



International  
Competition  
Network

ADVOCACY WORKING GROUP  
**BENEFITS PROJECT**



**EXPLAINING  
THE BENEFITS  
OF COMPETITION  
TO THE GOVERNMENT  
AND THE LEGISLATOR**



# INTRODUCTION



This online resource, drawn from the 2014 Benefits Report, has the objective of setting out particular means and messages for competition agencies when approaching governmental and legislative bodies. It tackles a variety of situations and dimensions, including advocating the principles and benefits of competition, raising awareness of the importance of competition and competition-friendly policies, communicating the need for legislative or institutional reform. It draws on various means of communication, formal and informal, direct and indirect, of communicating with government and legislators.

The document is organized as follows. Section 1 provides tips for effective communication with government stakeholders. It discusses why and how to approach public entities and suggests communication strategies for such approaches. Section 2 lists and expands on the broad themes and key messages which may be referred to and used in order to achieve the desired result. Section 3 presents case studies to illustrate how competition agencies have used advocacy tools to influence actions and decisions by policymakers.



# **SECTION 1: TIPS FOR EFFECTIVE COMMUNICATION WITH THE GOVERNMENT AND THE LEGISLATOR**



## WHY AND HOW

---

### **The Importance of government**

It is imperative that competition agencies realise the significance of Government as a stakeholder and direct an appropriate portion of advocacy efforts at communicating with Government to ensure that competition authorities are able to influence policy outcomes in a way that realises the benefits of competition.

### **Adapting messages**

Not all stakeholders are receptive to certain messages and means of communication. Competition authorities need to adapt their messages and approach to suit the specific stakeholder they are communicating with.

### **Selecting the most appropriate advocacy instruments**

Certain advocacy instruments are better suited to communicating with Government – these messages and instruments should be clearly defined based on the circumstances of the particular jurisdiction. For example; it may be appropriate to communicate with the public through the media and website, whereas it is more effective to communicate with Government through one-on-one meetings. Where possible competition authorities need to employ advocacy instruments that best suit the stakeholder, as well as the sector at stake.

### **Frequency of contacts**

The frequency of communication should match the significance of government as a stakeholder – frequent contact is imperative in developing a sound relationship.

### **Directing advocacy efforts**

Competition authorities need to educate policymakers on not only the benefits of competition, but also when it is necessary to consult competition expertise in formulating regulatory frameworks or drafting legislation. This can be achieved through educational seminars and conferences that target specific government agencies and aim to establish a dialogue between Government and competition authorities.

### **Central message to convey to policymakers**

It is necessary to convey the importance of competition and the role that competition agencies can play in Government achieving its goals. For example; competition authorities need to be able to convey the role that they can play in helping Government to achieve its public procurement goals. Section 2 of this document contains and discusses the key messages to be conveyed to government stakeholders.



## Building relationships while preserving independence

For advocacy to be successful, it is important to be able to build strong and trusting relationships with government at all levels. It takes time to build the necessary trust between officials while preserving the independence of the agency, but good relationships and the building of trust between officials might be considered the cornerstones of successful advocacy.

## COMMUNICATION STRATEGIES

---

This section discusses approaches a competition agency may use in its role as impartial competition expert in policy review. Government departments and competition agencies can complement each other in maximising competition as a driver for the efficient working of markets, boosting economic growth. Policy objectives pursued through laws and regulations can unnecessarily restrict competition in the marketplace. Competition agencies are well placed to advise government departments about the impact of these restrictions and how to achieve the goals aimed for with less restriction on competition.

They can be particularly helpful in three ways:

1. **Positive use of competition:** Policies which can be advanced by increased competition, such as public procurement;
2. **Limiting negative impact on competition:** Policy implementation may create certain restrictions of competition, such as those needed to ensure air traffic security. Agencies are well placed to help departments restrict markets only enough to achieve their desired goal;
3. **Advising on possible competition impacts in related areas:** Some policy regimes can generally be considered 'competition neutral', such as monetary policy. Here an agency can provide advice on unintended market impacts of otherwise benign policies.

The dialogue between competition authorities and regulatory authorities, Congress or Parliament is a key area of competition advocacy. Advocacy initiatives can be undertaken in order to influence the policy framework and its implementation in a competition-friendly way. For example, in some systems, agencies regularly provide impact assessments, opinions or advice on new legislation or regulation.

## The Relationship between Policymakers and the Competition Agency

The nature of the relationship between competition authorities and policymakers is defined by a variety of factors; in some cases agencies may play a direct role in the policy review process, whereas in other cases agencies may play a more general and indirect role. The level of consistency at which an Agency participates in policy review may be defined by the depth and degree of the Agency-Government relationship; and the capacity and resource constraints may limit the extent to which agency may engage in policy review.

Two characteristics of competition agencies are important in setting the tone for their relationship with other agencies and government departments:



- **Impartiality:** establishes the credibility of the agency as a source of expertise in policy forums.
- **Rationality:** competition authorities should always clearly set out their recommendations to policymakers in a reasoned and analytical manner. This will improve transparency by holding decision makers accountable for their decisions.

## Different approaches to policy discussions

Competition agencies can engage in a variety of ways in external policy processes. There is no 'one size fits all' approach to such techniques, but rather agencies must tailor their efforts to the particular problem at hand. Agencies have used a number of different approaches:

**Direct:** an agency may have, or seek, direct institutional representation in government.

**Market Studies:** Agencies can undertake sector, or regulation, specific studies to develop the case for reform or review of particular anti-competitive problems. These reviews are particularly valuable in sectors without a specific anti-competitive problem, but that nonetheless, is not working to the benefit of consumers or the wider economy.

**Ex-ante Regulation:** Competition authorities are well placed to advise policymakers whether the benefits outweigh the costs of regulating, and can help the regulator to avoid causing market distortion.

**General Approach:** Agencies can influence thinking inside governments and regulators by regular meetings and feedback sessions; training of government officials through seminars and workshops; submitting official letters that identify competition risks and the need for remedies; submitting comments and advisory opinions on draft policies; producing reports and publications that offer competition-centred insights and inform governments of agency activity; press releases; seminars for policymakers; interviews with the media; both formal and informal recommendations to other government actors; participation in other forums, such as the courts or the legislative process; informal discussions with regulators; consultation papers; and seeking input from non-governmental entities.

## The role of competition assessment

A competition assessment is an evaluation by the competition agency or another government body of the potential competitive effects of a proposed or existing policy. Through the assessment, competition agencies can urge policymakers to consider the policy's likely impact on competition, identify whether justifications exist for any restrictions on competition, and assess whether less restrictive alternatives would achieve the intended public policy goal. Such assessments may consider the costs and benefits of proposed policies

Competition assessments may be of particular use in advocacy efforts. The following issues have a particular bearing on the likely success of advocacy efforts:



**Timing:** The earlier an agency can engage in a policy making process to bring to bear their competition analytical toolkit the more likely they are to succeed in ensuring policies are competition-friendly. Initiative: Some authorities may only conduct studies or make recommendations when requested by the relevant Ministry and cannot decide on their own to make the contents of their reports public or to pressure for their recommendations to be taken into account.

**Access:** Access to policymakers and their community of influence is key to making progress in any particular policy process.

**Non-binding opinions:** Opinions and recommendations made by agencies are frequently non-binding. While ministries and regulators can choose to ignore them the frequency and strength with which the agency makes representations will increase the political costs of their being ignored.

**Multi-faceted policymaking:** The dispersed nature of policymaking make influencing processes complex. Creating a track-record in helpful and robust interventions will create a climate in which agency influence can increase.

Competition Assessment Toolkits, such as that produced by the OECD, provide handy guidelines and checklists. Moreover they provide the analytical framework that regulators and legislators need to use to produce less competition-restrictive policies.

The ICN Advocacy Working Group has also prepared *Recommended Practices for Competition Assessment* to provide guidance to agencies engaged in competition assessments.

In drafting the recommended practices, the Advocacy Working Group relied on the OECD's extensive work on competition assessment, including the **OECD Competition Assessment Toolkit**.

The ICN's Recommended Practices for Competition Assessment are available in [English](#), [Arabic](#), [French](#), and [Spanish](#).



## **SECTION 2: KEY MESSAGES TO THE GOVERNMENT AND THE LEGISLATOR**



It's all in the messaging. (But it's not all talk.) This section provides illustrative themes and talking points on the importance of competition policy and studies and links to empirical work to support them. The messages agencies use to promote competition policy and principles in the domestic arena are strikingly similar across jurisdictions. We speak the same language in articulating the benefits of competition, and we seek to enhance these messages by grounding them in empirical work.

The Advocacy Working Group seeks to support member advocacy activities by distilling common themes and messages on the benefits of competition which can be used by member agencies in their own advocacy work.

The genesis for this messages section of the Benefits Project was the 2009 Steering Group project, "[The case for competition policy in difficult economic times.](#)" With the threat of economic crisis looming, Steering Group members sought to support members' advocacy within their own governments by writing a series of talking points about the importance of continued adherence to competition policy, and citing empirical support for the proposed messages. Competition agencies from all different parts of the globe and from varying levels of economic prosperity reported that they used this document in crafting their own messages.

Recognizing the potential for significant benefits from experience sharing, the Advocacy Working Group broadened the focus of this project to encompass more topics and more jurisdictions to create the messages found in these pages.

This section is organized as follows. First, some of the broad themes that appear often in messages sent by competition agencies to government stakeholders are presented and discussed.

Then, the main messages are arranged into two groups: (i) those which are cross-sectional, i.e. they talk about benefits attained when competition is fostered in any productive and (ii) messages which are related to benefits obtained by fostering competition in specific sectors.

## **BROAD THEMES**

---

### **Innovation and market access**

#### ***Competition can boost innovation***

Competition policy and enforcement can be beneficial to innovation by, for example, ensuring firms, particularly new entrants, get access to fair terms. For example, in many countries, professions such as lawyers, doctors, pharmacists and opticians are subject to restrictions many of which were originally introduced under the guise of public safety, but which have developed into restrictions on innovation. Lifting these restrictions can encourage the professions to think innovatively, for example through extended opening hours, more convenient locations or online service provision.



### ***Competition policy and enforcement can help market access***

It can reduce the ability of large firms to use their market power over small and medium sized firms. It can promote the fair setting of standards. It can enable market entry can limit particularly pernicious negative effects of some industrial policy actions. For example, it keeps competitors from colluding and can create safe harbors for technology transfer agreements. It can, through such tool as state aid control, can be used to improve the performance of economic sectors in a controlled way.

### ***The interface with Intellectual Property law is key***

Intellectual property rights are temporary monopolies that by their nature restrict competition. However, they are pro-competitive in their ability to encourage innovation, reward for invention and creative activities. This means that competition law has to take a balanced view of the costs and benefits of the particular restriction and should be enforced against practices where intellectual property rights are being used as instrument for distort competition beyond the right granted by the patent, copyright or trademark.

## **Benefits for consumers**

### ***Consumers often benefit from upstream competition***

Competition law may benefit the structure of the market and competition as such, but very often the benefits accrued further up the chain of users will be passed on to the end-consumer.

### ***Greater competition can drive consumer welfare gains***

Eliminating inefficient practices and cartel activity leads to lower prices for consumers. Competition delivers lower prices, greater choice and more responsive markets: consumers are empowered through the provision of choice, information and increased awareness of their rights and means of redress that competition can bring. In the Netherlands, competition in the energy sector has been promoted by the use of an online competition coach, which guides consumers through the steps of switching energy supplier.

### ***Private rights of action can help competition law enforcement***

In some jurisdictions competition law allows consumers to privately enforce their rights.

## **Economic recovery**

### ***Protectionism has to be resisted***

- Relaxing, suspending, or eliminating competition policy during an economic crisis can inadvertently harm consumers and producers by lowering efficiency and slowing, rather than promoting economic recovery.
- History demonstrates that the costs of restrictions on competition are both substantial, and extremely difficult to remove or reverse.



- More effective competition and competition policy should be part of the solution to make markets work better in the future

[See the ICN's case for competition policy in difficult economic times \(2009\).](#)

## Informing broader policy objectives

Competition is not always a priority for government departments: competition agencies can offer useful advice and insight on unintended market effects of government measures and help ensure that the benefits of competition are properly understood and taken into account in policy-making.

For example, as governments consider a range of reforms to the regulatory framework governing financial markets, it is important that they are mindful of the competitive impact of those regimes and seek to promote greater levels of competition in affected markets, relying on competition agencies to provide guidance on how they can achieve that end.

## CROSS-SECTIONAL MESSAGES

---

### Competition promotes productivity and economic growth

There is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that competition policy has an important role to play in improving the productivity and therefore the growth prospects of an economy.

At the most general level, these are the messages about the importance of competition to productivity and growth:

- Competitive and dynamic markets have increased productivity and promoted economic growth across the globe.
- Competition policy has an important role to play in improving the productivity, and therefore the growth prospects, of an economy.
- Where competition is strong, productivity is strong. In order to increase productivity, a business must become more efficient, control its costs, and develop new products that consumers want. In competitive markets, if firms do not improve their productivity they will lose customers to other firms and new entrants. Competition is a key driver of increased productivity by promoting efficiency, removing barriers to entry and exit, and encouraging innovation.
- Effective competition provides significant benefits for consumers through lower prices and better quality goods and services.
- When markets work well, firms thrive by meeting consumers' needs better and more effectively than their competitors, through innovation, increased productivity and a lower cost base.

### ***Competition contributes to increased productivity through:***

- **Pressure on firms to control costs.** In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.



- **Easy market entry and exit.** Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an exiting firm is less efficient than the average incumbent. Entry – and the threat of entry –incentivizes firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.
- **Encouraging innovation.** Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.
- **Pressure to Improve Infrastructure.** Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports, and communications, as well as improving educational opportunities.
- **Benchmarking.** Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals.

#### Sources:

References and links to studies that support the link between competition and productivity and economic growth:

- **Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo, and Cristiana Vitale, Competition Policy and Productivity Growth: An Empirical Assessment, The Review of Economics and Statistics, October 2013, 95(4): 1324–1336.** This paper estimates the impact of competition policy on total factor productivity growth for 22 industries in twelve OECD countries over 1995 to 2005, finding a positive and significant effect of competition policy on productivity growth.
- A synthesis of the theoretical and empirical debates on competition and growth is available in **Philippe Aghion and Rachel Griffith, Competition and Growth: Reconciling Theory and Evidence, MIT Press, 2008** (cites recent empirical studies point to a positive effect of competition on productivity growth, direct discussion of how the benefits of tougher competition can be achieved while at the same time mitigating the negative effects competition and imitation may have on some sectors or industries.) See also **Aghion P, Howitt P., The Economics of Growth, MIT Press 2009** and **Aghion P, Akcigit U, Howitt P. What Do We Learn From Schumpeterian Growth Theory? 2013.** On South Africa, see **Aghion, Philippe, Matias Braun, and Johannes Fedderke. 2008. Competition and productivity growth in South Africa. Economics of Transition 16(4): 741-768,** which indicates that high mark-ups have a large negative impact on productivity growth in South African manufacturing industry.
- Some of the most striking empirical work on competition and growth comes from the **National Competition Policy (NCP) in Australia.** In April 1995, the Australian



government committed to the implementation of a wide-ranging National Competition Policy — that drew heavily on a blueprint established by an earlier independent inquiry, the “Hilmer Review.” These efforts increased Australia’s gross domestic product by 2.5 per cent, and the average household’s income by A\$7000 per annum. At the sector level, the results are equally impressive. For example, in the electricity sector, average real prices Australia-wide fell by 19 per cent, real port charges fell by up to 50 per cent, average telecommunications charges have fallen by more than 20 per cent in real terms, etc. See, e.g., **Review of National Competition Policy Reforms**, available at: <http://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf>. See also **Productivity Commission, Review of National Competition Policy Reforms, Inquiry Report No33., February, 2005**, <http://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf>.

- **William Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability (2004), at 103.** McKinsey Global Institute cross-sectional survey of industries in many nations revealed that “economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can’t replace less efficient ones. Economic growth slows and nations remain poor.”
- For a general discussion of the competition and other policies and growth, see **Fred Hilmer, Learnings from Successful Competition Policy and Productivity, July 29, 2010.**
- See also **OFT’s Government in markets - Why competition matters – a guide for policy makers**, [http://www.ofit.gov.uk/shared\\_ofit/business\\_leaflets/general/OFT1113.pdf](http://www.ofit.gov.uk/shared_ofit/business_leaflets/general/OFT1113.pdf), with examples from specific markets, including aviation, telecommunications, and products such as books, sports jerseys, glasses, etc. On competition and growth generally, see the **UK OFT’s Competition and growth, November 2011**, [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofit.gov.uk/shared\\_ofit/economic\\_research/ofit1390.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.ofit.gov.uk/shared_ofit/economic_research/ofit1390.pdf), discussing the general evidence on the relationship between competition and growth, and describing the impact on growth of a number of specific competition interventions.
- Competition and competition policy can contribute to growth, an improved innovation climate and increased quality and efficiency within the public sector. This link is examined in the context of the Nordic countries, in a report which includes a comparison between competition policy, legal instruments, and implementation of competition rules. See **A Vision for Competition, Competition Policy towards 2020, Report from the Nordic competition authorities, No. 1/2013**, [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/nordiska/Nordic\\_report\\_Vision\\_For\\_Competition\\_2013\\_webb.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/nordiska/Nordic_report_Vision_For_Competition_2013_webb.pdf).
- In countries where there is more dynamism in markets, measured by the presence of more fast growing and shrinking firms, productivity growth is significantly higher. See, for example, **Bravo-Viosca, A. and Criscuolo, C., (2010), Evidence on business growth dynamics, presentation and paper for the OECD Working Party on Industry Analysis, 8-9 November 2010.**



- Competition raises managers' incentives to out-perform competitors and, therefore, is often associated with higher levels of total factor productivity. **Van Reenen, John (2011) Does competition raise productivity through improving management quality? *International Journal of Industrial Organization*, 29 (3). 306-316. ISSN 0167-7187**
- A study of approximately 4000 mid-sized enterprises in the US, Europe, and Asia concluded that competition contributes to better managed firms. **Bloom, N., Dorgan, S., Dowdy, J., and van Reenen, J. (2007), Summary report: Management Practices and Productivity: Why they matter, Centre for Economic Performance and McKinsey & Co.**
- An OECD estimated that new firms account for approximately 10% of all firms in a number of OECD countries, and that a similar share of firms exit every year. **OECD (2004), Understanding Economic Growth - A Macro-level, Industry-level, and Firm-level Perspective. OECD publishing.**

For studies that indicate the benefits of competition policy in a wider context, see:

- **The European Commission, European Competitiveness Report 2008 (COM(2008) 774 final)**, estimates that if trade between Member States in the European Union were to be eliminated (for example, as a result of market sharing agreements or because of State erected barriers), average productivity would fall by 13 per cent.
- **UK's Overseas Development Institute report "Assessing the Economic Impact of Competition"** The report discusses the findings of an ODI research project, which examined (1) how the policy framework of a country affects the degree of competition in any given product market, and (2) how the degree of competition affects market outcomes, such as price, competitiveness, innovation, and access to services. ODI conducted primary research in Zambia, Kenya, Ghana, Vietnam, and Bangladesh across four product markets: sugar, cement, beer, and mobile phone services. In addition to stating the research findings in each of these markets, the report draws interesting country comparisons of policy frameworks and market structures. The report concludes with policy recommendations for each country and a general discussion of the impact of competition on economic performance in markets. <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6056.pdf>.
- Older empirical studies that point to a positive correlation between growth and product market competition include: **Stephen J. Nickell, Competition and Corporate Performance, *Journal of Political Economy* , Vol. 104, No. 4 (Aug., 1996), pp. 724-746** and **Blundell, R and Griffith, R and Van Reenen, J, Market share, market value and innovation in a panel of British manufacturing firms , *Review of Economic Studies*, 66(3) (228). 529-554 (1999)**. See also **Michael E. Porter, The Competitive Advantage of Nations (1990), at 662**. This comprehensive multinational study of international competitiveness that "creating a dominant domestic competitor rarely



results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad.” and Djankov and Murrell, **Enterprise Restructuring in Transition: A Quantitative Survey**, 40 *Journal of Economic Literature* 739-792 (2002). This study indicates that very large benefits from competition policy can be observed in transition economies that provide a natural laboratory to consider the effect of competition. See also Ahn, **Competition, Innovation and Productivity Growth: A Review of Theory and Evidence**, *Economics Department Working papers No 37, OECD, document number ECO/WKP (2002)*. Competition encourages innovative activities and increases productivity; dynamic long-run gains from competition are likely to dominate the short-run efficiency gains since firms will continue to innovate.

### **Effective competition and competition policy can aid economic recovery**

Economic downturns, although temporary, tend to increase short-term protectionist pressures to relax competition that can have long run effects. Relaxing, suspending, or eliminating competition policy during an economic crisis can harm consumers and producers by slowing, rather than promoting economic recovery. History demonstrates that the costs of restrictions on competition are substantial and often only become evident in the long run. They are also extremely difficult to remove or reverse.

Relaxing competition policy is an ineffective, and even counterproductive, means to boost the economy and encourage recovery. A downturn requires firms to adapt and change and competition provides adequate incentives for this to take place. Competition policy is designed to counteract market failure, and in particular the anticompetitive exercise of market power. Firms with market power have incentives to restrict output, to raise prices, and to reduce their levels of investment and innovation. In general, therefore, policies which result in increased market power can prove counterproductive, since further restrictions in output and productivity are likely to exacerbate the effects of recession and slow the recovery. These policies can also reduce the ability of new firms to enter the market and further hinder growth.

History demonstrates that a temporary relaxation of competition policy would be hard to reverse. This is partly because the costs of the relaxation would tend to fall on the customers of firms, who are often a large and disparate group of individuals; while the benefits will typically flow to a smaller group, namely the shareholders and management of certain firms in the industry in question. These firms will have a much stronger incentive than numerous unaffiliated consumers to organize and expend resources to air their views. Restrictions on competition are also typically less transparent than other more direct policy instruments, and thus their effects are harder to spotlight and critique.

A relaxation of competition policy may appear, at least superficially, to be a relatively ‘cheap’ option (in that it will not involve spending funds from taxpayers), however, it is an inefficient means to assist firms in financial difficulty. Any relaxation of competition policy will weaken firms’ incentives to be more efficient, render them less competitive internationally (see discussion of Lewis and Porter research findings in “growth” section), and penalize successful firms.



State support and special policies that protect incumbent firms from competitive pressures through artificial barriers can also lead to distortions of competition: in addition to weakening the recipient's incentives to be more efficient, competitors' incentives will be affected as results are achieved by state support rather than business decisions. See [http://ec.europa.eu/competition/recovery/financial\\_sector.html](http://ec.europa.eu/competition/recovery/financial_sector.html).

Consistent with these observations, past government policies to relax competition policy in periods of economic crisis have been economically harmful.

#### Sources:

- **OECD, Regulatory Reform for Recovery: Lessons from Implementation During the Crisis, 2010** identifies lessons learned in crisis situations about how regulatory reform, by enhancing regulatory quality and applying competition policy and market openness, can foster recovery and long term sustainable growth. It builds principally on case studies of regulatory reform responses to crisis episodes in Japan, Korea, Mexico, Sweden, and the United Kingdom.
- For analyses of the impact of the 2008 financial and economic crisis on the enforcement of competition law, see **Competition Law in Times of Economic Crisis: In Need of Adjustment?**, Ed. Jacques Derenne, Massimo Merola & José Rivas. Bruylant, 2013. See how DG Competition has addressed the 2008 financial downturn, here: <http://ec.europa.eu/competition/recovery/index.html>.
- **Competition Policy and Financial Crises - Lessons Learned and the Way Forward** is a report published by the Nordic competition authorities in September 2009 concerning the the role of competition policy in the financial crisis. **Michael Böheim, Competition policy: ten lessons learnt from the financial crisis, Empirica, Aug 2011, Vol. 38 Issue 3, p315**, examines 2008-2010 financial crisis and competition policy and enforcement.
- For an older historical example, one policy response to the Great Depression in the U.S. was the National Industrial Recovery Act of 1933 (NIRA). The NIRA attempted to suspend certain aspects of the U.S. antitrust laws and permitted firms to collude to fix prices and quantities in some sectors provided that industry raised wages above market-clearing levels. It is a widely held view among economists that these policies did not help the economy recover from the Great Depression and may even have exacerbated the Depression. The NIRA diminished the responsiveness of price to output and thus prevented the economy's self-correction mechanism from working. See, e.g., **Cole and Ohanian, New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis, 112 Journal of Political Economy, no. 4 (2004)** find "that New Deal cartelization policies are a key factor behind the weak recovery, accounting for about 60 percent of the difference between actual output and trend output" and lengthened the Great Depression by seven years, and **Harkrider, Lessons from the Great Depression, 23(2) Antitrust (Spring 2009)**, states that "firms in cartelized industries are unlikely to innovate, especially where such innovation



leads to new products and competitors that are likely to challenge incumbents. Thus, it is perhaps not surprising that according to one study, there were few, indeed, almost no, new products introduced in the late 1920s and 1930s that could drive increases in consumer spending or investment”.

- In contrast, in Korea, responses to the 1997 crisis showed an increasing willingness to rely on the market to correct business failures and to drive growth. The failure of one of the largest chaebols, Daewoo, marked an end to the –too big to fail– policy for the biggest chaebols. This signalled that decisions on market entry and exit would be left to markets and thereby increased the credibility of the competition regime.
- Almunia and Perez Motta, The Competition Factor, April 2013: <http://www.project-syndicate.org/commentary/how-pro-competition-policies-can-boost-economic-recovery-by-joaquin-almunia-and-eduardo-p--motta>.

## Competition drives innovation

New and improved products, processes, and services are created through innovation, helping to create new businesses and economic growth. Dynamic competition to innovate provides a significant share of the consumer benefits associated with competition, and can have greater impact on consumer welfare than static price competition.

The basic conditions of competition can impact innovation. Competitive rivalry can encourage firms to pursue a dynamic path of innovative development. Competition policy has a potentially important role to play in encouraging innovation through the promotion of regulatory reforms that prevent foreclosure of existing competitors from reaching customers or suppliers and that facilitate market entry and enhance competition.

The potential benefits to consumer welfare from firm efficiencies and collaborative efficiencies that lead to innovation can be significant, thus warranting careful assessments by competition agencies of the potential for certain business conduct to create more rapid or enhanced innovation. The liberalization and deregulation of certain innovative-driven markets, e.g. telecommunications, provide illustrative examples of competition lowering prices and encouraging innovation and investment.

The relationship and links between competition and innovation is complex. Further, it can be challenging to balance dynamic efficiency gains from innovation that manifest in the longer term, against more static assessment of competition effects in the short-term. See the sample resources below for further details.

### Sources

- A Vision for Competition, Competition Policy towards 2020, Report from the Nordic competition authorities, No. 1/2013, [http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/nordiska/Nordic\\_report\\_Vision\\_For\\_Competition\\_2013\\_webb.pdf](http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/nordiska/Nordic_report_Vision_For_Competition_2013_webb.pdf).



- The European Commission has found that the liberalization of the European telecoms markets from 1998 has brought more competition to the markets, and in turn brought major benefits to consumers in the form of lower prices and better services. Similarly, a study in the United Kingdom found a 90 per cent reduction in the cost of international telephone calls between 1992 and 2002 as a result of deregulation.

## **Competition and competition policy can be a substitute to industrial policy**

Industrial policy is a broad term that encompasses all forms of governmental intervention, directly or indirectly influencing business decisions, and is developed and adopted by countries to, among other things, foster economic development or to adjust for market failures.

Among the more common forms, industrial policy measures can take the form of government investments, public procurement requirements, policies, subsidisation of specific companies, as well as the creation and protection of strong domestic competitors (so called “national champions”).

Whereas industrial policy is directed, among other things, at correcting market failures and fostering economic development, competition policy is generally directed at stopping companies hindering the normal functioning of market mechanisms through anticompetitive behaviour.

Competition policy, if enforced and executed properly, can often render the implementation of industrial policy unnecessary. The advantage of pursuing aligned aims through competition policy and the competitive process rather than industrial policy, is that competition policy is far less costly and creates fewer negative externalities. It manages this through not directly and selectively intervening in market structures, but ensure a fair competitive setting for all market participants.

### ***Promotion of efficiency and innovation***

- Competition policy generates strong and fair competition by ensuring that market mechanisms operate freely, deterring future unlawful conduct and ascertaining that no abusive conduct remains un-remedied.
- The resulting intensified competitive pressure and competition, requires companies to become more competitive, by reducing costs to an efficient level and/or investing in innovation to improve quality or develop new products.
- Intensified competition facilitates the benchmarking of companies and managerial performance, providing easier and more accurate assessment of performance, incentivising managers to act more efficiently.
- Cost minimising, greater innovation and more efficient production allows companies to offer goods or services to customers at lower prices and/or better quality;
- For consumers, a greater variety of options matching the heterogeneity of their needs leading to an increase in customer surplus and thereby consumer welfare.
- For companies, lower prices and higher quality creates the opportunity to acquire larger market shares as lower prices or higher quality attracts more consumers.
- The fostering of innovation and efficiency through intensified competition not only intensifies the effectiveness of companies, but also, in aggregate, boosts the country’s competitiveness and



ability to compete on export markets. This, and the resulting exit of inefficient firms, undermines the need for government influenced mergers or other governmental interventions aimed at providing a competitive setting or economic growth.

### **Protection of consumers and efficient competitors**

- In a market with insufficient competition, companies with market power have the ability and incentive to set excessive or exploitative prices and/or other abusive conduct directed at forcing competitors out of the market.
- In most competition law systems there are particular provisions for firms held to be in dominant positions. Competition policy prohibits such firms from resorting to these unlawful practices and provides for sanctions and remedies in the event of their occurrence. These restrictions on dominant market participants allow competition policy to provide for a fair competitive setting. This in turn effectively protects competitors (who are generally not the target for competition benefits) from unfair competition.
- Competition policy can act against any competitive restrictions by dominant players rendering the creation by the State of additional domestic competitors (so called “national champions”) unnecessary.
- Developing countries, in particular, can ensure that a robust competition policy and process limit the potential exploitation of their power by companies; the more aggressive the competition law enforcement, the higher the deterrence and detection probability, and thus the higher the positive results, and the more effective the targeted prevention and intended protection.

### **Facilitating entry of new competitors**

- Finally, an effective competition policy and process limits the raising of artificial barriers to entry through cartelised or abusive behaviour. It also allows for interventions to facilitate market entry by reducing those unfair barriers of entry that have already been created.
- The entry of new firms in turn allows, among other things, for a wider variety of choice for consumers. This incentivises long-established competitors to improve their performance to avoid losing market shares, resulting in increased productivity, consumer welfare and, ultimately, economic growth.
- By addressing the exclusionary conduct of dominant firms, competition authorities can facilitate entry in previously monopolised or otherwise restricted industrial sectors, rendering the need for wider government intervention.

All these effects allow for open and competitive markets, a maximisation of consumer welfare and economic growth without the necessity of resorting to industrial policy. These competition policy initiatives enable an agency to demonstrate the benefit of competition in structural/ sectorial reform.

#### **Sources:**

- *Government in markets, Why competition matters – a guide for policy makers*, Office of Fair Trading, 2009, [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/OFT1113.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/OFT1113.pdf).



- *Competition Policy, Industrial Policy and National Champions*, OECD POLICY ROUNDTABLES, 2009, <http://www.oecd.org/daf/competition/44548025.pdf>.
- *Is Competition Policy Worth it?*, Professor Paul A Geroski, September 2004, <http://ies.fsv.cuni.cz/default/file/download/id/9514>.
- *Why is competition important for growth and poverty reduction?*, Nick Godfrey, OECD Global Forum on International Investment VII, <http://www.oecd.org/investment/globalforum/40315399.pdf>.
- OECD Policy Round Tables, *Energy Security and Competition Policy 2007*, <http://www.oecd.org/competition/abuse/39897242.pdf>. The Round Table examined the links between competition policy and energy security.
- Conway, Herd and Chalaux, March 2008, "Product Market Regulation and Economic Performance Across Indian States," OECD Economics Department Working Papers No. 600, [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=eco/wkp\(2008\)8](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=eco/wkp(2008)8). This paper uses the OECD's indicators of product market regulation to assess the extent to which the regulatory environment affects economic performance across Indian states. The degree to which product market regulation is supportive of competition is found to vary considerably across states.
- *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, <http://www.oecd.org/gov/regulatory-policy/44789472.pdf>. Pages 7, 16 and 27.
- *Competition Assessment Toolkit – Principles*, <http://www.oecd.org/daf/competition/46193173.pdf>. Page 25 onwards.
- *Reviving Growth And Productivity, "Better Policies" Series*, September 2012, <http://www.oecd.org/about/publishing/2012%2009%20Italy%20Brochure%20EN.pdf>. Pages 13 – 15.
- *EU Industrial Policy and Global Competition: Recent Lessons And Way Forward, European Competitiveness Report 2011*, <http://ec.europa.eu/DocsRoom/documents/573/attachments/1/translations/en/renditions/pdf>.
- *The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy*, United Nations Conference on Trade and Development, 2010, [http://unctad.org/en/docs/tdrbpconf7d3\\_en.pdf](http://unctad.org/en/docs/tdrbpconf7d3_en.pdf). To be effective in supporting the development process, competition law and policy (CLP) need to be supported and compatible with other complementary pro-development policies that can bear on economic development. A spectrum of factors – including social, economic and political environment – dictate the choices for competition provisions



and enforcement design. Moreover, the priorities adopted by governments in terms of budgetary support, manpower availability and political support are key determinants of agency effectiveness. States would want to exercise their policy space to adapt their competition laws and enforcement institutions to local conditions. The report also discusses the impact of competition policy on economic development. In particular, it addresses (a) How effective can CLP be in promoting economic development? (b) What are the factors that can augment or impede such effectiveness? (c) Given that countries are at different stages of their economic development process, should the design and enforcement of their CLP vary and, if so, in what ways?

## Competition is required for poverty reduction

The rationale behind competition policy is the enhancement of consumer welfare. Consumer welfare – as the term indicates – describes the economic wealth standard of society’s consumers. The efficient performance of markets is essential to generate improved standards of living for citizens and to provide the resources necessary for state action to provide public goods and address other relevant concerns.

Competition law and policy represent an essential component of the governance mechanisms that are required for development and poverty reduction. From the standpoint of consumers, competition law enforcement provides an essential deterrent to cartels and other practices that restrict output, raise prices and thereby erode purchasing power and increase citizen poverty. This is even more important in poor countries than in richer ones. It is very often the poor who are faced with restricted choice and over-inflated prices, and whose access to goods and services is limited because of restricted transport and access to online services.

### Source:

- See [http://www.asobancaria.com/portal/page/portal/Eventos/eventos/IV\\_CONGRESO\\_DE\\_ACCESO/Tab5/Antonio%20Gomes.pdf](http://www.asobancaria.com/portal/page/portal/Eventos/eventos/IV_CONGRESO_DE_ACCESO/Tab5/Antonio%20Gomes.pdf).

## Competition provides incentives which foster sustainable development

Increased awareness of the importance of public health and environmental control have made sustainable development an important element of consumer demand. Firms that lack the economies of scale/scope to compete on price levels may find their way in the sustainable production of goods. When successful, other businesses in the industry will be inclined to follow the same path of sustainability.

Creating a competitive advantage by means of innovation can contribute to sustainable development. Competition policy provides the opportunity to compete on these grounds. Competition authorities provide a playing field where competition under fair terms is possible through regulation and enforcement. While companies protected by cartels or secure in a monopoly position have little incentive to change their practices, companies faced with competition may seek to develop new product lines, or improve the old ones, to meet the environmental and social expectations of consumers.



**Source:**

- See <https://www.acm.nl/en/publications/publication/11733/Opportunities-for-collaborations-with-regard-to-sustainable-development>.

## SECTOR-SPECIFIC MESSAGES

---

### **Competition concerns are crucial for the success of energy market reforms and sustainability**

In the past the energy sector has been thought to consist of “natural monopolies”, where efficiency in production could only be achieved through reliance on public or private monopoly suppliers under strict government regulation of prices, entry and investments. This led to major market deficiencies and hence a loss of consumer surplus:

- There was no mechanism that spurred the firms to minimize costs, no open spot market existed which could ensure that all the available resources were used for energy production.
- Large price differences existed between the prices paid by different consumer groups, creating a large potential for misallocation of resources.

#### ***Energy market reforms***

Dramatic changes have taken place over the past few years, leading to improved competition and a reformation of regulation within the sector. Increasingly these changes occur at an international level, thereby integrating national energy markets into wider regional networks. The lessons from these trends indicate that:

- Only if energy producers, wholesalers and suppliers vigorously compete with one another, are buyers able to fully reap the benefits of an integrated energy market.
- These benefits rely on the fact that, among other things, market participants cannot be allowed to engage in illegal activities such as market manipulation or insider trading on both a national and international level.
- International cooperation in competition policy should follow the level of market integration. Competition policy on the wholesale market should therefore be executed internationally.
- The integration of markets leads to a more efficient utilization of available production and network capacity.
- Increased competition on the wholesale market leads to lower wholesale energy prices which, if the retail markets are competitive enough, leads to lower prices for consumers.
- Finally, a large number of producers in an integrated market will help security of supply.

#### ***Sustainability and market forces***

While striving for competition within the energy market, long term effects of this competition on the sustainability of energy usage might be overlooked. Competition is however also the major driving force behind innovation in energy usage. This causes a challenge for competition policy:



- Competition policy should encourage innovation in energy usage, while keeping an eye on the long term developments of existing energy usage.
- The sustainability problem is one which the market is not expected to solve. The solutions to this problem are however still to be found in competition principles.
- Increasingly competitive markets in emission credits or rights can be created in order to foster the use of innovative ways of energy usage.

In developing a sustainable competition policy within the energy market, the special characteristics of the market should be taken into account:

### **Network effects**

Network effects of interest arise because of physical limits to competition within markets. In the energy sector generation and retailing are most likely to be competitive, but monopolies tend to remain in the transmission and distribution sectors of the business and in long distance transmission. The high costs for expansion, replacement and adjustment of the infrastructure, combined with the requirement of continued high levels of reliability of the energy networks, lead to the question of how the additional room that is offered to renewable energy sources can be kept affordable. Having effective regulation, which, on the one hand, protects buyers that are dependent on providers, and, on the other hand, enables network operators to recoup their efficient investments and services, continues to be crucial.

### **Predictability**

The increase in wind and solar energy already means that energy supply has become more unpredictable and variable. Guaranteeing security of supply will therefore make new demands on the regulation of energy markets. Variability also means that additional efforts are needed to maintain voltage quality on the grid. At the same time, network operators are faced with major investments in order to connect the new production sites and also to facilitate small-scale distributed generation. In order to guarantee equal competitive conditions in the energy markets, the increased market integration also increasingly calls for international coordination, for example for harmonizing stimulation schemes for sustainable energy.

#### **Sources:**

- Competition and welfare: The Norwegian experience, konkurransetil synhet, 2006. [http://www.konkurransetilsynet.no/iKnowBase/Content/416052/COMPETITION\\_AND\\_WELFARE.PDF](http://www.konkurransetilsynet.no/iKnowBase/Content/416052/COMPETITION_AND_WELFARE.PDF).
- Restructuring, competition and regulatory reform in the US electricity sector, Journal of economic perspectives, 1997. <http://www.jstor.org/discover/10.2307/2138188?uid=3738736&uid=2&uid=4&sid=21103374822281>.



- Network effects as infrastructure challenges facing utilities and regulators, The regulation of infrastructure in a time of transition Tenth ACCC Regulatory Conference, 2009, <https://www.accc.gov.au/system/files/Tim%20Brennan%20-%20keynote%20paper.pdf>.
- Feed in or certificates, competition or complementarity? Combining a static efficiency and a dynamic innovation perspective on the greening of the energy industry, energy policy, 2007. <http://www.sciencedirect.com/science/article/pii/S0301421506001856>.
- Market outlook, The Netherlands Authority for Consumers and Markets, 2013. <https://www.acm.nl/en/publications/publication/11305/Market-Outlook-Authority-for-Consumers-en-Markets/>.

## Competition in Healthcare – a prescription for healthy markets

Vigorous competition, both price and non-price, can have important benefits in health care. Price competition generally results in lower prices and, thus, broader access to health care products and services. Non-price competition can promote higher quality and encourage innovation.

More concretely, competition can result in new and improved drugs, cheaper generic alternatives to branded drugs, treatments with less pain and fewer side effects, and treatments offered in a manner and location consumers desire.

Vigorous competition can be unpleasant for competitors, however. Indeed, competition can be ruthless – a circumstance that can be unsettling for providers who prefer to focus on the importance of trust and compassion in the delivery of health care services. Yet, the incentives and pressures of competition can inspire health care providers to do a better job and create better outcomes for consumers. Vigorous competition can promote the delivery of high quality, cost-effective health care and advances in its provision, and vigorous antitrust enforcement helps protect competition.

Price regulation, even if indirect, can distort provider responses to consumer demand and restrict consumer access to health care services. Regulatory rules also can reduce the rewards from innovation and sometimes create perverse incentives, rewarding inefficient conduct and poor results. Restrictions on entry and extensive regulation of other aspects of provider behavior and organizational form can bar new entrants and hinder the development of new forms of competition.

### Sources:

- DOJ & FTC Report on Improving Healthcare: A dose of Competition 2004, available on the FTC's website at: <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>. The Report addresses two basic questions. First, what is the current role of competition in health care, and how can it be enhanced to increase consumer welfare? Second, how



has, and how should, antitrust enforcement work to protect existing and potential competition in health care? Commentators have extensively analyzed the application of competition and antitrust law to health care. In general, these commentators have concluded that increased competition has empowered consumers, lowered prices, increased quality, and made health care more accessible. DOJ & FTC Report at 41 n.200 (2004). The agendas, transcripts, presentations, and written comments from each session of the joint hearings, are available at [www.ftc.gov/ogc/healthcarehearings/index.htm](http://www.ftc.gov/ogc/healthcarehearings/index.htm).

- Antitrust enforcement improves health care by preventing or stopping anticompetitive agreements to raise prices, and fostering competition that spurs innovation, improves quality, and expands consumers' access to care. Chief among the anticompetitive tactics targeted by the FTC are "pay-for-delay" drug patent settlements, in which a branded drug company compensates a generic competitor for not bringing its lower-cost drug to market for a certain period of time. This tactic delays patient access to less-expensive generic drugs, and the FTC has estimated that it costs U.S. consumers \$3.5 billion a year. <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.
- In February 2013, the Chamber of Deputies in Mexico approved a reform to the General Law of Health, which will require from physicians to include in their prescriptions the generic denomination of drugs, allowing consumers to choose between patented drugs and generics, thus favoring competition; this reform was following the FCC's previous recommendation and was sent to the Senate for further approval. <http://www.oecd.org/daf/competition/45048775.pdf>.

**Antitrust enforcement can improve health care in two ways. First, by preventing or stopping anticompetitive agreements to raise prices, antitrust enforcement saves money that consumers, employers, and governments otherwise would spend on health care.**

- In Mexico, a study done by the FCC in 2006 revealed that the IMSS, the third largest government purchaser of goods and services in Mexico and the largest single public purchaser of pharmaceuticals and other medical supplies, paid between 12 to 36% higher prices than what could have been obtained in a competitive environment. <http://www.oecd.org/mexico/fightingagainstbidriggingoecd-cfc-imssco-operation.htm>.
- In 2011, the IMSS implemented the Guidelines drawn by the OECD to tackle bid rigging. The OECD worked all through 2011 with the IMSS to improve rules, procedures and training of Mexico's procurement officials. [http://imco.org.mx/wp-content/uploads/2012/1/case\\_imss\\_final\\_dic\\_16.pdf](http://imco.org.mx/wp-content/uploads/2012/1/case_imss_final_dic_16.pdf).
- The adoption of the Guidelines by the IMSS was a key milestone in Mexico's fight against bid rigging in public procurement, which contributed to allow for increased



competition in public procurement processes of IMSS in order to promote efficiency on behalf of its beneficiaries. [http://unctad.org/meetings/en/Contribution/ciclp2012\\_RT\\_PP\\_Mexico\\_en.pdf](http://unctad.org/meetings/en/Contribution/ciclp2012_RT_PP_Mexico_en.pdf).

- According to the World Bank, the procurement of medicines has been particularly prone to weak governance, which, in turn contributes to stock-outs, wastage, poor quality, and cost inflation (World Bank 2011). In a similar vein, a medicine pricing study which is cited in the 2010 World Health Report found that, in Africa, European and Western Pacific Regions, governments paid an unnecessary surcharge of, on average, 34-44% for medicines (see Cameron et al. 2009, cited in WHO 2010). Moreover, in many cases, the failures of procurement systems to deliver good results relate specifically to a lack of effective competition, whether due to unnecessarily restrictive approaches to bidder selection and screening or to explicit collusion among suppliers (see Box 2). Such deficiencies in public procurement practices should be acknowledged as a significant failure of public health systems, and of governments' efforts to improve the welfare of citizens. [http://www.wto.org/english/res\\_e/reser\\_e/ersd201302\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf).

#### **Second, competition spurs innovation that improves care and expands access.**

- The elimination of barriers to competition, including to international competition, in the health sector clearly has the potential to improve the competitive nature and efficiency of the public health procurement market, as well as the access to a broader range of medical technology by allowing more suppliers to bid on public health procurement contracts. The foregoing is corroborated by a recent study by the Swedish National Board of Trade, which provides an example of how important transnational economic activity can be to public health care services. The study finds that open borders appear as important for quality and efficiency of the health care sector as for any other field in the economy. Borders that are open to competition in government procurement spur competition in markets where few firms are active, improve the quality of health care, and help authorities ensure that taxpayers' money is spent in the most efficient way (Kommerskollegium 2011) [http://www.wto.org/english/res\\_e/reser\\_e/ersd201302\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf).
- Some have suggested that the antitrust laws act as barriers to health care provider collaborations that could lower costs and improve quality. That is simply wrong. Antitrust standards distinguish between price fixing by health care providers, which is likely to increase health care costs, and effective clinical integration among health care providers that has the potential to achieve cost savings and improve health outcomes. In order to assist in making that distinction clear, the US FTC has provided extensive guidance on how health care providers can collaborate in ways consistent with the antitrust laws, precisely because such collaborations have the potential to reduce costs and improve quality. <http://www.ftc.gov/bc/healthcare/industryguide/index.htm>.



- Prepared Statement of The Federal Trade Commission Before the Committee On The Judiciary United States House Of Representatives Subcommittee On Courts And Competition Policy On Antitrust Enforcement in the Health Care Industry December 1, 2010, available at <http://www.ftc.gov/os/testimony/101201antitrusthealthcare.pdf>.

## Restrictions to competition in professions may unnecessarily harm consumers

Like all consumers, consumers of professional services benefit from competition, and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality. Professional/non-professional competition benefits consumers, particularly when there is no evidence that consumers have been harmed by non-professional service providers.

Professionals (or licensed professionals) may try to prevent competition from non-professionals through the adoption of excessively broad restrictions by the government. Some proposals may be overt attempts by professionals to eliminate competition from alternative service providers, while others may be good faith efforts to protect consumers that have not been tailored narrowly enough to avoid unnecessary harm to competition.

Restrictions on competition in the professions may be in the public interest if they are justified by a valid need – such as preventing significant consumer harm from the provision of services by providers who lack required knowledge and training – and are narrowly drawn to minimize their anticompetitive impact.

Professional restrictions based on required knowledge, training, or skills can protect consumers. However, consumers also benefit when non-professionals compete to provide services that do not require the requisite knowledge, training, or skills. Allowing non-professionals to provide such services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and the degree of assurance about the quality of the service.

Professional bodies have, since their creation, presented problems from a competition perspective. This is because of some basic characteristics of professions:

- They establish entry barriers to an area of work under the auspices of consumer protection
- They work in services with significant information asymmetries: consumers are rarely able to judge the value or quality of a service provided by a professional
- Many important areas of work are regulated, to some degree, by professional groups from healthcare to the law.

Many professions also have a very long history of self-regulation and indeed many self-regulatory bodies have been in existence in some form for centuries. The role of the Guild system in the Middle Ages in Europe provided an early indication of the importance of professions and the struggles that other authorities would have in regulating them in the wider public interest. This is because while professional groups may profess to promote the public interest they are also there to act in a similar way as a trades union – to protect members and enhance their earning opportunities.



### Sources:

There have been a number of **general studies** of professional services and their interaction with competition policy.

- In Self-regulated professions, **Balancing competition and regulation**, **Competition Bureau, 2007**, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html> the Canadian Competition Bureau found that '(g)iven a considerable body of evidence that shows that reducing regulation improves competition and, as a result, productivity, it is reasonable to ask whether and how professional services could be less regulated in Canada.'
- The **OECD, Competition in Professional Services, 2000**, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=318763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=318763) found that '(t)he regulation of the quality of professional services has, for a long time, created headaches for competition policy-makers and law enforcers. Where markets fail to provide adequate quality levels and where the consequences of poor quality are severe, policymakers typically step in to regulate quality of professional services, typically through licensing, standard-setting and quality monitoring. These functions are often delegated to the profession itself, which has an incentive to limit entry into the profession to restrict competition. This roundtable discussed competition policy problems raised by the self-regulation of professional service providers and the means for dealing with them, from law enforcement to advocacy. It also describes how changes in international regulation can promote competition by increasing the possibility of trade across borders for professional business services such as accounting, law and engineering.' More support for this approach is found in **Competition in professions, A report by the Director General of Fair Trading, Office of Fair Trading, March 2001, OFT328**, [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared\\_oftr/reports/professional\\_bodies/of328.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared_oftr/reports/professional_bodies/of328.pdf).

### Studies in particular professional service sectors.

There have been a number of more specific studies targeted at the competition issues in particular professional areas. For instance:

- In healthcare **OECD, Policy Roundtables, Enhancing Beneficial Competition in the Health Professions, 2004**, <http://www.oecd.org/regreform/sectors/35910986.pdf> surveyed the work of competition authorities in the healthcare field, across a range of professions.
- **OECD, Policy Roundtables, Competitive Restrictions in Legal Professions, 2007**, <http://www.oecd.org/regreform/sectors/40080343.pdf> debated competitive restrictions in legal professions; while the **European Commission Project Regarding Competition in Professional Services** [http://www.personal.psu.edu/faculty/l/s/lst3/Terry\\_EU\\_competition.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/Terry_EU_competition.pdf) took the view that '(l)awyer regulation has been under



assault. Antitrust officials around the world have taken aim at the regulatory systems of the legal profession. This includes European antitrust officials, who have concluded that some lawyer regulators are affected by the “weight of tradition,” “fail to see how things can be done differently,” and do not regulate in the public interest.’

- The OECD also took a close look at **Competition and Regulation in Auditing and Related Professions 2009** <http://www.oecd.org/daf/competition/44284186.pdf>; arguing that ‘(a)ccounting professions provide key services for ensuring the smooth operation of market economies. Maintaining access to quality accounting work at a reasonable price is crucial for increasing transparency of publicly held companies. While many practices may serve to protect consumers who are not otherwise able to assess the company accounts, there appear to be many areas in which there is restricted competition, particularly as a result of a string of mergers between large accounting firms. Accounting firms often face conflicts of interest arising from the multiple business segments in which they operate. The major policy challenge is to identify and remove the restrictions which are unnecessary or disproportionate to achieve public interest goals. Competition law and advocacy can play a major role in this respect, either by challenging anti-competitive activity as illegal or advocating changes to laws and regulations.’

## **Competition in telecommunications markets underlies competitive economies**

The digital and communications revolution shows no signs of slowing down. Consumers increasingly use digital services not just for their internet (including mobile internet) requirements, but also for their television and telephony needs. By taking advantage increasingly of social media, often on mobile platforms, consumers have greater access to information about products and services. At the same time consumers are increasingly sharing experiences of products and services across fora. This makes online safety and protection of personal information of growing importance for consumers.

Having fast and high-quality broadband internet is rapidly becoming a prerequisite for a competitive, innovative and sustainable knowledge economy. However, the telecommunications market has a number of structural characteristics that dampen competition; network effects, costs for expansion, replacement and adjustment of the telecom networks are high, leading to restricted market access.

One route around these problems is the provision of unbundled access to the infrastructure of incumbents, giving competitors a chance to access and remain active in the telecom market. Widening access to multiple providers means that:

- Consumers benefit from competition among different providers by being able to select services from many providers of broadband internet access;
- Consumers get more choices through new investments, lower prices, and the introduction of new services;
- The improved competition eventually reduces excess capacity that had been built during market access restrictions.



### **Net neutrality**

Having an open Internet system is centrally important for a number of less directly economic factors. For example, freedom of information for citizens and consumers is more likely to drive the development of innovative services than limited or restricted information flows. Competition authorities are therefore often involved in attempts to provide rules on net neutrality: where services that are the same must be treated equally by the internet provider.

- Net neutrality rules, among other things, prohibits broadband access providers from prioritizing traffic, charging differential prices based on the priority status, imposing congestion-related charges, and adopting business models that offer exclusive content or that establish exclusive relationships with particular content providers.
- Not having such rules means that internet providers adopt economically inefficient business models and network management practices due to a lack of sufficient competition in the provision of broadband access services.
- By such market behavior, providers could create an artificial scarcity in which consumers are obliged to buy uncompetitive products.

### **Economic development**

As part process of sculpting more dynamic economies developing economics increasingly introduce market forces to the telecommunications market. This process involves both letting go of national control of information systems, but on the on the other hand creating opportunities for exponential economic growth. The positive impacts of such a move tend to be:

- Liberalization of the telecom market reduces transaction costs for both households and enterprises, facilitates job creation by private sector development, and enhances access to financial services.
- Liberalization of telecom markets hence causes a more geographically balanced distribution of wealth.
- Telecommunications liberalisation often triggers, or acts as a platform for innovation and new entrants in complementary markets.

### **Online safety**

Long gone are the days when the Internet could be viewed as a frivolous or elitist tool. It has evolved into a global communications and commerce platform that is increasingly accessible to wide cross sections of the world's populace. However, the accessibility of this resource has been accompanied by many complications and challenges. Among these challenges, and of key interest in ensuring consumers trust traders and each other online, is the security and control of personal data.

The problem of online security straddles the line between consumer, information and competition policy. Agencies need to develop rules, in conjunction with other competent agencies to ensure safety online. These include:



- Online fraud: Spam is considered a vehicle for fraud, viruses, malware, and spyware. Open access to the net increases the creation of spam and potentially increases the vulnerability of the economic system.
- Consumer education: spam is often used to target vulnerable populations often in poor social or medical conditions.

#### Sources:

- Competition assessment toolkit, OECD, 2011. <http://www.oecd.org/daf/competition/46193173.pdf>.
- Net neutrality and consumer welfare, Journal of competition law and economics, 2010. <http://jcle.oxfordjournals.org/content/6/3/497.abstract>.
- China's Telecommunications sector and the WTO: Can China conform to the telecom regulatory principles?, China in the new millennium, 1998, <http://books.google.nl/books?hl=nl&lr=&id=BIGnLYA4PtsC&oi=fnd&pg=PA193&dq=telecom+competition+china&ots=Y4Y2QfWfof&sig=q8EW8BVkGurymLInGoG-u3NTFao#v=onepage&q=telecom%20competition%20china&f=false>.
- The Benefits from Competition: some illustrative UK cases, DTI economics paper, 2004 <https://core.ac.uk/download/pdf/9633876.pdf?repositoryId=7>.
- Market outlook, The Netherlands Authority for Consumers and Markets, 2013. <https://www.acm.nl/en/publications/publication/11305/Market-Outlook-Authority-for-Consumers-en-Markets>.
- Safety and security on the Internet; Challenges and advances in Member States, World Health Organization, 2011. [http://www.who.int/goe/publications/goe\\_security\\_web.pdf](http://www.who.int/goe/publications/goe_security_web.pdf).



## **SECTION 3: CASE STUDIES**



The following case studies illustrate how certain competition authorities use different advocacy instruments to influence the decisions of policymakers across various sectors and within the constraints of different agency-Government relationships. These examples also illustrate how competition benefits can facilitate the realisation of policy objectives such as economic growth, productivity and industrial policy.

## 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.

## 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.

## **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.

## **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.



## 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 were 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.