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THE GOALS OF COMPETITION POLICY – Contribution from Consumers International

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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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The Goals of Competition Policy

- Contribution from Consumers International –

Consumers everywhere in the world are very concerned at high and rising prices and their impact on the cost of living. Competition regulators have few if any powers in relation to them. Considerations should be given to giving them more power to enable them to identify, investigate, monitor, study, expose, influence and in some cases restrain and sanction such prices. Consumers are also concerned at increased concentration, reduced competition, higher mark ups, higher prices and greater inequality. Stronger competition laws, and more vigorous enforcement of them are needed. Many discussions of competition law ignore the possibility of using or threatening to use a divestiture power in appropriate circumstances. Consumers are also aware that legislation, regulations, and government actions can all contribute to high and rising prices. Arguably those restrictions do more harm than private sector restrictions. Yet those exemptions are generally exempt from scrutiny or action by competition agencies other than by selective, limited occasional advocacy in particular circumstances. Processes should be established to enable independent scrutiny.

1. High and rising costs

1. The biggest concern of consumers everywhere in the world is high and rising prices, both in respect of essential goods and services such as food and energy, and generally for all goods and services.
2. Prices may be considered under the headings below:

1.1. General inflation

3. A continuing rise in prices (inflation) most often in the past has been the result of aggregate demand exceeding aggregate supply. In such cases the appropriate solution has been restrictive monetary and fiscal policy.
4. However, the current inflation is not simply demand driven. There are supply-side factors. In this situation restrictive monetary and fiscal policy is an especially blunt and socially and economically costly instrument. (It is also noted that restrictive monetary policy tends to drive up exchange rates affecting export and import competing sectors).

1.2. Expectations of inflation

5. There is a real possibility that expectations of inflation may take off in the current situation and trigger an ongoing cycle of price rises as they did for long periods in the 1970s and 1980s.
6. Many forecasters take the view that inflationary expectations have not yet set in, and that economic actors, whether they be consumers, businesses or workers, are acting on the basis that inflation will fall back to the low levels of recent years. However, expectations of inflation may become deeply embedded particularly having regard to the high 'underlying' rates of inflation currently and its possible persistence.

1.3. Profiteering

7. During the COVID period and now during the Ukraine war period there is a real possibility that advantage has been or will be taken of short-term market disruption to charge excessive prices. There seems to have been some profiteering during the COVID period when some suppliers of vaccinations and masks lifted prices heavily to make profits.

1.4. Excessive prices in the longer term

8. Currently some firms with monopoly power are charging very high or ‘excessive’ prices on a continuing basis.

1.5. Government induced high prices

9. There are many situations where governments are themselves responsible for prices being excessive. This can arise through legislative, regulatory, and other interventions that restrict competition. Tax increases are a further factor. Higher interest rates can cause some prices to rise even if their general impact is deflationary.

1.6. Disruption

10. There is major disruption in every economy today. There are supply and demand disruptions everywhere stemming from macroeconomic policies, war, post-COVID adjustments, climate change and decarbonization, increased protectionism and reduced competition. These factors combined with inflation, and emerging inflationary expectations, create opportunities for overcharging and for masking unwarranted price increases.

2. Powers of competition regulators

11. Competition regulators have few or no powers over prices.

12. An important feature of competition lore (or competition culture) is the opposition to such powers. As elementary economics textbooks point out the main potential harm from monopoly is high (‘excessive’) prices. However, antitrust and competition law around the world usually make little or no provision for dealing directly with high prices even though they are a major concern of consumers. There are admittedly some jurisdictions which prohibit excessive prices, in the circumstances of dominance or substantial market power. However, these powers are rarely invoked, usually only in special and limited circumstances. When they are it usually requires lengthy processes before conclusions are reached.

13. Some agencies can become involved in pricing matters through market studies.

14. They also may be able to undertake advocacy in relation to high prices but typically this occurs only occasionally and mostly in special limited circumstances.

15. A handful have explicit powers to comment on high prices. Even then it is only when governments invite them to do so.

16. Broadly then most competition agencies do not have the power to deal with or even address today’s high prices and inflation. Nor is it part of the competition culture.

17. Yet there is some expectation by consumers that governments will take direct action in relation to high prices and it is natural to ask whether competition agencies should become involved.

18. Therefore, should competition agencies have additional powers, or should they keep out of these fields and ‘play in their own sandpit’?

3. Policy options

3.1. General inflation

19. To the extent that there are supply factors in the current inflation there would seem to be scope for more attention to be given to them by governments. Sometimes the drivers of supply side inflation are linked with a lack of competition. Sometimes there are restrictions on supply arising as side effects of disruption in the global economy e.g. supply chain disruptions. These can give rise to market power whether short term or long term and a capacity to exploit buyers of all kinds. There would seem to be scope for agencies to investigate the supply side restrictions to consider whether there are competition or other unwarranted impediments and whether there is exploitation of short term or long-term market power and to consider whether there are appropriate measures that could be taken that would ease some of the difficulties. With their understanding of markets competition, and supply and demand, competition agencies could be well equipped to do this work and to expose and take action.

3.2. Expectations of inflation

20. In the 1970s when inflationary expectations were making a substantial contribution to ongoing inflation many governments including the United States, the United Kingdom, Australia and Canada took measures to deal with the incorporation of inflationary expectations into prices. This most often took the form of price policies aimed at reducing or eliminating the inflationary element of price rises and was usually linked with similar wage policies.

21. In Australia in 2000 when a Goods and Services Tax expected to lift prices was introduced the government charged the ACCC with the responsibility of ensuring that unwarranted price expectations were not included in prices.

22. Is there scope in the current situation for governments though competition agencies to take measures to address problems arising from the inclusion of inflationary expectations in prices? This could take many forms ranging from study of prices at the industry and firm level, some exposure of price rises which are falsely claimed to be based on current or expected inflation; and actions that would modify the inclusion of unwarranted expectations in prices. The fact that there could be scrutiny of such prices could temper them.

3.3. Profiteering

23. Could the governments through competition agencies deal with profiteering? Once again this could be through study and exposure (name and shame) or through penalties or controls. There could be a particular focus on the exploitation of short-term market power.

3.4. Excessive prices in the longer term

24. Given the importance of containing prices is it timely for competition agencies to be directed to investigate more often cases of ‘excessive’ prices. This might involve competition analysis to establish that firms have market power and that they are exploiting it in the form of higher prices. There could be power to act more quickly than at present.

25. It might be argued that there are some regulatory bodies in the public utility area that address questions of high prices by monopolists. Governments may believe that these agencies are sufficient to address problems of high prices in telecommunications, energy, and other fields of monopoly regulation. However, often these agencies have little power over such prices or do not use their powers to curb prices and certainly not to deal with inflationary expectations, opportunistic prices and the like.

3.5. Government actions

26. In most countries there are instances of government actions that increase prices. This may be done directly by establishing minimum prices in various fields especially agriculture. It may also be done indirectly by government regulation that restricts competition e.g. entry barriers into some industries. Of particular concern is the current rising tide of protectionism. Should not the government take a more serious look at these matters using independent agencies? A useful perspective is to see protectionist trade policies as an area of global competition policy gone badly wrong.

3.6. Disruption

27. The many current disruptions in economies everywhere create opportunities for exploitative pricing. There seems to be scope for pricing action by competition regulators. To the extent that anti-inflationary monetary policies are frustrated by downwards ‘price stickiness’ could more be done?

4. Conclusions on prices

28. In a period of continuing high and rising prices and great public concern about their impact on the cost of living the traditional instruments of competition law – regarding cartels, abuse of dominance, anti-competitive mergers, and advocacy – although valuable in themselves have only a modest contribution. There are some measures which governments could take in response to public concerns including identifying, monitoring, studying, exposing, influencing and in some cases restraining and sanctioning such prices. Competition agencies, properly resourced, could with their knowledge of markets, competition and supply and demand be tasked with some of these roles. This would seem to be better than entrusting those roles to other parts of government.

5. Energy prices: a note

29. Energy prices have soared everywhere. There are several causes including the Ukraine war, side effects of decarbonization, aftereffects of COVID-19 and the recovery from it, OPEC decisions, and the general rise in underlying rates of inflation. There are four options: do nothing; subsidise consumers possibly through taxes levied on energy companies; hold down energy prices generally for the benefit of all users; take measures aimed at protecting low-income vulnerable consumers.

30. There are some measures that could be taken on the prices front preferably under the supervision or oversight of competition bodies or directly by them. The issues are similar to those discussed above in relation to prices.

31. Of particular note is that high energy prices fall heavily on the more disadvantaged members of society. Some steps that could be taken include: better identification of vulnerability; reduced complexity of pricing and enhance accessibility for energy consumers e.g. via default prices; stronger protection for consumers facing payment difficulties; stronger connection with persons with ‘lived experience’ (that is vulnerable consumers) and to give them the opportunity of expressing their specific concerns more directly and to assist in identifying measures that might more specifically address their problems; improve the efficiency of regulation.¹

32. Decarbonisation is another important element in the changing world economy and can be seen as part of the energy price challenges. Pricing should be scrutinized by competition agencies. Are prices justified? Are they the result of anticompetitive arrangements? Do they reflect the true costs of energy sources such as coal, atomic energy, electricity, gas, renewables? Should opportunistic pricing be directly curbed?

6. Food prices: a note

33. This paper does not discuss the challenge of food prices beyond noting the extensive protectionism regulation, protectionism and trade restrictions that apply in this sector. In addition, there appear to be, high degrees of concentration in important parts of the global food system.

7. Concentration, reduced competition, higher mark ups and profit, and greater inequality

34. It is commonplace now to observe that there has been an increase in concentration, reduced competition, higher mark ups, and a higher share of profits in national income. Associated with that has been a rise in inequality in many economies.

35. Picketty² and others stress that there has been some general improvement over the years in regard to the reduction of inequality especially in incomes but there is still a big gap requiring multi-dimensional policy innovation.

36. How can competition policy contribute to dealing with reduced competition? An obvious answer is more vigorous enforcement of competition law through closer scrutiny of mergers, abuse of market power and coordinated pricing behaviour. There could also be strengthened legislation in this regard.

37. There are, however, significant gaps in competition law. First, as noted earlier although the main harm from reduced competition takes the form of high prices, competition regulators rarely have pricing powers. This needs review.

38. An equally striking feature of competition law is the absence or little use of the power of divestiture. Economics textbooks point out that market power is generally associated with having high market shares and with there being a high degree of concentration in particular markets. Whilst attention is rightly drawn to the role of entry barriers and other factors in determining the amount of competition in a market most

¹ These ideas are expressed in Australian Energy Regulator, Australian Government, Towards Energy Equity - A strategy for an inclusive equity market (October 2022)

² Thomas Picketty, *A Brief History of Equality*, Harvard University Press 2022

treatises gloss over the potential role of divestiture even though at first glance it seems a relevant remedy in certain monopoly situations. This neglect is mirrored in the world of competition law. Often there is no divestiture power. When there is such power, it is rarely used. This is despite the fact that historically divestiture has played a very useful role in the promotion of competition in the United States. The breakup of oil, cigarettes, chemicals and in more recent times AT&T have produced excellent results. It is also despite the fact that in other parts of the world break ups of public utilities in fields such as energy and telecommunications have also been very productive.

39. The fact is that in some instances after weighing up all of the circumstances there are some industries where the best remedy for the exercise of monopoly power may be divestiture. Not only is this an important measure in itself it is also likely to have a significant deterrent effect on anticompetitive behaviour.

40. Divestiture may also be relevant to current problems of dealing with digital platforms.

41. Has the time not come for a wider debate about the possible role of divestiture in competition law and policy?

8. Government restrictions on competition

42. When consumers express concerns to competition agencies about a lack of competition in various fields they are often told that the problem is caused by government laws, regulations and actions that restrict competition and that the agency is powerless to deal with them, save possibly for some advocacy (of which there is relatively very little in relation to major government restrictions on competition). How often do they express concern at protectionism?

43. When the history of competition policy comes to be rewritten one can expect a broadly favourable report card on the performance of antitrust and competition law in relation to the private sector. The biggest failure will be seen to be the lack of action to address government-imposed restrictions on competition. These are arguably the biggest and most enduring restrictions on competition in every country of the world.

44. What role can and do competition agencies play? In most countries there is some advocacy, and it should continue. In some cases, it is supported by market studies although these are most often about the private sector. However, advocacy, typically, has some limitations. First, it typically covers a very limited field. Second, not only is the legal power of competition regulators to take action about government restrictions on competition non-existent in nearly every country but politically their voice is not a very strong one. They do not have a great deal of political weight when confronted with the departments of government, ministers and politicians, and powerful interest groups. It is true that in some countries' governments must consult with competition agencies about laws that restrict competition although in many cases the consultation leads to no change in outcomes. Competition agencies are most often not at the table when important restrictions on competition are introduced. There have been some instances for example in Australia where there has been systematic attempts to strike down laws, regulations and government actions that restrict competition but those instances are few and far between and even in countries like Australia the national competition policy has died.

45. Can more be done in this important dimension of competition policy? Is there a bigger role for competition agencies? If not, history will mark down the performance of competition policies.