



INTERNATIONAL COMPETITION NETWORK

**Report and
Summary of the Presentations of the
2009-2010 ICN Competition Advocacy Teleseminars**

Prepared by the

**ICN Competition Advocacy Working Group
Sub-Group 1: Experience Sharing Project**

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Introduction

The ICN Competition Advocacy Experience Sharing Project held a series of teleseminars dedicated to topical competition advocacy issues raised by the ICN members in 2009-2010. This Report contains summaries of the seminar presentations that include the major points covered by the speakers. The summaries are presented in chronological order of the experience sharing seminars.

The selection of the seminar topics was based on findings and recommendations of the “Report on Assessment of ICN Members’ Requirements and Recommendations on Further ICN Work on Competition Advocacy” prepared by sub-group 1 of the Advocacy Working Group for the 2009 ICN Conference in Zurich (available at: www.internationalcompetitionnetwork.org/uploads/library/doc362.pdf).

- Between September 2009 and February 2010, the Experience Sharing Project organized 5 teleseminars addressing the following topics: **“Building Relationships between Competition Authority and Private Bar: The Experience of Canada.”** Presented on September 29, 2009 by Sheridan Scott, a partner at Bennett Jones LLP and former Canadian Commissioner of Competition; Adam Fanaki, Acting Senior Deputy Commissioner of Competition, Mergers Branch with the Competition Bureau; and John Bodrug, partner at Davies Ward Phillips & Vineberg LLP and past Chair of the National Competition Law Section of the Canadian Bar Association (the "CBA").
- **“Government Involvement in Markets.”** Presented on November 4, 2009 by John Fingleton, Chief Executive of the UK Office of Fair Trading and Chair of the ICN Steering Group, and Chris Jenkins, Head of Competition Advocacy at the OFT.
- **“Advocacy: The Role of International Organizations. An Example from the OECD.”** Presented on November 17, 2009 by Hilary Jennings, Head of Competition Outreach, OECD.
- **“Competition in the Financial Markets: The Mexican Experience.”** Presented on January 14, 2010 by Ernesto Estrada, chief economist of the Mexican Federal Competition Commission (CFC).
- **“Evaluation of Competition Advocacy Efforts by Antitrust Authorities: The Experience of the Canadian Competition Bureau and the U.S. Federal Trade Commission.”** Presented by on February 2, 2010 Chris Busuttill, Director of Advocacy Coordination of

the Canadian Competition Bureau, and James C. Cooper, Attorney Advisor to Commissioner William E. Kovacic, U.S. FTC.

The Competition Advocacy Experience Sharing Project acknowledges its gratitude to the seminar speakers for the highly informative presentations and their preparation of the summaries included in this Report.

The seminars were moderated by Vladimir Kachalin, Assistant/Advisor to the Chairman of the Federal Antimonopoly Service of Russia.

The seminars were widely attended by ICN jurisdictions, with the attendance ranging from 15 to 25 ICN members; this attendance rate represents about 20% of the ICN membership. Technically the seminars were organized as telephone conferences. The summaries of the seminars and available presentation slides will be put on the Advocacy web page of the ICN web-site at <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx>.

Building Relationships between Competition Authority and Private Bar: The Experience of Canada

On September 29, 2009 the ICN Advocacy Working Group held a teleseminar on the Canadian experience in building relationships between the competition authority and the private bar. The panelists were Sheridan Scott, a partner at Bennett Jones LLP and former Canadian Commissioner of Competition; Adam Fanaki, Acting Senior Deputy Commissioner of Competition, Mergers Branch with the Competition Bureau; and John Bodrug, a partner at Davies Ward Phillips & Vineberg LLP and past Chair of the National Competition Law Section of the Canadian Bar Association (the "CBA"). The speakers discussed general principles that help to facilitate a more collaborative relationship and provided specific examples from the Canadian experience that demonstrate how this has been realized.

Ms. Scott noted that at the time of her appointment as Commissioner of Competition, the relationship between the Competition Bureau and the private bar was characterized by both sides as being quite negative. In response, she oversaw the establishment of a task force and appointed an internal champion within the Bureau to take responsibility for the initiative. This champion, and many of the members of the task force, had both public and private sector experience, which provided valuable insight in investigating the problem and crafting solutions to facilitate cooperation with the private bar. Among the first key issues addressed by the task force was the meaning of "collaboration"—that is, what level of participation by the private bar in policy-making and enforcement is appropriate, and what forms should that participation take? The recommendations that emerged were for more frequent interaction with members of the bar, through not only formal task forces and working groups, but also informal consultations relating to policy issues. An important feature of these consultations is that comments and ideas are not for attribution, which allows for more open dialogue where contrary views can be expressed without fear of retribution in future matters. The task force issued a report which is available at: www.cba.org/CBA/sections_Competition/pdf/endorsed_task.pdf.

There have been numerous benefits to this more collaborative process. For the members of the bar, engaging in consultation with the Competition Bureau provides a greater understanding of the priorities and perspectives of the agency, which assists in advising clients on potential courses of conduct. Agency participation in activities such as continuing legal education programs also provides value to members of the bar, particularly where agency representatives are prepared to comment on specific policies and case resolutions. While the members of the bar and the Bureau do not always agree on the issues, there is definite value to knowing what the agency's positions are rather than being surprised in the context of a particular case. Annual

CBA Merger Committee roundtables were identified as a specific initiative that helps to facilitate an understanding of a range of procedural and substantive issues.

For the agency's part, collaboration with the private bar is only one means of outreach to the public. One of the initiatives championed by Ms. Scott was the introduction of sector days, which saw representatives of the Competition Bureau meet with industry leaders in key sectors of the Canadian economy to discuss competition law and policy outside of the traditional investigative process.

Through the various collaborative efforts, certain challenges and strategies have been identified that provide valuable lessons for regulatory bodies and members of the private bar in other jurisdictions. On the challenges side, panelists noted a tendency on the part of the agency to generalize the opinions of members of the bar as though they spoke with a single, unified voice. However members of the bar often represent a broad range of clients and often take different positions on a particular issue. A key to successful collaboration is that members of the bar separate client and policy interests—that is, when participating in a consultation, they need to be mindful of what is best for the economy and competition policy generally, and not simply advocate a particular position based on a particular client interest. Many members of the bar have a genuine interest in competition law and policy beyond particular client relationships.

One benefit of consultation during the planning stage is that potential policy shortcomings or obvious points of disagreement can be identified and addressed early in the process, before positions have solidified and become more difficult to change. Involving members of the bar early in the process also sends a message about the significance and potential impact of the consultation. Where comments are solicited on draft guidelines, it encourages meaningful collaboration if members of the bar sense that their input is genuinely considered, even if their views are not adopted in the agency's final policy. Where consultation is merely pro forma, or where the opinions and advice of the bar are not accepted, the agency should avoid suggesting that the bar has in any way endorsed or collaborated on the final product. Co-opting the voice and standing of the bar in this manner would likely impair future efforts at collaboration. In the context of a particular collaboration, the agency should also be clear on what statements are intended to be passed on by bar members to clients as either a current position or one that is under consideration – in some cases, the agency may welcome the bar's assistance in conveying enforcement positions; in others, the communications may not reflect an agency position, but merely the exploration of policy options.

It is also important that the agency seek input representing a diverse range of viewpoints. Not all lawyers practice at large firms or act for large corporations. Reaching out to practitioners

outside of the traditional competition bar is a helpful component of any policy aimed at enhancing consultation and ensuring optimal policy results. The Canadian Bureau recognizes this and has made efforts to include plaintiffs' counsel in its consultations. Open invitation forums and informal roundtables can be especially effective in this regard. The CBA has a regular rotation of members serving in executive positions, which also facilitates this objective.

Mr. Fanaki demonstrated the benefits of collaboration on an example of finding approach to dealing with a wide range of issues raised by recent amendments to Canada's *Competition Act* that overhauled the merger review process. The Competition Bureau organized a conference call that was attended by a majority of the members of the competition bar. The agency presented a proposal for dealing with various transitional issues, which was subsequently modified to address concerns raised by members of the bar during the call. There was tremendous interest from the members of the bar, both from an academic and a practical standpoint, in addressing uncertainty surrounding the new law and how it would be enforced. Through the consultation process, the parties were able to reach an understanding on a process to be followed during the transitional period, which provided the certainty that is essential in merger reviews. The recent amendments have also provided opportunities for outreach on the part of the Bureau. The Bureau partnered with law firms to hold seminars for corporate clients, taking advantage of the consistent contact and pipeline to business executives that law firms enjoy, but the Bureau generally does not.

The efficient manner in which both the agency and the bar have been able to adapt to the changes in the law is an excellent demonstration of the application of the principles discussed by all three panelists during the teleseminar. While still a work in progress, the relationship between the Bureau and the private bar in Canada has become much more collaborative, to the benefit of all involved.

Government involvement in markets

On 4 November 2009, the ICN Advocacy Working Group held a teleseminar on government's involvement in markets. The presenters were John Fingleton, Chief Executive of the UK Office of Fair Trading and Chair of the ICN Steering Group, and Chris Jenkins, Head of Competition Advocacy at the OFT.

The speakers discussed the topic of government involvement in markets. Much of the content was drawn from the OFT's recent publication on 'Government in Markets'.¹ The speakers looked at the different ways that government interventions can affect competition, and the advice that competition authorities can give to government policy makers. Their presentation focused on four issues:

- Why competition matters.
- Why and how government intervenes in markets.
- Changing role of government.
- More effective intervention.

Why competition matters

There is strong evidence that competition typically drives better outcomes for consumers, higher productivity and economic growth.

Competition is good for consumers because prices fall, quality rises, there is greater choice, and entry by new firms becomes easier. The European aviation market is a good example. Reforms in the 1990s led to reduced support for national carriers. Any airline with a license from a EU country was allowed to operate any route. This led to exit (Sabena) and entry (e.g. Ryanair, Easy Jet). As a result, the lowest non-sale fare fell by 66% and flight frequency increased by 78% between 1992 and 2002, with no worsening of safety associated with low-cost airlines or increased competition.

Competition in the telecommunication market demonstrates similar benefits. The cost of international telephone calls from the UK fell by 90% between 1992 and 2002.

¹ http://www.offt.gov.uk/shared_offt/business_leaflets/general/OFT1113.pdf

Competition is also good for productivity and international competitiveness. It drives firms to improve their internal efficiency and reduce costs. And it creates incentives to innovate and adopt new technology.

But it is hard to predict the benefits of competition in advance. In contrast, the costs of restricting competition can sometimes be unanticipated, and hard to reverse.

Why and how government intervenes in markets

Government and markets are inextricably linked in a modern economy.

Sometimes public debate is premised on a false dichotomy between ‘free markets’ and ‘state control’. In practice, government is crucial to effective functioning of modern markets. At a very basic level, we need rule of law, and enforcement of contracts. There are also clear and well-known economic market failures – relating to market power, externalities and asymmetric information – which can justify intervention. And there are wider policy interests. Government has a legitimate concern about the outcomes of markets, and how these affect equity, the environment, health outcomes and so on.

Government can intervene in markets in many different ways. It can act directly in a market as a provider or as a buyer (procurer). It can also act indirectly through taxes and subsidies, through regulation, and through wider influence on consumers and firms in a market.

So, in summary, there are diverse legitimate grounds for government intervention in markets – either in helping to secure effective markets, or in terms of delivering wider policy objectives.

At the same time, the impacts of government interventions in markets tend to be hard to assess in advance, and only become manifest over time. They can also be hard to reverse. For example, the suspension of the competition rules by the Roosevelt administration in 1933 is argued to have added to the duration of the Great Depression, and government intervention to restrict competition in 'structurally depressed industries' prolonged the Japanese recession in the 1990s.

Changing role of government

Government's approach to markets is changing, but there is no straightforward trend. There has been a long-term shift at least in the UK from direct state ownership to regulation and

indirect control. But as a result of the recent economic downturn, protectionist demands are going up, domestically and abroad.

This raises the question of whether there has been a change in the burden of proof. Previously, there was a preference for finding a market solution, based on confidence in the market process. Those arguing for intervention bore the burden of proof. Since we can never quantify and measure the full costs and benefits of any policy measure, particularly in terms of the future impact on markets, a small shift in that burden could have big effects. For this reason, competition agencies need to be alert to a possible shift in the burden of proof and engage in framework advocacy, reminding people of the benefits of competition.

Similarly, it is important that we improve the quality of market interventions. Botched liberalization or poorly designed choice mechanisms could be worse than state restrictions on markets, and damage trust in markets.

More effective intervention

It is possible to identify some high level principles that are particularly important in designing policy.

First, entry and exit is often key to securing benefits from competition, but can be overlooked by policy makers. The evidence from the airline market shows the importance of new entrants in driving change and new business models. Conversely, where there is excess demand for a service and real political constraints on exit (for example school or hospital closures) then simply enabling choice will not necessarily create genuine competition.

Second, government often has a range of alternative instruments for achieving a policy goal. Measures that impose direct restrictions on competition are rarely optimal. For example, imposing a minimum price for alcohol in order to reduce demand can bring with it increased incentives at the margin to sell, and generate rents that are difficult to undo.

Third, consumers are diffuse, less personally affected, less informed, and less collectively organized than suppliers. This can lead to evidential bias in policy making.

One example of a government-imposed restriction on competition in the UK relates to pharmacies. Control of entry regulations was introduced in 1987 to reduce costs to the National Health Service (NHS). This restricted consumer choice and convenience, and restricted competition on 'over the counter' drugs. The OFT found that regulation of entry costs consumers

£25-30m per year more for over the counter drugs, businesses £16m per year in compliance costs, and the NHS approximately £10m per year in administrative costs.

The speakers concluded by asking whether we are at a turning point in government's involvement in markets. They concluded that competition authorities have an important role in advocating competition and trying to identify unintended consequences of government interventions.

Advocacy: The Role of International Organizations. An Example from the OECD.

This teleseminar was presented by Hilary Jennings, Head of Competition Outreach, OECD, on November 17, 2009.

What is the OECD and the OECD Competition Committee?

The OECD consists of the governments of 31 member nations from Europe, North and South America and the Asia/Pacific region. Founded in 1961, it provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practices and work to coordinate domestic and international policies. These governments work together to address the economic, social, and environmental challenges of globalization. Reflecting the importance placed on the OECD's leadership, expertise and impartiality, each member country sends an ambassador to the organization's Paris-based headquarters. These ambassadors form the OECD's governing Council.

Working towards its goal of global economic policy reform, the OECD uses "peer pressure", voluntary best practices and non-binding Recommendations, and where necessary, binding agreements to influence governments' policies. It combines the analytical rigor of its experts with the active involvement of senior government policy makers.

The OECD's Competition Committee brings together the leaders of the world's major competition authorities. It is the most well-established of the international policy organizations promoting regular exchanges of views and analysis on important competition policy issues. It provides a forum for members and non-members (some of whom are associated more closely to the Committee as Observers) to discuss competition policy at a senior level.

The Competition Committee is supported in its mission by a specialist Competition Division, within the OECD's Directorate for Financial and Enterprise Affairs. Other divisions within the Directorate cover areas such as investment, anti-corruption, financial markets, and corporate governance.

The role of the Competition Division is to provide the Competition Committee with analytical support to promote its platform around the world. In this way, it prepares analytical papers, sector studies and policy recommendations, as well as offers hands on support to governments seeking to strengthen their national competition frameworks.

Advocacy in the OECD

Competition advocacy is a much used term and is generally understood to mean making the voice of competition heard outside the world of competition specialists. Competition advocacy has been the subject of considerable discussion at the national and international levels: at the OECD and at the ICN. There is general agreement that it is an important function of competition authorities. But it is not the preserve of competition authorities. Other governmental and non-governmental actors can and do carry out competition advocacy.

International organizations play an important role in competition advocacy. And they do so at different levels.

Advocating international best practices

International organizations provide a forum for norm diffusion and sharing of experiences. This enables competition agencies and indeed governments to approach issues from a common basis of understanding. By working together, this reduces the chances of divergence and the risk of inconsistent outcomes.

International organizations define and shape international best practices. In turn international best practices influence domestic processes. They therefore have a role in transforming domestic competition policy.

International organizations are an avenue to develop and agree network commitments. The OECD uses its inter-governmental status to influence governments through a combination of recommendations and best practices. The weight of a product with an OECD badge can be significant when competition authorities or policy makers are looking to strengthening domestic competition frameworks – particularly for developing countries.

The Competition Committee has been responsible for several important OECD Council Recommendations as well as Best Practices. While Council Recommendations are not legally binding they entail the political commitment of members to implement them. Agreement at

Council level is regarded as a commitment on the part of governments to implement them at the national level.

The 1998 Recommendation on Hard Core Cartels successfully focused the attention of antitrust agencies on the need to combat cartels and to cooperate in doing so. It triggered a new era for cartel enforcement. It has helped to make cartel deterrence a top priority for all OECD competition agencies.

In 2005 the Competition Committee produced best practices for the sharing of confidential information in cartel investigations, which strengthened international consensus on the value of meaningful law enforcement co-operation against cartels.

The 1995 Recommendation on International Cooperation has provided the basis of many bilateral agreements.

The 2005 Recommendation on Merger Review seeks to advance the development of merger review procedures in line with internationally recognized best practices. As such it buttressed the ICN's important work in this area: officialising the best practices at an inter-governmental level.

A follow-up report to the 1998 Recommendation on hard-core cartels indicated that competition authorities needed to work with other parts of government. And so the OECD developed Guidelines for Fighting Bid Rigging in Public Procurement, which were adopted earlier this year. They provide governments with a highly useful tool to save government resources, given that public procurement accounts for about 15% of total GDP in many countries, and it can be higher in developing countries. The OECD Guidelines help officials design procurement tenders and identify possible cases of bid rigging early on, which facilitates follow-up investigation by competition agencies.

The Competition Committee has also developed best practices to help governments advocate pro-competitive reform, which has become an increasingly important priority of governments in the OECD. The Competition Committee's Working Party on Competition and Regulation has undertaken serious and substantive work assessing the competitive impact of policies. This culminated in the adoption in October 2009 of a Recommendation on Competition Assessment. The Recommendation urges member countries governments to identify regulations with excessive restrictions on market activity and adopt more pro-competitive policies that still achieve policy goals. The Recommendation grew out of previous OECD work in the area, including the 2005 OECD Guiding Principles on Regulatory Quality and Performance and the 2007 OECD Competition Assessment Toolkit.

This is the OECD advocating competition advocacy. And it has been successful. A number of governments have developed toolkits of their own, at times building on the work of the OECD. The OECD toolkit approach to reviewing regulation is gaining traction at least 20 countries since its release in 2007.

Establishing the international best practices is only part of the story. International organizations need to actively disseminate these best practices. The OECD does this through work with both member and non-member countries. There is for example a joint project between Mexico and the OECD on competition assessment.

The OECD also works with other international organizations, such as the Asian Development Bank, ASEAN, the Inter-American Development Bank and others to reach out to governments and competition authorities across the world. The OECD holds an annual Global Forum on Competition, which brings together some 90 countries, and is an important mechanism for the promotion of competition policy in developing and transition economies. There are two Regional Centers on Competition in Hungary and Korea in partnership with the competition authorities in each of the host countries. The aim is to help competition authorities in the region develop and implement effective law and policy.

The OECD's outreach and capacity building also includes in-country projects. A two years project in Brazil and Chile focused on reducing bid rigging in Latin America. These projects were designed to assist local competition and procurement agencies to detect and prevent bid rigging in public procurement and to develop the necessary enforcement tools to assist the competition authority in its anti- bid rigging efforts.

International organizations also have a role in defining best practices. The intergovernmental nature of the OECD means that governments are committed to the recommendations and practices they adopt. But these products are equally useful for non-member countries that can use them to advocate for changes to their own domestic frameworks or to align themselves with best practices as defined by the world's leading competition authorities through the OECD.

Advocacy to governments

The OECD provides a mechanism for direct advocacy to governments through Peer Reviews of national competition policies, which incorporate recommendations for changes in government policy. Peer reviews play an important signaling role for competition agencies.

Peer Review recommendations encourage agencies to go to their national legislatures and push for change. The process can also transform the agency itself as other agency heads with similar experiences have an opportunity to weigh in during the Peer Review discussions to offer conceptualized comments about similar institutional successes or malfunctions in their own countries and the way in which other agencies have addressed similar issues. Peer Reviews quickly become part of national public debate as they are closely analyzed by governments, the media and other influential commentators.

Advocacy within international organizations

The OECD is obviously much broader than just competition. The work of the Competition Division and the Competition Committee and the best practices it advocates must relate to the core mission of the organization. And it is this linking back of competition principles to wider policy objectives that makes for successful advocacy. By virtue of active working with other parts of the OECD, the Competition Division is able to make the case for competition policy being reflected in the wider goals of the organization and therefore the governments it is addressing.

Through its work on bid rigging, the OECD has developed close relationships with other OECD Committees, in particular the Public Governance Committee and the Working Group on Bribery, to ensure that sound competition principles are taken into account when developing other public procurement policies.

The OECD has horizontal projects on innovation, climate change and the environment and the Competition Division is involved in these. This provides a channel and network into other government policy areas, to ensure that the competition message is heard and to highlight its importance in relation to other policy considerations. This may not be a route that many competition authorities have available to them. Furthermore, as competition agencies become more independent, there may be less of a direct interest/involvement in competition on the part of the executive arm of government.

Advocacy on the international stage

The OECD itself is plugged into international debates and discussions on issues that could potentially have an impact on competition policy and enforcement, but where competition

agencies may not necessarily have a direct say. The work of the OECD feeds into discussions in other international organizations and groupings. The discussions in the G20 and the G8 on the current financial crisis are an excellent example of this.

The OECD Competition Committee conducted a series of roundtables on competition and the financial crisis in February 2009, aimed at examining safeguards to protect competition as emergency measures are implemented for financial stability purposes. This work fed into the OECD's strategic response to the crisis. This in turn fed into the work of the G20 and G8, as part of the OECD's working with the world's governments and other organizations to get economies moving again.

The OECD was able to provide messages both to competition agencies through its discussions in the Competition Committee, as well as to governments at the highest level. The OECD is well placed to have such discussions and to disseminate these messages across government networks on an international scale. Governments are hearing messages from their national competition agencies as well as from broader international organizations as they discuss strengthened co-operation on macroeconomic policies. It is a useful and dynamic complement.

The OECD will be doing more of this, as the international debate turns to exit strategies. The work of the Competition Committee on exit strategies, will again feed into OECD contributions to the G20 and other discussions during 2010.

And not only can international organizations such as the OECD help get the competition policy view into the G20 and other networks, but OECD also provides a forum for other international organizations to disseminate their views. For example, the keynote speech by the Managing Director of the IMF at the Global Forum in February 2009, alongside the OECD's Secretary General, was an opportunity to convey IMF messages to a broad high-level international audience of policy makers and competition authorities.

Conclusion

International organizations carry out a number of different competition advocacy roles, and the OECD's advocacy work can be categorized as follows:

- Developing and disseminating international best practices.
- Advocating for pro-competitive reforms.

- Bringing competition issues or concerns to the heart of national governments through its wider policy dialogues.
- Using its international status to help get the competition view into broader international governmental discussions.

Some of this work complements and supports the competition advocacy undertaken by competition authorities. Some of it is taken place at a broader level to a wider audience. There are different roles for different institutions. Each should play to its strengths.

Competition in the Financial Markets: Mexican Experience

On January 14, 2010 the ICN Advocacy Working Group held a teleseminar on the Mexican experience in advocating pro-competitive reforms in the banking sector. The panelist was Ernesto Estrada, chief economist of the Federal Competition Commission (CFC) of Mexico.

Mr. Estrada presented an overview of the pro-competitive reforms introduced in recent years in the Mexican banking sector and provided examples of the CFC's role in this process. He first described the Mexican economic crisis in 1995, which was characterized by the following indicators: GDP drop of 6%; peso depreciation of 55%; inflation rate of 52%; interest rate of 80%; decrease in stock prices of 40%; and risk-weighted bank capitalization was below 8%.

Government short-term strategy to exit from this crisis was based primarily on an international credit facility of 52 billion USD and a comprehensive bank bailout the cost of which reached 17% of the GDP by 2006. In addition, several pro-competitive reforms contributed to economic recovery, such as: the North America Foreign Trade Agreement (NAFTA) implemented in 1994 that is considered to open growth opportunities; competition legislations that entered into effect in mid 1994 that helped to remove restrictions on entry in several sectors, prevention of monopolies in some markets, and pro-competitive privatization, in particular over the railroads and maritime ports.

The above was followed by an aggressive deregulation process intended to strengthen feasibility and competitiveness of the banking sector. This process followed strict competition and prudential principles. The following were the most important reforms.

- Introduction of strict capitalization and risk management rules (1998-1999).
- Creation of strong financial regulators.
- Reduction of barriers to entry: elimination of restrictions to foreign investment (1998); reduction in minimum capital requirement; creation of niche banks and bank correspondents (2006-2007); promotion of competitive access to payment infrastructure (2002-2007); creation of unregulated financial entities that provide credit (except credit cards), but do not accept deposits (2006).
- Supervision of inter-bank fees by central bank (2004-2009).
- Obligation to offer transparent information to customers (2002-2009).
- Creation of credit bureaus (2002).

These reforms increased competition and improved market performance. For example, between 2000 and 2009, the sector registered the following changes:

- The number of banks increased from 35 to 43.
- Market concentration decreased. For example, the market share of the two largest banks (CR2) dropped from 48% to 41% in terms of deposits; from 50% to 41% in terms of loans; and from 80% to 52% in credit cards.
- Financial penetration increased. For example, the bank loans/GDP ratio rose from 0.7% to 4.7%, and the credit card transactions/GDP ratio went from 0.34% to 1.12%

Furthermore, these improvements did not put at risk the feasibility of the banking system, as bank capitalization increased from 17.7% to 26.5% and the ratio of non-performing loans to total loans reduced from 5.8% to 3.8%.

Afterwards, the panelist briefly described the current crises (2008-2009), which has featured drastic reductions in exports, investment, fiscal revenues and about a 10.1% decrease in the GDP (second quarter, 2009). However, this crisis is not associated with a bank crisis of 1995, as all the variables that determine financial health of the banks fall within accepted parameters.

Mr. Estrada pointed out that in spite of these recent improvements, penetration and competition in the banking sector is still poor compared to international standards. For example, the ratio of bank loans to GDP is 25% in Mexico compared to an average of 127% in OECD countries; and market share of the five largest banks (CR5) in deposits is 84% compared to 39% in the US and 58% in the UK.

In 2009 the CFC recommended further pro-competitive regulatory reforms that included the following measures:

- Introduce switching packages to facilitate customers switching between institutions.
- Strengthen supervision of inter-bank fees to prevent banks from using these fees as anticompetitive instruments.
- Oblige competitive interconnection between payment card switches and credit bureaus.
- Open the possibility of issuing payment cards by non-banking institutions.
- Strengthen the obligation of banks to offer transparent information on fees, interest rates, and terms and conditions to users.
- Introduce standardized basic credit cards.

These reforms were approved by Senate and are pending for approval by the congress.

Finally, the panelist commented that competition advocacy has played a key role in promoting competition in the banking sector, as many of the reforms introduced in recent years are associated with recommendations issued and promoted by the competition authority.

The CFC understands the competitiveness of the banking sectors is a key factor to enhance global economic competitiveness and consumer welfare, so it has been involved in a permanent effort to advocate for pro-competitive reforms. The most relevant CFC competition advocacy activities in this sector include:

- Permanent effort to raise public awareness of the lack of competition in the banking sector and its costs for consumers;
- Three public reports with recommendations to introduce pro-competitive reforms in this sector (the last one issued jointly with the OCDE) with strong presence in mass media;
- Several appearances before the Senate and the Congress proposing or supporting pro-competitive reforms; and
- Continuous collaboration with sector regulators has prompted them to become strong allies in introducing competition principles.

Evaluation of Competition Advocacy Efforts by Antitrust Authorities: The Experience of the Canadian Competition Bureau and the U.S. Federal Trade Commission

This teleseminar was held on February 2, 2010. The speakers at the seminar were Chris Busuttil, Director of Advocacy Coordination, the Canadian Competition Bureau and James C. Cooper, Attorney Advisor to Commissioner William E. Kovacic, U.S. FTC

Competition Advocacy in Canada²

Presentation by Chris Busuttil, Director of Advocacy Coordination, the Canadian Competition Bureau

Statutory role to advocate for competition

The Commissioner of Competition has the statutory right to act as an advocate for competition. The Commissioner can intervene before any federal board, commission or other tribunal in order to make representations to, and call evidence in respect of, the factors regarding competition that the board, commission or tribunal should take into consideration in determining the matter. In addition, with leave, the Commissioner can intervene before provincial boards, commissions or other tribunals to make similar representations.

Our advocacy work recognizes that there are other policy objectives that governments must address, including social, cultural and economic objectives. We do not argue blindly for competition at the expense of all other goals.

We do, however, advocate that these other goals be achieved through, and in concert with, competitive forces, and with the least impact on the competitiveness of the marketplace. Our role is to encourage regulators and legislators to adopt approaches that rely, to the greatest extent possible, on market forces. Where regulation is necessary, the Bureau advocates that regulation be only to the minimal degree necessary to achieve the objectives of the regulator.

² The views expressed here are those of the author and do not necessarily represent the views of the Competition Bureau or the Commissioner of Competition.

The Canadian approach to advocacy

There are three major types of advocacy work that the Competition Bureau undertakes:

- Interventions.
- Input into government policy development (both formal and informal).
- Market studies.

As resources are limited, we have taken care not to be too ambitious in the scope of work taken on, while recognizing that for the right issue, at the right time, the impact can be significant.

In 2008, the position of Director of Advocacy Coordination was created. The expectation is that as we move forward with advocacy initiatives, proposed activities will be evaluated along with other Competition Bureau priorities, taking an independent role where a compelling case can be made, but more generally, where a complementary message can be delivered through another medium. Advocacy initiatives that are pursued will first be evaluated and prioritized with reference to following criteria:

The initiative addresses a competition issue.

Advocacy is the most appropriate way to address the competition issue.

The Competition Bureau is the most appropriate body to lead the initiative.

The initiative will benefit Canadians.

The benefits to Canadians are measurable.

The likely benefit of the initiative can be estimated in advance.

The actual benefit of the initiative is measurable *ex-post*.

The work required to realize the benefit is feasible within a specified time period.

Any other important considerations that lend support to the advocacy initiative.

Evaluation of the FTC Competition Advocacy Program: 2001-2006

Presentation by James C. Cooper, Attorney Advisor to Commissioner William E. Kovacic, U.S. FTC

Competition Advocacy: theory and channels of influence

Broadly, competition advocacy is the use of competition agency expertise to persuade governmental actors at all levels to pursue policies that promote competition.

Competition advocacy is necessary because, due to collective action costs, consumers' interests in competition may not be fully represented in the political process. Further, many state-imposed restraints on competition are often beyond the reach of the competition authority. In particular, in the U.S., the *Noerr-Pennington* and state action doctrines together insulate from antitrust scrutiny a large class of anticompetitive public actions, and private attempts to procure such action. When *ex post* enforcement is not likely to be an option, the FTC tries to persuade decision-makers *ex ante* to adopt policies that promote competition.

Advocacy can have a direct or indirect influence on policy. It can directly influence policy by making a convincing argument that sways decision makers. Indirectly, if advocacy informs the public of the likely costs associated with an anticompetitive regulation, it can create political pressure to support a pro-competition position. Finally, advocacy can also provide political cover for regulators to adopt a pro-competition policy that may not be supported by some of their constituents.

History and process of competition advocacy at the FTC

At the FTC, modern competition advocacy began in the late 1970s. Since 1980, the FTC has filed more than 750 comments. During the zenith of the advocacy program in the mid-1980s, the FTC filed as many as 90 comments a year, while in the 1990s the FTC was less active and chose certain areas on which to focus its advocacy efforts (e.g., electricity deregulation). From 2001-2008, advocacy filings rose to around 20 per year.

The FTC attempts to influence policy makers in three basic ways: formal advocacy, informal advocacy, and market studies. Formal comments typically come at the request of a policy maker, in response to an invitation for public comments, or on the FTC's own initiative as an *amicus curiae* brief filed with a court. Staff from the Office of Policy Planning and the

Bureau of Economics most often prepares formal comments, but they will also solicit input from colleagues in the Bureaus of Consumer Protection and Competition if matter involves certain issues. The Office of General Counsel typically takes the lead role on *amicus curiae* briefs. The full Commission approves the release of all advocacy comments. Informal advocacy entails FTC staff engaging in informal discussions with policymakers at various levels regarding the competitive impact of their proposals. The FTC also engages in research of various industries and practices, and releases its findings via staff reports. These reports often contain an empirical element. The FTC previously has released studies regarding the pharmaceutical and petroleum industries, as well as on a range of consumer protection issues, such as consumer privacy and consumer fraud. These studies can affect policy by providing empirical evidence of the likely competitive effects of proposed governmental regulation.

Evaluation of the FTC advocacy program

In 2007, the FTC undertook an evaluation of the FTC's advocacy program to gauge the extent to which advocacy influenced policymaking. This method of evaluation focuses on an intermediate outcome – influence – rather than outputs (e.g., number of advocacies) or inputs (e.g., resources devoted to advocacy). A measure of the ultimate outcome would entail a focus on the market place effects of advocacy.

The FTC survey targeted those involved in the decision-making process for proposal on which the FTC provided formal comment from 2001-2006. This methodology improved on two prior studies that surveyed only the decision-maker who requested FTC comment, which would tend to result in a bias toward favorable responses. For reasons involving professional ethics, the FTC did not survey judges who received FTC amicus briefs, nor recipients of FTC comments who were involved in a proposed rule-making where that process was ongoing.

Reponses received

There was a 45% (36/80) response rate. Of the 36 responses received, 53% were from those who solicited the FTC comment, 28% were from representatives of agencies that were engaged in a formal rulemaking procedure, and 19% from opponents of the FTC's position. Most responses were from recipients of FTC comment between 2003 and 2005, and involved a broad range of regulatory issues, including professional regulation (e.g., law, optometry, real estate brokerage, and morticians), wine and beer distribution restrictions, pharmacy protection

legislation, physician collective bargaining, food and drug labeling, airline reservation systems, electronic fund transfers and “do-not-email” lists.

Quality and weight of FTC comment

75% of respondents agreed that the FTC’s comment “presented sound analysis and clear reasoning” (11% disagreed and 15% had no opinion) and 73% agreed that the comment “would be useful to decision-makers facing other relevant issues in the future” (12% disagree, 17% had no opinion). These results indicate that more than the 53% of respondents who solicited FTC comments found that the FTC had done a solid job, even if they disagreed with the ultimate position the FTC took on the policy at issue.

The fact that the comment came from the FTC caused 88% of respondents to give it more weight (11% disagreed and 8% had no opinion), while 55% agreed that the FTC’s comment “provided information from a perspective that was not previously considered” (22% disagreed and 22% had no opinion).

Efficacy of FTC comment

Although 61% agreed that the outcomes reached at the end of their decision-making processes were consistent with FTC position, this does not necessary imply that the FTC’s advocacy affected the favorable outcomes.

Examining the data more closely reveals that 94% of respondents said that FTC comment was considered and 54% (or 79% of those with who provided an opinion on the question) said the FTC comment influenced the outcome. When the outcome is consistent with FTC position, 79% of respondents said the FTC comment influenced outcome. Taken as a whole, these data suggest that the FTC has influenced outcomes.

Role of press coverage

61% of matters received press coverage, and press coverage is associated with a higher percentage of positive outcomes (58% vs. 38%). Press coverage of the FTC’s involvement, however, appears to have no effect on outcomes; 67% of respondents disagreed with the proposition that the FTC was effective due to press coverage, and moreover, there was a lower FTC success rate with press coverage of FTC involvement than without (55% vs. 71%).

Future work

Self-assessment is necessary to improve the agency (*see FTC AT 100*). In the future, the FTC hopes to make *ex post* evaluation a part of all advocacy efforts and to send out surveys within six months of filing comment in order more easily to capture the contemporaneous impressions of those involved in the decision-making process.

The FTC's evaluation could be improved in several ways in future work. For example, future work could examine how additional variables such as fora, industry, interest group involvement, and majority political party affect outcomes. Future work also could involve *ex post* evaluation of market outcomes through case studies and empirical analysis. This would enable the FTC to assess the affect of its advocacy on the market and to consider in retrospect whether the intervention was good for consumers.

Relevant websites and documents

US Submission to the OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities: www.ftc.gov/bc/international/docs/evalauth.pdf

FTC Advocacy Website: www.ftc.gov/opp/advocacy_date.shtm

FTC at 100: www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf

Concluding remarks

According to the feedback received from the seminar participants by e-mail and in the course of the AWG conference calls, the advocacy seminars have proved to be a useful forum for sharing advocacy experience among ICN members, and have provided members with the possibility to learn experiences of international organizations and hear from NGAs on matters related to competition advocacy. Based on this feedback, the AWG plans to continue the teleseminars and seeks to involve panels of speakers at future seminars in order to encourage broader member and NGA engagement. The seminar summaries and the presentation slides will be further put on the AWG web-page. The AWG will also use “Postings” section of the web-page to form a basis for continued discussion of the seminar issues along with broader competition advocacy topics by ICN Membership by providing a means for ICN members and NGAs to post notes on these issues.