once it exists. Effective merger policy requires a judgment concerning the impact of a merger on competition before the merger occurred."

OECD Framework for the Design and Implementation of Competition Law and Policy: Chapter 4 Mergers

41. However, a young competition agency should, where resources permit, undertake a wide range of investigations on and/or reviews of mergers that are likely to lead to competition concerns. This will allow the competition authority's officer to get "on-job-training" as they implement investigation procedures. The competition assessment and general learning points from the investigation should also be documented and archived to form the competition authority's institutional knowledge. Refer to **Module D1: Operationalising the Enforcement Strategy** on "enforcement experimentation" for more information.

42. **Recommendation.** The recommendation to commence enforcement, i.e. investigation should comprise of the following:
- (i) Relevant information received by the competition authority, e.g. description of the merger, and merger parties;
  - (ii) Assessment as to why the merger is likely to lead to competition concerns i.e. the theory of harm;
  - (iii) Whether any valid defences or exemptions/exclusions under the competition law are likely to apply to the alleged conduct; and
  - (iv) Why the case against the merger should be selected and/or prioritized.
43. The recommendation should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future. Depending on the internal operating procedures of the competition authority, such recommendations may be made by the agency officer/team assessing the merger, or by a group of agency officers (e.g. screening committee).
44. Should the competition authority decide not to commence enforcement, it can also consider whether other non-enforcement type actions e.g. advocacy or cooperating with another enforcement agency, should be taken instead. Refer to **Module D5: Weighing Competition Enforcement and Competition Advocacy** for more information.

### Investigation Stage

45. This sub-section highlights the "nuts and bolts" of how to start and progress a merger investigation.

#### a) Formation of the Case Team

46. As a first step, a case team should be formed to work on the investigation. The size and experience of the case team will depend on the complexity of the case.

47. A typical case team structure will comprise of a case team leader (who is usually a senior or experienced investigator) and at least one or two case team members who will assist the case team leader with the day-to-day running of the investigation.
48. Case teams typically include personnel with legal and/or economic skills.

### b) Planning and Tracking Investigations

49. **Investigation plan.** The investigation plan sets priorities for the merger investigation and focuses the merger investigation on particular theories of harm. It should guide the case team's strategy and fact-finding decisions. The ICN Mergers Working Group's Guidance on Investigative Technique recommends that an investigation plan should cover items within three primary areas:
- (i) Theories – developing and tracking various theories of harm;
  - (ii) Evidence – identifying sources of evidence and pertinent facts to help evaluate the theories of harm; and
  - (iii) Tasks – specifying administrative tasks and assignments, including careful scrutiny of available time (especially for notifications where statutory timelines are prescribed).
50. The items included in the investigation plan may vary according to the stage of the investigation. Ultimately, the investigation plan should be a flexible and forward looking document that can be updated as the investigation develops.
51. **Evidence Matrix.** It is recommended that the case team set out an evidence matrix based on the information relied upon to commence the investigation, and identify information gaps at the start of an investigation. Likewise, the evidence matrix should be a “live document” like the investigation plan and should be updated contemporaneously during the course of the investigation whenever evidence is received, as it will support informed decision making.
52. The ACCC's AANZFTA CLIP Toolkit for Senior Competition Investigators suggests the following template for an evidence matrix:
53. Case teams should also be guided by the senior management of the competition authority, and coordinate with other relevant parts of the competition authority (e.g. case teams who have conducted investigations in the same industry). Key investigative actions that can benefit from this oversight and coordination include: compulsory information requests, evidence evaluation, recommendations to the competition authority's decision makers. Regular internal meetings between the case teams, senior management, and other relevant agency officers can help guide and reassess the investigative progress, strategies and theories.

### c) Investigation Outcomes

53. **If the competition authority determines that the merger is likely to infringe competition law.** An investigation may culminate in the competition authority issuing an infringement decision (in an administrative system), or referring the merger for prosecution (in a prosecutorial system). Apart from demonstrating that the merger infringes competition law, a competition agency will need to consider how to:
- (i) Remedy the situation such that the process of competition is restored e.g. impose structural remedies (where the transaction needs to be restructured to eliminate the anti-competitive

aspects), unwind the merger, or impose behavioural remedies on the merged entity to modify or limit its future conduct;

- (ii) Deter future conduct from the entities involved e.g. impose financial penalties on the entities involved;
  - (iii) Deter future/similar conduct in the jurisdiction generally e.g. marking up financial penalties imposed;
  - (iv) Communicate the decision to the general public and interested parties e.g. leniency applicants, complainants, government agencies to demonstrate the importance and relevance of competition enforcement; and
  - (v) Manage the risks of an appeal against the infringement decision (in an administrative system), and counter arguments that entities will raise (in a prosecutorial system).
55. Some competition agencies may also decide not to issue an infringement decision or pursue the route of prosecuting the merger on grounds of administrative priority.
56. **If the merger is unlikely to infringe competition law.** An investigation may also culminate in the competition authority taking no further action if the merger does not have any anti-competitive impact.
57. The decision to not take further action should be documented in a report, and archived in the competition authority's electronic database. It should be archived in a manner that allows for easy access in the future. Evidence collected during the course of the investigation should be similarly archived as it is a useful reference for future assessments and general market intelligence.
58. In some jurisdictions, competition agencies may be required to publish their grounds for the non-infringement decision.
59. Lastly, due process and procedural fairness during the course of the investigation to its completion should be ensured. This is discussed in **Module D6: Due Process and Procedural Fairness**.

## References and Useful Resources

Source	Relevant Section	Title	Access
ACCC for the AANZFTA Competition Law Implementation Program	Investigation Stage: Investigation Plan	Toolkit for senior competition investigators	<a href="https://asean-competition.org/file/post_image/Toolkit%20for%20senior%20competition%20investigators.pdf">https://asean-competition.org/file/post_image/Toolkit%20for%20senior%20competition%20investigators.pdf</a>
ICN	Pre-investigation and investigation stage	ICN Investigative Techniques Handbook for Merger Review	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_HBInvestigativeTechniques.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_HBInvestigativeTechniques.pdf</a>
OECD	Pre-investigation and investigation stage	Framework for the Design and Implementation of Competition Law and Policy, Chapter 4: Mergers	<a href="http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf">http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf</a>

## Module D5: Weighing Competition Enforcement and Competition Advocacy

### Key Points

- Competition advocacy and competition enforcement are complementary.
- Competition advocacy should be aligned with the jurisdiction's competition policy and law development stage.
- The competition authority should engage in adequate advocacy prior to active implementation i.e. enforcement of the law.
- Competition enforcement should take place after a period of competition advocacy. Otherwise, competition advocacy would become ineffective as it lacks follow-up action, evidence and credibility.

### Complementarity of Competition Advocacy and Enforcement

1. The Toolkit for Competition Advocacy in ASEAN highlights that effective competition policy and law relies on effective advocacy and enforcement.



**Figure 46:** Complementarity of Competition Advocacy and Enforcement

2. Kovacic (1997) observed that the creation of a transition economy competition regime often coincides with the relaxation of central controls over prices. As such, government actors may perceive that the introduction of competition law is an “insurance against higher prices”. Some transition economy competition laws may allow the competition authority to set prices for dominant firms, and these competition authorities may face pressure to re-introduce price control measures. Competition authorities that lack formal powers for price control may nonetheless face demands to do so. Competition advocacy is therefore required to correct these potentially unrealistic expectations about competition enforcement.
3. More generally, advocacy and enforcement mutually reinforce each other and should not be seen as independent activities. For example, concluded enforcement cases can be used for “evidence-based” competition advocacy, to demonstrate the benefits of competition enforcement for consumers and businesses. Similarly, consumer-focused competition advocacy initiatives can be used to supplement or support competition enforcement. As consumers become more aware of the role of the competition authority, they will be more willing to assist the competition authority by responding to consumer surveys. Consumers will also be able to identify anti-competitive practices and bring them to the attention of the competition authority via complaints.

### **Singapore**

The objective of the competition law in Singapore is to promote the efficient functioning of markets, aimed towards enhancing the competitiveness of the Singapore economy. The Competition Act prohibits anti-competitive activities. Specific prohibited activities include agreements that prevent, restrict or distort competition, abuse of dominance and mergers that substantially lessen competition.

In administering and enforcing the Competition Act, CCCS adopts a two-pronged approach of enforcement and advocacy. CCCS enforces the Act by taking action against anti-competitive activities and its focus is on activities that have a significant adverse impact on the economy. At the same time, CCCS also works with government agencies, the business community and the public to advocate pro-competition practices and promote a strong competitive culture and environment.

*Source: CCCS and the Competition Act*

#### **Case Study 24: Competition Enforcement and Competition Advocacy (Singapore)**

4. Competition agencies can also consider making concurrent use of both competition enforcement and competition advocacy tools to tackle anti-competitive conduct. The Toolkit on Competition Advocacy in ASEAN suggests that it is not always necessary for a competition agency to launch a full investigation. It is also important to continuously engage in consultations with different stakeholders and to sensitise them about the need to bring about a competitive environment.

### **Malaysia**

In 2013, the Malaysia Competition Commission (MyCC) completed a “Market Review on Fixing of Prices and Fees by Professional Bodies in Malaysia under the Competition Act 2010 [Act 712]”. The report highlighted the need to devote attention to the professions from the perspective of competition policy.

Aside from describing key restrictions to competition and their alleged general interest justifications, the report also proposed a future course of action aimed at encouraging more pro-competitive mechanisms. The research involved 131 bodies or associations in 35 sectors. Its findings indicated a considerable number of instances where Malaysian professional bodies appear to regulate prices or fees for their members. This was either backed by specific legislation or where a governing body had regulatory authority over a certain sector and established a scale of fees for that sector.

Although any price fixing agreements that are made in accordance with a legislative requirement are allowed, such agreements must also be carefully assessed against the purpose and principles of the Malaysian Competition Act.

Following the publication of the report, the MyCC organised a series of public consultations with members of professional bodies in order to seek their views and support a review of their price-fixing practices. Furthermore, the MyCC collaborated with the Malaysian Productivity Corporation (MPC) in carrying out a Regulatory Impact Assessment (RIA) and a Competition Impact Assessment (CIA). These served to study whether the existing restrictions under national legislations pursue a legitimate public interest objective, and whether there was any leeway for regulatory change.

As one of the major outcomes of the report and subsequent seminars, the Malaysia Institute of Chartered Secretaries and Administrators (MAICSA) issued a technical announcement for its members that it will not proceed with a proposed guide on fee indicators for professional secretarial services as this was not mandated by law. Four other sectors followed suit later in 2015 and issued directives to dismantle their scale of fees, in order to uphold the spirit of the competition law.

*Source: Toolkit on Competition Advocacy in ASEAN*

#### Case Study 25: Competition Enforcement and Competition Advocacy (Malaysia)

### Alignment of Competition Advocacy with Competition Policy and Law Development Stage

"Without enforcement, the compliance effort is not going to bear fruits."

Interviewee response to the Journal of Antitrust Enforcement Agency Effectiveness Study

5. The Toolkit for Competition Advocacy in ASEAN recommends that for a new or developing competition regime, competition advocacy can take priority over enforcement in the initial stage. It is therefore important for a competition agency to set a moratorium or grace period after which enforcement will commence (see **Module C3: Common Implementation Feature – Phasing Competition Enforcement / Prioritisation by Type of Competition Law Prohibition**). For example, transitional periods or sunset clauses give businesses enough time to comply with and understand the implications of competition law.
6. However, competition agencies should note that if competition enforcement does not take place after a period of competition advocacy initiatives, competition advocacy then becomes ineffective as it lacks evidence and credibility.
7. The principles for aligning advocacy with the stage of development of competition policy and law are set out in the ASEAN Regional Core Competencies Toolkit:

### 3.3.1 Matching advocacy with CPL development stage

It is true that during certain development stages some stakeholders are of crucial importance for CPL development. For instance:

- *When first introducing or reviewing the law, adequate resources should be spent in advocating the benefits of competition law with the legislature;*
- *When implementing the law, it is crucial that businesses are subject to adequate advocacy action to become aware of the law and responsive to the CA's enforcement action. At the same time, it is crucial that all actors involved in implementing the law (e.g. CA's internal stakeholders, judges, business lawyers) are made aware of, and trained in, the law and its procedures; and*
- *When the CA has reached a good level of enforcement and a competition culture is sufficiently widespread throughout the ASEAN Member State, advocacy activities should preferably target government-induced distortion of competition, in the context of a competition assessment framework.*

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Complementarity of advocacy and enforcement	Toolkit for Competition Advocacy in ASEAN	<a href="https://asean-competition.org/file/post_image/Toolkit%20on%20Competition%20Advocacy%20in%20ASEAN.pdf">https://asean-competition.org/file/post_image/Toolkit%20on%20Competition%20Advocacy%20in%20ASEAN.pdf</a>
	Matching competition advocacy with competition policy and law development stage	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN	<a href="https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf">https://www.asean.org/wp-content/uploads/images/2015/september/competition/Final%20Book%20RCC%20Guidelines%20public%20version_revP5.pdf</a>
William E. Kovacic (1997)	Complementarity of advocacy and enforcement	Getting Started: Creating New Competition Policy Institutions in Transition Economies	<a href="https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/">https://brooklynworks.brooklaw.edu/bjil/vol23/iss2/4/</a>

## Module D6: Due Process and Procedural Fairness

### Key Points

- Enforcement procedures are underpinned by three key principles: rules of natural justice, transparency and confidentiality protection.
- Competition agencies should formally inform entities under investigation about the suspected infringement(s), and engage with them during the course of the investigation.
- Entities under investigation should have the right to be represented and advised by independent legal advisors and have the right to access the competition authority's file.
- Competition agencies should also engage with relevant third parties during the course of the investigation as this promotes more informed and robust enforcement.
- Competition agencies should justify their infringement decisions in an administrative system (or their decision to prosecute in a prosecutorial system) solely on evidence presented in the decision (or at the hearing).

1. The contents of this module are largely adapted from the ICN AEWG's Annotated Guidance on Investigative Process; the ASEAN Regional Guidelines on Competition Policy Chapter 7: Due Process; and the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN on "fairness(due process), transparency and confidentiality".
2. The subsections discuss the key principle of transparency, and how the competition authority should engage with entities under investigation and third parties to ensure due process and procedural fairness.



**Figure 47:** Key Principles of Due Process and Procedural Fairness

### Rules of Natural Justice, Transparency and Confidentiality Protection

3. These three key principles are fundamental to supporting the credibility of the competition authority and should underpin the competition authority's engagement with the entities under investigation, and third parties during the course of the investigation.

#### a) Rules of Natural Justice

4. Competition agencies should take into consideration the rules of natural justice, such as informing entities under investigation of the investigation against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no-evidence' rule), or a similar legal concept under the laws of the jurisdiction.

## b) Transparency

5. The ICN Guidance on Investigative Process highlights that transparency is a basic attribute of sound and effective competition enforcement.
6. **During the course of the investigation.** Generally, the extent of investigative transparency is subject to the competition authority's discretion and should take into account the specific needs of the investigation and obligation to protect confidential information. Different types of investigations, and investigations at different stages may require varying level of transparency e.g. the covert non-public stage of a cartel investigation typically calls for less transparency.
7. To the extent that it does not undermine the effectiveness of an investigation, competition agencies should formally inform entities under investigation that an investigation has been commenced as soon as possible. It is recommended that competition agencies include in the notice to the entities under investigation the following information:
  - (i) The name of the entity or entities (parent and/or subsidiaries) investigated;
  - (ii) The legal basis for commencing investigations;
  - (iii) The subject matter of the investigation i.e. what the suspected infringement(s) is(are); and
  - (iv) Where possible, the expected timing/milestones of the investigation.
8. There may be good reasons to not make investigations public to third parties: the fact of an investigation could harm a business, and the investigation often concerns confidential business information that should not be made public.
9. After formal allegations of infringement are made, entities under investigation should be provided with access to files. Access to files is a fundamental procedural guarantee intended to apply the principle of equality of arms and to protect the rights of the defence. Competition agencies should grant, as far as possible, to the natural and legal persons against whom it has started infringement proceedings, access to all documents. This relates to documents which have been obtained, produced and/or assembled by the competition authority during the investigation, on which the allegation is based.
10. Competition agencies may not, depending on the legal requirements in respective jurisdictions, have to grant access to purely internal documents or drafts, confidential correspondence between the competition authority and other public authorities and documents protected by secrecy or confidentiality laws (e.g., complaints and confidential documents attached to them, where the complainants have applied for confidentiality, or documents containing business or national security secrets).
11. **Means to promote transparency (external-facing).** The transparency of the competition authority's policies, practices and procedures may be strengthened by publication of procedural and enforcement guidelines, guidelines on the competition regulatory body's policies and priorities in the application of the substantive rules and competition regulatory body/judicial authority decisions. These should be publicly accessible, e.g. they can be hosted on the competition authority's website.
12. Where feasible, the competition authority may also grant third parties interested in the proceedings (i.e., complainants or other participants to the proceedings) access to specific documents of the files, further to a specific request, provided that these documents are not protected by secrecy or confidentiality laws.

**13. Means to promote transparency (internal-facing).** Internally, competition agencies should promote consistency of procedures through internal rules or practices for conducting investigations. These internal rules or practices can be documented in an internal procedure manual which agency officers can refer to. The internal procedure manual should also contain templates or model questionnaires for routine investigative requests and recommendations on how to deal with “frequently encountered requests” during the course of the investigation, e.g. requests for a deadline extension for the provision of documents/information. It should be a “live” document that is updated regularly to reflect the agency’s investigation experience and align with international best practices.

### c) Confidentiality Protection

14. The ICN Guidance on Investigative Process highlights that confidentiality protection is a basic attribute of sound and effective competition enforcement.

15. Apart from adhering to legal requirements to protect confidentiality, competition agencies should respect confidentiality as it is important to ensure cooperation and the submission of information from entities under investigation and third parties during the course of the investigation.

**16. Means to promote confidentiality protection (external-facing).** Competition agencies should have clear, publicly available criteria for the types of information that are entitled to confidential protection, how to submit and designate confidential information and the circumstances under which confidential information may be disclosed. Common types of information that are considered confidential include, business secrets, trade secrets and sensitive personal information.

**17. Means to promote confidentiality protection (internal-facing).** Competition agencies should have clear internal policies regarding the handling of confidential information by agency officers, as well as access by entities under investigation and third parties to confidential material obtained during the course of the investigation.

18. The internal policy should also set out the procedures for evaluating the basis for confidentiality claims to ensure that excessive or unwarranted claims are rejected. The rejection of such claims should also be communicated clearly, and in a timely manner to the party who has provided the information. The party should also have the opportunity to object prior to disclosure.

### Engagement with Entities Under Investigation

19. **Substantive matters to be discussed.** Competition agencies’ engagements with entities under investigation should cover the following issues:

- (i) Significant procedural issues concerning the investigation; and
- (ii) Relevant legal, economic, and factual bases for competition concerns.

20. Apart from promoting transparency, ICN members’ experience indicate that investigations benefit from open discussion of investigative theories with the entities under investigation and the explanation of competition concerns at key points of the investigation e.g. commencement, new theories of harm, proposed infringement decision. Further, these engagements do not limit a competition agency’s discretion to pursue new or adapt existing theories of harm based on developments in an investigation. However, these new or updated theories of harm and the competition concerns which arise should be incorporated into the competition authority’s engagements with the entities under investigation.

21. Such engagements should not be a “one-way presentation” by the entities under investigation, but should be a two-way dialogue involving the competition authority’s investigation team.
22. Apart from legal requirements to provide formal opportunities for entities under investigation to discuss the investigation with the competition authority and respond to the competition authority’s competition concerns, the competition authority should consider allowing them to propose additional meetings at key points of the investigation, e.g. commencement, new theories of harm and the proposed infringement decision.
23. **Representation and access to files.** Entities under investigation should have the right to be represented and advised by independent legal advisors. They should be allowed to present their views to the competition authority via their counsel, their employees and outside experts.
24. **Oral hearings.** The ICN AEWG recommends that any final, formal hearing on alleged infringements of competition law during enforcement proceedings should be conducted before officials who are independent of the investigative process. Such hearings should be held pursuant to transparent rules and procedures that include the opportunities for parties to make arguments, present and rebut evidence, and respond to allegations.
25. **Conclusion of investigation.** Competition agencies should justify their infringement decisions in an administrative system (or their decision to prosecute in a prosecutorial system) solely on evidence presented in the decision (or at the hearing). All final written decisions should include:
  - (i) A detailed explanation of the facts;
  - (ii) Evidence relied upon;
  - (iii) Arguments forwarded by entities under investigation;
  - (iv) Reasons for finding an infringement;
  - (v) Sanctions e.g. financial penalties; and
  - (vi) Directions imposed on the entities under investigation

### Engagement with Third Parties

26. Competition agencies should further engage with relevant third parties e.g. competitors, customers, and government agencies during the course of the investigation as this promotes more informed and robust enforcement. Relevant third parties should also be given the opportunity to submit their views during the course of the investigation.
27. Competition agencies have relied on a variety of ways to engage with third parties, from formal investigative tools e.g. request for information, official hearings, to more informal tools e.g. phone calls, letters, emails and meetings to solicit for views and perspectives on the competition concerns.

### Engagement with the Press

28. As recommended in the Toolkit on Competition Advocacy in ASEAN, competition agencies should put in place an organizational media policy. The policy should set out who within the competition authority can speak to media personnel and respond to media requests.
29. The Toolkit recommends that contact with the press, e.g. local media or international competition news outlet be managed through the competition authority’s press office or communications department. The competition authority personnel that speak to the media typically include

communication and press officers, appointed spokespersons, technical experts and the leaders of the competition authority e.g. CEO or Chairperson.

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Rules of Natural Justice, Transparency and Confidentiality Protection	ASEAN Regional Guidelines on Competition Policy, Chapter 7: Due Process	<a href="https://asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy">https://asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy</a>
	Rules of Natural Justice, Transparency and Confidentiality Protection	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN: Fairness(due process), transparency and confidentiality	<a href="https://asean-competition.org/file/post_image/Regional%20Core%20Competencies.pdf">https://asean-competition.org/file/post_image/Regional%20Core%20Competencies.pdf</a>
	Engagement with the Press	Toolkit for Competition Advocacy in ASEAN	<a href="https://asean-competition.org/file/post_image/Toolkit%20on%20Competition%20Advocacy%20in%20ASEAN.pdf">https://asean-competition.org/file/post_image/Toolkit%20on%20Competition%20Advocacy%20in%20ASEAN.pdf</a>
ICN	Key Principles: Transparency	Annotated ICN Guidance on Investigative Process	<a href="http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf">http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf</a>

## Module D7: Information Collection and Investigation Tools

### Key Points

- Competition agencies have a wide range of investigation tools which they can rely on to collect information through written responses and/or oral interviews.
- The information collected should be relevant to the investigation, and should receive appropriate consideration by the competition authority.
- When collecting information from parties, competition agencies should have the discretion to discuss the requests with parties, and provide avenues for parties to seek clarification and resolve disputes regarding the requests.
- Competition agencies should set out clear criteria and procedural requirements for each type of investigation tool to ensure due process and procedural fairness.

1. The contents of this module are largely adapted from the IC AEWG's Annotated Guidance on Investigative Process.

### Principles for Information Collection

2. Competition agencies typically have the power to compel the provision of information at various stages of an investigation from entities under investigation and relevant third parties. They may also have the ability to accept and consider submissions documenting views relevant to the investigation made voluntarily.
3. The process of information collection should be informed by the legal framework provided for under the respective jurisdiction's competition law.
4. Apart from adhering to the legal requirements for information collection, competition agencies should be guided by the following principles:
  - (i) They should ensure that the requested and/or collected information are relevant to the investigation i.e. assessment of the anti-competitive conduct, to avoid imposing unnecessary burden and costs on the parties. This will further ensure that the competition authority does not embark on a fishing expedition for information/documentation;
  - (ii) They should have the discretion to discuss requests for information with the recipients to ensure mutual understanding of the requests. Parties should also be allowed to seek clarification, and resolve disputes regarding the information requests;
  - (iii) They should consider imposing appropriate limits to the scope, time period, issues addressed, persons impacted, and the format of the responses required, as long as they are able to conduct their investigation effectively; and
  - (iv) They should have sufficient resources to evaluate the information collected, for the purposes of assessing the competitive impact of the anti-competitive conduct investigated to determine whether an infringement has occurred, and how the misconduct may be remedied. All information collected should receive appropriate consideration by the competition authority.

## Types of Investigation Tools

5. The most common investigative tools used by competition agencies are:
  - (i) Voluntary and compulsory requests for information (documents and written responses);
  - (ii) Voluntary and compulsory on-site searches or inspections;
  - (iii) Voluntary and compulsory interviews or testimony;
  - (iv) Voluntary submissions of information; and
  - (v) General desktop research for relevant publicly available information.
6. Competition agencies should set out clear criteria and procedural requirements for each type of investigation tool, in order to ensure due process and procedural fairness. For example, competition agencies should implement appropriate limitations on the use of investigative tools that are commensurate with the effective enforcement of competition law. Information collected should be subject to applicable legal privileges, and confidentiality protections. Refer to **Module D6: Due Process and Procedural Fairness** for more information.

## Written Responses Versus Oral Interviews

7. **Comparing the pros and cons.** The table below sets out the factors that competition agencies should consider when collecting information via written responses, and oral interviews.

	Advantages	Disadvantages
Written responses	<p>Information received is automatically documented and ready for filing without having to prepare for minutes and to verify with sources.</p> <p>Comprehensive responses can be provided as parties have time to consider the questions posed and consult with relevant persons.</p>	<p>Less interactive than oral interviews, and do not allow for immediate clarifications of questions or answers.</p> <p>May be too carefully screened by counsels such that it provides less useful information than an oral interview.</p>
Oral interviews	<p>Respondents can respond in a short amount of time, with relatively little burden.</p> <p>Useful as an initial contact to identify issues and to obtain responses to open-ended questions as parties have an opportunity to fully present views in areas that may not have been fully anticipated by the competition authority.</p>	<p>Need to prepare minutes for verification with the respondents.</p> <p>Respondents in attendance may not have all the requisite knowledge on the issue and are unable to provide a comprehensive answer during the oral interview.</p>

**Figure 48:** Pros and Cons of Written Responses and Oral Interviews

8. Competition agencies should also be aware of potential biases in the information collected through different investigative tools and from various sources. For example, voluntary written submissions from merger parties explaining why competition is not impacted by a merger transaction are likely to be more biased than the merger parties' pre-existing respective board meeting minutes documenting their deliberations on the merger. Where possible, competition agencies should deploy different investigative tools to collect information from different sources to corroborate the claims made and the evidence received.

9. **Written Responses.** The following principles for obtaining reliable written responses are adapted from the ICN Investigative Techniques Handbook for Merger Review:
- (i) Plan in order to efficiently find the important reliable evidence. Reviewing large quantities of material is time-consuming, tedious and difficult. Competition agencies should determine the types of evidence that are most relevant to the purpose of conducting competition assessment.
  - (ii) Consider using an appropriate system e.g. database software to track documents received. If a substantial number of documents is to be reviewed, a systematic way of identifying and retrieving the most important document should be developed. A possible method is to rely on an evidence matrix.
  - (iii) Pay close attention to pre-existing documents. Pre-existing documents that are created before investigations are commenced are likely to be a more reliable source on how competition works in an industry. Documents setting out facts that are inconsistent with parties' written submissions are particularly useful.
  - (iv) Exercise caution when relying on historical information to ensure that the information is representative. Historical information may not be representative because conditions in the market may have changed significantly.
  - (v) Documents that parties create for the purposes of submission to the competition authority must be carefully scrutinised as they are aimed at convincing the competition authority that their conduct/agreement/merger poses no competition risk.
  - (vi) Inquire about the scope of voluntary production of documents which should include only carefully selected and vetted documents. Reviewing large quantities of material is time-consuming, tedious and difficult, and may not be useful for competition assessment.
  - (vii) Pay attention to electronic documents, including emails. Prepare for written responses with electronic documents in mind. In some corporations, emails may be more useful because they reveal important and candid information that is never found in formal memoranda.
  - (viii) Do not assume that you can understand any document standing alone. Competition agencies cannot assess the significance of a document without reviewing other related or similar documents which will help to put the document in context.
10. **Oral Responses.** The following principles for obtaining reliable oral responses are adapted from the ICN Investigative Techniques Handbook for Merger Review:
- (i) Consider the competence of any person serving as a witness/respondent. The person should be qualified to address the topic i.e. have sufficient knowledge and responsibility.
  - (ii) Do not accept conclusory statements alone and consider requiring the witness's/respondent's relevant documents and data. These documents and data should form the basis of the claims made by the witness/respondent. The credibility of a witness/respondent may be undermined if the documents and data do not support his claim.
  - (iii) Open-ended questions usually are best i.e. who, what, when, where, how, are useful tools for formulating these questions.
  - (iv) Determine if the witness/respondent speaks for the company. Different representatives from a large business may hold different views. It may be risky to assume that the views of one employee are representative of the business.
  - (v) Consider bias i.e. whether the witness/respondent has an "agenda" that affects his response.

- (vi) When in doubt about oral evidence, get a sworn or signed statement or sworn testimony. Competition agencies observed that it is common that a respondent's superficial and confident position during the interview may become more tentative and qualified as a result of requiring a sworn or signed statement.
- (vii) Make sure that the witness/respondent is aware of the potential sanctions of providing false and misleading information. This will reduce the chance of inaccurate information supplied orally to the competition authority.
- (viii) Where it is allowed by law, the oral interview should be recorded or video-taped (as the case maybe) in accordance with the requirements of the law.

## References and Useful Resources

Source	Relevant Section	Title	Access
ICN	Principles for Information Collection and Types of investigation tools	Annotated ICN Guidance on Investigative Process	<a href="http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf">http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf</a>
	Types of investigation tools, Written Responses versus Oral Interviews, and Potential Biases	ICN Investigative Techniques Handbook for Merger Review	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_HBIInvestigativeTechniques.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_HBIInvestigativeTechniques.pdf</a>

# E

## ONGOING REVIEW OF THE COMPETITION ENFORCEMENT STRATEGY

" The strategy needs to be periodically reviewed and updated to make sure that it remains progressive and relevant. The competition agency might not need to set a fixed period for reviewing and updating its strategy, but should at least consider doing so in accordance with the development milestones of the regime."

ASEAN Self-Assessment Toolkit  
on Competition Enforcement and  
Advocacy

This section picks up from **Step 4: Elaborate the competition enforcement strategic plan** in Module C1: **Formulating the Competition Enforcement Strategy**.

The purpose of this section is to explain the fundamentals of competition enforcement strategy review. In particular,

- **Module E1: Institutionalising the Review of the Competition Enforcement Strategy** will explain why competition authorities should review their competition enforcement strategies on an ongoing basis;
- **Module E2: Competition Enforcement Strategy** will discuss the common metrics the competition authorities rely on to track the success of their enforcement strategy; and
- **Module E3: Updating the Competition Enforcement Strategy** will explain how the competition authorities should update their competition enforcement strategy.

## Module E1: Institutionalising the Review of the Competition Enforcement Strategy

### Key Points

- The competition enforcement strategy should be periodically reviewed and updated to ensure that it remains progressive and relevant.
- The ultimate aim of an evaluation review is to increase the effectiveness of the competition enforcement strategy and implementation initiatives.
- The specific evaluation review mechanism chosen is less important than the maintenance of an ongoing effort to evaluate the competition enforcement

1. The contents of this module are adapted from the ICN AEWG’s “Practice Manual on Competition Agency Evaluation”; the Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN; and Kovacic et. al (2011) “How does your Competition Agency Measure Up?”.
2. When designing a competition enforcement strategy, competition authorities should consider at the same time, how the competition enforcement strategy can be evaluated to measure the progress made towards achieving its competition enforcement goals: Refer to **Step 4: Elaborate the competition enforcement strategic plan** in Module C1: **Formulating the Competition Enforcement Strategy**.
3. As previously stated in the ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy:

*The strategy needs to be periodically reviewed and updated to make sure that it remains progressive and relevant. The competition authority might not need to set a fixed period for reviewing and updating its strategy, but should at least consider doing so in accordance with the development milestones of the regime.*

4. This module will discuss the reasons for conducting reviews of the effectiveness of the competition enforcement strategy and the mechanisms for conducting these reviews.

### Definition

5. The ICN AEWG defines competition agency evaluation as a “bundle of interrelated activities, exercises and reporting functions”. It is a multifaceted collection of exercises that can be: formal and informal; focused on individuals, specific agency units, or agency-wide; related to enforcement and non-enforcement activities; linked to an overall report or separate and unrelated; focused on short, discreet terms or longer horizons or trends; crafted for outside review or internal learning; directed at specific cases, enforcement areas, investigative practices or general policy issues and agency operations; and based on quantitative as well as qualitative measurements.
6. The ICN AEWG also identifies evaluation as a core function of the competition authority’s governance, and further highlights that “*evaluation of agency performance is a universal practice*”.

## Why Review the Effectiveness of the Competition Enforcement Strategy?

"The reviews are quite useful as they provide constructive feedback to the Authority on whether it is on the right track and whether it is making any impact to the economy. The reviews also inform the Authority whether or not stakeholder expectations are met"

Interviewee response to the Journal of Antitrust Enforcement Agency Effectiveness Study

7. The review of a competition enforcement strategy is a key constituent of evaluation.
8. It is obvious that a strategy has to be reviewed to determine if its design and implementation are "fit for purpose". Kovacic et. al (2011) opined that "a *good strategy does not consist of mechanically repeating what the competition authority has done before*".

9. While looking "backwards" to see how the competition authority has done i.e. review of the competition enforcement initiatives, the ultimate aim of an evaluation review is to increase the effectiveness of the competition authority's competition enforcement strategy and implementation initiatives, and consequently competition policy and law in the jurisdiction. The ICN AEWG observed the following applications of evaluation reviews by competition authorities:
  - (i) Shaping the competition authority's strategic planning and strategy;
  - (ii) Setting future priorities; and
  - (iii) Considering and making internal changes to the competition authority.
10. Furthermore, evaluation reinforces accountability and provides an informed foundation for future competition enforcement strategy planning and enforcement initiatives. For new competition authorities, impact assessment can help them gain public acceptance and credibility amongst key actors/stakeholders as they demonstrate the benefits of competition enforcement activities.
11. It is important to note at this juncture that the application of the findings from the evaluation review does not always equate to changes to enforcement strategy or enforcement implementation. They should instead be relied upon as reference points, to guide and refine the competition authority's competition enforcement strategy. These issues are discussed in **Module E3: Updating the Competition Enforcement Strategy**.

**Spain**

Although the Spanish National Commission of Markets and Competition (CNMC) considers that Spanish Competition Law is adequate to face most competition challenges and is comparable to the most advanced in Europe, competition enforcement needs continuous adaptation and there is room for improvement in competition legislation at least in the following areas:

- Reviewing provisions regarding fine calculation would be convenient for two reasons: First, to allow CNMC to employ similar methods of fine calculation as those employed by the European Commissions. This would result in a more homogeneous completion of enforcement, considering that both the CNMC and the EC can handle cases affecting the Spanish and EU markets. Second, and more importantly, to ensure that fines are effectively deterrent. In some cases, the limits imposed by Spanish legislation (as interpreted in recent case law) may hinder the deterrent effect of fines.
- Allowing for the application of next generation antitrust tools, such as settlements. These kinds of tools may make antitrust enforcement more effective, as well as help to save public and private resources currently devoted to litigation.
- Setting priorities: more flexibility for the CNMC to focus on the more relevant cases. CNMC can act both on its own initiative and in response to complaints. In the case of complaints, there is an obligation to act and little margin of maneuver to rapidly close a case, even when the use of public resources is not clearly justified. A bigger margin of maneuver, to focus on the most relevant cases, could be highly beneficial for an effective competition law enforcement.

*Source: ICN, Lessons to be learnt from the experience of young competition agencies.*

**Case Study 26:** Reviewing the Effectiveness of Competition Enforcement Strategy (Spain)

## Ongoing Review Mechanisms

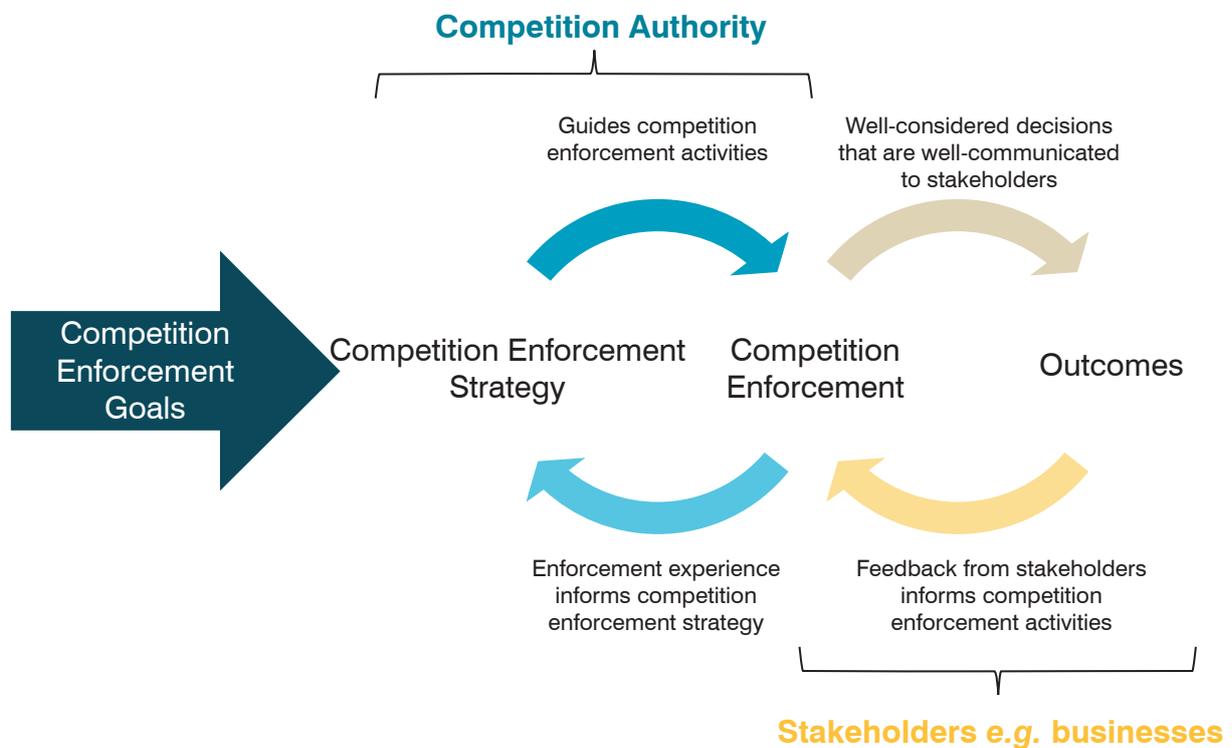
"Rome was not built in a day: competition enforcement is a marathon, not a sprint race."

Interviewee response to the Journal of Antitrust Enforcement Agency Effectiveness Study

12. Kovacic et. al (2011) recommends that the “process of reassessment must be an ongoing effort, its execution requiring an internal planning mechanism, to devise and revise strategies”. The following mechanisms were recommended:

- Formation of a long-term planning committee made up of management and staff from the competition authority;
- Creating a recourse to internal policy review sessions through which the competition authority’s management and staff discuss possible application of resources; and
- Consultation with relevant external bodies e.g. the then-UK OFT had a non-executive board.

13. The ICN AEWG observed that these evaluation review exercises typically result in written reports or are incorporated into institutional and/or strategic planning. Additionally, some competition authorities have evaluation officers i.e. dedicated personnel in the competition authority to make sure that past evaluations are taken into consideration during strategic planning, including the consideration of changes.
14. Kovacic et. al (2011) added that the specific mechanism chosen is less important than the maintenance of “a continuing effort to reconsider priorities and realign the competition authority’s strategies to addressing economic conditions”.
15. Lastly, it is useful to contextualise review in the “Competition Enforcement Strategy Virtuous Cycle” discussed in
16. **Module B2: Why have a Competition Enforcement Strategy?** above. Competition enforcement strategy reviews fall within the “return loop” from outcomes to competition enforcement and thereafter competition enforcement strategy.



**Figure 49:** The Competition Enforcement Strategy Virtuous Cycle

## International Practices: Competition Authorities' Experience

### a) Impact Assessment

17. The OECD 2013 report by Professor Stephen Davies describes how competition authorities assess the impact of their enforcement work on a regular basis. The report highlights the ten essential features of impact assessment as they have been conducted by competition authorities.

18. The ten features are set out in the table below.

S/N	Defining Features	Notes
1.	Impacts are assessed on a regular, usually annual, basis, during the following year.	Refer also to feature 7.
2.	They are relatively undemanding in cost and time, usually utilising information collected at the time of interventions and/or simple default assumptions.	N/A
3.	Estimates are generally performed using ex-ante information.	Impact assessments are conducted once interventions have been undertaken, but using only the information available ex-ante, i.e. that are available at the time of the intervention. The practitioner projects forward comparing what would happen with and without the intervention. In general, ex-ante evaluation is simpler to conduct and makes fewer demands on data than does ex-post evaluation which can only be conducted some years after, when accurate data becomes available on what actually did happen. Given that impact assessments are typically conducted in the year following intervention, they must, almost inevitably, use only the information available ex-ante. This helps to achieve feature 2 above since little data collection or analysis should be required.
4.	It is assumed that no intervention i.e. enforcement action can have a negative impact.	This is a direct consequence of feature 3 - given that the information used is confined only to that available at the time of the original intervention, and by definition the competition authority must have projected a positive outcome from intervening. Of course, it is important that competition authorities should also evaluate from a more self-critical perspective, but that is the role of the ex-post evaluation.
5.	Estimates are deliberately 'conservative'.	This is essential, given the ex-ante basis and feature 4 above. Obviously, the term 'conservative' is relative. However, it is distinguished from 'lower bound' which is meant to indicate the least positive possible outcome (refer to feature 8 below).
6.	Estimates are in terms of static consumer benefits. Typically, only static benefits are calculated, i.e. reduced price/increased consumer surplus.	The emphasis on consumer benefits is appropriate, reflecting the fact that competition enforcement is guided by the consumer welfare standard.
7.	Annual moving averages are usually employed.	Estimates are usually made annually. However, there can sometimes be considerable variability between years due to the erratic frequency over time in cases from abnormally large markets. Therefore it is the practice of some competition authorities to report estimates in moving average form. For example, the estimate for 2012 would be an average of the estimates for 2010-2012. This smooths, rather than entirely removes, the sensitivity of estimates to very large but infrequent mergers or cartels.
8.	Estimates are 'point' estimates, rather than a range of plausible values.	In principle, the alternative would be to present estimates in the form of a range, based on a statistical confidence interval. But this is impossible given the ad-hoc nature of many of the estimates. Sometimes however a competition authority might present alternative estimates for different assumptions - typically 'high' and 'low' bounds.
9.	Assessments typically cover mergers and cartels, and usually abuses of dominance.	Ideally, all areas of competition policy should be included.

S/N	Defining Features	Notes
10.	The deterrence impact of competition policy is sometimes mentioned in impact assessments, but it has never been estimated in detail. Similarly, the possible beneficial effects of competition policy on productivity, innovation, and growth are not estimated.	As stated at feature 6, impact assessments are essentially static.

**Figure 50: Ten Features of Impact Assessment**

19. The OECD (2014) propose the following general principles when evaluating enforcement actions:
- (i) Whenever possible, use case-specific information: relying on such information enables a more accurate assessment.
  - (ii) Assume that no enforcement action will have a negative impact: this is because no competition authority would intervene e.g. to block a merger or stop a business practice if it considered that enforcement would not generate any benefits. Put another way, the enforcement action is presumed to have a positive impact.
  - (iii) Estimate static consumer benefits and where possible, also include dynamic ones.

#### b) Reports

20. The ICN AEWG observed that a common form or embodiment of a competition authority's evaluation is a written activity or performance report, often in the form of an annual report which describes the competition authority's enforcement work. The content of these reports include:
- (i) Enforcement and non-enforcement activities;
  - (ii) Workload statistics; and
  - (iii) Narrative descriptions of the competition authority's activities, including enforcement decisions reached and enforcement actions taken.
21. The OECD similarly recommends that a competition authority assesses and publishes its evaluation findings regularly to promote accountability and transparency. Competition authorities should consider reporting the results by types of enforcement decisions where possible.
22. Further, as noted in **Module D5: Weighing Competition Enforcement and Competition Advocacy**, competition enforcement and competition advocacy are complementary. Advocacy and enforcement mutually reinforce each other and should not be seen as independent activities. Reports on the competition authority's concluded enforcement cases can be used for "evidence-based" competition advocacy, to demonstrate the benefits of competition enforcement for consumers and businesses.
23. That said, not all evaluation results are made public. The ICN AEWG observed that a good deal is subject to internal use only. The reported results allow the competition authority to present its perspective on the utility of its enforcement actions and allows for reaction, feedback, and criticism from external stakeholders/actors.
24. Pertinently, competition authorities should provide clear explanations on how to interpret the evaluation findings in the report. For example, the OECD (2014) recommends that the competition authority includes the following explanations when reporting impact assessments based on *ex-ante*

estimates of overcharge: discussed in **Module E2: Competition Enforcement Strategy** below:

- (i) The numbers are *ex-ante* estimates, relating to likely future effects or averted effects that can only be estimates.
- (ii) The estimates do not usually ascribe any value to “no-enforcement action”.
- (iii) The benefits are mostly estimated as “static” effects due to lower prices. It does not take into account the dynamic effects, i.e., how greater competition produces better and cheaper products/services via innovation and productivity gains in the longer term.
- (iv) The estimates do not take into account the “deterrent effect” of the competition authority’s decisions.

## **Singapore**

### SISTIC

#### *Case Background*

In June 2010, CCS found that SISTIC, a ticketing agent, had entered into a series of exclusive agreements with venue providers such as Singapore Indoor Stadium (“SIS”) and The Esplanade Co. Ltd (“TECL”), requiring that all events held at their venues use SISTIC as the sole ticketing service provider. There were also 17 other agreements requiring event promoters to use SISTIC as their sole provider.

CCS issued an infringement decision in June 2010 against SISTIC for abuse of dominance. CCS was of the view that the exclusive agreements had the effect of foreclosing the market to rival ticketing service providers as it prevented competitors from gaining progressive foothold in the market and that SISTIC’s objective justifications for the agreements were not defensible. SISTIC was required to remove the exclusivity clauses from its contracts. SISTIC appealed to the CAB but the CAB dismissed SISTIC’s appeal against liability in 2012.

#### *Methodology*

The methodology employed for this case was purely qualitative, with most interviews being with rivals, new entrants and event promoters. Simulation would be difficult without access to a considerable amount of data and estimations of demand elasticities. An event study is also not possible because none of the ticketing services providers are quoted on the stock exchange. A formal DID is also not suitable due to lack of data. Further, it is too soon to do a before-after comparison or DID analysis because the effects of removing exclusive agreements would likely only be felt after more time has passed.

#### *Post-Enforcement Findings and Assessment*

The key findings are that SISTIC’s smaller rivals have increased their market share and some new entry has occurred. However, it was widely acknowledged that SISTIC continues to benefit from its incumbency, first-mover advantages, and this is reinforced by continuing brand loyalty from promoters. This is however to be expected and may be inevitable in any market where one firm has enjoyed a dominant position for many years and is not an indication that the CCS’s intervention has been ineffective. Rather, the full benefits may only be felt with the passage of time or through the growth and consolidation of rival agents.

In terms of prices, there was no evidence that CCS's intervention had any impact on the fees charged by SISTIC. The price schedule that SISTIC charged as of 15 May 2013 had not changed from that during the period of abuse on 8 May 2010. There is also no real evidence that the intervention per se had led to a speeding up in innovation. Even though SISTIC had introduced a mobile application that would allow users to purchase tickets via mobile phones after the intervention, there was no evidence to suggest that this innovation could be attributed to CCS's intervention to remove SISTIC's exclusivity restrictions.

### Conclusion

Based on interviews with selected market participants, it would seem that CCS's enforcement had led to some initial positive outcomes thus far for the industry. However, these outcomes should be qualified as not enough time had passed to assess whether new entrants would be able to remain viable. It might be possible that new entrants would exit the industry if they are unable to compete with SISTIC even after exclusivity was removed. In addition, it is noted that one event promoter had questioned whether the vertical ownership linkage between SISTIC and the main venue operators, such as SIS and TECL, would create a vested interest in how ticketing agents are chosen.

*Source: Professor Stephen Davies, Post-Enforcement Evaluation Methodologies and Indicative Findings, August 2013*

### Case Study 27: Post-Enforcement Assessment (Singapore)

## References and Useful Resources

Source	Relevant Section	Title	Access
CCCS	International Practices: Competition Authorities' Experience	Post-Enforcement Evaluation Methodologies and Indicative Findings	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-post-enforcement-evaluation---uploaded-270813.pdf?la=en&amp;hash=7613ED82EE6FC5A57064BEE1DC6ECB8AB5FF70CF">https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-post-enforcement-evaluation---uploaded-270813.pdf?la=en&amp;hash=7613ED82EE6FC5A57064BEE1DC6ECB8AB5FF70CF</a>
ICN	International Practices by Competition Authorities' Experience and Ongoing Review Mechanisms	Agency Effectiveness Working Group's "Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-evaluation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-evaluation/</a>
ICN	Why Review the Effectiveness of the Competition Enforcement Strategy?, International Practices by Competition Authorities' Experience	Lessons to be learnt from the experience of young competition agencies	<a href="https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf">https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf</a>
OECD	International Practices by Competition Authorities' Experience	Assessment of the impact of the competition authorities' activities: Note by Prof. Stephen Davies (2013)	<a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2%282013%291&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2%282013%291&amp;docLanguage=En</a>

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Source	Relevant Section	Title	Access
William E. Kovacic, Hugh M Hollman and Patricia Grant (2011)	Ongoing Review Mechanisms	How does your competition agency measure up?	<a href="https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf">https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf</a>

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## Module E2: Competition Enforcement Strategy Evaluation Tools

### Key Points

- Data collection is an important foundation for evaluation.
- Competition authorities should rely on a mix of quantitative and qualitative; self-assessment and external assessment evaluation tools.
- There are no “perfect” evaluation tools. However, this should not deter a competition authority from engaging in evaluation. Even an imperfect evaluation is a positive step towards understanding and improving the competition authority.

1. The contents of this module are adapted from the ICN AEWG’s “Competition Agency Evaluation: Practice Manual”; Kovacic et al. “How does your competition agency measure up”; and the OECD Guide for helping competition authorities assess the expected impact of their activities (2014).
2. The ICN AEWG did not identify a consensus norm for how to evaluate a competition authority. In this module, we highlight the two types of evaluation tools (self-assessment tools and external assessment tools) that competition authorities can rely on when evaluating the success of their competition enforcement strategy.

### Data Collection

3. Kovacic et al. (2011) opined that the collection of data that recounts the competition authority’s enforcement activities and measures their impact is an important foundation for evaluation.
4. The ICN AEWG observed the following challenges and limitations of choosing and selecting data to collect:
  - (i) Indicators are only useful if an agency has the ability to collect and report the necessary data. Data can include information on past agency activities and their results, and information on markets. Some of this data can be retrieved from internal databases (available at some agencies) or from sector regulators.
  - (ii) The process of selecting indicators, as well as gathering, analysing, and reporting the subsequent data, can be resource intensive.
  - (iii) Indicators need to be contextualised. There is a risk that when indicator-data is taken out of context it may be misunderstood.
  - (iv) Some indicators (e.g. the number of cases filed) could subject an agency to criticism that their incentives are not driven by reaching the right result but rather by meeting the indicator targets.
  - (v) Although indicators can demonstrate results they do not explain results. Results need to be thoroughly analysed in order to get an accurate idea of whether an agency is meeting its objectives. For example, indicators may demonstrate that an agency is failing to achieve a particular objective; however, indicators cannot be relied upon to explain why the agency is failing. Indicators only signal the need for more thorough analysis.
  - (vi) There is not always a clear and exclusive causal link between a result and the agency’s activity. For example, it may be difficult to directly measure changes to consumer welfare or productivity that result exclusively from an agency’s enforcement, research or advocacy activities.

5. It is important to note at this juncture that there are no “perfect” evaluation tools. That said, this should not deter the competition authority from engaging in evaluation. Kovacic et al. (2011) highlights that just because an evaluation is not perfect does not mean the evaluation should not be done. To the contrary, even an imperfect evaluation, executed as accurately as possible, is a positive step to both understanding and improving the competition authority.

#### a) Quantitative Data

6. A survey prescribed by the ICN AEWG found the following quantitative data that competition authorities collect to assess their performance:
- (i) Indicators with more than 90% agreement:
    - i. enforcement actions or decisions;
    - ii. sanctions imposed or obtained;
    - iii. investigations initiated;
    - iv. investigations closed;
    - v. complaints addressed;
    - vi. investigations or enforcement actions by type of enforcement (e.g., mergers, cartels);
    - vii. remedies imposed or obtained;
    - viii. advocacy actions;
    - ix. studies undertaken or produced; and
    - x. appeals.
  - (ii) Indicators with 73-85% agreement:
    - i. intermediate investigative steps or actions; e.g., requests for information issued, raids or searches, decisions to advance phases of an investigation, statements of objections;
    - ii. appearances before or comments to legislative bodies, courts, sector regulators;
    - iii. policy statements and guidelines issued; and
    - iv. press coverage.
7. The ICN AEWG further reported that some competition authorities also track and report indicators such as website visits, newsletter recipients, or use of social media and measures of international interaction such as the number of instances of enforcement cooperation with international counterparts or the number of international consultations, comments or advice provided, bilateral meetings, or technical assistance missions.

#### b) Quantitative Data: Specific Enforcement Cases

8. In relation to evaluating specific enforcement cases, Professor Stephen Davies’ recommended the following data collection and assessment practices in his report for the CCCS on Post Enforcement Evaluation Methodologies and Indicative Findings:

- (i) It should be assumed that “Difference-in-Difference”<sup>5</sup> or “Before-After”<sup>6</sup> methodologies are the default methodologies when choosing cases for evaluation. This would mean that the competition authority needs to collect pre-enforcement data and post-enforcement data.
  - (ii) Evaluation should be conducted only after two to three years have elapsed since the enforcement action. This would mean that the competition authority needs to collect data for two to three years, post-enforcement.
  - (iii) Avoid choosing cases that are “easy to assess”. For example, price data is easier to access when products are homogenous or commoditised. Opting for “easy markets” would run the risk of sample selection bias.
9. It is good practice to consider the appropriateness and feasibility of different quantification methods before collecting data for quantification assessment.

<b>Singapore</b>					
<b>Case</b>	<b>Type of Case</b>	<b>Method: Simulation<sup>1</sup></b>	<b>Method: Event Study<sup>2</sup></b>	<b>Method: Difference-in-Difference</b>	<b>Method: Before-After</b>
Samwoh/ Highway	Merger	Theoretically feasible but data & time constraints make it impracticable.	All firms (except one) are not listed.	Malaysia as comparator, but judged infeasible.	Basic comparison was possible.
Express Bus Agencies Association	Cartel	Theoretically feasible: monopolistic competition with limited product differentiation. But too demanding on time/ data.	All firms are not listed.	Malaysian bus companies or public buses are possible comparators. However, both were rejected as impracticable by CCS staff.	Initial thought was that this was impossible, further investigation revealed a limited version could be applied.
SISTIC	Abuse of Dominance	Technically complex and insufficient data with which to calibrate.	All firms are not listed.	Insufficient post-intervention data.	Insufficient post-intervention data.

*Source: Professor Stephen Davies, Post Enforcement Evaluation Methodologies and Indicative Findings, 2013*

**Case Study 28: Quantification Methods (Singapore)**

10. Lastly, apart from collecting data to quantitatively evaluate an enforcement outcome, Professor Stephen Davies recommends that qualitative data should also be collected as part of the evaluation process, and to account for information gaps where quantitative data is unavailable.

<sup>5</sup> DID is a quasi-experimental econometric technique involving a comparison of prices before and after an event relative to some other real world control, i.e., a similar market without the event or within the same market for firms not involved in the event.

<sup>6</sup> This methodology is a simple comparison of difference between the situation before an event and the effects thereafter. For mergers, the method is a simple comparison of prices before the merger with prices after the merger. For cartels, the method is to estimate the extent of cartel overcharge by comparing prices within the cartel period with pre- or post-cartel prices. In order to control for exogenous factors during the assessment period, the analysis should ideally include other variables such as demand growth, inflation, capacity utilisation, etc.

### c) Qualitative Data

11. It is not always the case that enforcement outcomes can be quantitatively assessed. In such cases, competition authorities will need to rely on qualification tools.
12. A survey prescribed by the ICN AEWG found the following quantitative data that competition authorities collect to assess their performance:
  - (i) Indicators with almost 100% agreement:
    - i. Level or quality of training opportunities provided to staff;
    - ii. Communications or awareness levels of the competition authority's work with companies and the public; and
  - (ii) Indicators with more than 75% agreement:
    - i. Length and timeliness of investigations;
    - ii. Whether the agency has achieved its strategic objectives and goals;
    - iii. Percentage of investigations closed in an initial phase;
    - iv. Job satisfaction levels of staff at the competition authority; and
  - (iii) Indicators with 50-70% agreement:
    - i. Percentage of investigations that lead to enforcement actions;
    - ii. Win rate on appeal;
    - iii. Cost of investigation studies or enforcement actions; and
    - iv. Success rate for advocacy efforts.
13. The ICN AEWG also reported that 18% of competition authorities surveyed assess the burden imposed by (or utility of) requests for information. 42% of competition authorities regularly evaluate the efficiency of their investigative process or litigation.
14. The ICN AEWG observed that competition authorities routinely rely on qualitative assessment and reputational feedback (discussed below) in their evaluation.

### d) Qualitative Data: Reputational Feedback

15. The ICN AEWG survey observed that competition authorities also collect qualitative data to assess their reputation. Reputation feedback can provide insight into how the competition authority's enforcement actions are perceived by external stakeholders/actors.
16. Further, seeking opinions from these external stakeholders/actors can signal the competition authority's willingness to learn about the impact and perception of the competition authority's enforcement actions. The ICN AEWG added that seeking reputational feedback can spur two-way interactions.
17. 82% of competition authorities surveyed seek reputational feedback from non-government external stakeholders. The key observations on seeking reputational feedback are set out below:
  - (i) How? A slight majority of responding competition authorities use formal surveys or interviews, others compile feedback from stakeholders informally.
  - (ii) How often? Half of the competition authorities carry out their feedback exercise regularly, the other half on an ad-hoc basis.

- (iii) By whom? Mostly by the competition authority. Feedback was gathered twice as often by the competition authority itself as by hired third parties.
- (iv) Who? For a significant majority of agencies, companies (93%) and the legal community (79%) are the key stakeholder targets in terms of feedback. Feedback is also gathered from academics (60%), consumers (75%) and the press (46%). These percentages refer to the subset of responding agencies that seek reputational feedback from stakeholders.

## Self-Assessment Tools

### a) Strategic Goals and Implementation Initiatives

18. A simple metric that can be relied on is to determine if the strategic goals and implementation initiatives established in the strategy were completed. The following working aid can be used for such evaluations.

Strategic Goal	Implementation Initiative	How and when was this accomplished?	What was the feedback received?
Strategic Goal 1: [insert]	Initiative 1(a) [Insert]		
	Initiative 1(b) [Insert]		
	Initiative 1(c) [Insert]		
Strategic Goal 2: [insert]	Initiative 2(a) [Insert]		
	Initiative 2(b) [Insert]		

**Figure 51:** Strategic Goal Evaluation Matrix

### b) Activity Levels

"This is akin to measuring the effectiveness of commercial airlines solely by the number of departures. Imagine going to an airport and seeing a series of screens, all of which are labelled "departures". When the passengers ask about arrivals, the airlines reply that they do not track those events. Nobody runs a commercial airline company this way. For competition policy, we should be concerned not only with how many cases an agency launches, but also with where and how they come to earth."

Kovacic et. al (2011)

19. The most common metrics collected and reported by competition authorities (set out in paragraph 6 above) relate to activity levels. The ICN AEWG noted that they are the easiest and most understandable metrics to communicate to external stakeholders/actors that are unfamiliar with competition law and enforcement. They are also the easiest to monitor, track and articulate. However, the ICN AEWG cautioned that activity levels are only a "rough proxy" for effectiveness. It is obvious that the differences in the facts, markets involved, and the impact of each enforcement action make the significance of "cross-matter" and "cross-time" comparison less demonstrable.

20. Additionally, Kovacic et al. (2011) argued that review based on activity levels e.g. number of cases initiated can warp the incentive of the current leadership as it can potentially motivate them to focus on "churning enforcement cases" rather than enforcement outcomes.

### c) Specific Enforcement Outcomes

21. Kovacic et al. (2011) highlighted the following benefits of assessing the effectiveness of competition enforcement strategy by enforcement outcomes over activity levels:
- (i) Provides staff with information on how their actions affect achievement of the competition authority's competition enforcement goals.
  - (ii) Allows value to be placed on deterrence, which activity level-metrics do not recognise.
  - (iii) Success or the lack thereof can suggest how the competition authority might improve its approach to competition enforcement strategy, as well as strengthen its implementation initiatives.
22. Relatedly, Kovacic et al. (2011) cautioned that assessment that focuses entirely on activity levels can overlook the inherently evolutionary nature of competition policy. They recommended that the *“study of activity levels can be interpreted only by placing the competition authority's work in historical context and by recognising that competition authorities' progress through a lifecycle in which, for various reasons, it emphasises different objectives in different eras.”*
23. They argued that a competition authority's enforcement “report card” should have two components, one to measure the competition authority's work by contemporary standards; and another to assess the competition authority's contribution to policies, doctrinal developments or analytical concepts that prove to be durable and respected over a longer term.

#### **United States**

When the DOJ initiated the Otter Tail Power case in 1969, few appreciated the changes that this case—which involved a relatively obscure electric utility serving the north central US - would bring to the application of antitrust to traditionally regulated industries. The seemingly small case (Otter Tail) paved the way for the initiation of the DOJ's visibly big case in 1974 that led to the restructuring of AT&T in the 1980s. Instead, observers at the time would have said that the most important government action filed in 1969 was not the Otter Tail complaint but the initiation of the monopolisation case against IBM. Otter Tail was a small case that made big law.

*Source: Kovacic et al. (2011), How does your competition agency measure up?*

#### **Case Study 29: Specific Enforcement Outcomes (United States)**

24. As such, Kovacic et al., (2011) argued that a competition authority's “final grade” for its competition enforcement strategy and programme in one era cannot be calculated until years later, where commentators e.g. academics are able to assess whether earlier competition enforcement initiatives remain sound following developments in the competition authority's policy and learning. This means that the “grade” of the competition authority is always going to be incomplete for any one period.
25. On top of reporting activity levels, the ICN AEWG observed that only 53% of competition authorities surveyed attempted to quantify, estimate or measure direct consumer benefits generated by the competition authority's enforcement activities. Not all competition enforcement outcomes are objectively measureable and may require subjective judgement to assess success.
26. We highlight a few common tools (both quantitative and qualitative) that competition authorities rely on to measure and report the success of a competition enforcement initiative.

## i. Quantification Techniques

27. **Overcharge.** The impact of an enforcement action can be quantified by the “overcharge”, e.g., higher prices charged by a cartel that was avoided. The OECD 2013 report by Professor Stephen Davies notes that the following information is required when estimating overcharge:
- The size of the affected turnover;
  - The price increase removed or avoided; and
  - The length of time the increased price would have prevailed at absent the competition enforcement action.
28. The OECD (2014) paper suggests using default assumptions as a starting point when more specific information is not available. These default assumptions are based on the existing practices of OECD competition authorities.

Item	Description	Assumption (Cartel)	Assumption (Abuse of Dominance)	Assumption (Mergers)
A	The size of the affected turnover.	Ex-ante turnover of the companies under investigation in the affected market(s).	Ex-ante turnover of the companies under investigation in the affected market(s).	Ex-ante turnover of all the firms in the affected market(s).
b	The price increase removed or avoided.	Overcharge of 10%.	Overcharge of 5%.	Price increase of 3%.
c	The length of time the increased price would have prevailed absent the competition enforcement action.	3-year duration.	3-year duration.	2-year duration.

**Figure 52:** Default Assumptions for Quantification Techniques

29. The product of items (a) and (b) will provide an estimate of the magnitude of overcharge. Leong (2016) proposed the following formula when calculating overcharge:

$$\text{Value of Overcharge} = \frac{\text{Relevant Turnover}}{100\% + \% \text{Overcharge}} \times \% \text{Overcharge}$$

30. In addition to the default assumption methods, Leong (2016) suggested the following methods (set out in the table below) to estimate overcharge.

S/N	Method	Description
1.	Informal/anecdotal evidence	Interviews with personnel from the firms engaging in the anti-competitive conduct to reveal their estimates of the overcharge.
2.	“Before-after” comparison	Using a “before-after” comparison, i.e., of the price before and after the anti-competitive conduct was implemented. However, this method assumes that the “date of implementation” is known, and does not account for other factors that affect prices, generally.
3.	Marginal Cost / Average Cost	Using the marginal cost of producing the good/service as the “undistorted price”. As it may be difficult to estimate the marginal cost, average cost estimates can be used as an alternative.
4.	Analogy	Finding another market that is fairly similar to the affected relevant market to draw inferences on the price overcharge.

S/N	Method	Description
5.	Econometric Methods	<p>Demand estimation, market simulation or reduced-form estimation of prices are some econometric methods. However, these methods are typically time consuming and require significant amounts of data.</p> <p>Note: Professor Stephen Davies' 2013 report for the CCCS on Post Enforcement Evaluation Methodologies and Indicative Findings contains an extensive discussion on quantitative evaluation methodologies (simulations, event studies, difference-in-difference, and before-after).</p>

**Figure 53: Methods to Estimate Overcharge**

### **Singapore (Before-after comparison)**

#### **Express Bus Agencies Association Cartel**

##### **Case Background**

This case involved a cartel of 13 bus companies which operated express bus services between Singapore and Malaysia. Between 1 January 2006 and 24 July 2008, these firms fixed prices on these services using two agreements - a minimum selling price ("MSP") and a fuel and insurance surcharge ("FIC"). The CCS concluded that the parties had infringed the Competition Act because the parties had agreed to fix prices. Given robust legal evidence of price fixing, there was no need for the CCS to make assumptions to reach its decision.

For this post-enforcement evaluation, there is far less need for a qualitative survey since the intervention has led to the cessation of the cartel, and the only substantive issue is to quantify the consequent benefits received by consumers. Hence, a simple before-after comparison method was used in this case, employing a comparison of a sample of current prices, as posted on the internet, with prices for the same routes and ticket types as recorded by the previous case team.

Based on a sample of 52 comparable tickets in December 2012 to January 2013, the headline finding is that prices have fallen on average by 11% from the previous cartel price recorded in 2008. The 52 tickets covered seven different destinations in Southern Malaysia, from Singapore (Golden Mile/Boon Lay). The seven destinations are Butterworth, Penang island, Ipoh, Taiping, Malacca, Kuala Lumpur and Genting.

The actual impact of the 11% decline to consumers is most likely understated. This is because the costs of the bus companies, particularly for labour and fuel costs are likely to have increased post-enforcement. In real terms, the prices of the 52 tickets declined approximately 25% from the previous cartel price.

Based on the findings, the change in ticket prices resulting from the removal of the agreement to fix the two components of bus ticket prices could be interpreted as a successful intervention.

There are however two important caveats to this conclusion. First, it is unclear the extent to which the sample of 52 tickets used to measure the price changes is statistically representative. That said, since it includes seven different destinations, seven of the former cartelists, and various bus types, it is likely to be representative. Second, the price decline cannot necessarily be attributed entirely to the breaking of the cartel as there could be other exogenous factors such as increased competition from low cost carriers causing the price decrease. Ideally, the comparison should be by how much price has fallen relative to what it would have been had the cartel persisted (i.e. the counterfactual). However, such comparison is not feasible due to data constraint. Nonetheless, these qualifications are unlikely to entirely negate the positive impact of CCS's enforcement action.

*Source: Professor Stephen Davies, Post-Enforcement Evaluation Methodologies and Indicative Findings, August 2013*

**Case Study 30: Quantification Techniques – Before-after Comparison (Singapore)**

31. **Harm or Illegal Gains Caused by the Anti-competitive Conduct.** Leong (2016) explained that this calculation method follows similar assumptions to the overcharge calculation method. However, the main difference is that the duration used in the calculation is the actual duration of the anti-competitive conduct. There are limitations to using the actual duration in the computation method as it assumes that the same level of overcharge applies across the entire period of the anti-competitive conduct.
32. **Value of Market Opened for Competition.** Leong (2016) explained that the size of the market that would experience more competition, in particular abuse of dominance cases, can be relied on to quantify the competition authority's enforcement action.

**Singapore**

For instance, in CCS's landmark abuse of dominance case, involving the abusing ticketing company, SISTIC, it was assessed that the accumulated foreclosure attributable to the exclusive agreements was in the range of 60 to 65 per cent by revenues. The value of the market opened for internal consideration was considered to be SISTIC's relevant turnover multiplied by this 60 to 65 per cent. Such a calculation, though unpolished, provides an estimation of the benefits that enforcement work has for businesses and competitors.

*Source: Jayme Leong, Quantifying the Benefits of Competition Enforcement and Advocacy, May 2016*

**Case Study 31: Quantification Techniques – Value of Market Opened for Competition (Singapore)**

33. That said, the ICN AEWG also observed that only a slight majority of competition authorities (~53%) in its survey attempted to quantify or measure direct consumer benefits generated by enforcement actions. Interestingly, the ICN AEWG also observed that no competition authority surveyed made a systematic attempt to estimate the deterrence effect of their actions.

## ii. Qualitative Techniques

34. It is not always the case that enforcement outcomes can be quantitatively assessed. In such cases, competition authorities will need to rely on qualification tools. They tend to be more “subjective” assessments as they lack the rigor of quantitative assessment tools.
35. That said, they are important in their own right. The ICN AEWG notes that qualitative review can be relied on to reflect internal and external perceptions of the competition authority’s enforcement performance, in particular “reputational feedback”. Further, the ICN AEWG highlights that the practice of *“qualitative review recognises that good performance may not always mean more enforcement activity, but rather better activity”*.
36. Common tools include surveys and interviews with the infringing parties, competitors, suppliers and customers. As noted in the ICN AEWG’s survey, for a significant majority of competition authorities, companies (93%) and the legal community (79%) are the key stakeholder targets in terms of feedback. Feedback was further gathered from academics (60%), consumers (75%) and the press (46%).

## External Assessment Tools

37. The ICN AEWG observed that the vast majority of competition authorities surveyed ~85% are subject to external evaluation, most of which were required by statute. We highlight the most common external assessment tools that competition authorities have relied on below.

### a) Peer Review

38. The ICN AEWG observed that competition authorities also compare themselves, in some way, their results, activities, policy and operations with:
- (i) Their international counterparts; and/or
  - (ii) Similar domestic agencies (administrative agencies that deal with economic law and regulation, and sector regulators, many of which have concurrent jurisdiction with the competition authority).
39. Interestingly, the ICN AEWG noted that competition agencies appear to be more likely to compare performance goals, policies, and practices with international peers than other domestic agencies. The approach to compare with international peers is underpinned by the increasingly “cross-border” nature of competition law enforcement. Domestic agencies on the other hand are relied upon to compare operational experiences and key, non-competition enforcement aspects of the competition authority’s operations.
40. Kovacic et al. (2011) explained that an international peer review i.e. review by an international organisation or another competition authority could provide a more accurate and effective picture of a competition authority’s enforcement work vis-à-vis self-assessment. Evidently, peer reviews avoid the bias of self-assessment. Likewise, these peer reviewers should ideally focus on assessing competition enforcement outcomes rather than activity levels.

## b) Consultant-led Review

41. The ICN AEWG survey revealed that approximately 30% of competition authorities have hired external, non-government consultants to conduct an evaluation or a focussed aspect of a broader evaluation e.g. stakeholder surveys. These study are generally “narrowly-focussed”, covering impact evaluation of a specific enforcement case outcome, and types of enforcement cases.

## c) Public Consultations

42. Kovacic et al. (2011) noted that competition authorities can learn a lot from external stakeholders/actors that know the competition authority best, e.g. law firms, economic consultancies, in-house counsels and academics. These consultations typically take the form of surveys and interviews conducted by an external party e.g. survey house engaged by the competition authority.

43. As noted in the ICN AEWG’s survey, for a significant majority of competition authorities, companies (93%) and the legal community (79%) are the key stakeholder targets in terms of feedback. Feedback was also gathered from academics (60%), consumers (75%) and the press (46%).

## References and Useful Resources

Source	Relevant Section	Title	Access
CCCS	Self-Assessment Tools	Post-enforcement Evaluation Methodologies and Indicative Findings (2013)	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-post-enforcement-evaluation---uploaded-270813.pdf?la=en&amp;hash=7613ED82EE6FC5A57064BEE1DC6ECB8AB5FF70CF">https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-post-enforcement-evaluation---uploaded-270813.pdf?la=en&amp;hash=7613ED82EE6FC5A57064BEE1DC6ECB8AB5FF70CF</a>
ICN	Data Collection	Agency Effectiveness Working Group’s “Competition Agency Practice Manual Chapter 1: Strategic Planning and Prioritisation	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-strategic-planning-and-prioritisation/</a>
ICN	Data Collection, Self-Assessment Tools and External Assessment Tools	Agency Effectiveness Working Group’s “Competition Agency Evaluation” Practice Manual	<a href="https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-evaluation/">https://www.internationalcompetitionnetwork.org/portfolio/competition-agency-practice-manual-evaluation/</a>
Leong Jayme	Self-Assessment Tools	Quantifying the Benefits of Competition Enforcement and Advocacy (2016)	<a href="https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-occasional-paper--quantification-clean.pdf">https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/occasional-paper/ccs-occasional-paper--quantification-clean.pdf</a>
OECD	Self-Assessment Tools	Assessment of the impact of the competition authorities’ activities: Note by Prof. Stephen Davies (2013)	<a href="http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2%282013%291&amp;docLanguage=En">http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2%282013%291&amp;docLanguage=En</a>
OECD	Self-Assessment Tools	Guide for helping competition authorities assess the expected impact of their activities (2014)	<a href="https://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf">https://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf</a>
William E. Kovacic, Hugh M Hollman and Patricia Grant (2011)	Data Collection, Self-Assessment Tools and External Assessment Tools.	How does your competition agency measure up?	<a href="https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf">https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf</a>

## Module E3: Updating the Competition Enforcement Strategy

### Key Points

- It is not always the case that changes to the competition enforcement strategy are needed. Sometimes, maintaining the status quo may be the better path.
- Apart from communicating the changes to the competition enforcement strategy, competition authorities should also explain the reasons for making these changes.
- Competition law should evolve over time, to reflect competition enforcement experience.

1. The contents of this module are largely adapted from the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN; ICN AEWG's "Competition Agency Evaluation: Practice Manual"; and Kovacic et al. "How does your competition agency measure up?".
2. This module will explore how competition agencies can communicate their updated enforcement strategies effectively to key stakeholders, and why they should consider reviewing and amending competition laws.
3. It is particularly important to keep in mind the following observations by Kovacic et al. (2011) when deciding whether changes to competition enforcement strategy are required. While the evolutionary nature of competition law may require a competition authority to change its competition enforcement strategy, there may also be times where maintaining the status quo is the better path. Put another way, competition authorities should not update their competition enforcement strategy for the sake of changing.

### Communicating the Updated Competition Enforcement Strategy

4. The ICN Recommended Practices for Investigative Process recommends that competition agencies should periodically review internal rules, procedures, and practices to seek continual improvement in their enforcement processes. These changes should be informed by the competition authority's evaluation review findings.
5. The same communications platforms and best practices for external-facing and internal-facing implementation initiatives set out in **Module C2: Preparing to Implementing the Competition Enforcement Strategy** should apply.
6. Apart from explaining the changes, competition authorities should also carefully explain the reasons for proposing such changes. Where possible, proposed changes to external-facing implementation initiatives e.g. guidelines should be publicly consulted with external actors. Similarly, proposed changes to internal-facing implementation initiatives e.g. internal procedure manuals should be consulted with staff.

## Reviewing and Amending the Competition Law

7. At the macro-level, the Guidelines on Developing Regional Core Competencies in Competition Policy and Law for ASEAN state that:

*Competition enforcement is an ongoing exercise and competition law should evolve with the evolution of market behaviour and society in general. After a few years of practice, each AMS should consider whether the legislative framework needs to be completed (e.g. by adopting additional implementing measures and guidance) or improved (e.g. by adding additional features which have not been introduced from the beginning)*

8. This means that competition law should always evolve over time, to reflect competition enforcement experience (in particular, problems and learnings), enhance enforcement capabilities and remedies, fix procedural problems and match international standards and best practices.
9. As such, competition law should also be reviewed to analyse the impact of competition enforcement (guided by competition enforcement strategy) and consider possible amendments after a period of competition enforcement experience. These possible amendments should also be informed by the competition authority's evaluation review findings.
10. In particular competition law should be adjusted to:
- (i) Eliminate repetitions and contradictions;
  - (ii) Refine the language;
  - (iii) Fill in possible gaps in competition enforcement; and
  - (iv) Adapt the competition law to new economic circumstances.
11. The following legislative reform checklist is suggested in the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN:
- (i) **Clarity of the law**  
In the first stage of development, the competition law should be clear and simple so as to be as easily understandable as possible. In a more advanced phase of development, the AMSs should clarify concepts that have been difficult to apply and were perceived as ambiguous. Possibly more advanced concepts and instruments can also be introduced.
  - (ii) **Objectives of the law**  
The competition law's objectives should be reviewed to verify whether they are clear to enforcers and interested parties; whether those objectives have made it easier to understand and apply the law; and whether conflicts have arisen amongst those objectives.
  - (iii) **Completeness of the legal framework**  
In the first stage of development, competition law should cover the basics. In a later, more advanced phase, additional elements should be developed such as preliminary merger control and leniency programmes. At the same time, more detailed provisions could be introduced to provide guidance on how the competition authority enforces the law in specific markets or in particular instances.

**(iv) Powers of the Competition Authority**

A revision of the competition law should consider whether the competition authority has adequate powers to perform its functions, in particular in terms of its investigation and prosecution powers and ordering effective sanctions and remedies. A competition authority should also have the discretion not to sanction but instead to allow negotiated solutions of violations where such a mechanism is preferable in terms of the use of resources and outcomes.

**(v) Due process**

As the competition authority takes effective measures and tackles more advanced competition issues, the need increases for adequate guarantees of the prosecuted parties' rights. A revision of the competition procedure should ensure that adequate "checks-and-balances" are introduced to guarantee both effective enforcement and the fundamental rights of the companies and individuals concerned.

**Singapore**

1. The-then Competition Commission of Singapore ("CCS") sought feedback on proposed changes to the Competition Act (Cap. 50B) ("the Act") in December 2017. The proposed changes to the Act were introduced after taking into account CCS's practical experience in enforcing the Act.
2. The amendments were aimed at providing the CCS with appropriate enforcement tools in line with international best practices and to streamline existing processes.
3. The proposed changes:
  - (a) codified the process of providing confidential advice to businesses for anticipated mergers, which already exists under the CCS Guidelines on Merger Procedures 2012;
  - (b) enabled businesses under investigation to offer legally binding commitments to address any anti-competitive conduct involving sections 34 and 47 of the Act in a timely manner; and
  - (c) enabled CCS's evidence-gathering and investigation process to be more efficient and effective, which will minimise any potential disruption to businesses.
4. The proposed amendments also sought to provide more certainty to businesses and stakeholders by providing for confidential advice for anticipated mergers under the Act and allowing businesses under investigation to provide legally binding commitments for anti-competitive conduct relating to sections 34 and 47 so as to address and resolve the competition concerns arising from the conduct. The streamlining and simplification of the interview process during an inspection allows the CCS to conduct its inspections in a more efficient manner, minimising any potential disruption to businesses.

*Source: CCCS Media Release "CCS Consults on Proposed Changes to the Competition Act", 21 December 2017*

**Case Study 32: Reviewing and Amending Competition Law (Singapore)**

## References and Useful Resources

Source	Relevant Section	Title	Access
ASEAN	Reviewing and Amending the Competition Law	Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN	<a href="https://asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean">https://asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean</a>
CCCS	Reviewing and Amending the Competition Law	CCS Consults on Proposed Changes to the Competition Act	<a href="https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/ccs-consults-on-proposed-changes-to-the-competition-act">https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/ccs-consults-on-proposed-changes-to-the-competition-act</a>
ICN	Communicating the Updated Enforcement Strategy	ICN Guidance on Investigative Process	<a href="http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf">http://icn2018delhi.in/images/AEWG-Annotated-GIP.pdf</a>
William E. Kovacic, Hugh M. Hollman and Patricia Grant (2011)	N/A	How does your competition agency measure up?	<a href="https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf">https://www.jonesday.com/files/Publication/6bf2d85c-ea82-4c6e-8d77-977afb26ab7/Presentation/PublicationAttachment/169372fa-b7ab-4529-83fd-43207901b1b9/competitionagency.pdf</a>

## KEY DEFINITIONS AND TERMS

ACAP	ASEAN Competition Action Plan 2016-2025.
AEGC	ASEAN Experts Group on Competition.
ASEAN	Association of Southeast Asian Nations.
Anti-competitive Conduct	Collective reference to all types of conduct/agreements e.g. cartels, abuse of dominance, and/or mergers that are anti-competitive.
Cartel	Businesses involved in cartel conduct typically agree to limit or reduce competition. Examples of cartel conduct include price fixing, market sharing, bid-rigging and production control.
Complainant	A person or a group of persons or an enterprise (often a competitor or consumer), who make(s) a complaint either verbally or in writing to a competition authority.
Competition enforcement strategy	A competition enforcement strategy deals with the “how”, i.e., how a competition authority will go about conducting its competition enforcement activities. It is essentially an action plan that details a competition authority’s analytical thinking and commitment of its resources to competition enforcement activities.
Enforcement or Competition Enforcement	Enforcement refers to the administering of competition laws by competition authorities to address and deter anti-competitive conduct in the economy. Examples of such activities include, but are not limited to, investigations, reviewing notifications, leniency applications, advocacy and market/sector studies.
ICN	International Competition Network.
ICN AEWG	International Competition Network Agency Effectiveness Working Group.
Investigation	The action of investigating alleged anti-competitive conduct e.g. cartel, abuse of dominance, mergers that substantially lessen competition. Competition authorities typically exercise their formal powers of investigation provided for by competition law, for example to conduct dawn raids, issue formal requests for information.

Informant/ Whistle-blower	A person who volunteers information to a competition authority about an anti-competitive conduct e.g. cartel. This person would typically have information about the anti-competitive conduct, for example, companies involved in the cartel, origins of the cartel, documents evidencing the practices of the cartel. An informant would normally require some guarantee of confidentiality and/or anonymity as his decision to volunteer such information often risks his continued employment, status and/or reputation in the industry or the organisation he is in.
IPM or Internal Procedure Manual	A reference document that contains policies/guidelines/processes for competition agency officers implementing enforcement-related tools e.g. administering the complaint system, conducting investigations, interviews with parties under investigation.
Leniency	A system implemented by a competition authority to grant partial or total immunity from penalties to cartel members who volunteer information on a cartel conduct.
Leniency Applicant	A cartel member who reports cartel conduct to the competition authority.
Theory of Harm	How a transaction/conduct/agreement harms the process of competition
Third Party	An industry and/or market participant who has relevant information about an industry or market which the competition authority is currently enforcing or looking to enforce competition laws in. Examples include competitors, suppliers, consumers, and trade associations.

## LIST OF FIGURES

Figure 1: Toolkit Summary .....	8
Figure 2: Components of a Competition Authority's Strategic Plan .....	12
Figure 3: The Competition Enforcement Strategy Virtuous Cycle .....	17
Figure 4: Strategy Development as a Loop Process.....	23
Figure 5: Strategy Development as a Linear Process .....	23
Figure 6: Stakeholder/Actor Assessment Matrix .....	24
Figure 7: Stakeholder Relationship Mapping .....	26
Figure 8: Scenario Planning Matrix.....	26
Figure 9: Contrasting Scenarios .....	27
Figure 10: Triangle of Coherence .....	29
Figure 11: Strategic Options Matrix .....	30
Figure 12: Strategic Options Assessment Matrix .....	30
Figure 13: Effective/Risk Matrix.....	31
Figure 14: Competition Authorities' Mission and Vision Statements .....	36
Figure 15: Plan of Milestones.....	38
Figure 16: Plan of Operations .....	39
Figure 17: Prioritisation Framework.....	41
Figure 18: External Stakeholders' Considerations .....	51
Figure 19: Common Reasons for Prioritising Sectors.....	53
Figure 20: Reasons for and Against Communicating Prioritised Sectors.....	55
Figure 21: Prioritisation Framework.....	59
Figure 22: Prioritisation Factors .....	60
Figure 23: Reasons for and Against Communicating Case Prioritisation Criteria .....	62
Figure 24: Three Step Process .....	66
Figure 25: Competition System Trajectories .....	69
Figure 26 Cartel Enforcement Stages .....	70
Figure 27: Cartel Detection Tools.....	71
Figure 28: Elements and Features of a Complaint System.....	72
Figure 29: Elements and Features of a Leniency System.....	76
Figure 30: Elements and Features of a Whistleblowing System.....	77
Figure 31: Pre-Investigation Stages (Cartel Enforcement).....	83
Figure 32: Investigation Action Plan Template .....	88

Figure 33: Evidence Matrix Template.....	88
Figure 34: Abusive Conduct Enforcement Stages .....	93
Figure 35: Abusive Conduct Detection Tools .....	94
Figure 36: Pre-Investigation Stages (Abusive Conduct Enforcement) .....	99
Figure 37: Analytical Framework for Pre-investigation Abusive Conduct Enforcement .....	100
Figure 38: Step-wise Decision Making Framework for Abusive Conduct Enforcement.....	100
Figure 39: Investigation Action Plan Template .....	104
Figure 40: Evidence Matrix Template.....	105
Figure 41: Step-wise Decision Making Framework for Abusive Conduct Enforcement.....	105
Figure 42: Merger Enforcement Stages .....	108
Figure 43: Merger Enforcement Detection Tools .....	109
Figure 44: Pre-Investigation Stages (Merger Enforcement).....	113
Figure 45 Types of Mergers and Competition Concerns .....	114
Figure 46: Complementarity of Competition Advocacy and Enforcement.....	119
Figure 47: Key Principles of Due Process and Procedural Fairness .....	123
Figure 48: Pros and Cons of Written Responses and Oral Interviews.....	129
Figure 49: The Competition Enforcement Strategy Virtuous Cycle .....	136
Figure 50: Ten Features of Impact Assessment .....	138
Figure 51: Strategic Goal Evaluation Matrix .....	146
Figure 52: Default Assumptions for Quantification Techniques .....	148
Figure 53: Methods to Estimate Overcharge .....	149

## LIST OF CASE STUDY

- Case Study 1: Setting the Goals for Competition Enforcement
- Case Study 2: Capacity Building (India)
- Case Study 3: Phased Implementation by Prohibitions (Singapore)
- Case Study 4: Transitional Provisions – Transitional Clause (Philippine)
- Case Study 5: Transitional Provisions – Grace Period (Philippine)
- Case Study 6: Transitional Provisions (Singapore)
- Case Study 7: Prioritised Sectors (EU)
- Case Study 8: Communicating Sector Priorities (Malaysia)
- Case Study 9: Case Prioritisation Criteria (United Kingdom)
- Case Study 10: Enforcement Experimentation Experience (Singapore)
- Case Study 11: Collaterals on Filing Complaints (Malaysia)
- Case Study 12: Collaterals on Filing Complaints (Philippines)
- Case Study 13: Collaterals on Filing Complaints (Singapore)
- Case Study 14: Engagement with other government agencies (Singapore)
- Case Study 15: Cooperation with other government agencies (Singapore)
- Case Study 16: Monitoring and Intelligence (Malaysia)
- Case Study 17: Monitoring and Intelligence (Singapore)
- Case Study 18: Investigation Outcomes (Singapore)
- Case Study 19: Collaterals on Filing Complaints (Malaysia)
- Case Study 20: Collaterals on Filing Complaints (Philippines)
- Case Study 21: Collaterals on Filing Complaints (Singapore)
- Case Study 22: Commencing Abusive Conduct Investigations (Mexico)
- Case Study 23: Monitoring & Intelligence reports on merger activities (Singapore)
- Case Study 24: Competition Enforcement and Competition Advocacy (Singapore)
- Case Study 25: Competition Enforcement and Competition Advocacy (Malaysia)
- Case Study 26: Reviewing the Effectiveness of Competition Enforcement Strategy (Spain)
- Case Study 27: Post-Enforcement Assessment (Singapore)
- Case Study 28: Quantification Methods (Singapore)
- Case Study 29: Specific Enforcement Outcomes (United States)
- Case Study 30: Quantification Techniques – Before-after Comparison (Singapore)
- Case Study 31: Quantification Techniques – Value of Market Opened for Competition (Singapore)
- Case Study 32: Reviewing and Amending Competition Law (Singapore)

## COMPARATIVE TABLE ON COMPETITION LAW ENFORCEMENT FRAMEWORKS IN ASEAN

ASEAN Member State	National Competition Law	Authority Administering the National Competition Law	Are there Specific Sectors that Come Under Sectoral Regulators with Own Competition laws?	Prohibition on Anti-Competitive Agreements	Prohibition Against Abuse of Dominant Position	Prohibition Against Anti-Competitive Mergers	Main Exemptions from the National Competition Law (e.g. SOEs/GLCs are Exempted, Statutory Boards, etc.)	Adjudication	Leniency Program	Does National Competition Law Have Settlement Provisions?	Main Investigative Powers Conferred by the Law
Brunei Darussalam	Yes. Competition Order 2015	Competition Commission of Brunei Darussalam and Competition and Consumer Affairs Department	N/A.	Yes. Chapter 2 of the Order prohibits agreements, decisions, or concerted practice that have as their object or effect the prevention, restriction, or distortion of competition within Brunei Darussalam.	Yes. Chapter 3 of the Order prohibits abuse of dominant position in any market in Brunei Darussalam, when it consists of: (a) Predatory behaviour; (b) Limiting production; (c) Applying dissimilar conditions to equivalent transactions; (d) Making contract conclusion.	Yes. Chapter 4 of the Order prohibits mergers that have resulted or may be expected to result in a substantial lessening of competition within any market.	The Order does not apply to activities carried on by the government and Statutory Bodies.	Yes. The adjudication starts from investigation and Commission's decision upon completion of investigation.	Yes. The Order regulates the leniency program, with a reduction of up to 100 percent of any penalties which would otherwise have been imposed.	N/A.	Yes. Investigative powers of the Commission are: (a) power to require documents/information; and (b) power to enter premises without/under warrant.
Cambodia	Ministry of Commerce has completed the drafting of the national competition law, and waiting for full Cabinet meeting by the end of 2019. Then it will be submitted to the National Assembly with which is expected to be enacted by early 2020.	The National Competition Agency will established under this law namely "The Competition Commission of Cambodia" in which the Directorate General of CAMCONTROL will be the Secretariat of this Commission.	Under the proposed law, the Commission and Directorate are responsible for the application of competition law in all sectors. The existing RAs will not have competition enforcement powers after this law enters into force.	Yes.	Yes.	Yes.	No.	Yes.	Yes.	Yes.	Yes. Investigative powers of the Commission are: (a) power to require documents/information; and (b) power to enter premises with compliance to the criminal code. (according to the draft law)
Indonesia	Yes. The Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition	Indonesian Competition Commission (ICC) [Formerly known as The Commission for the Supervision of Business Competition (Indonesian acronym: KPPU)]	No.	Yes. Article 5 excluded price fixing agreement by joint venture. Article 50 excluded violation in implementing certain law, IPR, franchise, technical standard, agency, research, international agreement, export, SMEs, and cooperatives	Yes. Article 50 excluded violation in implementing certain law, IPR, franchise, technical standard, agency, research, international agreement, export, SMEs, and cooperatives	Yes. Article 28 and 29. Exclusion gives to mergers between affiliated companies.	Exemption is provided by Article 51 to the establishment of monopoly or concentration by SOE and enterprises by certain Law under public interest's background.	Yes.	No.	Yes. Based on the current Case Handling Procedure (Commission Regulation Number 1 Year 2019), ICC could issue commitment decision to companies who are willingful to cease and desist their violating behavior in the market.	Power to summon, and request for documents. No power for raid or seizure.
Lao PDR	Yes. Law on Competition 2015	Yes. Lao Competition Committee (LCC)	Sectoral regulators have wide powers to consider matters in their sectors including, potentially, competition law matters.	Yes. Article 20 of the Law prohibits anti-competitive agreements. Exemption is allowed if the agreement provides benefits in promotes technological advancement, improves quality of products/services, and strengthens SMEs	Yes. Article 31 of the Law prohibits abuse of dominant position. Exemption may apply if the practices are contributing to the national socio-economic development or due to national strategy and security reasons.	Yes. Article 38 of the Law prohibits anti-competitive mergers or acquisitions, but can be exempted if under bankruptcy and if merger contributes to growth or technological advancement.	Yes. Certain agreements, monopoly or dominant position, and mergers may be exempted on a case-by-case basis.	Yes. LCC shall take actions on issuing order and decision.	N/A.	N/A.	Yes.
Malaysia	Yes. Competition Act 2010	Malaysia Competition Commission (MyCC)	Yes. i. Communication and Multimedia Sector regulated by the Malaysian Communications and Multimedia Commission (MCMC); ii. Energy Sector regulated by Energy Commission (ST); iii. Aviation Sector regulated by the Malaysian Aviation Commission (MAVCOM); and iv. Upstream Oil and Gas Activities regulated by the Petroleum Development Act 1974 and Petroleum Regulations 1974	Yes. Section 4 of the Competition Act 2010 (exclusions: non-commercial activities, agreements with net benefits, individual exemptions, block exemptions, agreements in pursuance of legislative requirements, collective bargaining activities for employment terms, services of general economic interests, activities regulated by the Malaysian Multimedia and Communications Commission and the Energy Commission	Yes. Section 10 of the Competition Act 2010	N/A.	Yes. Activities in exercise of governmental authority, activities conducted on the principle of solidarity, purchase of goods/ services not for the purposes of an economic activity, agreements in pursuance to a legislative requirement, collective bargaining activities for employment terms, services of general economic interests.	Yes.	Yes.	No. However, the Competition Act 2010 contains a provision to accept voluntary undertakings as per Section 43.	Yes. (1) Power of search and seizure (with and without a warrant) (2) Power to require information
Myanmar	Yes. Competition Law 2015 (The Pyidaungsu Hluttaw Law No. 9, 2015)	Myanmar Competition Commission (MmCC)	N/A.	Yes. Article 13 of Chapter VII	Yes. Article 15 and 27	Yes. Article 31 and 32	Yes. The Commission has the power for exempting from the compliance of this Law to businesses essential for the benefit of the State and small and medium enterprises, if necessary	N/A.	Yes.	N/A.	Yes.
Philippines	Yes. Philippine Competition Act 2015 (PCA or the Act).	Philippine Competition Commission (PCC)	Yes. The Philippines adopts a sectoral and holistic approach to competition policy and law enforcement with over thirty (30) industry-specific and consumer welfare laws, addressing competition related practices.	Yes. Section 14 of the Act stipulates three (3) types of anticompetitive agreements.	Yes. Section 15 of the Act prohibits abuse of dominant position.	Yes. Section 20 of the Act prohibits mergers and acquisitions that substantially prevent, restrict, or lessen competition.	Yes. Prohibited mergers and acquisitions may be exempt from prohibition if the same brings gains in efficiencies or in cases of imminent financial failure. For abuse of dominance cases, permissible price differentials are exempted. In addition, the PCC may forbear from applying the Act, in whole or in part, in all or in specific cases, under certain determinations.	Yes.	Yes.	Yes. Section 37(a) of the Act allows an entity to request for a Binding Ruling on a contemplated act, course of conduct, agreement, or decision.	Yes. Section 33 of the Act confers upon the PCC the power to investigate and enforce orders and resolutions by making use of any available means, provisional or otherwise under existing laws and procedures.
Singapore	Yes. Competition Act (Chapter 50B). Original Enactment: 2004 Revised: 2006	Competition and Consumer Commission of Singapore (CCCS)	Yes. (Telecoms; media; energy, airport services)	Yes. Under section 34 (Refer to Third Schedule of the Competition Act for list of full exclusions from Section 34 and Section 47)	Yes. Under section 47 (Refer to Third Schedule of the Competition Act for list of full exclusions from Section 34 and Section 47)	Yes. Under section 54 (Refer to Fourth Schedule of the Competition Act for list of full exclusions from Section 54)	Government activities; supply of piped potable water & waste-water management services; bus and rail services; cargo terminal operations; clearing houses for banks; armed security services	Yes.	Yes.	No. for s34/s47 although we accept voluntary undertaking. Our competition law provides for commitments for s54	Yes. (1) Powers to require documents or information; (2) Powers to enter and search premises
Thailand	Yes. Competition Act B.E. 2560 (2017)	Office of Trade Competition Commission (OTCC)	Yes. (Telecoms and energy.)	Yes. Section 54 (horizontal agreements that substantially reduce competition) with exemptions for those considered a single economic entity. Section 55 (horizontal and vertical agreements that also affect competition). Exemptions to Section 55 are provided under Section 56 for single economic entity, R&D, and particular patterns, e.g. franchise.	Yes. Under section 50.	Two tracks are in place: 1) post-merger notification without clearance requirement for mergers within the minimum thresholds (market share, sales revenue, capital amount, number of stocks, or assets) to be prescribed in an implementing regulation; 2) pre-merger clearance required for mergers that may result in a monopoly or a dominant position in a market. Exemptions for mergers of operators considered as a single economic entity for restructuring purposes.	Section 4 of the Act excludes the following: (a) central, regional or local administrations; (b) SOEs, public organizations, or other government agencies regulated under the law or Cabinet's resolution for public interest purposes; (c) groups of farmers, cooperatives, or cooperative groups recognized under the law; and (d) business that are specifically regulated under other sectoral laws.	Yes.	No.	Yes.	Yes. The officers shall have the powers to issue a subpoena, enter premises/venues, gather document/evidence, and collect or bring a physical evidence as a sample for examination.
Vietnam	Yes. The Law on Competition (Law No. 23/2018/QH14). Effective date: 01/7/2019	The Viet Nam Competition Commission (Formerly Vietnam Competition and Consumer Authority and Vietnam Competition Council)	Yes. If there is any discrepancy between this Law and other laws in terms of anti-competitive practices, economic concentration, unfair competition practices and handling of unfair competition practices, the latter shall prevail.	Yes. Chapter III.	Yes. Chapter IV.	Yes. Chapter II Section III (from Article 16-Article 24). Exclusions: mergers with net economic benefits; SMEs.	Supply of public goods and services; SMEs; enterprises go bankrupt.	Yes.	Yes. Article 112.	Yes.	Yes. (1) Powers to require documents or information; (2) Powers to enter and search premises; (3) Powers to seize persons and documents.

Source: Contents are extracted from Annex II "Comparative Table on Competition Law Frameworks in ASEAN" of the Handbook on Competition Policy and Law (5<sup>th</sup> Edition)



## FOOTNOTES

1. Peter Drucker(1973) explained that “[Strategic Planning] It is analytical thinking and commitment of resources to action. Many techniques may be used in the process – but then again, none may be needed..... Quantification is not planning. To be sure, one uses rigorous logical methods, as far as possible – if only to make sure that one does not deceive oneself.....Strategic planning is not the application of scientific methods to business decisions ..... It is the application of thought, analysis, imagination, and judgment. It is responsibility, rather than technique.”
2. Peter Drucker(1973) explained that “We must start out that forecasting is not a respectable human activity and not worthwhile beyond the shortest of periods. Strategic Planning is necessary precisely because we cannot forecast. Another, even more compelling, reason why forecasting is not strategic planning is that forecasting attempts to find the most probable course of events or, at best, a range of probabilities. But the entrepreneurial problem is the unique event that will change the possibilities; the entrepreneurial universe is not a physical but a social universe. Indeed the central entrepreneurial contribution, which alone is rewarded with a profit is to bring about the unique event or innovation that changes the economic, social or political situation.”
3. Peter Drucker(1973) explained that “[Strategic Planning] deals with the futurity of present decisions. Decisions exist only in the present. The question that faces the strategic decision -maker is not what the organisation should do tomorrow. It is ‘What do we have to do today to be ready for an uncertain tomorrow?’ The question is not what will happened in the future. It is ‘What futurity do we have to build into our present thinking and doing , what time spans do we have to consider, and how do we use this information to make a rational decision now?’”
4. Peter Drucker(1973) explained that “Whilst it is futile to try to eliminate risk, and questionable to try to minimise it, it is essential that the risks taken be the right risks. The end result of successful strategic planning must be capacity to take a greater risk, for this is the only way to improve entrepreneurial performance. To extend this capacity however, we must understand the risks we take. We must be able to choose rationally among risk-taking courses of action rather than plunge into uncertainty on the basis of hunch, hearsay, or experience, no matter how carefully quantified.”
5. DID is a quasi-experimental econometric technique involving a comparison of prices before and after an event relative to some other real world control, i.e., a similar market without the event or within the same market for firms not involved in the event.
6. This methodology is a simple comparison of difference between the situation before an event and the effects thereafter. For mergers, the method is a simple comparison of prices before the merger with prices after the merger. For cartels, the method is to estimate the extent of cartel overcharge by comparing prices within the cartel period with pre- or post-cartel prices. In order to control for exogenous factors during the assessment period, the analysis should ideally include other variables such as demand growth, inflation, capacity utilisation, etc.





