

RECOMMENDED PRACTICES ON COMPETITION ASSESSMENT

A primary goal of competition agencies is to promote competitive markets and thereby protect consumers. Most competition agencies do this through at least two mechanisms: enforcement and advocacy.

“Competition advocacy” refers to those activities conducted by the competition agency related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other government bodies and by increasing public awareness of the benefits of competition.¹

The goal of competition advocacy is to enhance understanding of the competitive process and provide a framework for thinking about public policy issues from a competition perspective. A significant part of many competition agencies’ advocacy activities is dedicated to addressing public restraints on competition. Many competition agencies do this by offering input on proposed or existing legislation, regulations, or policies so as to prevent unnecessary restrictions that hinder competition on the merits and adversely impact price, quality, innovation, or consumer choice.

Recognizing that legislation, regulations, and policies (“policy” or “policies”) may restrict competition, including inadvertently, competition agencies can help policymakers as they evaluate the impact of a policy. For example, a proposed law seeking to address a specific policy goal such as consumer protection or environmental concerns may have unnecessary, disproportionate, or unanticipated adverse effects on competition. The adverse impact is more likely where policies impose specific limits on price, quantity, or quality, limit market entry or exit, or interfere with innovation. Competition agencies can help identify the costs to competition of a particular proposal and make specific recommendations to help mitigate these costs that the policymaker can take into account when assessing the overall goals of the policies under review.

Thus, a “competition assessment” occurs when, either at a policymakers’ request, or of its own initiative, a competition agency or another government body evaluates the competitive effects of a proposed or existing policy. Through the competition assessment, competition agencies can urge policymakers to consider the policy’s likely impact on competition, identify whether justifications exist for any restrictions on competition, and assess whether less restrictive alternatives would achieve the intended public policy goal. By offering policymakers expertise regarding the potential costs of restrictions on competition, competition agencies raise awareness among policymakers and elevate competition as a consideration alongside other public policy goals.

Competition assessments can take many forms, ranging from recommendations supported by general economic theory to the more resource-intensive competition impact assessments, with many variations in between. The different ways of conducting a competition assessment of

¹ Definition of advocacy from the 2002 ICN advocacy report, “Advocacy and Competition Policy” at 1. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>.

proposed or existing policies can themselves constitute advocacies, as well as provide a foundation for or input into later advocacies.

These Recommended Practices are intended to provide guidance to competition agencies on the competition assessment process, and do not require competition agencies to engage in competition assessment, including as related to any particular case or sectors.² Although the Recommended Practices are addressed to competition agencies, it is recognized that other government bodies can carry out valuable competition assessment work.

General Framework for Competition Assessment

- I. A competition assessment should include the identification of a proposed or existing policy that may unduly restrict competition and an evaluation of its likely impact on competition.**

Comment 1: A competition assessment is a review that identifies proposed or existing or policies that may unduly restrict competition and evaluates the policy's likely impact on competition. It can be conducted by the competition agency or another government body. The evaluation is often based on general economic principles, but can also be based on existing studies, enforcement experience, or even, in some cases, on new empirical work such as a quantification of the costs of the policy. The assessment of competitive effects is used to urge policymakers to consider the policy's likely impact on competition in deciding whether the policy is appropriate.

Comment 2: Competition assessments should be incorporated in the review of public policies in an efficient and effective manner, consistent with institutional and resource constraints.

Comment 3: Where possible, a competition assessment should include suggestions for alternative approaches to achieve the policy goals while reducing restrictions on competition.

Comment 4: Policymakers' readiness to accept recommendations may be considered in deciding whether a competition assessment is appropriate.

Comment 5: While proposed policies are often the focus of competition assessments, existing policies also are appropriate targets for competition assessments. Such an assessment allows for the consideration of actual effects and incentives that have resulted from the implementation of these policies. It may be initiated by the competition agency, another government body, or policymakers.

Comment 6: Competition assessment of existing policies can build on "sunset clauses" (a provision that a law or regulation will expire on a particular date, unless it is reauthorized, or on a statutory requirement to assess the overall impact of legislation or regulation after a certain period). In some jurisdictions, a specific body within government, the legislature, or other

² The OECD's extensive work on competition assessment, including the OECD Council Recommendation on Competition Assessment and the OECD Competition Assessment Toolkit, is an important complement to these Recommended Practices. Available at: <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

bodies may be tasked with defining priorities for the review of existing public policies. Such an assessment may also be undertaken as part of a broader assessment of public policies.

Creating an Enabling Environment for Competition Assessment

II. Competition agencies should advocate for a policymaking environment that promotes consideration of competition principles.

Comment 1: As part of their competition advocacy mission, competition agencies should seek to persuade policymakers to create an institutional environment that facilitates competition input into decision-making. Such an environment may include, as appropriate in the particular institutional circumstance:

- A clear process for drafting and adopting new policies with appropriate periods for review and comment by interested parties;
- Written procedures for considering a regulatory impact assessment of proposed policies;
- Appropriate legal authority for the competition agency, or where applicable another government body, to conduct competition assessment upon referral or on its own initiative, which could include a formal role for the competition agency to offer input early in the policy drafting process;
- The early involvement of competition agencies in the process;
- Other avenues for the competition agency to express its views to members of government, the legislature, or other bodies, such as through hearings, studies, or opinions;
- Commitment by the relevant government bodies to consider competition assessments and any accompanying recommendations;
- Openness to consider relevant expertise from academia, consumer organizations, independent non-government bodies, and the private sector, as well as comparative experiences, including with respect to pro-competitive reforms, in other jurisdictions that are relevant to the competition assessment;
- The publication of formal final competition assessment recommendations so that a public debate can take place on this basis, including before government, the legislature or other bodies; and/or
- A response of policymakers to the competition assessment.

Comment 2: Regular contact between competition agencies and other parts of the government, the legislature, or other bodies that administer and promulgate policies provides a good foundation for effective advocacy of competition principles. Competition agencies often build formal or informal networks and contact lists of competition advocates, at decision-making and operational level, within government, the legislature, or other bodies responsible for drafting or reviewing existing policies. The network of the competition agency's former employees or of officials from other offices that participated in staff exchanges with the competition agency may be particularly good candidates for inclusion in these networks and contact lists.

III. The process for conducting competition assessments should be transparent.

Comment 1: Competition agencies should develop guidance or tools for conducting their own competition assessments or provide support for others to engage in assessments relying on existing tools such as the OECD competition assessment toolkit. Such guidance or tools may help policymakers identify the main issues to address as part of a competition assessment. They may also serve to encourage policymakers to conduct in-house assessments of proposed policies, where relevant. When the competition agency drafts the guidance, it should explain the main aspects and steps of competition assessment, when it is desirable to seek an opinion from the competition agency, and the general substantive criteria used to conduct the assessment. It may also describe the types of provisions that are likely to restrict competition, how those restrictions can be avoided and how mitigation measures can be taken. It may also contain examples (such as past competition assessments, case practice, relevant caselaw).

Comment 2: Competition agencies should consider publicly identifying priorities regarding the competition assessment of proposed or existing policies. They should also consider making selection criteria available to policymakers and other interested parties, which may promote competition awareness and further encourage referrals for competition assessment.

Comment 3: Competition agencies should make available public materials related to their competition assessment activities, including press releases, interviews, and other materials. Competition agencies may also consider making available a description of past competition assessment work in reports directed to government, the legislature, or other bodies, or in publicly available annual reports or sector inquiry reports. These reports may highlight the more prominent competition assessment activities, with summaries of how proposed or existing policies were changed, or how the level of competition in a given economic sector increased, due to the competition agency's competition assessment. Providing such materials can help increase awareness of the agency's expertise and competition assessment activities, highlight the potential benefits of competition assessment, and engender broader interest and participation in the process.

Selecting Policies for Competition Assessment

IV. Competition agencies should focus their competition assessments on the types of restrictions on competition that pose the greatest threat to competition.

Comment 1: In deciding whether to conduct a competition assessment, particular attention should be paid to policies that limit the number or range of market participants, the actions that market participants can take, the incentives of market participants to behave in a competitive manner, and the choices and information available to consumers, as these restrictions are more likely to have a significant impact on competition.

V. Competition agencies should consider defining selection criteria by which to prioritize competition assessment among other advocacy activities.

Comment 1: In prioritizing competition assessment work, it may be useful for competition agencies to define selection criteria. These criteria can give guidance to the competition agency to focus its action on the most significant matters and consider the interaction between its enforcement and advocacy. This also enables policymakers and the public to understand the competition agency's assessment activities and to seek its support and use these criteria for their own activities (e.g., to propose legislative/administrative measures or to plead their own cases before courts).

Comment 2: Appropriate criteria for defining priorities for competition assessment of policies may include factors such as:

- Available competition agency resources and overall priorities;
- The likelihood that the policy will be adopted;
- The potential or actual competitive impact of the policy, which depends on the extent and nature of the possible restriction on competition, but also on the importance of the economic sector or matter at stake;
 - for the domestic economy (which may be measured, for example, by its contribution to GDP, its connection with other economic sectors as a provider of inputs or services, its significance for investment and productivity, or by the potential scope for wider gains through innovation, improved distribution or business processes if pro-competitive reforms are conducted in that sector);
 - for consumers or taxpayers (which may be measured, for example, by the share of consumer expenditure for the relevant products or services, by the fact that the goods or services are purchased by the government, or by the likelihood that a pro-competitive reform may contribute to the alleviation of poverty or improve the quality of life of vulnerable consumers).
- The policymaker's perceived openness to competition assessment;
- The degree of liberalization of the market (intervention may be particularly beneficial at the outset of the liberalization process);
- The added value of a successful competition assessment compared to other advocacy work or as a complement to competition enforcement;
- Past advocacy, monitoring, or enforcement activity that indicates, for example, a history of anticompetitive conduct or competition concerns, a pattern of unexplained higher prevailing prices than in similarly situated economies, high market concentration or high barriers to entry in the sector; and/or
- The success of pro-competitive reforms or competition assessment in other jurisdictions in the sector.

VI. In identifying opportunities for competition assessment, competition agencies should consider the institutional arrangements and relationships with policymakers.

Comment 1: Competition agencies may wish to engage in structured and long-term relationships with relevant public organizations and other government agencies so as to identify

early opportunities for competition assessment and incorporate them into their overall planning.

Comment 2: Competition agencies may wish to monitor government and legislative agendas to identify possible areas for future competition assessment work. In jurisdictions where decision-making in many economic sectors is decentralized such that regional or local bodies are responsible for or share policy/lawmaking, competition agencies may also, within available resources, monitor local legislation and regulations of those entities.

Comment 3: Competition agencies also may wish to conduct specific outreach initiatives with respect to government (central, regional, or local), the legislature, or other bodies, for example, through training, public conferences, seminars, formal or informal meetings, direct involvement in the drafting or review of legislation or in government working groups, to better identify possible areas for competition assessment.

Comment 4: Competition agencies may consider coordinating their competition advocacy and assessment work with sector regulators on the basis of legislative provisions, memoranda of understandings, or informal procedures.

Comment 5: Consultations (e.g., in the form of a permanent forum or occasional seminars and conferences on specific topics) with interested parties, in particular consumer organizations, the business community, independent non-government organizations or experts also may serve to identify opportunities for competition assessment. Similarly, voluntary submissions (e.g., in the form of complaints) from interested parties may provide helpful indications of opportunities for competition assessment.

Comment 6: Market studies, sector inquiries, and other research on specific markets or economic sectors conducted by the competition agency or others that identify restrictions on competition that result from policies may inform a competition agency's consideration and selection of competition assessments.

Conducting a Competition Assessment

- VII. When conducting competition assessments, consideration should be given as to whether a competitive restriction is reasonably related to the goals of the policy under review and whether the policy goal could be achieved without harming competition or in a less restrictive manner.**

Comment 1: Competition agencies generally take a phased approach to the competition assessment, starting with considering the policy's goals, assessing the competitive restraints, and identifying potential less restrictive alternatives that may achieve the policy objectives.

VIII. A competition assessment should start with the identification and consideration of the goals and objectives of the policy under review and include a review of prior work in the area.

Comment 1: It is important to identify the goals of the proposed or existing policy either directly through communication with the policymaker, or by reviewing speeches, public statements, preparatory work, or public consultations. The identification of the goals may assist the competition agency in understanding the intended effects of the policies.

Comment 2: Previous competition agency comments or inquiries relevant to the competition assessment of the policy under review should be considered to inform the assessment. The work of competition agencies in other jurisdictions can provide valuable insights and background information.

IX. When considering whether a policy is likely to have significant impact on competition, it is important to consider how the restrictions are likely to influence the market structure and the behavior of firms and customers in the market(s) or in neighboring markets.

Comment 1: When conducting a competition assessment, competition agencies should consider the several forms that restrictions on competition could take in the policy under review. The impact on competition is more important than the specific form of restriction.

Comment 2: When conducting a competition assessment, competition agencies should be mindful that not all restrictions are harmful to competition. Competition agencies should focus primarily on evaluating the costs of the restrictions to competition and highlighting ways to achieve the objectives through means that are less damaging to competition.

Comment 3: When competition agencies conduct assessments, they should consider the following types of restrictions that may have a significant impact on competition.

- A. COMPETITION AGENCIES SHOULD ANALYZE WHETHER POLICIES THAT RAISE BARRIERS TO ENTRY INTO, OR EXPANSION IN, OR EXIT FROM, A MARKET ARE LIKELY TO SIGNIFICANTLY RESTRICT COMPETITION.³

*Examples of such restrictions may include:*⁴

- Policies that grant exclusive rights to a firm usually create a barrier to entry. Competition agencies may wish to analyze whether such policies either directly or indirectly create a situation in which only one firm or only a small set of firms are allowed to provide certain goods or services.

³ See the Competition Checklist in the OECD's Competition Assessment Toolkit, pp 7 – 18. Available at: <http://www.oecd.org/daf/competition/46193173.pdf>.

⁴ The examples of specific types of restrictions in the following sections are not intended as Recommended Practices. They are included as non-exclusive illustrations of the restrictions that competition agencies may wish to consider for competition assessment.

- Even when policies do not grant exclusive rights, they may sometimes unnecessarily limit which firms can compete in a market, for example, if firms are required to conform to certain organizational forms or business models, unduly restricting their right to freely choose their structures and processes.
 - Policies that significantly limit the sources of investment, expertise, or technical capacity.
 - Policies that require firms to conform to unnecessarily high quality requirements or to offer a mandatory minimum set of services, limiting consumer choice and possibly decreasing the number of firms operating in the market if certain firms cannot meet the quality criteria.
 - Policies that directly or indirectly create barriers to or otherwise impede the movement of goods and services across borders or require firms to operate local establishments or facilities.
 - Policies that establish restrictions on professions that require minimum educational standards or practical experience, as such restrictions may exclude capable practitioners or investors.
 - Policies that directly or indirectly create regulatory standards that impose a significant cost for compliance (e.g., rigorous product testing requirements) or requirements to adopt certain technologies.
 - Policies that establish significant restrictions on investments.
 - Policies that directly or indirectly create anticompetitive barriers to exit, as they may increase the risks associated with entry, and thereby influence a potential entrant's decision to enter the market.
- B. COMPETITION AGENCIES SHOULD ANALYZE WHETHER POLICIES THAT CONTROL HOW FIRMS ARE ALLOWED TO COMPETE IN A MARKET ARE LIKELY TO SIGNIFICANTLY RESTRICT COMPETITION.

Examples of such restrictions may include:

- Policies that favor certain firms over others. This could involve preferential treatment to state-owned enterprises or legal monopolies as well as setting standards for product quality in such a way as to favor some firms over others.
- Policies that implement so-called "grandfather clauses" that may exempt existing firms or practitioners from new requirements. Such provisions can unfairly favor incumbents over new entrants.
- Policies that set prices or otherwise influencing how prices are set.

- Policies that directly or indirectly control non-price terms of sale, such as contract lengths, warranties and service on the market.
 - Policies that prescribe quality requirements that are more restrictive than what is necessary to protect consumers.
 - Policies that directly or indirectly set quantitative restrictions on output.
 - Policies that establish unnecessary advertising restrictions. Restrictions imposed on comparative advertising (e.g., where firms explicitly compare their price, quality, etc. against their competitors' offerings) or non-comparative advertising (e.g., general statements about the firm's products, without comparisons to others') can unnecessarily restrict competition and have a disproportionate impact on new entrants.
- C. COMPETITION AGENCIES SHOULD ANALYZE WHETHER POLICIES THAT SHIELD FIRMS FROM COMPETITIVE PRESSURE ARE LIKELY TO SIGNIFICANTLY RESTRICT COMPETITION.

Examples of such restrictions may include:

- Policies that exempt a particular industry or group of firms from the jurisdictional reach of competition law.
 - Policies that allow firms or professionals to exchange strategic information.
 - Policies that create self-regulated professions that do not include satisfactory safeguards against anti-competitive behavior.
 - Policies that limit the profits or market share that firms may achieve. Such restrictions (e.g., rate-of-return regulation) may prevent firms from benefiting from efficiencies, taking risks, and innovating, or reduce their incentives to do so.
- D. COMPETITION AGENCIES SHOULD ANALYZE WHETHER POLICIES THAT CONTROL THE CHOICES AVAILABLE TO CONSUMERS ARE LIKELY TO SIGNIFICANTLY RESTRICT COMPETITION.

An example of such a restriction are policies that create a situation in which the choices available to consumers are directly or indirectly limited.

Evaluating the Likely Impact on Competition

- X. Once the restraint and its possible effect on competition have been identified, competition agencies should evaluate the likely competitive effects on the basis of sound economic theory, and, where feasible, on empirical evidence.**

Comment 1: Competition agencies should present a reasoned basis for the competition assessment of the policy under review. The approach best suited to the issue should be left to the competition agency, considering available resources and data.

Comment 2: As an initial matter, the competition agency may choose to base its evaluation of the policy's competitive effects solely on general economic principles.

Comment 3: Existing empirical work, such as data or studies produced by a statistical or other government body, or data or studies prepared by a government body responsible for oversight in the affected market, for example, a sectoral regulator, can also be used as the foundation for the competition assessment. This is particularly relevant in a resource-constrained environment and for relatively short legislative cycles, which can prevent specific empirical assessments and detailed quantification of the likely impact of the proposed change.

Comment 4: Recognizing that competition impact assessments are usually resource intensive and only necessary in select instances, competition agencies may seek to quantify the cost of a particular restriction, which may be used as a tool to strengthen the case for eliminating or changing the restriction on competition. When competition agencies conduct a competition impact assessment, they should consider carefully the metric they will use to derive quantitative estimates of the harm to competition of the policy under review, recognizing the benefits of a metric that is neutral across restraints and that allows for ready comparison among different sorts of restraints.

In order to test estimates, a competition impact assessment might look to "natural experiments" based on changes that occurred in markets when the policies were not in effect. Another alternative is to find a control group that has not been subject to these policies, and compare differences in conditions before and after the policies went into effect. Competition agencies should recognize that any measurement or estimate is bound to be imprecise. "Rough and ready" estimates of the impact of restrictions on competition raised by proposed or existing policies should be subject to appropriate revision in light of new learning.

Delivering the Assessment

XI. Competition agencies should consider carefully the form of competition assessment most appropriate for a particular situation.

Comment 1: Competition agencies may wish to share their expertise with policymakers through informal consultations and advice, public formal written opinions or letters (e.g., by engaging directly in hearings or meetings during the decision-making process), or in a more formal role (e.g., on a specific regulatory committee within government, the legislature or other bodies). Public formal comments or opinions are a practical communication tool intended for policymakers and the media that can facilitate engagement of interested parties outside the competition agency, whereas informal opinions can influence decision-making within government, the legislature, or other bodies and may strengthen the role of the competition agency as a trusted advisor.

Comment 2: Competition agencies should have discretion to decide whether to give a formal or informal opinion, and whether or not to issue an opinion so as to balance their competition assessment activities within their overall resources and priorities.

Comment 3: Offering a range of advocacy activities related to competition assessment may help enhance the receptivity of the policymaker.

XII. Competition agencies should seek to deliver the competition assessment in a timely manner.

Comment 1: Competition agencies should endeavor to time the delivery of the competition assessment to ensure that the policymaker can be informed of the competition agency's recommendation with an appropriate period to make adjustments if appropriate.

XIII. Competition agencies should engage with interested parties outside the agency to promote policymakers' consideration of the competition assessment.

Comment 1: As described in Recommended Practice V, competition agencies should, where appropriate, maintain relationships with relevant public organizations and domestic peer agencies both to foster opportunities to identify potential competition assessments and to improve the likelihood that assessments will be considered in the policymaking process.

Comment 2: The quality and impact of competition agencies' competition assessments may be strengthened through consultation with interested parties. In evaluating the input from interested parties, competition agencies should consider submitters' interests and motivations. Consultation with interested parties also enables competition agencies to better anticipate possible public reaction and to reflect on how these reactions may be addressed. This process may help build support for proposed reforms for a more competitive economic environment. Consultations may be carried out during the competition assessment and may include public conferences and seminars organized by the competition agency after the competition assessment has been delivered. Consultations allow interested parties to present their views on public policy issues and on the competition agency's recommendations.