

ICN Module - Competition Advocacy

MR. JOHN DAVIES: Good day. I'm John Davies from the International Law Firm of Freshfields Bruckhaus Deringer, speaking to you from London. Welcome to this ICN sponsored program on competition agency use of advocacy to advance competition interests. Although attention is most often directed at the investigation of individuals in firms for violations of competition law, it's important to recognize that restraint splashed by government can be as, or more anti-competitive than private firm activity. In some sense, governmentally imposed restraints, such things as tariffs or other barriers to import, quota systems and the like can be more effective, since they can cover wide sways of the economy and since cheating may be punished as an infraction of law.

Thus, competition advocacy with a goal of reducing or eliminating government restrictions is an exceedingly important function for a competition law enforcement agency. Changing a single government policy can be more effective in opening broad sectors of economic activity to the pressure of competition than any given enforcement action. In jurisdictions where there is a history of government management of sectors of the economy there may be vestiges of unnecessary and frankly anti-competitive restraints that are still in place. Even in broadly liberal open economies there are often protected sectors or industries often enjoying political support which result in injury to the competition marketplace and to consumers.

Private interests often seek to convince government to regulate their industries in ways that protect incumbents from unwanted competition. While businesses often complain about regulations sometimes they work to secure regulation that will insulate them from competitive pressures and regulations imposed for ostensibly positive public policy reasons. For example, to

MR. DAVIES: protect the public against substandard goods or services may be used to protect incumbents against competition. This protection creates supra competitive profits which may in turn be used to finance extensive and fierce lobbying against any change. Regulation that may not be generally objectionable is sometimes used in ways to create entry barriers to the injury of consumers. Invocation of tariffs and similar trade measures can sometimes be used to police the pricing of more efficient foreign competitors to the benefit of local industry and the injury of local consumers. Health and safety laws or labeling laws, for instance, are sometimes abused to keep new entrants from the market in the guise of protecting the public. The professions such as medicine and law may have enjoyed privileged positions that have minimized competition in the guise of needed professional regulation that only the professionals are capable of enforcing.

Oftentimes these restraints are enforced by the state. These restraints can be much more attractive because competition can be restricted in ways that may be perfectly legal. One need not risk the wrath of the competition authority and legal sanctions associated with price fixing if the would-be cartelists can convince government to impose a minimum price for a good or service and then punish cheaters for a regulatory infringement.

Unfortunately, competition advocacy oftentimes gets little or no attention at competition enforcement agencies. Several reasons may explain this phenomenon. First, it is not sexy. There is no surveillance of cartelists, no prosecution of bad actors, none of the trappings or excitement of law enforcement, second it is hard, interests embedded within government can be just as tough or tougher than the price fixing malefactor and as any experienced competition advocate will hasten to add there are lots of defeats. You must get up off the floor and have the resolve not to give up. When you do prevail and win there are usually few accolades in the press

MR. DAVIES: or elsewhere. Lastly, agencies like businesses sometimes prefer the quiet life. We have more important things to do and why tangle with the people who fund the agency who may appoint its head if you don't really have to do so. Despite these challenges competition advocacy is important and should not be neglected. Many agencies, particularly new ones, sometimes limit their competition advocacy to educating the public about the benefits of competition generally. That is well and good; however, this module focuses on more ambitious advocacy where the agency is confronted with a particular current or proposed government restraint and it has to decide whether and if so, how to proceed. Let's travel to Dublin and look in on how anti-competitive regulation is sometimes sponsored by private interests.

#### SCENE AT IRISH GOLF CLUB

PHARMACIST 1: Times are getting tough aren't they? It was fine when it was just the three of us operating pharmacies around here. Now there's two more. Now it was okay when you were up on the high street, I was in the square and then you were on the Dublin Road, there's two more now offering reduced prices for prescriptions, family deals and so on. One of them is in the shopping center. That's really convenient for shoppers. Another one is much nearer to the doctors than we are. I don't know how long we can keep up with these guys.

PHARMACIST 2: No, I was talking to some of the people in the National Pharmacy Association Meeting recently and it's not just us. It's happening all over the country and it's not sustainable. You know it's hard on the new guys as well our ourselves, you know and maybe, maybe we could come to some sort of agreement before the next association meeting on how we can compete with each other.

PHARMACIST 3: I know that fixing prices is against the law so obviously we can't do that but, but, but, maybe if we got the government to make a regulation limiting the number of

PHARMACIST 3: new pharmacies and maybe those regulations could have rules laying down where pharmacy could actually be set up. That would certainly stop the new guys in their tracks.

PHARMACIST 2: It would.

PHARMACIST 1: But the problem there is though, why would the government want to help us out? I mean everyone thinks we make a pretty good living. You know it's harder to get into pharmacy than it is to get into medical school and the government knows exactly how much pharmacies change hands for nowadays.

PHARMACIST 2: Hold on a minute, what about the elderly, what about those with chronic illness?

PHARMACIST 3: What about them?

PHARMACIST 2: Well, maybe we could play the public health card. You know, if we make a case that if we're competing with each other to the extent where we all go out of business, how do people get their prescriptions filled? You know, you don't want the elderly having to travel long distances to get their prescriptions or those with chronic illness, you know, and a regulation might help that but the thing is, for example, the supermarkets. They get the business from you know, especially the out of town ones. They get the business from those who control you. You know those who are able. What about those who aren't?

PHARMACIST 1: Sounds like a good idea but you know, surely we can't stop someone setting a pharmacy if they're a qualified pharmacist.

PHARMACIST 3: Maybe we can't stop people setting up pharmacies but we can certainly affect the way they make money. Remember, we all have community pharmacy contracts with the Department of Health so that patients can get their drugs free or have them

PHARMACIST 3: reimbursed by the state. What about, maybe we could get the government to make regulations to say that you can only get a government contract if you're a certain minimum distance away from the nearest established pharmacy. How about that?

PHARMACIST 2: And that would be us, brilliant. I mean the regulation could say something along the lines of, you know, you can't get a government pharmacy contract if you're, you must be at least in an urban area. Maybe 500 meters from the nearest pharmacy or maybe in a rural area, five kilometers.

PHARMACIST 1: My brother qualified as a pharmacist last year. He's looking to set up a pharmacy down near the railway station. Have great, you know, foot for plenty of passing trade but that's less than 500 meters away from me. Perhaps we could say 250 meters?

PHARMACIST 3: That sounds good. The main thing to remember though. It's not about our profits. It's a public health issue. It's about the sick, the elderly, getting their medicines and so on. As it happens I have a cousin who's one of the organizers of one of the senior citizen's movement and I know she'd do anything to help us and to help them. We could even get them to sponsor the idea.

PHARMACIST 1: Sponsor?

PHARMACIST 3: Yeah and if it works well that's great and if it doesn't, well we're no worse off.

PHARMACIST 2: Genius.

PHARMACIST 3: Folks, I think it's time we enlisted the help of the senior citizens.

PHARMACIST 2: Cheers.

SCENE FROM IRISH COMPETITION AUTHORITY

AGENCY ATTORNEY 1: Well listen I'll stop in, I want to see the birthday pictures.

AGENCY ATTORNEY 2: Yes. I'll see you.

AGENCY ATTORNEY 3: Hey Han, how you doing?

AGENCY ATTORNEY 2: Hey Malachy, did you see the senior citizen's movement is proposing government pass legislation to prevent anyone to set up a new pharmacy within a certain distance of existing one. Even if they meet the distance requirement, they also have to say so there is a demand in area.

AGENCY ATTORNEY 3: Can I see that?

AGENCY ATTORNEY 2: Oh yeah, of course.

AGENCY ATTORNEY 3: I don't believe it. Look here, the Pharmacists' Association has said that they welcome legislation such as this as it ensures the availability of community pharmacy services in rural areas and to the elderly. Such touching concern for the rural elderly.

AGENCY ATTORNEY 2: The advocacy division didn't know this was coming?

AGENCY ATTORNEY 3: Well I certainly didn't. Listen, can I borrow this paper? I need to go talk to Karen thanks.

AGENCY ATTORNEY 2: See you Malachy.

AGENCY ATTORNEY 3: Bye.

MODERATOR

MR. DAVIES: Opportunities to advocate for competition arise in many different ways. The agency may be asked for its views by a parliamentary committee or a member of parliament. Interest groups may bring issues appropriate for advocacy to the attention of the agency or the agency may have had an issue under study for some time and take the initiative to advocate or as here an issue may come to the attention of the agency because a case officer was reading a newspaper. Let's return to the authority and see what happens next.

SCENE FROM IRISH COMPETITION AUTHORITY

AGENCY ATTORNEY 3: Have you seen this?

AGENCY ATTORNEY 4: Oh I have, yes. My phone hasn't stopped ringing since first thing this morning. First of all, I have the consumer agency on. They're worried about legislation that will restrict choice for consumers. But they don't want to come out publicly against something that's been portrayed as benefiting the sick and the old but they want to know whether we're going to do something and then I had the National Pharmacists Association. Wait for this, they're supporting the legislation to ensure the availability of a community pharmacy service throughout the country.

AGENCY ATTORNEY 3: Isn't that great. They want to ensure the availability of a service by stopping people from offering it.

AGENCY ATTORNEY 4: Exactly. And then the minister rang.

AGENCY ATTORNEY 3: Uh oh.

AGENCY ATTORNEY 4: Yes, she said she knew that we wouldn't be happy with a law that was fixed entry. But she went on about the need to ensure the viability of local and rural pharmacies and she said that it was important to protect them from competition.

AGENCY ATTORNEY 3: What did you say to that?

AGENCY ATTORNEY 4: I said, well I thanked her for the call and I told her that it would be inappropriate for me to take a view of legislation that I haven't yet read and that in any event it wasn't a decision for me but rather for the authority to make. I told her we'd get back to her as quickly as we could and she seemed to be happy enough with that and then after her I had the senior citizen's mob on the phone and they pulled no punches. We have to step behind them and urge urban rural solidarity and the availability of an even spread of services nationwide. So

AGENCY ATTORNEY 4: there's look obviously a head of steam building up here and we need to do something. Will you have a look at the ICN website and see if any other agency has addressed this or a similar issue in the past? Have a look at the advocacy working group's web page. Down the left hand side you'll see a link to postings from competition authorities and if memory serves me right the US FTC have posted information on all of their advocacy subjects topic-by-topic and I'm almost positive that they have done something on pharmacy regulation. If that doesn't work email all of the agency representatives on the advocacy working group. There's no point in us trying to reinvent the wheel if another agency has done this already.

AGENCY ATTORNEY 3: Right but we need to get moving on this don't we?

AGENCY ATTORNEY 4: We do I'm afraid. So you can drop everything else, we'll deal with this and try and nip it in the bud now.

AGENCY ATTORNEY 3: Okay, will do.

AGENCY ATTORNEY 4: Okay, thanks Malachy.

SCENE FROM IRISH COMPETITION AUTHORITY

AGENCY ATTORNEY 3: All right, I found 30 submissions on pharmacy regulation made by the U.S. Federal Trade Commission to various parts of the U.S. government. Now unfortunately, there was nothing precisely like our issue and but there is some useful information there. In the U.K. though the government actually subsidizes pharmacies to open on Sundays and bank holidays in areas where they wouldn't otherwise do so. Now I couldn't find anything else from other agencies but I've emailed those where we have a contact but it's too early to hear back from them.

AGENCY ATTORNEY 4: Okay, well like many of our advocacy projects, this is a tricky one. Comments by us are useless unless policy makers will listen to us. So as always,

AGENCY ATTORNEY 4: we're going to have to take a very measured perspective and our advocacy program is here for the long run so we don't want to waste important capital needlessly on this issue alone. Now, I think we'll be more persuasive if we weren't the only ones who were saying this. So if the ICN support us we can use that information to show that this is a perspective of governments all over the world. Now, I'm not sure that we are best placed to assess the optimal schemes for ensuring the delivery of pharmaceuticals to our citizens. But let's assume that it is a bone-fide issue and one that the government does need to address. Then the question turns to what is the most appropriate means of delivering this service.

AGENCY ATTORNEY 5: Well I found an OECD report on regulatory reform in Ireland which says that where there was a genuine public service obligation like providing a loss-making service in rural areas. The solution is not to create a protective monopoly to cross-subsidize the unprofitable bits.

AGENCY ATTORNEY 3: Yeah, we don't even know that rural pharmacies are unprofitable. I've seen reports and local papers of pharmacies changing hands for substantial sums of money even in under-populated areas.

AGENCY ATTORNEY 4: Precisely, we need to establish the fact base here so that we can counter that assumption. Even if it turns out that there are loss-making areas. I agree with the point on cross-subsidization. The most efficient way to establish this is to find out what areas need subsidization, hold an auction for the delivery of those services and let the one who comes in with the least requirement for subsidy win and deliver that service. It can be paid for by way of government grant, government subsidy or via special tax but the worst way of doing it is to increase the prices to all pharmacy patients because then it'll be the oldest, the sickest and those most in need of drugs that will end up paying more.

AGENCY ATTORNEY 5: Okay, well I will put together a draft of comments doing three things. I will firstly identify if there's a problem with access to pharmacy services. Secondly, I'll show that introducing restrictions to entry will only result in the protection of business interests of existing pharmacists and lastly, I'll conclude that if there is a supply problem in some areas this could be resolved by considering a subsidy in appropriate cases. That would keep drug prices down for the majority of patients.

AGENCY ATTORNEY 3: Yes, hopefully this will be an attractive option for government. I think we may need to make the senior citizen movement aware of our concerns in relation to restricting entry to a profession like pharmacy. We also need to persuade them that the subsidy option is a way to address their problems and concerns in areas where they think there's a problem with supply.

AGENCY ATTORNEY 4: Yes and it's important that we address the responses that those who are promoting this regulation are likely to bring up. For example, I wouldn't be at all surprised if the subsidy proposal were countered on the basis that it will not address the issues of cream-skimming in urban areas that affect the elderly man and woman. That would have a nice populist ring to it so we need to address that one early.

MODERATOR

MR. DAVIES: From Dublin we look to Professor James Cooper at George Mason University just outside Washington, D.C. for some practical guidance on how one can optimize the effects of agency advocacy interventions. Professor Cooper served in the competition advocacy program of the U.S. Federal Trade Commission.

PROFESSOR JAMES COOPER: Hi, I'm James Cooper. I teach at the George Mason University School of Law but before that I was at the FTC working in their competition advocacy program. Today I want to talk about the role of empirical evidence in competition advocacy.

Let's start at the beginning. What's the goal of competition advocacy? Well, broadly competition advocacy is designed to help policy makers understand the important of competition when they're making regulatory decisions. How do we typically do this? Well, depending on the status quo competition advocacy often takes the form of writing comments or giving testimony in opposition to regulations that unreasonably restrain competition or in support of removing existing regulations that do the same thing. What do we put in our arguments? Well, it's pretty easy to find support for the general proposition that competition is the best way to organize a market that it leads to superior outcomes in terms of lower prices or better quality, more variety for consumers. Although the benefits from competition are widely recognized, those advocating for restrictions on competition often ground their calls in claims of market failures. That is a claim that without this regulation the free market is actually going to harm consumers. In this proposition that sometimes markets require government intervention to help consumers is also widely accepted in the mainstream of economics. Again, take this quote from Gregory Mankiw's book.

So, without evidence competition advocacy could often come down to just one theory pitted against another. The previous discussion should have highlighted the importance of empirical evidence and competition advocacy which is the heart of my talk today. Why do we need empirical evidence? Well it serves two main goals, first it's going to help you arrive at the correct answer internally. It may be that the restraint in question actually harms competition.

PROF. COOPER: There may be a market failure that needs to be dealt with. It's important to understand the market setting well before you engage in advocacy. Second, once you've developed your empirical evidence internally you can use this evidence to make your case to external policy makers. So what kind of evidence are you looking for? Well first, you want evidence that the restriction in question negatively impacts competition based on standard competition policy metrics like price, output or quality. Second, you want to know if there's a market failure and if so, does the proposed restriction ameliorate it or are there less restrictive alternatives.

What types of evidence can we bring to bear? Well I want to talk broadly about three tiers of evidence based on their usefulness. First is what I would say is general evidence that competition is better than regulation. For instance, empirical evidence that deregulated industries, improve outcomes or that price ceilings create shortages. The second kind of evidence is in that what I would call analogous evidence. For instance, empirical evidence involving a restraint that's similar to, but not exactly like the one in question or involving a similar restraint but in a different market. So general and analogous evidence can be persuasive.

However, these kind of arguments, this kind of evidence leaves you open to the “yes but we’re different” argument. What do I mean by that? Well, for example, think of professional services. Restrictions on competition there are often met with yes, we understand that advertising is good but our services are too complex for consumers to understand. They can't evaluate price and quality correctly so we need restrictions or another area the FTC has some experience in, online wine sells. Online competition is good, yes but there is too much potential for harm from underage drinking to allow online sellers to compete with offline sellers. These are what I would call the “yes but we’re different” arguments and this is why you need, what I

PROF. COOPER: will call category number three, restraint-specific evidence. This is evidence that demonstrates that the specific restraint in question is harmful to consumers.

Returning to the examples that I just talked about, professional services. Empirical research led by the Federal Trade Commission in the 1980's and later picked up by outside academics show that advertising professional services like legal services or optometry led to lower prices and had no adverse affect on quality.

And take the online wine case. An FTC staff report showed that online wine sales allow consumers access to greater variety and lower prices and that there was no evidence that online sales led to a greater incidence of underage drinking. So, how do we find the empirical evidence we need? Well first you don't want to reinvent the wheel. One place to look is peer reviewed economics journals. For instance, the Journal of Law and Economics, the Journal of Industrial Economics, the Rand Journal of Economics and the Journal of Regulatory Economics together published over 100 articles a year that deal with many of these topics that examine the effect of regulation on economic outcomes.

Second, you can develop your empirical evidence internally. How do you go about doing that? Well, the gold standard for any empirical test would be a randomized trial. That's rarely if ever available in economics. So the next best thing would be what we'd call a natural experiment or a quasi experiment. There you look for a regulatory change that can serve as experiment. Where some group, whether it's an industry or a jurisdiction has, is affected by the regulation and another group is not. You appropriately control for confounding variables and use appropriate statistical techniques and hopefully you'll be able to identify the effects of the regulation in question by comparing the outcomes in the control group and the treatment group. Often, these sort of data; however, are not available or you may not have the time to conduct such an in depth

PROF. COOPER: study. So you can use other methods such as before and after comparison of a single group or comparing different groups at one instance in time and finally there's case studies. You can look at outcomes in depth of a certain jurisdiction where a regulatory change has occurred.

This brings to mind another important factor. What I would call competition policy R&D or competition policy research and development. For competition advocacy it's important to identify issues early so that you can set up empirical projects in the pipeline. They'll be ready to go when you need them for advocacy efforts. So now I want to turn to the Irish example that we just saw. The proposal to place geographic entry restrictions on pharmacies fits the standard template. Competition may work generally but not in my industry. Left alone, free entries will force the sick and the elderly to travel long distances to fill their prescriptions or worse yet, maybe do without them.

Although the consumer protection story here is merely a cover for rent seeking, it's a compelling story nonetheless and one that can't be rebutted with theory alone. So, we need empirical evidence to answer these questions. First, do geographic entry restrictions harm consumers through higher prices and less convenience and second, are these restrictions nonetheless necessary to assure the consumers retain reasonable access to pharmacies? So what type of evidence could the Irish competition authority bring to bear? Well first, in the analogous category they could look to U.S. Certificate of Need laws. The laws limit entry for a variety of healthcare providers in a variety of U.S. jurisdictions. They're mainly justified to ensure that incumbents are profitable enough to make sure the consumers have access to healthcare providers. Well, a relatively large literature suggests that these laws lead to higher prices and provide consumers with no countervailing benefits.

PROF. COOPER: Now the Certificate of Need laws are sufficiently similar to the pharmacy restriction -- entry restriction laws that the Irish competition authority is dealing with. This empirical literature could be useful.

Second, let's look at direct empirical evidence. Well, looking at the peer review literature there's an article by Schaumans and Verboven in the Rand Journal of Economics studying entry restrictions in the Belgium pharmacy market. They find that removing these restrictions will actually lower prices and may increase the number of pharmacies and would not reduce the number of pharmacies. This study is directly on point, and would be very useful. Finally, if the Irish competition authority had sufficient time, or they thought that this would be the type of issue that they would be dealing with in the future, they may want to invest in their own internal, in developing their own empirical evidence. How would they go about doing this? Well, as we discussed before they would want to look at variation and regulations across different jurisdictions. They would want, they could measure the price and output and variety and number of pharmacies in jurisdictions with restrictions and jurisdictions without restrictions and depending on the data available they could employ a quasi-experimental methodology, before and after methodology or a cross sectional methodology.

Finally, they could engage in a case study. They could find jurisdiction that either adopted these restrictions or got rid of these restrictions and carefully document what happened in these markets. Well, it looks like the Irish competition authority has a lot of empirical evidence that they could turn to and I wish them luck and I hope that you will find this discussion helpful as you go forward with your competition advocacy. Thanks for your time.

MODERATOR

MR. DAVIES: Thank you James. We now move from the George Mason University to the Comision Federal de Competencia de Mexico in the Federal District for insights from one competition authority that has been very active on the advocacy front.

PAOLO FRANCO BENEDETTI

MR. BENEDETTI: Hi, my name's Paulo Franco Benedetti, I'm the Director General for Institutional and International Affairs at the Mexican Federal Competition Commission. Let me start by saying that at the Federal Competition Commission we dedicate significant, a significant portion of agency resources to competition advocacy. Our experience is that it has been one of the most effective tools for change in Mexico. Most of our work is around introducing competition principles into laws and regulations by our opinions or participation in meetings as well as, when the CFC has a formal seat at the table.

The first lesson is build public awareness on the need for reform. We have to take into account that when we try to push for the reforms to the status quo that competition agencies normally push for, we face a serious collective action challenge. That is, beginnings from reform are scattered but losses are concentrated. Normally, players with a loss of political interest. We also have to take into account that legislators or policy makers are human. That is, if we weigh political costs and benefits of reform for them. Public awareness is the only tool, in a way, to counteract lobbying by vested interest. And finally we also have to take into account that building awareness takes time and effort but in our experience it pays off in many aspects of the agency work. The big conclusion for the first lesson is get allies (however loose) before embarking on reform.

Now the second lesson would be make sure that the discussion is public. You have to take into account that the public is your main constituency and that it is harder for legislators or

MR. BENEDETTI: policy makers to argue that consumer welfare needs to take a backseat to producer interest when consumers are actually listening. Public discussion makes it more difficult for legislators or policy makers to sit on their hands and you have to take into account also that your first challenge is overcoming inactivity. You have to bear in mind also that in most persuasive arguments against reforms can't be made in public. Keep the language as plain as possible. That is, hold your arguments to a simple, straightforward story. Grandma, as we often say here, has to understand it.

Quantification of benefits from reform can play crucial role in driving the point home. You also have to be reminded that it's about consumers. Nobody understands or care about overall efficiency or sophisticated arguments. Also, you have to take into account that you don't have to be afraid of polemicizing. Every announcer argument is a point for vested interest and also don't be afraid of oversimplifying. It's better to keep it plain and simple. Sometimes it has to be black versus white, gray means no reform.

The fourth lesson is that you need to understand how media works. In this regard, you have to take into account that the media can be your biggest ally or enemy in promoting reforms. In order to make it your biggest ally you need to understand how media works. Press releases for example, get media interest in your issues. They provide some degree of control on how information is presented to the public. Journalists are more likely to report the story your way. Press releases should be written as you want your story to appear in the news. Keep in that sense, press releases brief, clear and to the point. Also, provide attention grabbing titles. It is also very important, I would say, to cultivate relationship with journalists/editors that cover your issues. Also, you get to know the media's deadlines and better days and adapt to them. My conclusion here will be use media to ensure that competition issues are kept on the public

MR. BENEDETTI: agenda.

The fifth lesson that we have learned throughout all these years is invoke international practice and let foreign experts make your point. In this regard, you have to take into account a consistency with international practice gives comfort to non-experts. Pretty much everybody but yourself and a vested interest. Foreign experts tend also to be seen as biased and therefore they are more credible sometimes than the agency. We naturally hold a stake in the outcome. My conclusion here it's not you who is crazy and there is a second, third, fourth opinion to attest it.

The sixth lesson we have learned is do the homework and the leg work. Discussions are likely to be multi-actor that is politicians, decision makers, policy makers, agency, vested interest and hopefully consumers. You need to lead and often from behind. It's important to bear in mind that you need to be out there. That is go to Congress. Visit policy makers, media and decision makers. Get to know these worlds and get to be known there. Hired lobbyists should be sherpas, not substitutes for you. My final point here would be never undervalue an opportunity to explain. You never know for sure what influence your interlocutor has and perhaps my conclusion would be nobody wants reform as much as you do and you have to act accordingly.

Our seventh recommendation would be to quantify the benefits and costs of your recommendations. That is, quantify the costs of keeping the status quo and potential benefits of reform. Also, want progress and success and here you have to bear in mind that the cost and benefit figures are easy to understand and more appealing than the economic and legal explanations that often lie behind them.

The eighth recommendation would be pick your battles. That is, assess the likelihood of your advocacy strategy. Then pick the battles you know you can win. If you have to enter a

MR. BENEDETTI: battle that you are likely to lose, weigh whether the cost of losing is less than the cost of not engaging and finally realize that if you lose a battle at the end you could end up worse than before you enter it. That is, do the homework before choosing your fights.

MR. DAVIES: Thank you Paolo for those practical tips. Next, calling on agency heads from various jurisdictions, my colleague, Deirdre Trapp will now host a roundtable discussion exploring the broader issues, some sensitive, which often surround advocacy projects.

#### ROUNDTABLE

MS. DEIRDRE TRAPP: So with me here today in Washington are Phillip Collins, Chairman of the UK Office of Fair Trading, Mihe Gaomab who is the Chief Executive Officer of the Namibian Competition Commission, Felipe Irrarazabal, he's a National Economic Prosecutor of the Chilean Competition Authority and Dan Sjöblom, who's the Director General of the Swedish Competition Authority. Our panelists have a wealth of experience in managing successful advocacy programs and together we want to explore how they've managed advocacy in areas where there were strong interest groups both within and outside government. So welcome panel members, welcome. Let's get started by considering the first question. So what's worked best in terms of effective competition advocacy in your jurisdictions? Anybody prepared to offer some examples?

MR. DAN SJÖBLOM: I'll be happy to go first. Thank you Deirdre. Yeah, so in my experience you need to invest considerably into successful advocacy and I'll try to give you a few memories and experiences from that to illustrate my point. So my first point would be if you spread your advocacy efforts too thinly considering the resources that you have at hand you risk, as you do in normal case work to achieve nothing on any of those projects. So you need to be prioritizing your advocacy efforts and you need to consider who the recipient is, what kind of

MR. SJÖBLOM: proposals that he might or might not be interested in and how you should package those proposals but I think the lesson to learn is that you need to focus, you need to have a plan and present things that the recipient, the government can use and relate to and if I may take a moment to make just one more point?

MS. TRAPP: Yes, of course.

MR. SJÖBLOM: The other thing I would make is recommend is that you use your networks. You develop and you make good use of your networks. Both domestic and international and I think the way to do this is to invest in building your networks, not when it's time to do the advocacy but before because when the government proposal that you dislike for whatever reason comes along that's not the time to try to build alliances with other agencies.

MS. TRAPP: Yes, absolutely. Phillip, actually we had quite a similar experience in the UK.

MR. PHILLIP COLLINS: Sure we did, yes. I mean I think in terms of what works best, it's important to recognize, actually there are many different forms and types of competition advocacy and what works best depends slightly on the nature of the problem, of the issues you're trying to deal with. The attitude of interested parties, the attitude of the government towards both the agency and to competition advocacy generally and I think Dan's made an important point they're actually trying to build a portfolio work so you're not just reliant on one or two projects and you've got some projects that are perhaps longer term, medium term and some that are very short term so you can demonstrate your agility. In the UK we found that some of the projects are really quite long term and in particular in the professions where we've tackled restrictions on competition in the professions, notably legal services and dentistry. We find that quite often you have to follow those for a significant number of years, initial reports get referred

MR. COLLINS: to specialist committees, that then look at them and they come back and report to ministers, who then ask parliament, to induce legislation. It takes time so you need to, as Dan says, you need to invest. You need to invest in the skill set but you also need to invest in a variety of projects to make sure that you've actually got the best set of competition advocacy at work.

MS. TRAPP: Does persistence pay in Chile, Felipe?

MR. FELIPE IRARRAZABAL: What we have been working on advocacy specialty on sector studies but much more focused and also in drafting guidelines but again, prioritization I think is the key. I mean you really have to choose certain sector that are the best one.

MS. TRAPP: Mihe, what about you?

MR. MIHE GAOMAB: Yeah, from our part of the world, they still need to engage and inform and educate, not just the government officials, but also the legislative and the judiciary. There is a fair regard for the judiciary to better understand competition principles. Um, the issue that actually that we are confronted with, is the market studies or rather the sector reform studies. We are increasingly getting our own health. There is also issues out on the retail sector and they are strong anticompetitive practices. The consumer of many industry do not necessarily understand how that, uh, places about, uh, in terms of enforcement but we are basically looking on it and we are researching on it.

MS. TRAPP: So market studies seem to be the most effective weapon, possibly, for driving change in this area. You've all referred to market studies and the ability to have that evidence in your toolkit to push that sort of work forward as being a key. Could any of you describe some recent experiences where you've been less successful? Tricky one, I know. Nobody likes to address to things that haven't gone quite as well, particularly in this area which

is very sensitive politically but who'd like to share some thoughts on you know where some of the advocacy not gone as quite as one might've hoped and what were the lessons learned from those sorts of experiences? Felipe, you look like you're ready to dive in here.

MR. IRARRAZABAL: I can volunteer, I can volunteer. In Chile, as I said we tried to, to conduct at least one market study per year and we have done that on the construction sector, on the bank sector and last year we did on the private health insurance sector.

MS. TRAPP: Oh that is interesting because Mihe was saying health was a big issue for you guys as well.

MR. IRARRAZABAL: Which is a very sensitive market with a lot of public policy discussion. I would say three main issues, I mean, uh, on pursuing this market study. The first one is we decided to outsource the study to a university which I think it has some pro and cons with respect to that decision. It is supposed to be more independent. The risk of lack of information and the risk of errors are not taken by the agency and also somehow does not compromise the agency if something comes up that could be something that you would like to investigate and use your enforcement powers.

MS. TRAPP: Of course.

MR. IRARRAZABAL: But, it is tricky and maybe it's not that easy to select the team. You might face that the team is not, not as competent as you would like to. Um, then the second issue is public information or private information and at least in Chile normally public information is not really available and normally it's not in good quality so, uh, so you have to request private information and then it can, all the issues on confidentiality and then it's very important to be in a good mood with the regulator and in this case with the health regulator that obviously has much more knowledge and information about the sector and the third issue,

MR. IRARRAZABAL: it's, uh, well we wanted this, uh, to put it on the table a discussion on public policy, you know because we understood that there are many issues and some of them are highly regulated and so when the study was completed and, and we sent it to a congressman, we sent it to a regulator, to a ministry of health and everybody was happy receiving the document but then a lot of media attention came out because of this study. A group of congressmen, senators decided to knock our door requesting an investigation which is now underway, an investigation basically based on the conclusions of our report. So I would call this a boomerang effect.

MR. COLLINS: So they turned the report against you.

MR. IRARRAZABAL: So my thought on this regard is that you have to very carefully because sometimes you know where you start at the beginning of the process because I think, I'm still thinking that it's a good effort to put it on this advocacy project but you never know how you end it with a project and in this case I think it was a boomerang effect because somehow we put a lot of more meat on the debate but on the other hand we have an investigation on enforceability of the antitrust law because of one of the conclusions of the report.

MS. TRAPP: So fascinating insights there on governance and, uh, and building networks which is the point that Dan made earlier about making sure that you're properly engaged with your sort of sponsoring government departments in this area.

MR. COLLINS: I think one point to make in relation to external consultants, we've also found historically this to be an issue and I think the question is, uh, the kind of procurement process you use and what filters you use to find the right people but also the way in which you use internal resources combined with external resources so that it's clearly an external report but it can be supported by internal resources of the agency but actually project managing those is not

MR. COLLINS: always easy. Look, you can't just contract the whole thing out. I think one further point I'd make which goes back to your example is importance of evaluating advocacy work because you do need to try and make sure you pick out the lessons from each piece of work, go back and look over it and we've had several examples from early studies, particular in relation to things like pharmacies and taxes. Both of which seem to be sort of endemic problems to agencies all around the world where with the benefit of hindsight having gone back and looked at the study we produced actually we found that we could've done things differently and that would've produced a better result.

So on taxes whilst the study was very good it was roundly attacked by a parliamentary committee whereas if we had actually addressed it in a different way it would've been much easier to deal with and on pharmacies we weren't actually able to persuade the government to go as far as we wanted them to do and that meant at the end of the day whilst we achieved some benefits, we didn't achieve all the benefits that we could've realized.

MS. TRAPP: It's interesting how health again, becomes a real hot topic doesn't it, in terms of the stakeholders who have got influence of the decision making finalizing.

MR. COLLINS: And of course it helps you've got some very powerful vested interests, very, very powerful vested interests.

MS. TRAPP: Mihe, tell us about your health study in Namibia.

MR. GAOMAB: Well, I mean there was a independent private body that used to regulate health and it was not done according to law so, um, uh, for our advocacy cases we came to know of that and we informed them that the way they actually fix studies or prices are not in best accord to the competition law and that's why also the minister of health took note and said that they are not regulated. The government must actually regulate them on terms of the pricing

MR. GAOMAB: structure. So what we are currently doing is that we are undertaking a study to look at the pricing structure and how the scheduling has been done but most importantly I think the minister of health wants to come in order to be in control of the stated obligations to afford, um, um, health reform and that's what we are busy at.

MS. TRAPP: It must be very tricky when you identify the ministry responsible for the governance and regulation of a particular function. That is the ministry itself that has, um, uh, not completely followed the due processes of law. That must be very tricky debate.

MR. COLLINS: So was it the case really that they were, in a sense, sort of blessing anti-competitive practices being carried on by the healthcare professionals yes?

MR. GAOMAB: It just that they don't know that they are anti-competitive practices and we, we came to make that a way for our advocacy efforts and now they are taking the warning, uh, and now they are taking step not really to govern them but create a study to be a kind of a structure, uh, that can report to the minister of health.

MS. TRAPP: So it's a pretty challenging area this, you know, you have to take on the fights when necessary and really challenge some entrenched views as to how things should happen and should be done for the future and sometimes using third parties, sometimes putting your own political capital out there to brave. So who's got some guidance on selecting which battles to fight and which ones to let go? Any examples people would like to discuss?

MR. COLLINS: Should I lead off on that?

MS. TRAPP: Phillip, dive in.

MR. COLLINS: I think it's important to think before you start fighting any battles to actually be thoroughly prepared. So to make sure you actually know what the parties' positions are likely to be, what the government's position is likely to be. Also, think about, about timing.

MR. COLLINS: Is now the appropriate time to think about doing a study in this sector because if you do want to do a study there may be a better time a little later perhaps when you can go, your study will go better with the grain of policy initiatives. That's one point. Um, the second thing is to think very carefully about whether there really is competition and markets problem here and what the issues are because it's very easy to think there's a problem and actually when you get into it you find it's not actually a competition problem or in fact even if it is one it's not one you can necessarily deal with and you don't necessarily want to get into a battle where you can't actually resolve it and that leads to a third point which is, um, do try and confine yourself dealing just with the competition and markets issues.

It's very tempting to get into other policy areas and clearly you need to take count of those but actually getting drawn into policy areas which are outside your expertise is not a good thing for a competition agency to do otherwise you can be accused of going outside your mandate. I think a few other points about, um, conducting the study, you do need to be very open and transparent with all the parties.

There are different ways of doing this, you can call for information, a general call for information, you can have industry round tables, you can go to industry events, you can have different groups of stakeholders, so a degree of openness is very important and then, uh, you need to have a very full thorough report which you publish which, um explains your position very carefully and then, um, I think fall out work is very important in some cases. Actually produce a report but then that will go to government, say typically it'll go to the industry. That report is liked to be examined by, for instance, parliamentary committees, it will be examined in the media. You need to think about what your follow-on strategy is making sure your recommendations are implemented and I think just one final point around resources and Dan

MR. COLLINS: made this point, I think earlier in the beginning of this session which is around investing in resources because you do want, if you're doing competition advocacy to have a range of different projects with different time scales and looking at different issues. So you can build a body of advocacy work which can then be used in other cases. So those have been my thoughts about, about battles to fight and how to fight them.

MS. TRAPP: Dan, you spoke earlier on about the Swedish moves to ensure that competition policy was properly established, instituted in the financial crisis and there was no stepping away. I think, do you have other examples, there's been when you have taken a step back?

MR. SJÖBLOM: No, but in, I would perhaps make this point in terms of with selecting battles. I share very much what Phillip was saying that you need to look at sort of the entire picture. I mean is now the right time and, and preferably if you can, I would speak to your government, the recipient of the report before you even start thinking about making the report. I mean they are, the people there that you interface with they will know if you say that, oh I'm thinking about looking at the pharmacy market or whatever market and we might present the report with some suggestions in, uh, six months time or a year time or whatever. Then they know, is there any readiness to receive a report on that and if they say, well actually the timing of that is not so good because there's this other policy initiative going on or whatever then put that idea in a book somewhere and take it up when time is right because investing all of those resources and then producing a report and then if there's no readiness to do anything with the investment you made that is pretty pointless.

MS. TRAPP: Yeah, well it goes to Felipe's point, doesn't it about whether you are trying to do something that will lead to enforcement action, uh, your boomerang or whether it's

something where you're trying to encourage another government agency to take its proper role and to take proper steps to change things within its own sphere of influence. Well thank you all very much for that fascinating discussion of some very tricky and sensitive issues but I'm sure we've covered a lot of useful ground for people, uh for people today. So I'd like to thank Phillip Collins and Dan Sjöblom and Mihe Gaomab and Phillip Irarrazabal. Thank you very much indeed.

MR. DAVIES: Thank you to our panel of agency heads for sharing their experiences and the lessons learned from them. We now move to Washington, D.C. for an interview with Commissioner Maureen Ohlhausen at the Federal Trade Commission.

MS. TRAPP: So we bring this, forum, to a fitting close, uh, with someone who's been very active in the competition advocacy field for a many years. I'm here at the United States Federal Trade Commission in Washington with Commissioner Maureen Ohlhausen. Commissioner Ohlhausen's been personally involved in leading competition advocacy for the FTC for the past four years and has a long involvement preceding that. Welcome, Commissioner Ohlhausen.

COMMISSIONER MAUREEN OHLHAUSEN: Thank you so much, Deirdre, I'm delighted to be here.

MS. TRAPP: Could you share with our audience today, uh, the benefits that your agency has brought, uh, to the American public through the efforts that you make personally and through your organization with competition advocacy?

COMMISSIONER OHLHAUSEN: Certainly, one of the topics, you know, we're primarily a law enforcement agency and we bring competition and consumer protection actions but there are certain areas in which we can't bring an enforcement action such as where a state or

COMMISSIONER OHLHAUSEN: a sister federal agency or congress is considering a regulation or a bill that may, impact consumers. Sometimes, these can benefit consumers, they can increase choice for consumers, they might provide some additional consumer protections that would be beneficial but often or sometimes in other instances they are not so beneficial for consumers. So we're able to bring our expertise in competition principles and economics and in consumer protection to bear, to weigh in on these provisions and suggest ways that the protections, the benefits could be achieved without impacts on competition.

One of the other issues that comes to mind in this area is the fact that you know, we typically challenge private restraints on competition but public restraints can have an even worse impact on competition, on benefits and to consumers and consumer welfare because they tend to be durable, they're enforced by the government and it's hard for the market to go around them because it might be illegal to adopt a different method of business.

MS. TRAPP: That's a very interesting insight. Obviously the more challenging end of the spectrum, I guess, to deal with.

COMMISSIONER OHLHAUSEN: Yes.

MS. TRAPP: So where does the FTC primarily engage in competition advocacy?

COMMISSIONER OHLHAUSEN: So, primarily we engage in competition advocacy before the states, state legislature, sometimes state regulatory boards, before other federal agencies, sometimes before bar associations or professional associations and that's where we would file things like formal comments, we also might appear live, do testimony, we also file in courts. We file amicus briefs in certain issues. We also like to think of competition advocacy quite broadly to also include some of the policy work we do by having workshops, doing studies, economic studies, legal studies and issuing reports and then another channel is through doing

COMMISSIONER OHLHAUSEN: more informal things like this discussion that we're having, doing speeches, articles and things like that.

MS. TRAPP: So what would you say your principle or main objectives are with this field of endeavor, this large amount of work?

COMMISSIONER OHLHAUSEN: Well, what we try to do, which is what we try to do in all our efforts is to enhance consumer welfare and that's sort of our general overarching principle. But the way we do that and the three areas on which we focus primarily are in facilitating entry, so making it easier for new businesses, new business models to enter the market and then conversely opposing new barriers to entry. Eliminating perverse market incentives, that's another important area and then also focusing on making it easier for consumers to get useful information so they can make decisions for themselves and make better informed decisions.

MS. TRAPP: So Commissioner, I'd next like to discuss with you the benefits of an advocacy program. Could you describe some of the primary benefits of programs of work like this for the benefits of our audience?

COMMISSIONER OHLHAUSEN: Well, as I already mentioned, oftentimes advocacy is the only way to address certain anticompetitive regulations and laws or provisions that are out there. Either through, because it's being promulgated by a state or it's protected in some way from antitrust trust enforcement, maybe through an exemption of some kind. It's also very cost effective. It can be based, you know, with a little bit of staff effort by drawing upon the industry expertise or the agency expertise in certain industries that we have and our economists. It's much less expensive and resource intensive than bringing a case so this might be a good way for an

COMMISSIONER OHLHAUSEN: agency with reduced resources to try to make a difference and start to improve conditions for consumers.

The other benefit that it brings is that it, I can really identify anti-competitive regulations and by doing that highlight the cost that consumers will suffer. It also assigns political responsibility for them. Why is this happening, who is pushing this, who are the beneficiaries and kind of gives a voice to consumer interests that aren't necessarily part of the larger debate and then through that also bring more scrutiny to what's going on through, often when we do an advocacy there'll be some press involved in it or sometimes we can spur a greater academic or economic research so that more evidence is developed on the likely impact of these kinds of regulations.

MS. TRAPP: Why do you believe the FTC's program has been such a success?

COMMISSIONER OHLHAUSEN: I think it's for several reasons. One, we really have worked hard to ground all of our work in, firmly in competition principles, in economic theory and where possible, in economic evidence. We do look for empirical work and sometimes we do it ourselves but also look for any empirical support that might be available. We also, as I mentioned, draw upon the industry knowledge and experience that we've gained through our enforcement activities and also I think our reputation as an agency that is concerned about consumers, that does take our consumer protection and competition protection roles very seriously helps gives our opinions a little more weight when before another policymaker.

MS. TRAPP: So you stay within your, like your areas of core competency in a sense?

COMMISSIONER OHLHAUSEN: That's correct. That's correct. One other thing that we do to try to make sure we can continue to be successful in our competition advocacy areas.

COMMISSIONER OHLHAUSEN: We do regular assessments. So we follow up, this started under my tenure and continues today, we follow up after we have filed an advocacy.

MS. TRAPP: You mentioned earlier on the analytical approach that you bring to the work. Could you say a little bit more about how you introduce the work of economists into this sphere?

COMMISSIONER OHLHAUSEN: Yes, so the economic analysis is a very important part of what we do and I think that is shown where we've got a good economic analysis and particularly good empirical evidence has really helped us be successful in a number of areas. I mean sometimes you go in and you're offering an opinion and another policymaker might say well why is your opinion any more likely to be correct than our opinion. But if we can offer some sort of evidence, some sort of empirical study that says, well, unbalanced consumers are actually worse off when you introduce these kinds of restrictions, they don't get the consumer protection that you, you know they think that they will get. That really helps sway the policymakers to make the right decision that make consumers better off.

MS. TRAPP: How else, how do you go about prioritizing or selecting the cases that you take up because there must be many potential calls on your time and resources?

COMMISSIONER OHLHAUSEN: Yes, so we try to focus on areas that are of particular importance to consumers and where we have particular expertise. It would be difficult to try to address every kind of anticompetitive proposed regulation or restraint that may come up. So, we try not to be so broad as to be unfocused. So we try to focus on areas where we can bring our expertise to bear and where we have good evidence, often where sometimes the FTC itself has produced it but where there might be otherwise a good body of evidence, empirical evidence out there. We also try to focus on areas where there's consensus within the commission. So we do

COMMISSIONER OHLHAUSEN: things, for example, where there's going to be new issues coming up to look a little bit over the horizon. So as I mentioned we focus on ecommerce issues, another area where we've had a lot of focus on is on new forms of healthcare delivery. So we've looked at things, restrictions on nurse practitioners, restrictions on the online sales of contact lenses and things like that. So we've tried to pay attention to areas that are important to consumers and also areas where new and innovative business models might be running into some barriers that don't necessarily make consumers better off in the long run.

MS. TRAPP: Fantastic. Commissioner, thank you very much indeed for your time. That's been a really wonderful insight into the work of the FTC's program in consumer advocacy. You've obviously got an incredibly successful program and it's great you are able to share your time and accomplishments of yourself and your team with us. Thank you very much.

COMMISSIONER OHLHAUSEN: Oh thank you very much Deirdre. I appreciate the opportunity.

MR. DAVIES: Thank you Commissioner Ohlhausen and Deirdre for that insightful interview. That concludes this ICN module on competition advocacy. We would like to thank the Irish Competition Authority, Professor Cooper, the Comision Federal de Competencia de Mexico, FTC Commissioner Ohlhausen and Deirdre Trapp for their gracious and valuable assistance with this program and of course, the agency heads who are giving their time to participate in the panel and thanks to you, our audience, for joining us today. We do hope that you've been inspired to consider the important role that competition advocacy can play for your agency and to have illustrated some of the resources that you might deploy. Thank you again.