

Competition Policy Implementation Working Group

Subgroup 3 Competition Advocacy in Regulated Sectors

- Competition Advocacy Review -
Case Studies on Regulated Sectors

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I – Introduction

Sector regulation presents specific challenges in competition policy. The role of antitrust and sector regulation for regulated industries can be complementary but at times results in tension. Regulation seeks to identify a problem before it happens and creates an administrative process to regulate behaviour ex-ante. Competition policy/antitrust generally evaluates industries ex-post within the context of marketplace conditions.

In many jurisdictions, a number of sectors have transitioned or are transitioning from tradition, state-dominated regulation to competition-driven principles. It is during this transition period in which the competition agencies should be particularly concerned because of market power concerns that might forestall true competition beyond this phase. Many developing countries have a strong legacy of state interventionism in the economy, including state ownership of regulated industries. Some of these industries have been fully or partially privatised while others remain under state ownership. In a number of countries the privatisations have not come hand-in-hand with liberalization of the market that would promote open competition. In markets that continue to have state owned enterprises (SOEs), entrants are faced with a situation where the government serves as both regulator and market participant.

By advocating before sector regulators, independent competition agencies can play a role in preventing regulation from being destructive to competition and the overall goal of promoting consumer welfare¹. A common way to institutionalize competition advocacy is for the competition agency to become involved in competition-related regulatory proceedings. The competition agency is probably well suited to understand the economic impact of regulation on competition and therefore is best positioned to provide such guidance to other agencies. The issues raised in many regulatory proceedings tend to involve the same types of questions that the competition agency can confront, e.g., whether competition is feasible, whether an industry is naturally monopolistic, whether cross subsidies exist and, if so, whether they are desirable, whether economies of scale are substantial, and whether particular regulations are likely to accomplish their stated objectives. When the experience of competition agencies is combined with the industry expertise of the sectoral regulators, the outcome is likely to be positive.

As noted above, the goal of competition policy laws are designed to protect the competitive process. Competition leads to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer. Competition policy laws can also be used to counter public sector anticompetitive restraints. A country's competition agency needs to be aware of competition-related developments in regulated sectors such as energy, telecommunications, financial services and postal services as part of an effective competition advocacy program.

¹ For the purposes of this study, competition advocacy refers specifically to “the ability of the competition office to provide advice, influence and participate in government economic and regulatory policies in order to promote more competitive industry structure, firm behavior and market performance.” This definition is drawn from the World Bank website, <http://www1.worldbank.org/beext/faq/q16.htm>.

To attract investors and promote a more open and competitive environment, numerous governments have been simplifying and modernizing laws and regulations that affect regulated sectors. Sector regulators should be given the independence and authority to regulate the industry. Effective regulators, who pursue pro-competitive goals, can go a long way toward ensuring that free markets operate competitively. This can be a crucial role in societies that are still adjusting to increased competition and where the social benefits of privatization and liberalization policies are not immediately apparent.

Sometimes, however, regulation has the effect of creating barriers that can distort competition. A competition agency, through advocacy initiatives, can act to ensure that measures aimed at increasing efficiency and investments are applied in the least restrictive manner to competition.²

A previous report by the ICN notes that public regulations and rule making can hamper competition.³ It further notes that while regulatory intervention may be necessary in some sectors, such intervention may go beyond what is strictly necessary to maintain competitive markets. The competition agency must become involved in the regulatory and the rule-making process to promote consideration of competition concerns. The report's Executive Summary specifies:

*“Competition may not only be hindered by private anti-competitive conduct, such as collusion among competitors, anticompetitive mergers...but also...by public regulatory intervention and rulemaking. Such regulatory intervention may be warranted in sectors featuring extensive economies of scale or other market failures. In particular, without intervention, some markets may fail to provide minimal levels of service considered of public interest. However, regulatory intervention may go beyond what is strictly necessary and may impede competition in those sectors”.*⁴

The competition office, therefore...

*“... [M]ust also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace”.*⁵

² OECD, Regulatory Reform in Network Industries: Past Experience and Current Issues, OECD Economic Outlook, June 2000.

³ *Capacity Building and Technical Assistance: Building credible competition authorities in developing and transition economies*, ICN Working Group on Capacity Building and Competition Policy Implementation (2003).

⁴ Id., Executive Summary.

⁵ The World Bank, OECD: *A Framework for the Design and Implementation of Competition Law and Policy*, Chapter 6, at 93, 1998.

Probably one of the best ways for a competition agency to be proactive is to enhance competition advocacy activities, as the experiences in developing and developed countries have shown. Advocacy, as explained above, refers to activities conducted by the competition authority related to the promotion of a competitive environment for economic activities through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.

A successful competition advocacy effort, for example in regulatory reform, may bring about economic benefits far in excess of a single successful enforcement action, or even more than one. If that is so, then it is logical that an agency should focus significant resources on competition advocacy. Based on the responses to the 2002 ICN advocacy survey, of those countries (both developed and developing) that could identify the proportion of their resources spent on advocacy, most (62%) spent less than 20% on that activity. The remainder spent between 20% and 30%. There are various reasons for this apparent disparity. Agencies, especially in developing countries, lack the technical expertise necessary for meaningful participation in many proceedings. Administrative and regulatory matters often take a long time, and can consume vast amounts of resources. And, as in enforcement matters, an agency may in the end be unsuccessful in a given advocacy effort. The agency must, therefore, select its advocacy projects with care, with an eye toward the importance of a matter to the country's economy, the resources that participation will require and the likelihood of success.⁶

Building on the previous work of ICN in competition advocacy, this subgroup set out to learn more about the different advocacy strategies adopted by various countries and the effectiveness of these policies in the institutional arrangements in which they were implemented.

In order to better examine these mentioned aspects of the interaction between competition agencies, advocacy policies and the regulated sectors, we will proceed examining case studies, trying to depict some conclusions, where it is possible, about the different advocacy strategies adopted by various countries and the effectiveness of these policies in the institutional arrangements they were implemented.

The subgroup designed a set of questions intended to provide a description of the advocacy performed, identify the problems the sector was facing before the advocacy work, how the process was conducted and what concrete results and/or lessons can be drawn from the experience.⁷ The case studies are responses to a series of questions and the presentations of the responses are organized as such. Note that the main objective was to analyse the advocacy performed and not only to measure how successful outcome of the advocacy activity was. With respect to this approach, both successful and unsuccessful experiences are invaluable to assess the effectiveness of the advocacy work.

⁶ Clark, John W., *Competition Advocacy: Challenges for Developing Countries*, 2004.

⁷ The outline for the case studies, containing the steps to the analysis of the advocacy work can be found in Annex I of this document and at: www.internationalcompetitionnetwork.org

II – Case Studies: Advocacy in Regulated Sectors

A - Understanding the Problem

The first part of the case study was intended to identify the characteristics of the regulatory environment before the implementation of the advocacy work, in an attempt to isolate the anticompetitive problems experienced by the sectors and the main objective of the advocacy effort.

Several of the reported cases revolve around problems with previous interventionist policies. More specifically, these cases revealed that the recent regulatory problems are, to a great extent, connected to the actions of the state-owned companies recently privatized. In several cases, the privatization process was not conducted effectively, resulting in the conversion of a public monopoly into a private one. Thus, the dominant position of the state-owned enterprises (SOEs) was maintained after privatization. Even in the cases where there were not SOEs, there is clear evidence that the market was distorted (or threatened to be distorted) by various interventionist practices.

Mexico. Telecommunications was the first infrastructure sector to be liberalized in Mexico. Privatization of the telephony state monopoly, Telmex⁸ preceded the current sectoral law and so missed important competition considerations in its design. For example, Telmex was granted a concession title over the preexisting nation-wide telephony network and a six-year period of exclusivity over long distance telephony.

Between 1990 and 1995, Telmex' concession led the sector's liberalization. There was no independent sectoral regulator and the regulatory framework ruling telecommunications continued to be the 1934 Law of Means of Communication⁹.

Because key structural and regulatory decisions in this sector were designed prior to the creation of the Competition Agency, the sector has faced a number of regulatory challenges, especially regarding competition. The main allegations concern a lack of effective mechanisms to control the exercise of the incumbent's market power in the regulatory framework. Regulatory delays have favored the permanence of Telmex's market position in telephony markets.

Following the market opening, the number of competitors has increases from 1 to 21 in local telephony; from 1 to 11 in long distance services; and from 1 to 17 in satellite services provision. However, the level of effective competition in fixed and mobile telephony is still one of lowest among OECD countries: Telmex has a 75% market share in long distance

⁸ Teléfonos de México, SA. The private firm kept the name after the privatization.

⁹ This regulatory gap was partially filled with the 1995 Federal Telecommunications Law (FTL), which applies to all telecom services and networks, including wired and wireless networks and satellite communications. Nevertheless, the law was aligned with the concession previously granted to Telmex.

and 95% in fixed lines; and Telcel, a subsidiary of Telmex's group, has a 79% market share in mobile telephony.

Portugal Not only in developing countries problems with the privatisation process are to be expected. 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 is currently ensured by several private operators, including the incumbent, but, after three years of market liberalization, in terms of market share, PTG still accounts for some 90% in fixed line business and some 45% in mobile.

In the above context, the incumbent, kept contracts for telecom services and products with the Public Administration since the time it was a public monopoly, regardless of the new liberalised context. More recently, 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 to this background, the main goal of the advocacy effort was to create conditions for a 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.

Brazil. Similarly to other countries, the format of the aviation sector in Brazil was initially formulated by the Air Force, and nowadays the armed forces still play an important role in the definition of the policies for the sector. Civil aviation was idealized at that time (and it still is) as a strategic sector for the government, a great mechanism of integration of the territory. Therefore, the administration always observed carefully the development of the national aviation industry, these actions ranging from direct participation in the companies to financial support to regulation of the entire sector.

Regulatory experience in the civil aviation market was initiated in early 60's, when the government sponsored a number of conferences to discuss models of intervention in the aviation sector. The result of these meetings erected a rigid regulatory model based on the stimulus to mergers between the main air companies, strict control over the establishment of new businesses, as well as over tariffs, new routes and itineraries.

The government and the regulatory agency itself tried to artificially adequate the supply to the existing demand, endorsing a strong disincentive to competition in the civil aviation

market, seen as harmful to its stability. In essence, the regulation over the capacity of the carriers and the virtual prohibition of establishing new businesses excluded the possibility of efficient allocation of the capacity supplied, keeping the inefficient companies inside the market, and avoiding the efficient ones to expand its activities.

The aim of the advocacy work, carried out during the 90's, was to gradually abandon the existing regulatory scheme, withdrawing the participation of the State in some carriers, allowing airlines to operate freely, administrating their own capacity, seats offered, airports served and management strategies. The main objective of the Competition Authority was to deliver better services to the citizens, and at more competitive prices. The goal was to switch the focus from the airlines to the consumers.

European Union. The EU case study focused on the maritime shipping sector, with particular reference to liner conferences (arrangements between maritime carriers which involve price-fixing and supply regulation). Even though there is not a problem with state-owned enterprises, the main problems faced by the sector were related to substantial governmental interference in the activity.

There is no specific regulator for this sector, but two EU Regulations govern the application of the EU competition rules to the sector. In particular, one Council Regulation from 1986 (Regulation 4056/86) provides a “block exemption” to liner conferences, thus declaring that they do not infringe article 81 of the EU Treaty. The sector also benefits from “immunity” regarding consortium agreements between two or more vessel operating companies (Regulation 823/2000 recently amended by Regulation 611/2005).

The European Commission has been conducting a review of Regulation 4056/86, seeking to assess whether the “safe harbor” from the competition rules provided to liner conferences is still appropriate in today's market conditions. The growth in importance of operational arrangements, which do not involve price-fixing, has been accompanied by a decline in the significance of conferences. This trend has been particularly marked on the trades between the EU and the United States, largely as a consequence of Commission decisions and changes in US legislation, which have promoted individual service contracts at the expense of carriage under the conference tariff. These developments raise the question of whether reliable scheduled maritime transport services can be achieved by less restrictive means than horizontal price-fixing and capacity limitation.

Moreover, and unlike any other exemptions, the Regulation does not contain any review clause, and, as a result no comprehensive review has been carried out the last 19 years since the Regulation and the liner conference block exemption first entered into force. In comparison, all the other block exemptions are re-examined roughly every 5 years.

United States. 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. UPL statutes and regulations may be justified when excluding non-lawyers from offering a particular service when there is a clear showing that it advances an important consumer protection objective and the benefits to consumers outweigh the harms created by the reduction in competition. The general justification for excluding persons not admitted to the bar from the practice of law is the protection of the public, not protection of lawyers from competition. However, at times, state UPL provisions have also 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, or from providing certain types of services that may nominally be legal services, but that some non-lawyer professionals are equally qualified to provide, such as tax advice.¹⁰

In the past few years, 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”) have opposed state UPL regulations that would likely harm consumers by depriving them of the benefits of competition. This case study highlights two such advocacy efforts relating to proposed UPL regulations in the states of Kentucky and Rhode Island.

The UPL advocacy efforts generally involve protecting, not creating, competition. In one UPL case in Kentucky, competition existed in the provision of real estate closing services. In 1981, the Kentucky Bar Association (KBA), the state bar agency, approved an opinion that held that non-lawyers conducting a real estate closing did not engage in the unauthorized practice of law. This allowed Kentucky consumers to choose to use a non-lawyer closing agent. However, in 1997, the KBA's Unauthorized Practice of Law Committee drafted an opinion that would have prevented non-lawyers from competing with attorneys in providing real estate closing services.

In Kentucky, for 16 years prior to the 1997 UPL proposal, consumers could choose to use a non-lawyer closing agent, as the state allowed real estate mortgage lenders and title insurance companies to compete with lawyers to offer non-legal closing services. The 1997 KBA proposal threatened to eliminate the choice – and therefore the benefits of competition – that Kentucky consumers had, and to drive up the prices of real estate closings. The 1997 proposal did not contain evidence or reasoning that such action was required to protect the public.

In another UPL case in Rhode Island, the markets were similarly competitive with respect to the provision of real estate closing services. Both lawyers and non-lawyers were allowed

¹⁰ Other examples include advice to tenants by tenants associations and to home buyers by realtors about what the state's laws require, estate planning, the provision of legal information but not advice by trained lay people, the negotiation of agreements that could have a legal effect, the completion of purchase and sale agreements by real estate agents, and various forms of compliance training for corporate employees.

to provide such services. In 2002, however, 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 proposed bill prohibited lay closing services in both residential and commercial deals and purchases, refinancings, second mortgages, and other transactions.

As in Kentucky, in Rhode Island, an existing competitive market for the provision of real estate closing services was threatened by anti-competitive regulation. The antitrust agencies believed that the proposed UPL bill likely would cause Rhode Island consumers and businesses to pay more for real estate closings and could also prevent them from benefiting from competition from out-of-state and Internet lenders that could provide more convenient closing services. One industry source estimated that Rhode Islanders could pay \$200-\$500 more, if buyers must pay for their own attorneys, as well as the lender's closing lawyer.

The specific aim of the advocacy efforts in Kentucky and Rhode Island was to discourage the adoption of the proposed opinion or bill that enlarged the definition of the practice of law to prohibit non-lawyers from offering non-legal real estate closing services.

In cases where the antitrust agencies chose to voice their opinions in opposition to proposed opinions or bills, such as in Kentucky, Rhode Island, and elsewhere, the agencies believed that the proposed prohibitions would harm the public interest by eliminating the provision of real estate closings and other types of services by non-lawyers, resulting in an increase in cost to consumers that outweighed any regulatory benefits. Therefore, the agencies engaged in efforts to educate decision-makers about possible anticompetitive effects.

In these and related cases, the Justice Department and the FTC urged policy-makers to consider whether lawyer/non-lawyer competition was in the public interest. The antitrust agencies recognize that there are circumstances requiring the knowledge and skill of a person trained in the law, but nonetheless believe that consumers generally benefit from competition between lawyers and non-lawyers in the provision of many services. The agencies' advocacy efforts urge regulators to not only assess harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also to consider the benefits that accrue to consumers when lawyers and non-lawyers compete. The advocacy efforts sought both to demonstrate the harm to consumers when competition is reduced and to expose the weaknesses of the argument that UPL restrictions were needed to protect consumers at real estate closings.

B – Understanding the Advocacy

In this section, the case studies seek more information on how the advocacy work was performed, identifying which instruments were used to convince the regulators and how they were applied. Another important aspect is an examination of how much transparency there was while the process was carried out.

México. The main advocacy efforts, designed to promote competition in the Mexican telecomm sector, have included: (a) issuing press releases on controversial decisions; (b)

organizing specialized seminars on telecomm for policy makers and entrepreneurial groups; (c) issuing opinions on projects aimed at amending administrative procedures and the sector's regulatory framework, as well as proceedings that have been proposed either by the executive or legislative branches; and (d) actively participating in national and international forums.

Unfortunately, the Federal Competition Commission (CFC) is experiencing difficulties with the work on advocacy due to institutional arrangements and Telmex's consolidated dominant position. The last formal advocacy intervention with the legislative branch was between 2002 and 2003. The *Parliamentary Conference on Telecommunications*¹¹ requested CFC participation in the process of drafting a bill for a new telecommunications law to replace the current one; this process was suspended. Differences of opinion in matters of competition arose regarding the division of regulatory powers to: (1) sanction anticompetitive practices in the sector; (2) regulate agents with substantial market power; and (3) to determine the degree of the Commission's intervention in the concession granting process. The CFC's position was that it should retain regulatory powers for (1); inter-institutional collaboration should be strengthened for (2); and that its powers of intervention should be broadened regarding (3). Detractors of this position advocated for the granting all the these powers to a strengthened Cofetel.

Other advocacy actions undertaken in the sector are related to the executive branch, where the CFC has been more active. Two relevant examples are briefly described below.

- In 2004, the SCT submitted a proposal to amend the executive decree that created Cofetel, as well as the internal regulation for both regulators to the agency in charge of assessing regulatory impact, Cofemer. The SCT sought to reassign powers and responsibilities with Cofetel, strengthen Cofetel's institutional design, broaden Cofetel's powers regarding permits controls, and allow the agency to intervene in the design of the general regulatory framework. However, the proposal diminished Cofetel's role in issuing opinions on concession allocations and public tenders to allocate spectrum and satellite orbits. During Cofemer's public consultation process, the CFC issued an opinion recommending that Cofetel's powers to intervene in allocating spectrum and orbits and other institutional features be strengthened.
- In 2004, the CFC also issued a favorable opinion regarding Cofetel's project to reduce entry barriers for cable and microwave networks with the object of leasing capacity for transporting telephony signals.

The first project has many detractors and the latter many supporters, nevertheless neither has been approved.

Portugal. The Competition body used a number of advocacy tools to convince regulators. Firstly, outreach efforts were pursued towards increasing awareness of policy – and opinion – makers as well as consumers at large.

¹¹ An *ad hoc* forum for Congress members, policymakers and sectoral representatives to discuss options aimed at strengthening the FTL and Cofetel.

Secondly, strategic support was provided by the Portuguese Innovation and Knowledge Society Unit (UMIC) a very high profile initiative promoting a wider use of information technology. UMIC reports directly to the Presidency of the Council of Ministers. UMIC has a keen interest in greater competition and lower prices of telecom services, since these would promote innovation and a greater usage of telecom services. To this extent, the objectives of UMIC and of the Competition Authority are interconnected.

However, the main instrument used by the Competition Authority was a Recommendation put forward to the Government. 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. It has been estimated that these savings would amount to up to 25% of the public telecom budget. The Minister is also responsible for public procurement legislation at large, and specifically for the one 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. So, 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 has studied beforehand the market structure, the demand, and the amount and type of telecom contracts generated by the Public Administration. It has also 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 has been carried out through the Media, including press and television. Simultaneously, the Competition Authority formally published the Recommendation in its website. This website is highly visited, with a monthly average of 8,000 hits in 2004. 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. The Government and the Authority had what we may call a "good press", when the decree-law, based on the Recommendation, was approved.

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.

The advocacy work was received with enthusiasm by the rivals to the incumbent. The incumbent did not react, formally, to the Recommendation, but market watchers have highlighted the risk of its losing of a captive market. The Sector Regulator (ANACOM) was not formally involved since this was mainly an issue of competition policy.

Brazil. The deregulation of air services in the country took a decade to be implemented due to the conservative position of the Air Force. In 1991, air transportation in Brazil started to undergo a careful process of reformulating the strict regulatory model, which had guided the sectorial policies for three decades. For the first time in the national aviation history, the focus of the government was not on the financial situation of the companies, but on the welfare of the consumers.

In collaboration with the Competition Authorities, the Air Force, responsible for issuing the rules for the sector, started to structure a measured reduction of the existing regulation. A system of gradual and monitored liberalization of the domestic airfares was implemented. In 1991 the carriers were allowed to operate its fares differently from the tariff established by the regulatory agency (DAC), by means of a price interval of 32% higher and 50% lower to the indicated fare. In 1998, the companies were allowed to give discounts of 65% on the fare established by the regulatory agency.

In 2001, the cooperation between the Competition Authority and the Ministry of Defense became even stronger. By this time the Competition Authority issued a proposal of an amplified deregulation. The proposal was based in a number of studies carried out by the Competition Authority and by NGAs. Those studies advocated that the market was strong enough to operate without restraints and that the companies could be allowed to determine freely their fares, operating lines and seats supplied. The plan included a couple of phases, initially setting free all the operations between the main airports of the country.

The close monitoring of the results would allow the government to proceed to the next phase, deregulating businesses in all the airports. The process also included opening of the market to new businesses, of both regular and non-regular air transportation; exclusion of the distinctions between regional and national carriers, as well as restrictions to operate on the main lines and airports (between Rio de Janeiro, São Paulo, Belo Horizonte and Brasília); less strict parameters for the concessions of new lines and itineraries; designation of other companies to explore the international services (monopoly at this point); incentive to the establishment of charter enterprises. Only the formal operation of the airports, allocation of slots and gates, and safety inspections were to be kept under strict control of the authorities.

The Competition Authority's proposal was initially received with skepticism in the Air Force. Nevertheless, the advocacy work carried out in other branches, particularly in the National Council for Civil Aviation (CONAC), composed by a number of Ministries and responsible for issuing the policy guidelines of the sector, helped to make Air Force standstill position more malleable. The constant links with the media and the divulgement of the agency studies on the web site and on seminars helped building awareness about the inefficiencies of the sector.

After several discussions between the Ministries in the CONAC, the proposal was largely approved and, with the success of deregulation between the main airports, the liberalization was soon extended to rest of the country. Competition Authorities were then responsible for conceiving the steps of this liberalization, as well as focusing its activities in any attempt of the airlines to act cooperatively in terms of conducts against competition (cartels, dumping). Observe that none of the instruments used to convince regulators were institutional tools. That means that the Competition Authority was not required or specifically authorized by law to offer remarks on the sector. This probably has caused the competition body to spend much more time and effort trying to create an understanding about the problems the sector was actually facing.

What must be highlighted is the adjustment of the approach of the regulatory agency and of some sections inside the armed forces. For the first time these institutions were recognizing that competition allow the economy, including the aviation sector, to better allocate its resources, offering the consumers better products, at lower prices and ensuring more efficiency for the whole system.

European Union. In a general approach, the European Commission has the institutional power to publish Communications and White Papers, and to propose legislation to the EU Council.

Concerning the maritime transport (liner conferences), it was agreed with the Member States that the review would be a three step process, consisting of: 1) fact finding, 2) a Commission paper and 3) a proposal for legislation. The review process started in March 2003, with the publication of a consultation paper. A total of 36 submissions were received, from providers of liner shipping services (carriers), transport users (shippers and freight forwarders), Member States, consumer associations and others. Following a public hearing that took place in December 2003, DG Competition set out the outcome of the consultation process and its preliminary analysis in a Discussion paper. The Discussion Paper served as a basis for a discussion with the Member States in May 2004. In October 2004 a White Paper was published by the Commission, to which 51 replies were received. The third phase of the review, a legislative proposal, has not yet begun.

The EU member states agreed on the framework for the review (as indicated above under question 2.1); they have been kept constantly informed of the different steps in taken and have had several opportunities to comment..

Carriers, in the form of the European Liners Affairs Association (ELAA) have presented to the Commission a proposal for a new “regulatory structure” for liner shipping services operating to and from the EU, which it believes could replace Regulation 4056/86. The proposal does not refer to price fixing but instead envisages the setting up of an information exchange system between competing liner shipping lines.

Shippers have unsurprisingly been advocates of reform to the liner shipping sector, and the removal of any antitrust exemptions that may apply. Other interested parties such as consumer associations have also supported the need for a repeal of the block exemption.

While the Commission has not formed a definitive position on the ELAA proposal, it will examine it carefully in the light of the principles governing the application of articles 81.1 and 81.3 of the EC Treaty..

In January the European Commission published a tender for a impact assessment study on the abolition of the conference block exemption and its replacement with an exchange of information system, as proposed by industry. The results of the study are expected in summer 2005. In March 2003 the Commission had relied on a team of economists from Erasmus University Rotterdam to assist in processing the replies to the consultation paper.

The entire review has been conducted in a public and transparent manner, with open invitations to interested parties to comment on the Commission's consultation paper of March 2003 and its White paper of October 2004. The third party comments have been essential in helping the Commission to form a view, and adding legitimacy to the exercise.

All documents produced by the Commission in the course of the review, the comments from third parties referred to below, are available on the web at: <http://europa.eu.int/comm/competition/antitrust/legislation/maritime/>.

United States. The two primary advocacy instruments used to convey the agencies' arguments on UPL issues are *letters* addressed to the bar association or legislature and *legal briefs* (called *amicus curiae* briefs because the agency is not a party to the case before a state court). Both are often announced by a third instrument: a *press release* that summarizes the facts and arguments to the public, at times attracting news media attention in the local jurisdiction. While the letters and briefs contain similar arguments, briefs are more formally structured to match the rules of the court, containing relevant cites to past cases in the jurisdiction.

The cases discussed here involve the use of the three instruments. 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.

Letters addressed to regulatory decision makers, legal briefs before courts, and press releases to the general public are all institutional advocacy tools commonly used by the antitrust agencies. Such tools also include formal comments of various forms, whether required or allowed by statute or at the request of the regulator; and speeches given by agency officials. In addition, both agencies advocate for competition through participation in state and federal legislative and regulatory fora as in the UPL cases. The agencies also participate in judicial fora, providing legal briefs as *amicus curiae*, especially when their participation can help remove anti-competitive regulations, when substantial questions of antitrust law are likely to be debated, or when because of special knowledge or experience, the agency can add a different perspective to the deliberations. The agencies' advocacy programs provide economic analysis and other informed guidance to help policymakers better understand the impact of their decisions in creating and maintaining competitive

markets. Whether formal comments, letters, or legal briefs, each tool is similar in that it is addressed to the decision makers with a clear pro-competitive message concerning the regulation at issue.

In both the Kentucky and Rhode Island instances, the agencies advocated against a proposed measure. On both occasions, the advocacy appears to have helped convince the body considering the measure to abandon it. 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. However, while opponents of the regulations and those that were undecided as to the merits of the regulations may have welcomed the agencies' views at the time, in both instances, proponents of the regulation later re-initiated similar proposals and continued to push for their approval.

In 1999, the KBA considered, and then adopted, a revised version of the 1997 opinion that proposed to ban non-lawyers from conducting closings for real estate sales. Under Kentucky Supreme Court rules, several aggrieved parties, including an association of title companies, challenged the KBA opinion in a lawsuit before the court. The Justice Department submitted a legal brief, as *amicus curiae*, in support of the title association opposing the opinion. The Supreme Court vacated the opinion and ruled that non-lawyers may provide non-legal real estate closing services in accordance with the practice established in 1981.

In 2003, the Rhode Island legislature again considered two bills that were very similar to the 2002 proposal that would have restrained competition between lawyers and non-lawyers for real estate closings. The antitrust agencies sent another letter to the legislature while it considered the new bills. As in 2002, the legislature did not pass the proposed bills.

The competition agencies use a variety of instruments to give transparency to the ongoing work. Generally, the agencies' UPL advocacy letters are published on the agencies' websites and announced by a press release. In the case of Rhode Island, the 2003 Letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (March 28, 2003 and June 30, 2003), were published on the Justice Department's website.¹² The FTC and the Justice Department published the 2003 Letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 28, 2003), as well as the joint 2002 letter (Mar. 29, 2002).¹³ The agencies also issued press releases with each letter, summarizing the facts and their arguments.¹⁴ Similarly, in the Kentucky case, the letters to the KBA and the *amicus curiae* brief were made available on the Justice Department's

¹² These letters are available at: http://www.usdoj.gov/atr/public/press_releases/2003/201130.htm#63003 and http://www.usdoj.gov/atr/public/press_releases/2003/200899.htm#1.

¹³ The 2002 letter is available at <http://www.usdoj.gov/atr/public/comments/10905.htm>

¹⁴ See, for example, the FTC's press release of April 1, 2003 is available at: <http://www.ftc.gov/opa/2003/04/riupl.htm>.

website, and press releases were issued.¹⁵ In some cases, press releases on the agencies' website have attracted media attention in the local jurisdiction, such as local newspaper stories.

The agencies tried to advocate before all the parties involved. There are four primary actors involved in regulation of the legal profession: state bar associations (private organizations of lawyers, not state agencies); state bar agencies (which formulate rules for court approval); state legislatures (which pass laws defining the profession of law); and state courts (often the supreme, or highest, courts of each state). In the case of Kentucky, the principal recipients of the advocacy initiative were the bar association (which initiated the regulation) and after that the Kentucky Supreme Court (which had authority to rule on the regulation). In Rhode Island, the efforts were directed at the state legislature, which had the power to enact the regulation into law. All of these actors can be involved in UPL advocacy initiatives. The antitrust agencies also seek to involve the public, with press releases or other widespread media.

Sectoral studies were also used to support the advocacy work. The Kentucky letters and amicus curiae brief and the Rhode Island letters all cited evidence from studies in other jurisdictions that suggest that the use of non-lawyers in various states provides a lower cost alternative for consumers.

The UPL advocacy efforts seek to explain that such restrictions force consumers who would not otherwise hire a lawyer to do so; thus businesses and individuals that rely on non-lawyers for advice and information related to real estate closing services and other types of services would be required to hire attorneys instead. Since the cost of retaining an attorney for those same services is often higher, this is a demonstrable harm to consumers in the form of higher costs. A 1996 study conducted in Virginia, and cited in several of the joint Justice Department/FTC letters and briefs, found that non-lawyer real estate closings were substantially less expensive than attorney closings. The average closing costs including title examination were \$451 for lawyers versus \$272 when non-lawyers were used. The study, and joint Justice Department/FTC advocacy efforts, helped persuade the Virginia legislature to reject a proposed law that would have barred non-lawyer closing agents but instead pass a statute that allows consumers to choose non-lawyers who are regulated through licensure and other means.

Another consequence the letters identify is that by eliminating competition from non-lawyers, UPL restrictions likely increase the price of lawyers' services because the availability of alternative, lower-cost non-lawyer service providers will no longer be a threat. Even consumers who would otherwise choose a lawyer over a non-lawyer would likely pay higher prices if the proposed rule were adopted. In several letters, the agencies have cited findings by the New Jersey Supreme Court that real estate closing fees were

¹⁵ Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>; and letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at <http://www.usdoj.gov/atr/public/comments/comments.htm>

much lower in southern New Jersey whether or not the transaction included a lawyer, where non-lawyer settlements were commonplace, than in the northern part of the state where lawyers conducted almost all settlements. South New Jersey buyers unrepresented by counsel paid no closing costs, while unrepresented sellers paid about \$90; buyers unrepresented by counsel throughout the entire transaction, including closing, paid on average \$650, while sellers paid \$350. North New Jersey buyers represented by counsel paid on average \$1,000, and sellers \$750. In *Re Opinion No. 26*, 654 A.2d at 1349.

Another argument the agencies frequently make in UPL advocacy letters is the lack of studies or evidence offered by supporters as justifications for the restrictions. Often, the advocates for the restriction have not provided any factual evidence demonstrating that consumers are actually hurt by the availability of non-lawyer real estate services, undercutting the professed consumer protection arguments in favor of the UPL restriction. The antitrust agency letters argue that other states and academics who have examined the issue have routinely failed to find evidence that allowing non-attorneys to perform real estate settlement functions results in consumer harm. One study cited in the letters compared five states where non-lawyers provide non-legal real estate services with five states that prohibit non-lawyer provision of such services. The study's goal was to determine "whether members of the public suffer actual harm from lay provision of real estate settlement services." The author found "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."¹⁶

C – Understanding the Results

Mexico. Following the market opening, the number of competitors has increased from 1 to 21 in local telephony; from 1 to 11 in long distance services; and from 1 to 17 in satellite services provision. However, the level of effective competition in fixed and mobile telephony is still one of lowest among OECD countries: Telmex has a 75% market share in long distance and 95% in fixed lines; and Telcel, a subsidiary of Telmex's group, has a 79% market share in mobile telephony¹⁷.

The number of leased lines has increased from 9.6 to 15.2 lines per inhabitant, but remains low compared to other OECD members.

Since competition has been introduced, local, mobile, long distance and international rates have fallen, but they are still high in comparison to other countries. Mexico, for example, consistently ranks among the five most expensive OECD countries in fixed and mobile telephone services.

¹⁶ Joyce Palomar, *The War Between Attorneys & Lay Conveyancers Empirical Evidence Says "Cease Fire!"*, 31 Conn. L. Rev. 423, at 477 and 520 (1999), cited in the agencies' letter to Representative Paul Kujawski of the Massachusetts House of Representatives, October 6, 2004, at <http://www.usdoj.gov/atr/public/comments/205772.htm>.

¹⁷ OECD Communications Outlook (2003) and OECD Report on Regulatory Policy (2004).

Institutional structures and responsibilities pose another challenge. Although the Federal Telecommunications Law (FTL) designates the Secretariat for Transport and Telecommunications (SCT) as the authority empowered to enforce the law, it also ordered the creation -by decree- of a technically and operatively independent sectoral regulator (Cofetel) to share powers with the SCT; this ambiguous situation created a weak regulator from the outset.¹⁸ Cofetel lacked sufficient powers to face strong carriers because its powers were conferred to it through an administrative ruling rather than by law; in addition, it shared responsibilities in regulatory proceedings with the SCT, which created a favorable environment for legal challenges and delays in enforcement decisions. According to the OECD, the resulting situation is one of unclear and non-transparent regulations, enforced by one of the weakest regulators among OECD members, causing legal uncertainty for investors.¹⁹

The lack of effectiveness of key enforcement resolutions has aggravated public perception that competition policy in the sector is ineffective. To date, key enforcement actions in telecommunications are partially or fully ineffective due to legal injunctions. Moreover, there is a general perception that there is a lack of coordination between regulatory and competition authorities which has caused further legal uncertainty to regulated agents:

Between 1993 and 2003 the CFC sanctioned Telmex in 13 out of the 29 investigations it undertook in telephony markets; the majority of these investigations referred to Telmex continued delay and increased access costs to local loop. The Commission ordered the incumbent to suspend the practices and imposed fines, which have now reached 40% of the CFC's total historical fines. None of these have been paid.

In 2005, the CFC gave conditional clearance to prospective bidders to participate in the 1.9 Ghz auction, stating that any agent, be they incumbents or entrants, was capped at 35 Mhz at the 1.9 Ghz band in all regions. This cap was lower than the cap initially established by Cofetel to ensure the entrance of new players.²⁰

In 1998, the CFC confirmed a resolution whereby it had decided that Telmex had substantial market power in five telecommunications markets. As a result, Cofetel issued specific regulations for Telmex in 2000. The CFC's decision, however, was subject to several judiciary injunctions brought about by Telmex, and resulted in the suspension of the CFC's decision and of Cofetel's regulations. The CFC was forced to withdraw its 1998 resolution, while Cofetel revoked its specific resolutions in May 2002, in compliance with a judicial order. The CFC issued a new market power determination to take into account the comments of the reviewing court. However, Telmex again challenged the new resolution in court, and on May 2004, won its judiciary action. Latter that year, the CFC confirmed its declaration on competition conditions. However, the situation remains blocked and the process nowadays lasts for over 6 years.

The ineffectiveness of competition policy regarding the declaration of Telmex's dominance in the five markets has hurt the CFC. The Commission currently faces adverse public

¹⁸ The 2004 Report of the OECD's Special Group on Regulatory Policy states that In the field of telecommunications, the COFETEL is much weaker than most of its counterparts in OECD countries.

¹⁹ 2004 OECD Report on Regulatory Policy.

²⁰ The CFC was not asked to issue its opinion on the auction rules, but only to assess prospective bidders.

opinion regarding its performance with information and openly expressing on competition burdens in the sector.

At the core of current discussion on telecommunications then, is a growing need to amend the existing regulatory framework. At the center is an urgency to strengthen Cofetel by granting it independence from the SCT and establishing its creation by law. Discussions also emphasize a need to clarify the division of responsibilities between Cofetel and the CFC in controlling entry, issuing regulations to agents with substantial market power, and sanctioning monopolistic practices. However, there is no consensus on the way forward. Since 2000, 14 different proposals to amend the FTL have been brought before Congress, all of them unresolved. Needless to say, this creates further uncertainty on the regulatory framework, affects investments decisions in the sector and favors the incumbent.

Box 1. The Role played by the Competition Authority: Telecomm X Railroads

The relevance of a proactive attitude by the Competition Authority can be enlightened by the privatization of the Mexican railroad system in comparison with what happened in telecomm.

In 1996, the Railway Service Law (RSL) was enacted and was followed by the program to divest Ferrocarriles Nacionales de Mexico (FNM), the State-owned monopoly for railroads. The Federal Competition Commission (CFC) issued opinions both on the RSL as well as on the privatization program in both of its stages: market design and allocation of assets to private players.

The nation-wide rail system was regionally divided into three route-based vertically integrated companies that could each serve major urban and industrial areas and ports, and several short lines. The regional division of FNM sought a balance between: i) competition among several concession holders; ii) operational economies; iii) responsiveness from regional markets; iv) optimal number of connection points with other railroads to avoid inefficiencies and rising costs; and v) economic feasibility for investors.

The resulting market structure promoted intra-modal competition through the following sources: 1) main consumption and cargo nodes are served by two or more carriers; 2) competing cargo nodes have access to competing railroads (e.g. The two most important cargo ports on the Pacific Coast are served by different railroads); 3) the Mexico Valley Terminal, the main cargo node in the system and where all railroads converge, is jointly owned by the three trunk carriers and the government; and 4) access among concessionaries is mandatory.

To maintain a non-stitched system operating, the regulatory framework includes access regulations to promote mandatory and voluntary interconnection and requires licensing of rail facilities to competitors to promote intramodal competition. Additionally, the law confers a mediator role to the sectoral regulator in order to solve occasional carrier disputes.

The rights to use rail facilities and to provide services were granted through a public bidding process with the concession title going to the highest bid. Concession titles for each railroad were awarded for 50-year periods, extendible for a similar period under certain conditions. Each concession also allows its holder, if needed, to build new lines after receiving authorization from the government.

The restructuring in the railroad system has been relatively successful, as shown by its productivity growth. The share of traffic lost to road freight transport, for example, was restored, and the sector's overall performance is positive as measured by the quality of the service delivered to users, its current tariffs, and the elimination of its fiscal deficit. Between 1996 and 2003, railways improved their productivity and began to recover their share in the freight transport market at an average rate of 5.3%; the ratio rail to road freight transport increased from 13.3% to 17%. Likewise, transported tons increased 53%, while tons/kilometers increased 37%.

In terms of its profitability, the sector recovered from operative losses of around 9,000 million pesos per year recorded between the years 1992 and 1996, to net operative profits of 4,563 million pesos between 2002 and 2003. Those earnings are paired with significant operative improvements: a boost in productivity for personnel of 357%, for locomotives of 48%, for railway cars of 43%; fuel by 15%; and traffic density by 37%. In similar fashion, indicators related to service quality have shown significant improvements, for example, the number of consumer complaints fell by 66%, and accidents had an overall decrease of over 80%.

Source: Estrada, Ernesto (2004) "Regulación y Competencia en los Ferrocarriles Mexicanos", chapter XIII in *Competencia Económica en México*, edited by the CFC, Porrúa: Mexico DF.

Nevertheless, regulatory failures have arisen in interlinear traffic. In sum, the lack of effectiveness of sectoral regulations in resolving disputes over access conditions has given incentives for concessionaires to use terms and conditions for interconnection and car-hire services as strategic tools aimed at limiting competitor access to essential facilities while improving their own position in the market. As a result, the CFC is now investigating the effects of disagreements and strategies that limit competitor access to essential facilities. Needless to say, it is difficult for this generalized problem to be resolved through resolutions and sanctions by the Commission on case-by-case analysis.

Since 2002, the CFC has been participating in the two technical committees of the National Standards Commission in charge of issuing both of these standards. Communication between the CFC and regulator's officers –sectoral and at the standard committee- is carried out through informal channels. In general, the CFC's participation in this process has been highly collaborative and its opinions have been addressed and are reflected in the drafts.

The analysis undertaken by the Commission²¹ has revealed the strengths and weaknesses of the existent regulatory framework, so that the CFC is now focusing its advocacy efforts in raising awareness on the urgent need to adequate regulatory framework in order to: (a) define access payments; (b) ensure certainty to concessionaries; (c) effectively resolve conflicts among concession holders; and (d) ultimately encourage intra-modal competition. In all cases, the solution should contemplate the creation of a strong independent regulator to oversee the sector.

The railroad and telecomm cases offer relevant examples of successes and challenges for competition advocacy in sectors that significantly affect Mexico's competitiveness. The results of CFC's advocacy actions have been generally successful: more so in railways than in telecomm. Differences between these sectors largely depend on the timing of the CFC's involvement: in railroads the competition agency was involved at an early stage of regulatory reform while in telecommunications, the regulatory framework and institutions were established immediately after privatisation when a dominant incumbent was established. Pro-competitive regulation has enhanced productivity and innovation, which has resulted into a greater variety of services, higher quality and lower prices to consumers.

Portugal. There are 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 are 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 accepts the main recommendations of the Authority and it changes drastically the framework for all public procurement of telecom services. From now on, 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.

It is still too early to evaluate if the new regulatory framework will promote lower prices, better quality of services and a flow of investments in the sector. However, the situation is expected to progress in the medium-term, when an enhanced competition will be able to improve the consumer welfare.

²¹ It refers to conclusions reached in enforcing actions and reinforced in a technical paper (Estrada, 2004).

Brazil. The concrete results of the deregulation process in terms of welfare for the consumers were demonstrated in a number of studies carried by experts in Brazil. However, the interpretations of those effects can vary greatly, depending on the observer.

In a broad-spectrum approach, the deregulation process augmented the number of seats and flights supplied and, of course, the options and types of services to the consumers. The liberalization gave the opportunity for the enterprises to differentiate their services, promoting a great number of combinations regarding quality and prices. The introduction of competition in tariffs, and not only in quality, permitted the enlargement of the national market and better responses to different types of customers and profiles.

According to the Department for Civil Aviation (DAC) statistics, the introduction of a noninterventionist strategy contributed to significantly improve the supply of services to the general public. By the end of the decade, the number of the offered seats/km had easily doubled²², representing a growth of 11% per year, exceeding by far the expansion of the economy.

Some experts blame the deregulation for the actual crisis in the sector, linking a presumed destructive competition to the terrible financial situation of traditional airlines. The excessive number of offered seats would have led to low profits and a series of annual deficits. Nevertheless, the figures of the sector development demonstrate diverse conclusions. In fact, during the process of deregulation, the ever-increasing number of customers followed the rising amount of seats/Km. As a matter of fact, in 1992, the medium load factor was 53,1% and rose to 58% in 2002, when the sector was already in crisis.

Concerning regional air transportation, during the last decade the country witnessed a significant expansion in the number of cities supplied with air services, especially after 1995. One regional airline, TAM, became national by that time and it is the biggest carrier nowadays. Unfortunately, the crisis over the whole sector forced some companies to make a better selection of lines they were operating. As a result, a severe decrease in the amount of cities provided with air services has been noticed. At the moment the figures are at the same level of 1998.

Regarding the evolution of ticket prices in the domestic market, the process of liberalization did not promote an elevation of the tariffs, as expected since the fares were been controlled for so many years. Comparing the values of 2002 and 1996, without inflation, the fares offered a fair stability, with a slight decrease on the period. However, if converted to dollars, the values reveal a considerable decline around 51% on the fares. The competition authority was not expecting a reduction on the fares, for they were been controlled for so many years.

²² In 1991, the figures for the seats/km were about 22.560.000. By 2001, 45.313.616 seats/km had been offered. Source: DAC, www.dac.gov.br, Evolution of the air transportation.

Other relevant changes can be pointed as results of the deregulation process of the last decade:

- New companies joined the market as low cost carriers (Gol, BRA, Fly), forcing the other ones to become more efficient. Actually, one of these, Gol, is nowadays one of the biggest airlines in Brazil;
- The reduction of market share of some traditional companies was followed by the expansion of activities of new and regional ones;
- The market share of the four bigger companies grew in the period, increasing from 68,8% to 82%.

The incentive to non-regular air-services (charter flights) and the introduction of less strict tariffs, allowed the companies to bring in modern commercial strategies, which were already been used in other markets, like the American and European ones. As examples of the strategies adopted by the industry, it is of utmost importance the yield management²³, providing the airlines with the capability to optimize space allocations with a view to maximize revenues (time-sensitive business travelers and price-sensitive tourists); the restructuring of the lines and itineraries using the *hub and spoke* strategy (a system which local airports offer air transportation to a central airport where long-distance flights are available); programs of electronic reserves in the internet; selling of tickets using travel agencies; projects of code sharing and the spread of travel awards program (miles program), which became a great obstacle for new competitors to access the market.

In the end of 1997 and in 1998, an aggressive competition regarding fares and discounts between the companies took place. As a result of the economic policy the government was engaged in, which lead to an overvalued currency, the airlines were able to keep their cost structure under control and engage in great discount rates for the general public, resulting in a growing load factor, and even expanding the number of aircrafts in their fleets. The airfares even became competitive if compared with regular ground transportation in the medium to long distances. A stable and overvalued currency also lead to a great number of companies operating international flights on a daily basis, especially to the United States.

The changes in the economic policy and the adoption of a fluctuating currency in 1999, which included a great devaluation of the exchange rate, stressed the costs of the air companies and, for example, reduced the flow of Brazilian tourists to other countries. These events, associated to the high level of the debts and interests associated to them (significantly caused by the modernization and enlargement of the fleet), limited the capacity of the companies to give discounts on the rates, resulting in sudden reduction of the demand of fights by the population. This scenario lead to very negative operational results in all companies, which turned out to be a severe crisis for the sector.

The transition from a regulated regime to a competitive scenario force the enterprises to undergo structural changes, pursuing more efficient procedures, reducing costs, augmenting productivity and adjusting itself to a new pattern of competition. Usually, not all the

²³ The process, called "yield management," focus on different discounts for each flight, itinerary, time of the flight and for anticipated acquisition of tickets, reaching different types of consumers with different rates (tourists x executive). The process can increase an airline's revenue anywhere from 5 to 10 percent.

companies are successful in pursuing these objectives, some, like Eastern, Midway, Pan Am and TWA in United States are forced to exit the market. Fortunately, the deregulation process also enables other companies to join the market, bringing innovative commercial and managing strategies, stimulating the efficiency of the whole market.

The deregulation process is not responsible for the market exclusion of some airlines. The elimination of a company only turns explicit some player's inefficiency, which had been kept unrevealed by the leniency of the regulated regime.

The assertive that the deregulation, bringing new players to the market, is responsible for the financial crisis the airlines are going through, doesn't have any connection with the reality. The crisis reflects the macroeconomic slowdown of the Brazilian economy and the inability of some companies to perform all the restructuring they were requested to maintain its market share. The economic slowdown and the consequent reduction of the demand for air transportation services showed the weakness of some players, in an industry traditionally susceptible to economic cycles. In addition, peculiar events like the devaluation of the currency in 1999 (elevating costs) and the terrorist attacks in New York (reducing international demand and increasing insurance costs) contributed to the present crisis of the sector.

Unfortunately, the erroneous understanding of the crisis causes and consequences has lead the government to recently issue new regulations for the sector, restricting the discretionary power of the companies to operate in any line and itineraries. Even though the national aviation market remains at some point deregulated, the administration is one more time trying to artificially adequate supply and demand.

The recent events demonstrate that Competition Authorities actions and competition advocacy policies must be stable and permanent, in order to create a long-term culture of competition in economic and politic sectors.

European Union. As indicated, the objective of promoting a review on the maritime regulatory framework is to assess its appropriateness with respect to today's market developments. In the course of the exercise the Commission concluded that the way in which Articles 81 and 82 were applied to the sector have to be completed reviewed. Particularly, the October 2004 White paper has come the following conclusion:

“[T]here is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified. On that basis, the Commission considers proposing to repeal the present block exemption for liner shipping conferences.”

In other words, in today's market conditions the assumption that liner conferences need to fix prices and regulate capacity in order to provide price stability and reliable scheduled maritime transport services has been found to be no longer acceptable.

The Commission has not yet produced the legislative proposal with these considerations. Currently (February 2005), DG Competition is engaged in contacts with other jurisdictions worldwide to gauge their views on the appropriate application of anti-trust rules to maritime transport.

Regardless of the final outcome of the advocacy work, the exercise itself is already very useful, given that it has brought a broad-ranging public review of the sector, and has also permitted international co-ordination between jurisdictions about the appropriate application of competition rules to maritime transport. The sector itself is being stimulated to reflect on crucial issues and make constructive proposals. All these factors, jointly with independent market developments, are to bring more competition into a traditionally non-competitive sector.

United States. In the examples of Kentucky and Rhode Island, though both required follow-up advocacy, the agencies' efforts helped to achieve the desired result – the rejection of the anticompetitive regulations. The agencies' advocacy efforts in Kentucky and Rhode Island helped to discourage the adoption of anticompetitive regulations that would have ended competition between lawyers and non-lawyers for real estate closing services. The result helped to maintain competition.

In November 1997, the Board of Governors of the KBA declined to adopt the opinion. But again, in the spring of 1999, a revised version of the restriction was presented to the Board of Governors. The opinion was approved in 1999, even though there was no evidence that Kentucky consumers were substantially harmed over the 18 years when non-lawyer real estate closings were allowed. In Kentucky, after the Board of Governors approves a UPL opinion, an aggrieved party may file a motion with the Kentucky Supreme Court seeking review of the opinion. In 2000, the Justice Department asked the Supreme Court of Kentucky to reject a KBA advisory opinion that declared real estate closings performed by non-lawyers an unauthorized practice of law. The Court ruled against the KBA and rejected the proposed change to the definition of the unauthorized practice of law.

The Rhode Island House of Representatives did not enact the 2002 bill into a law. The following year, however, a similar bill was introduced into Rhode Island House of Representatives. The agencies again sent a letter in 2003 to the legislators, citing the same concerns they had with the 2002 bill. The bill went to the state Senate and the Justice Department objected again. The 2003 bill did not become law.

In at least two other instances, after advocacy efforts from the agencies, states chose to modify the initial proposals rather than reject them. Part of the advocacy effort against the adoption of anticompetitive UPL restrictions related to real estate closing is that consumers can be protected by measures that restrain competition less than a complete ban on non-lawyer settlements. In response to advocacy efforts by the antitrust agencies and others, Virginia, confronted with similar issues in 1997, adopted a statute that permits consumers to choose non-lawyer settlement providers, but requires the state to regulate them, providing safeguards such as licensure and registration. Hence, Virginia consumers continue to have the benefits of competition, including lower-cost settlements. In another example, the New Jersey Supreme Court has required written notice to consumers of the

risks involved in proceeding with a real estate transaction without an attorney. This measure permits consumers to make an informed choice about whether to use non-lawyer closing services.

However, in one example the agencies' advocacy efforts did not affect the ultimate outcome. In 2003, a committee of the State Bar of Georgia approved an advisory opinion that prevented non-lawyers from competing with lawyers to perform certain real estate closing-related functions. In Georgia, the state Supreme Court governs the practice of law, and thus has the authority to approve such advisory opinions from the State Bar concerning the definition of the practice of law in Georgia. The agencies submitted a joint competition advocacy letter to the Bar urging it not to adopt the UPL restriction. Despite the agencies' opposition, the Bar adopted the opinion. The Bar argued that consumers would not be adequately protected unless a Georgia lawyer closed a real estate transaction despite not offering any evidence that consumers in Georgia or elsewhere had been inadequately protected in non-lawyer real estate closings. The opinion was then reviewed by the Georgia Supreme Court. The agencies submitted a joint legal amicus curiae brief arguing against the anticompetitive UPL opinion. The Georgia Supreme Court ultimately implemented the new regulations.

Based upon the previously mentioned studies of competition between lawyers and non-lawyers for non-legal real estate closing services cited in the agencies' letters and briefs, there is compelling evidence that maintaining competition between the two helps promote lower prices and better quality services. Indeed, these benefits of competition are the underpinnings of the agencies' UPL advocacy efforts.

III - Final Remarks

The case studies helped identify valuable information regarding the different ways that competition agencies interact with regulators and how they go about their competition advocacy work, delivering more competition to regulated sectors and to the economy as a whole. Even though competition advocacy methods and institutional arrangements can vary significantly across jurisdictions, some observations can be extracted from the case studies that are worth noting.

Initially, the competition agencies that provided successful competition advocacy case studies appear to possess a certain level of political and financial independence, in order to implement both its advocacy and enforcement functions. Of course, no competition agency has unlimited resources, so it is necessary to prioritize both competition advocacy and law enforcement activities.

As we were able to see in the Mexican and Portuguese case studies, some economies are actually struggling with the results of privatisation. Even though governments have interest in maximising revenues in privatisation procedures, it is important that publicly owned monopolies are not converted into private ones. Therefore, the competition agency can play an important role in the privatisation process, and if the process is carried out satisfactorily,

it can deliver a more competitive market to consumers, and save future governments resources.

The Mexican and Portuguese cases also address government procurement policy. Government procurement procedures may invite collusion, corruption, or may unnecessarily favour long-time suppliers. As the case study from Portugal demonstrates, competition agencies can play an important role in advocating procurement procedures that encourage competition. These reforms can translate directly into savings for the country's citizens. Successful advocacy in this arena tends to be visible, and can therefore contribute to the enhancement of the agency's reputation.²⁴

The presented cases also dedicate special attention to the interaction between the competition agencies and the legislative branch. The institutional procedures in many countries confer the competition agency the responsibility for reviewing and commenting on proposed legislation that can affect competition. Consultation in the legislative process, either mandatory or discretionary, is a key area of competition advocacy. However, given the volume of legislations, agencies may consider ways to identify and concentrate on only those proposals that present significant competition policy issues.

Although competition law is expected to apply to most economic sectors, most, if not all, jurisdictions have exemptions, due to historic developments, and other important government interests. The European Union case study illustrates the role a competition agency can play with respect to exemptions. As explained in its case study, the European Union undertook a review of a long-standing antitrust exemption in light of current market conditions. The ongoing advocacy work by the EU in the sector has led the Commission to consider proposing to repeal the exemption. The EU case study illustrates the pro-competitive steps that an agency can take in evaluating exemptions and advocating for the removal of anti-competitive rules in regulated sectors.

The case study from Brazil is a good example of the way competition agencies can make a difference in regulatory proceedings. As the case study demonstrates, repeated informal discussions and cooperation with the regulators, coupled with a proposal for market deregulation and a public awareness campaign ultimately helped introduce competition into a heavily regulated market.

The case studies from Brazil and the United States also highlight that competition advocacy is an educational effort – the imparting of information about how competitive markets work and the benefits that result. The advocacy efforts of the Competition Authorities in Brazil took place over several years, both with the relevant regulators and the public at large. In the U.S. example, the antitrust agencies advocated before multiple parties (i.e., state bar associations, state bar agencies, state legislatures, and state courts) and also used press releases to explain the agencies' reasoning. In both the Brazil and U.S. cases, the agencies used market or sectoral studies to help support their arguments. As in Brazil, effective competition advocacy can contribute to building *credibility* for an agencies' work. An agency acquires credibility as an effective and impartial advocate for competition. For an

²⁴ Clark, John W., *Competition Advocacy: Challenges for Developing Countries*, 2004.

agency's work to be more effective, the public and private sectors; policymakers and their constituents – businesses, workers and consumers – must understand how competition benefits an economy, and have confidence in the competition agency as an advocate for sound competition policy.

Finally, it is interesting to note the wide variety of advocacy tools used in the case studies. In some jurisdictions, the views of the competition agency regarding pending legislation is binding; in other jurisdictions, competition agencies play more of a consultative role. Likewise, with respect to advocacy before regulators, some agencies have a formal role, while others rely principally (or in part) on informal consultations with regulators. However, there is no structural template that can be applied in all countries and situations. The ICN Advocacy Report evidenced both formal and informal advocacy roles for competition agencies. According to the report, formalised roles²⁵, that is, laws or regulations that require that the agency receive timely notice of relevant regulatory decisions or rulemaking and allow the agency to comment or participate in the proceedings as a matter of right are less common than the many informal methods used by agencies.²⁶ The competition agencies involved in these cases used press releases; seminars for policymakers; interviews with the media; both formal and informal recommendations to other government actors; participation in other fora, such as the courts or the legislative process; informal discussions with regulators; conducting studies of the market in question; consultation papers; and seeking input from non-governmental entities. Such a wide array of advocacy tools suggests that there is no one best example of advocacy techniques, but rather there are many ways for a competition agency to promote the benefits of competition in sectors that are subject to regulation.

²⁵ ICN Report at 58-67.

²⁶ Id. at 63.

ANNEX I

Outline for Case Studies of Competition Advocacy in the Regulated Sectors

1) Understanding the problem

- 1.1) What was the regulatory context before the advocacy work?
- 1.3) Which problems did the sector face in terms of lack of competition?
- 1.2) What was the aim of the advocacy effort?

2) Understanding the advocacy

- 2.1) What were the instruments used to convince regulators?
- 2.2) Is this advocacy instrument used an institutional tool?
- 2.3) How was the advocacy received by the parties involved? (as a threat, as an assault to their autonomy, as a good idea)
- 2.4) Did the competition agency do anything to publicize the point of view expressed to the regulators in the advocacy work? What? Did it help or not?
- 2.5) Did the competition agency advocate for the changes to other bodies than to the regulators (Congress, Ministries)
- 2.6) Did the competition agency present any technical study to support its advocacy work?

3) Understanding the results

- 3.1) Were there any concrete changes made in the regulation or in the way it was applied? Which changes?
- 3.2) How do the competition agency evaluate the result vis-a-vis what they had in mind before the advocacy work?
- 3.3) Did it promote competition in the sector?
- 3.4) Did the new regulatory framework promote lower prices, better quality of services and increasing investment in the regulated sector?
- 3.5) If not, what have failed? What could be done to remedy the failures?