

Example: United Kingdom

The United Kingdom employs a mix of advocacy instruments that are undertaken as part of on-going advocacy efforts. These efforts are primarily concerned with making sure that markets work well for consumers such that productivity and economic growth, and the benefits thereof, are central features of competition advocacy efforts undertaken by the *UK's Office of Fair Trading (OFT)*. The advocacy instruments used to achieve this goal are;

Market Studies

One of the advocacy instruments frequently employed by the OFT is the regular use of broad and extensive market study instruments. Market studies are undertaken in line with the OFT's goal of making markets work well for consumers. In many cases, this requires consideration of different policy issues and/or the interaction of market and policy dynamics. The OFT undertakes market studies across all sectors and frequently makes recommendations to government.

For example, the OFT's 2003 Market Study into pharmacies had some success in opening up the market when reforms were announced in 2005 – these led to benefits including shorter waiting times, greater choice and extended opening hours. But regulations affecting pharmacies is a perennial concern and the OFT continues to address the competition issues in this industry.

The success of market studies in jurisdictions such as the UK has led to other jurisdictions, such as South Africa, for example, to amend legislation so as to empower competition authorities to undertake market studies.

Impact Assessments

One of the ways the OFT seeks to influence government policy is through competition scrutiny of Impact Assessments (IAs). The OFT's advocacy team oversees the competition impact test within Impact Assessments conducted by other government departments.

Anyone completing an Impact Assessment is required to carry out a competition assessment. Impact Assessments require policymakers to consider the costs and benefits of proposed policies.

The OFT provides advice and training, on request, to policymakers who are involved in completing the competition assessment part of the Impact Assessment.

Reports

The OFT advocacy team has published a number of reports on specific issues relating to government and markets. The OFT recently published a report on *Government in Markets*, which provides advice on the impacts that government policy can have on markets, and how interventions might be designed to minimize any distortions of competition.

Example: United States of America

The Federal Trade Commission (FTC) frequently makes use of advocacy letters as part of advocacy efforts. This example illustrates how US competition authorities were able to influence the policy outcomes affecting the Professions Sector in a way that focused on securing benefits of competition, specifically increased consumer choice and lower prices, experienced by consumers.

Advocacy Letters: Professions

Professions in the United States are often subject to laws and regulations specifying who may enter the profession and what types of minimal competency requirements must be satisfied before the individual can receive a license. In the United States, the fifty states, rather than the federal government, regulate the legal profession. One aspect of their regulation is to define through “unauthorized practice of law” (“UPL”) statutes those activities that are reserved for lawyers. UPL statutes prevent non-lawyers from competing with lawyers in a variety of services.

At times, state UPL provisions have been used to prohibit non-lawyers from offering professional services that are not legal in nature, such as performing real estate closings without rendering legal advice. Several state bars and legislatures have sought to adopt opinions or bills, in various forms, that would declare real estate closing services and other types of services to be the practice of law, and thus prevent non-lawyers from closing real estate transactions.

In keeping with their missions to foster competition, the Antitrust Division of the Department of Justice (“Justice Department”) and the Federal Trade Commission (FTC) (collectively, “antitrust agencies”) opposed state UPL regulations that would likely harm consumers by depriving them of the benefits of competition.

In one UPL case in Kentucky, competition existed in the provision of real estate closing services. However, in 1997, the KBA's Unauthorized Practice of Law Committee drafted a proposal that would have prevented non-lawyers from competing with attorneys in providing real estate closing services. This would eliminate consumer choice and drive up the prices of real estate closings. Similarly, in Rhode Island, markets were competitive with respect to real estate closing services. However, in 2002, a bill was introduced into the Rhode Island House of Representatives that would prevent non-lawyers from competing with lawyers to perform real estate closings.

The specific aim of the advocacy efforts in Kentucky and Rhode Island was to discourage the adoption of the proposed opinion or bill. Agencies engaged in efforts to educate decision-makers about possible anticompetitive effects. In Kentucky, the Justice Department sent letters to the Board of Governors of the KBA when it was considering the UPL proposal, submitted a legal brief before the Kentucky Supreme Court in a lawsuit brought by an association opposed to the proposal, and issued press releases. In Rhode Island, the FTC and Justice Department relied on letters to the state legislature when it was considering the UPL bill and accompanying press releases promoting the letters.

In both examples the agencies’ efforts helped to achieve the desired result – the rejection of the anticompetitive regulations. In 1997, in Kentucky, the Justice Department advocacy efforts appear to have contributed to the KBA’s decision to not adopt the proposed measure. Similarly, in 2003, the Rhode Island legislature declined to adopt the proposed UPL bill after receiving the agencies’ advocacy letter in opposition to the regulation.

Example: South Africa

This case study illustrates how South African competition authorities used recommendations submitted to policymakers to shape Public Procurement policy such that the outcome mitigated the potential for bid rigging and collusion amongst firms that could infringe on the benefits of competition experienced by markets and consumers.

Public Procurement

In January 2010 the Competition Commission made a submission to the National Treasury on the use of the Certificate of Independent Bid Determination in the procurement process.

The Certificate requires all bidders to disclose all material facts about any communication that they have had with competitors pertaining to the invitation to tender. The Certificate will assist purchasers by informing bidders about the illegality of bid-rigging and provide for additional penalties.

The objective of the Commission's submission was to influence National Treasury's procurement policy to address the gaps that had been identified by adopting the necessary measures to prevent bid-rigging before bids are submitted.

In response to the submission, the National Treasury developed a practice notice in terms of section 76(4) of the Public Finance Management Act, comprising an instruction to accounting officers in all spheres of government to ensure compliance with section 4(i)(b)(ii) of the Competition Act. In addition, the general conditions of contract were also amended to include clause 34, which covers the prohibition of restrictive practices. Clause 34 provides for the prohibition of collusive tendering and the referral of bidder(s) who have engaged in collusive tendering to the Commission for investigation and the possible imposition of administrative penalties.

In addition to the submission, the Commission undertook supplementary engagements with Government - the Commission provided training to procurement officers from the private and public sectors on the prevention, detection and reporting of bid-rigging during the tendering process and the Commission held a series of workshops for provincial sphere of government.

Example: Mauritius

These two examples illustrate how the Competition Commission of Mauritius (CCM) used market studies to determine competition problems within the regulatory framework of the cement industry, and the need to consider competition in formulating regulations for the sugar industry. These case studies highlights the role that competition agencies can play in Government's Industrial Policy decisions and more specifically the role that competition agencies can play in regulating and liberalizing sectors.

Deregulation of the Cement Industry

The CCM had heard a number of complaints relating to competition in the cement sector. To better understand the market the CCM, as permitted by the Competition Act 2007, undertook a market study from July 2010 to April 2011 that considered all aspects of the market to assess how the regulatory framework and business environment were affecting the levels of competition in the cement sector. The

primary motive underpinning the study was to establish whether the competitive process was working in the market and whether the regulatory framework was promoting or distorting competition in the market. The study revealed the following pertaining to the regulatory framework of the cement industry:

Mauritius is a cement importing country that has a highly regulated cement market. Government intervention took place through three interlinked mechanisms: Retail price controls on bagged cement; imports of cement by the State Trading Corporation (STC); and import control.

There were three cement importers in Mauritius, of which two are private operators and the third was the state-owned enterprise; the State Trading Corporation. The STC, which initially entered the market to ensure there were no artificial shortages in the market, accounted for 50% of imports with the remaining 50% shared between the other two importers. Under the existing regulatory framework, government set the volume of cement to be imported by the STC to allow a tender of sufficient quantity to obtain a competitive price on the international market for cement. Based on the volume and price of the international tenders the Minister of Commerce allocated import permits to the STC and the remaining two importers and fixed the retail price of cement.

The CCM identified that the regulatory framework was hampering competition in the cement market and possibly deterring new entrants. The Commissioners advice conveyed these competition concerns and posed possible options for reform that emphasised the need to encourage new market entrants that would likely allow for the eventual dismantling of the regulatory framework. Following the completion of the market study, in April 2011 Government announced the liberalization of trade in the cement market.

The CCM endorsed the liberalization of this sector as new entrants were identified as a means to decrease market concentration which would encourage competitive pricing and output. However, the Commission was concerned that the liberalization would give rise to competition issues unless clear measures were taken to ensure new suppliers could effectively operate with substantial capacity. The Commission produced a second report to convey these concerns to Government and to propose recommendations for moving forward. Government proceeded with liberalization despite the competition issues that would result. More than a year and a half later there have been no new entrants to the cement industry, which is seeing gradual rising cement prices.

Illustration of Government-Agency Dialogue: Proposed regulations in the sugar industry

Mauritius is a large sugar producing country and the sugar industry is considered an important contributor to the country's economy. Mauritian sugar fetches a higher price on the European market and as such, all domestically produced sugar is exported to Europe and sugar is imported for use in the domestic market.

However, the changing landscape of the both the import and export markets resulted in shifts in the sugar industry that began to raise a variety of competition-related concerns. Incentive mechanisms from the European markets began to decline, slowly making the export market less remunerative for domestic sugar producers. In the past domestic sugar prices were subsidised, which allowed importers to operate at a profit, until sugar subsidies were discontinued and the unique importer was allegedly faced with operating on a zero profit basis.

The unique sugar importer was responsible for subsidising the pensions of those dock workers who worked in the sugar import industry. This additional cost was transferred to domestic consumers by raising the price of domestic sugar. Given that there was only one monopoly importer in the market and there were no mechanisms in place to keep domestic sugar prices in check, the monopoly importer was in the position to decide prices freely to the negative impact of the consumer. Alternative suppliers of sugar decided to enter the market feeling that they could offer a lower domestic price.

The Ministry of Agro Industry and Food Security (The Ministry) responded to these issues by instituting proceedings to establish regulations to be imposed on the import sugar industry. At a relatively advanced stage in the regulation development process the Ministry called on the Competition Commission to assist with the formation of a regulatory regime. The Commission conducted an inquiry and recommended that the import market be open to all importers and proposed tax mechanisms to cover the cost of dock worker pensions. Given the late stage of entry of the Commission to the process, the formation of regulations was already at an advanced stage. Nonetheless, the Minister incorporated the recommendations proposed by the Commission by changing the regulations to allow for multiple importers and made changes to the tax regime in line with the Commission's recommended mechanisms.

This case illustrates how agency engages with policymakers in an advisory capacity to convey to government the benefits of competition, as well as in shaping the outcome of policy review.

Example: Portugal

This case study illustrates how recommendations, as a legal faculty, can be used in conjunction with other advocacy instruments to improve competition in the Portuguese Telecommunications market.

Telecommunication Sector

In Portugal, the telecom sector was for decades entrusted to one company – the publicly owned Portugal Telecom Group (PTG). Subsequently, a privatized PTG took over the set of rights and obligations of the concessionaire of the telecommunications public service. As a result of liberalisation, the provision of telecom services was ensured by several private operators, including the incumbent, but, after three years of market liberalization, in terms of market share, PTG still accounted for some 90% in fixed line business and some 45% in mobile. Regardless of the new liberalised context, the incumbent, kept contracts for telecom services and products with the Public Administration since the time it was a public monopoly. The new operators complained they did not have a chance to compete in

such a market, because no public services were being subject to tender. Indeed, such contracts were spread over a large number of distinct costumers and, as a result, contract values were often below the minimum threshold required for competitive tendering by the public procurement law. Overall, in 2003, PTG supplied more than 80% of the Public Administration requirements in this sector.

Accordingly, the main goal of the advocacy efforts undertaken by the Portuguese Competition Authority aimed to create conditions for more effective competition between operators by improving opportunities of tendering for telecom services and products purchased by the Public Administration. Concrete measures included: mandatory tenders for any acquisition of telecom services and products; forbidding automatic renewal of existing contracts; and periodic obligation (3 years) to open tenders for the provision of telecom services and products. The Competition Authority used a number of advocacy tools to convince regulators.

Outreach efforts were pursued towards increasing awareness of policy and opinion makers as well as consumers at large. However, the main instrument used by the Competition Authority was a Recommendation put forward to the Government. It is important to notice that the advocacy instrument used was actually an institutional tool. The Recommendation is a legal faculty, entrusted by law to the Competition Authority. However, this instrument *per se* is not mandatory, hence the need to articulate it with an appropriate dissemination effort.

Essentially, the Recommendation instrument allows the Authority to present to the Government and to other public institutions measures – mainly legislative ones - to boost competition. The Telecom Recommendation was informally presented, first hand, to the Minister of Finance and Public Administration, in order to make her aware of the potential savings for the public budget. The Minister is also responsible for public procurement legislation at large, and specifically for the legislation affecting the purchase of telecom services. The success of the instrument used depends, largely, on its acceptance by the Government.

In this case, the role of the central Government was critical since it was simultaneously responsible for adjustments in sector regulation as well as a major consumer of telecom services and products. In addition, contacts were held with local governments who are also major consumers of telecom services and are subjected to public tendering regulation. Thus, direct contacts between the Authority and the Minister of Finance and Public Administration, as well as the municipalities, were instrumental in the advocacy process.

In support of the importance of a new regulatory framework, the Authority studied the market structure, the demand, and the amount and type of telecom contracts generated by the Public Administration. Furthermore, it studied some foreign experiences, both for benchmarking and for the search of best practices in regulatory reform.

Finally, a major dissemination effort of the contents of the Recommendation was carried out through the Media, including press and television. Simultaneously, the Competition Authority formally published the Recommendation on its website. The Competition Authority publicized extensively the goals of the Recommendation before and after its enactment. This effort was instrumental in sensitizing consumers,

including the Public Administration, to benefits of the market opening. In general, the news and opinion columns in the Media were very supportive of the Authority's position.

There were several concrete changes in the regulatory framework due to the advocacy work performed by the Portuguese Competition Authority. The results vis-à-vis the main objective of the advocacy efforts was exceptional. The Government followed all the measures in the Recommendation and the new framework can, effectively, endorse more competition. A new decree-law with revised rules for public tendering was approved. This decree-law accepted the main recommendations of the Authority and it drastically changed the framework for all public procurement of telecom services; the provision of telecom services has to be subjected to a competitive tendering and contracts awarded for periods of up to three years. A minimum of three proposals is to be requested from market operators. These contracts are, thus, periodically subjected to contestability. Additional measures were also ensured against potential discrimination of small operators.