

COMPETITION ADVOCACY: CHALLENGES FOR DEVELOPING COUNTRIES

I. Introduction

It is conventional wisdom that a competition agency must do more than simply enforce its country's competition law.

. . . [C]ompetition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing the competition law. It must 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.¹

It is said that it is especially important for competition agencies in developing countries to engage in competition advocacy. The economic policies in these countries are undergoing fundamental changes; markets are becoming more open; new government and regulatory institutions are being formed; trade is assuming greater influence; and state owned enterprises are being privatised. Competition policy should have a fundamental role in this transition process, but it is difficult for a new competition agency to acquire the influence and the skills that it needs for this purpose.

II. A Foundation for Competition Advocacy

There are certain prerequisites for effective advocacy by a competition agency. At least three can be identified:

1. The agency should have a significant degree of *independence* from political influence from both inside and outside the government. It has long been recognised that independence is important for the law enforcement function of a competition agency, but it is a necessary component of effective advocacy as well.

There are two aspects to independence, structural and operational. An agency that is created as a separate entity, not part of a ministry and responsible directly to the parliament or legislature for its budget, is structurally independent. All else being equal, it will enjoy relative freedom in carrying out its enforcement and advocacy functions. At the same time, however, structural independence can have ambiguous effects on competition advocacy. An agency that is entirely separate from other parts of government may lack good access to the decisionmakers in the executive and legislative branches. It might not have the influence in government circles that it would have if it were part of a powerful ministry. It might even suffer from lack of information about activities in other parts of government that would benefit from its input. In

¹ The World Bank, OECD: *A Framework for the Design and Implementation of Competition Law and Policy*, Chapter 6, at 93, 1998.

any case, however, there are many countries in which the competition agency is not structurally independent, but experience has shown that an aggressive, competent agency can acquire a significant degree of independence regardless of its place within the structure of government.

Operational independence, in the context of competition advocacy, refers both to the freedom that the agency has to make comments and otherwise to participate in government and regulatory matters, and, in the course of those activities, to take positions that are independent of those held by others in the public and private sectors. The importance of operational independence was highlighted in a comprehensive report on competition advocacy by the International Competition Network, which was based on a survey of 50 ICN member countries. The report found that operational independence can be bolstered by laws that specifically authorise the competition agency, even require it, to comment on legislation or regulation that is being proposed.² Conversely, the agency is at a disadvantage in situations where it can comment or participate in a matter only if invited or authorised to do so by another government entity.

2. The agency should have sufficient *resources* to support both its enforcement and advocacy functions. The resource issue is well understood as critical to all aspects of a competition agency's work. Competition agencies, whether in developing or developed countries, seldom have enough resources. Given this scarcity, the competition agency must constantly make decisions about how to allocate resources between its law enforcement and advocacy functions.

It is sometimes said that a successful competition advocacy effort, for example in regulatory reform, can 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 most of its resources on competition advocacy, but the ICN survey showed that this is not the case. 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 good reasons for this apparent disparity, however. 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.

But the question remains as to what is the optimal proportion of a competition agency's total resources that should be devoted to advocacy, and more to the point of this paper, whether that proportion should be relatively greater for developing countries. Those issues are explored further in the concluding section below.

² International Competition Network, *Advocacy and Competition Policy*, at vi-vii, 2002, available at <http://www.internationalcompetitionnetwork.org/> (hereafter, "ICN Report"). The survey respondents included both developed and developing countries. The ICN's work on competition advocacy is the most comprehensive to date on this topic. On its website, in addition to the report noted above, can be found the responses to the questionnaire by some of the countries, a *Toolkit for Effective Advocacy*, some case studies on competition advocacy in the telecommunications, air transport, energy and legal profession sectors, a *Report on Model Advocacy Provisions*, and a report based on a second questionnaire, *Competition Advocacy in Regulated Sectors: Examples of Success*.

3. The agency must acquire *credibility* as an effective and impartial advocate for competition. Its reputation must extend throughout 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. This requires a multi-faceted effort from the agency. It is in part an educational effort – the imparting of information about how competitive markets work and the benefits that result. But at least as important is the experiential factor – there must be observable gains to consumers that derive from the actions of the agency. In other words, the competition agency must achieve some demonstrable success in both its law enforcement and advocacy efforts. That topic too is explored further below.

Suggested question for discussion

- *What strategies for acquiring the necessary independence, resources and credibility for effective competition advocacy have been successful in developing countries?*

III. Competition advocacy in practice

The opportunities for competition advocacy are numerous, and take several different forms. Below is a brief discussion of four principal forums in which a competition agency may practice advocacy: i) privatisation; ii) legislation, government policy and regulatory reform; iii) competition policy in regulation; and iv) building a competition culture. These classifications are not mutually exclusive, of course. Privatisation issues, for example, may arise in the course of regulatory reform in a given sector. Again, the emphasis in these discussions is on advocacy in developing countries.

Privatisation

The economies of many developing countries are characterised by a significant degree of participation by the state through state owned enterprises. Market reforms in these countries inevitably feature the privatisation of these SOEs. The competition agency should have a role in the privatisation process. It is important, it is often said, that publicly owned monopolies not be converted into private ones through the privatisation process. The state has an interest in maximising its revenues in privatisation sales, however, and thus it has an incentive to create and sell an enterprise that has market power. Such an entity has more value than one that is introduced into a competitive market. The competition agency is well placed to offer resistance to this tendency. It is in the agency's interest to participate in the privatisation process if only because "getting it right" at the privatisation stage – creating competitive markets from the outset – will lessen its enforcement burdens later on.

The agency can probably be most effective in this regard if the competition law applies directly to privatisation transactions. That is, the agency can review and block, or require modifications to, a proposed privatisation just as it could with regard to any other merger or restrictive agreement. This is not the case in many countries, however, which means that the agency has available only its powers of advocacy. Ideally the applicable law will permit the competition agency to participate formally in privatisations – to receive timely notice of proposed transactions, to request the submission of information and to submit formal statements or opinions regarding the competitive effects of the proposal.

The competition agency should limit its review of a proposed transaction to its competitive effects. Privatisation can be an intensely political process. There may be powerful interests arrayed in support of an anticompetitive transaction. The competition agency's review, therefore, should be professional and impartial. If a transaction is deemed to be anticompetitive, the agency should pay particular attention to the remedy that it proposes. Blocking the transaction, or a wholesale breakup of the entity to be sold, may be politically unpalatable. An acceptable alternative may be to encourage measures to lower barriers to entry in the affected market or markets, including trade barriers. The agency should also resist attempts by the privatisation agency to grant concessions or privileges to the purchasing entity in a privatisation that will interfere with the efficient operation of the market.

The privatisation process points up most acutely the dilemma facing the competition agency in a developing country. The agency's participation as advocate for competition is probably nowhere more important than in privatisation, but that process usually comes early in a country's market reforms, at a time when the new competition agency may have relatively little influence. It also presents an opportunity, however. A successful intervention by the agency in a high profile privatisation can significantly enhance its reputation and standing in the country.³

Suggested questions for discussion

- *Is it necessary for effective intervention in privatisations that the competition agency have a formal role in the process, for example that the competition law apply to privatisations? If the agency does not have such a formal role, how can it most effectively participate?*
- *Please briefly describe an instance of a successful intervention by the competition agency in a privatisation in your country. What strategies were most effective?*

Legislation, government policy and regulatory reform

This is a broad category, generally encompassing all initiatives by the legislative and executive branches of government that have a competition component.

Legislation

The procedures in many countries provide for a regular review and comment by the competition agency of proposed legislation that can affect competition. The output of a legislature or parliament can be huge; hundreds, perhaps thousands of laws may be proposed in the course of a legislative session. It is not a good use of scarce resources for the competition agency to even read, never mind comment upon, all of these pieces of legislation. Moreover, it is sometimes the case that the substance of a proposed law is effectively shaped in the drafting process, and will not be subject to significant change thereafter. Thus, there should be procedures in place that permit the agency to identify and concentrate on those relatively few proposals that present significant competition policy issues and that permit the agency to

³ See generally, ICN Report at 67-69. The ICN's survey asked the respondents to rank in order of importance the effect if their various competition advocacy activities on developing a competition culture within the country. At the top of list was "participation of the competition agency in the privatisation and regulatory reform processes." Id. At 80.

intervene in those instances early in the legislative process. This in turn may depend on the agency's ability to develop allies in the legislature who are supporters of a strong competition policy and who are willing to act on that conviction.

Suggested questions for discussion

- *What procedures does your agency employ in the legislative review process? How can such procedures be made both efficient and effective?*

Other government policies

There is a range of government policies that affect competition and markets (not including formal regulation, which is discussed separately below), to which the competition agency could provide useful input. These include trade policies, state aids and subsidies, and procurement procedures. As noted above, trade can provide important competition in newly opened markets in developing countries. The competition agency is well placed to promote trade liberalisation, but this position is likely to be controversial as well. Domestic producers and sellers, who may enjoy positions of dominance and who are well connected politically, will resist the lowering of barriers to efficient foreign competitors. Similar issues exist regarding state aids and subsidies to powerful domestic businesses. In this regard, however, there may exist policy reasons unrelated to competition, including social concerns such as protection for local workers, offered in justification for protectionist measures and state subsidies. The competition agency cannot ignore these issues; it can urge, however, that these restraints be strictly related to restructuring programs, that they be temporary and that policymakers consider more direct ways of achieving social goals rather than by interfering with the efficient operation of markets.⁴

An area of government policy in which the competition agency can especially helpful is in procurement policy. Governments are notoriously inefficient buyers. Their procurement procedures may invite collusion and corruption. They may reject competitive procedures in favour of long-time suppliers. The competition agency should be active in advocating reforms in procurement procedures that introduce market disciplines. These reforms will translate directly into savings for the country's citizens. Successful advocacy in this arena will also be visible, and will contribute to the enhancement of the agency's reputation.

Competition advocacy in government policymaking can extend beyond the national government, to regional and local governments as well. The economic power and influence of these government bodies varies across countries, but in some it is significant. Local governments may be participating directly in local markets through publicly owned enterprises, or they may exert significant regulatory control on these markets. Such activities are worthy subjects for advocacy by the competition agency, to the extent that the agency cannot intervene directly through the competition law.

Suggested questions for discussion

- *What role should the competition agency have in the development of trade policy? How can it counteract powerful domestic business interests that support unnecessary restraints on imports?*

⁴ See, World Bank, OECD, supra.

- *Does your agency have a formal programme for assisting government bodies in fashioning effective procurement practices? Please briefly describe it.*
- *In what other areas of government policymaking has your agency participated as competition advocate?*

Regulatory reform

One of the most significant forums for competition advocacy is in regulatory reform or deregulation, and again this has special importance in developing countries. The economies of most less developed countries are characterised by state owned monopolies in infrastructure industries, including telecommunications, electricity, railroads, air transportation, ports and maritime transport and petroleum and natural gas. Other markets, including financial markets, are also characterised by a high degree of government participation and control. Privatisation and deregulation of these sectors is usually a priority in countries that are progressing toward a market economy, and for obvious reasons it is critical that these processes incorporate sound competition policy principles.⁵ There are at least three subject areas that should receive the attention of the competition agency during the regulatory reform process:

- Privatisation. As discussed above, the tendency of governments in the privatisation process is to confer market power, if not monopoly, upon the entity to be divested in order to maximise its value. It is now understood, however, that competition is possible in almost all markets; natural monopoly exists in only a few network infrastructure contexts, such as electricity and natural gas distribution and railway track and signaling infrastructure. Thus, it should be the goal of the competition agency to introduce as much competition as possible into these newly liberalised markets in the privatisation process. The opportunity should exist for multiple competitors in those segments where competition is possible, and attention also should be given to separation of the ownership of natural monopoly and competitive entities within a sector.
- Application of the competition law. Because competition can exist in most markets it is logical that the competition law should have equally broad application. It is not uncommon, however, that exemptions from the competition law are created for certain aspects of operations (such as mergers) in newly liberalized, regulated markets. At the extreme, complete exemptions are created for some sectors (banking sometimes is one). It is obviously a function of competition advocacy to resist this tendency, again in a manner consistent with good governance. The competition law should apply in most situations. Of course, regulation is clearly necessary in some markets, including both economic regulation (prices, access) and “public interest” regulation (safety, universal service, environmental, financial viability, etc.). There will be tension between regulation and competition policy where they meet, and it may be necessary to restrict the application of the competition law in some circumstances, but this should be done only when it is necessary to permit a legitimate regulatory scheme to operate.

⁵ The economic benefits from regulatory reform are well known. Studies have shown that regulatory reform results in higher productivity, lower prices, the elimination of shortages, the stimulation of innovation, while ultimately boosting GDP. OECD, *Report on Regulatory Reform, Volume II*, 1997.

- Structural relationship between regulatory bodies and the competition agency. The competition agency should have the opportunity to provide regular input into the work of regulatory bodies when it is useful to do so. This is, fundamentally, a structural issue. What role should the competition agency have in the formation and application of regulatory policy? Should that role be formalized in laws or regulations, or can it be developed on an ad hoc basis? There is no structural template that can be applied in all countries and situations. There is anecdotal evidence, however, found in the ICN Report, that the competition agency is more effective as an advocate in regulatory matters when its role is formalised, that is, laws or regulations require that the agency receive timely notice of relevant regulatory decisions or rulemaking and that the agency can comment or participate in the proceedings as a matter of right.⁶ But such a formal structure apparently exists in a minority of countries.⁷ The evidence shows that productive relationships between the competition agency and regulators can be built informally, but such a process takes time and energy, commodities that are in short supply in competition agencies in developing countries.

Suggested questions for discussion

- *What are effective strategies for ensuring that the competition law is given the maximum application in sectors where there is also regulation? For ensuring that the competition agency has access to regulators to advocate for competition?*

Competition policy in regulation

This activity refers to participation by the competition agency in the rulemaking and implementation functions of a regulatory body, and is to be distinguished from regulatory reform, discussed above, which involves the fundamental restructuring of an industry and its regulatory scheme. It would seem that there are limited opportunities for competition agencies to participate directly in regulatory activities, and this may be especially true for agencies in developing countries. Competition agency officials often lack the industry expertise that is necessary for providing useful input into technical regulatory decisions. But there may be some matters before a regulator that fundamentally involve competition policy, and this is especially true where, as discussed above, the industry is exempted, in whole or part, from the application of the competition law. A regulator may have primary responsibility for merger control in the sector, for example. It is clear that the competition agency should participate in matters of this type as much as it is legally and practically possible.

Apart from participating in specific cases, there may be opportunities for the competition agency to engage in broader studies or evaluations of regulated sectors. The regulator may initiate such comprehensive review, and this would be a good opportunity for the competition agency to present the case for maximising competition in the sector. The competition agency could itself sponsor a conference or seminar on competition in a particular regulated sector, at which both industry and competition experts, from both within the country and abroad, could speak and present papers.

⁶ ICN Report at 58-67.

⁷ Id. at 63.

One of the principal activities of the OECD's Competition Committee is to study the application of competition policy in regulated industries. One of the Committee's working parties regularly conducts policy roundtable discussions on competition policy in regulated sectors. Recent roundtables have been conducted in the airline, airport services, banking, broadcasting, electricity, insurance, natural gas, postal services, railroad, road transport and telecommunications sectors. A roundtable also studied the topic of the relationship between regulators and competition authorities. The documentation from these roundtables is an excellent resource for competition agencies in their advocacy activities. All of it is available on the OECD website, at www.oecd.org/competition. The OECD can also provide a CD-ROM containing this documentation.

Suggested questions for discussion

- *What types of regulatory matters are most likely to benefit from intervention by the competition agency, and how can the agency decide when it should become involved in a matter?*
- *What other types of competition advocacy are useful in regulated industries? Has your agency sponsored or participated in industry-wide conferences or reviews?*

Building a competition culture

A cornerstone of a successful market economy is the existence of a "competition culture" within a country – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. An important focus for competition advocacy by the competition agency is the development of this competition culture. All parts of a society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials and judges – should be addressed in this effort. This proposition is now widely accepted. Competition officials in most countries are diligent about informing their citizens about the value of competition and of their efforts in promoting it.⁸

This paper will not dwell on the mechanics of a programme for developing a competition culture – there are several resources that can be consulted for that purpose.⁹ The tools that can be employed in the effort are generally well known, and include: publication of competition agency decisions, promulgation of enforcement guidelines, publication of pamphlets and information booklets for the general public, publication of annual reports, publication of market studies and of technical papers, regular communications with the press and electronic media, Internet web sites, speeches by senior enforcement officials, and seminars and conferences, including workshops for judges.

Building a competition culture is important in every country, but once again it seems that it is especially critical for developing countries. There is more education to be done in these

⁸ See, for example, a description of Jamaica's experience, in Barbara Lee, *Competition Advocacy for a Knowledge-Based Society*, 2002, available at www.jftc.com/news&publications.

⁹ They include the work done by the ICN in this area, cited above. Recently the OECD Competition Committee held a roundtable discussion on Communication by Competition Authorities. The documentation from that roundtable is available as described above.

countries because, in most cases, the public has not been heavily exposed to competition and competitive markets. The ICN survey bears this out. The responses indicated that consumers in developed countries are more familiar with the benefits of competition than are those in developing countries.¹⁰ Fortunately, there is good evidence that competition officials in developing countries understand the importance of competition advocacy for this purpose. In many developing countries there exist sophisticated programmes targeted at building a competition culture.

Suggested questions for discussion

- *Many developing countries employ some or all of the communications tools listed above. Is there anything more that can be done? Is it realistic to expect that a developing country can build a competition culture quickly, or is it essentially an evolutionary process?*

IV. The Relationship Between Competition Advocacy and Competition Law Enforcement

A commonly accepted definition of competition advocacy is that it includes all activities of a competition agency that are intended to promote competition apart from those that involve enforcement of the competition law.¹¹ Such a definition suggests that advocacy and enforcement are mutually exclusive, but they are not. In many ways they are interdependent. Thus, as noted above, effective competition advocacy in the privatisation and regulatory reform processes can favourably impact enforcement by creating competitive markets, in which future abuses of dominance and collusion are less likely to occur. Success in building a competition culture has obvious benefits for enforcement: businesses will more readily comply voluntarily with the competition law; businesses and the public will more willingly co-operate with enforcement actions, by providing evidence and the like; and policy makers will more enthusiastically support the mission of the competition agency, in particular by giving more resources to it.

Perhaps less well appreciated is how competition law enforcement can affect competition advocacy. Noted above is the importance of the agency's credibility and reputation to successful competition advocacy efforts. Such credibility cannot be gained through advocacy alone; it must be enhanced by success in enforcing the competition law. It is imperative that the agency select and successfully prosecute cases that are widely viewed as beneficial to consumers, whether they involve destructive cartels, high profile, anticompetitive mergers or abusive conduct by notorious dominant firms. In the end, a competition agency's reputation will be built largely upon its record in enforcing the competition law, and this reputation will significantly affect its influence as an advocate in other forums.¹²

¹⁰ ICN Report at 79.

¹¹ ICN Report at 25.

¹² See, ICN Report at 75-76; but see, William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brooklyn Journal of International Law, 408 (1997), in which the author points out the great difficulties facing new competition agencies resulting from the lack of experience and resources, and suggests a gradualist approach to law enforcement by these agencies.

Suggested questions for discussion

- *Do you feel that your agency can be successful in competition advocacy without having built some credibility on the enforcement side?*
- *How can a competition agency rationally allocate its resources between enforcement and advocacy? Indeed, is it necessary to do so, or can the agency essentially be opportunistic, selecting the most promising of either type of matter as they arise?*

V. Conclusions – challenges for developing countries

It is important that competition agencies in all countries engage in competition advocacy, but the discussions above suggest that it is especially critical for those in developing countries to do so. There are certain events that occur in the formative stages of a market economy, including privatisation and regulatory reform, which will significantly impact how the new economy develops. It is better to accomplish these changes properly at the outset than to try to amend them later, and the participation of the competition agency as an advocate for competition has obvious value to that end. Further, most developing countries lack suitable competition cultures, and it is important for the agency to begin the process of building one. These circumstances suggest that competition agencies in developing countries should be relatively more active in competition advocacy than their counterparts in developed countries. At the same time, however, they may lack the foundation for doing so – they may not yet have acquired the independence, the resources and the credibility necessary for effective advocacy.

There is no obvious solution to this dilemma. The agency must simply exercise good judgment in selecting and pursuing its advocacy projects. It must seek out matters that are economically important, politically visible, that will not occupy too many resources and in which the agency has a reasonable chance of success. It must give ongoing attention to building a competition culture through aggressive public relations and dissemination of information. And importantly, it must not neglect its law enforcement responsibilities. It must exercise the same care and expend at least the same amount of energy in finding and prosecuting violations of the law as it does in its advocacy efforts.