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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN COMPETITION FORUM

Session III: Strategies for Competition Advocacy

Call for Country Contributions

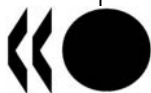
8-9 September, San-José (Costa Rica)

The attached document is circulated to the Latin American Competition Forum FOR DISCUSSION under session III at its forthcoming meeting to be held on 8-9 September 2010 (Costa Rica). Written contributions for that session should reach the Secretariat by 10 August at the latest.

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LATIN AMERICAN COMPETITION FORUM

-- 8-9 September, San José (Costa Rica)

Session III: Strategies for Competition Advocacy

CALL FOR COUNTRY CONTRIBUTIONS

1. This request for contributions is circulated in preparation for the discussion to be held in Session III of the Latin American Competition Forum (LACF, 8-9 September 2010 in Costa Rica). Session III will discuss Strategies for Competition Advocacy.¹ You are invited to make a written contribution to this discussion.

2. A commonly accepted definition of competition advocacy is the following:

Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.²

¹ This is the second time that the topic of competition advocacy has been discussed at a Latin American Competition Forum. The first was in 2004. An issues paper prepared by the Secretariat for that discussion is available on the OECD website, at <http://www.oecd.org/dataoecd/52/42/32033710.pdf>.

² International Competition Network, *Advocacy and Competition Policy* (2002). This was a comprehensive report by the ICN's Advocacy Working Group, based upon responses to a questionnaire issued to ICN members. In 2009 the Working Group published a second report, *Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy*, also based upon responses to a questionnaire. These two reports and other documents produced by the ICN on the topic are available on the ICN website, at www.internationalcompetitionnetwork.org.

3. As stated in this definition, there are two components to competition advocacy. The first reflects the competition agency's role as advisor to the government and to sector regulatory bodies concerning policies, legislation and regulations that implicate competition policy. The second is as proponent for public understanding and acceptance of competition and competitive markets – the development of a “competition culture.” Both are important, but they are quite different.

4. Advocacy on behalf of a *competition culture* essentially involves providing information: to the public about how individuals benefit from competition, and about the public's role in preserving competition – reporting activity that suggests cartel activity, for example; to the business community, including private law practitioners, about how it benefits from competition and about its obligations under the law; to the academic community about the importance of developing competence in competition analysis and microeconomics; and to judges about the principles of competition analysis and their role in enforcing the competition law. This type of competition advocacy is conducted in several ways, through web sites, informative and easy-to-read publications for public consumption, publication of decisions, guidelines and procedures, speeches by competition agency officials and seminars and conferences. This type of advocacy is relatively straightforward and is practiced in every country that has a competition law.

5. *Intra-government advocacy* is more complex and more difficult. For that reason, the discussion in the Forum will focus on this type of advocacy only. It is conducted in several contexts:

- *Regulatory reform.* The creation and modification of regulatory regimes is an ongoing process in every country, but it is especially important in developing countries, which may be in the process of creating new regulatory structures as a part of their transition to a market economy. Competition advocacy can play a vital role in this process, to ensure that regulation is both minimal – operating only where competition is not possible or effective – and efficient. The interaction between the regulatory process and the competition law is especially a topic that should receive the competition agency's attention.
- *Comments on proposed sector regulations.* Proposed regulations by sector regulators can implicate competition in several ways, for example in allocating take-off and landing slots at congested airports, allocating telecommunications spectrum or developing pricing rules in electrical generation. Other regulations are technical in nature and either do not merit the attention of the competition agency or require having expertise that the agency does not possess.³
- *Comments on other government policies.* Here the opportunities for comment are many. They include government actions in health care and health care products (pharmaceuticals), professional services, agricultural policy and trade, among others, as well as providing advice on procurement policies in order to generate maximum competition in government procurement and to limit opportunities for cartels. A challenge to the competition agency is to determine how to allocate its scarce resources among the many opportunities for input in these sectors and in those subject to regulation.
- *Comments on proposed legislation.* There is always the possibility that new laws will impact competition in some way, again providing opportunities for input by the competition agency. The output of a legislature can be prodigious, requiring some means for timely identification and comment by the agency on the relatively few proposals that impact competition and markets in a significant way. Moreover, the government bodies involved simply may not be interested in engaging with or including the competition agency in the legislative process.

³ This type of advocacy is to be distinguished from enforcing the competition law in regulated sectors. This too offers special challenges for the competition agency, but it is beyond the scope of this discussion.

Successful advocacy in this context thus has at least two requirements: the need to put in place a mechanism for identification of and comment upon proposed legislation, and a more practical aspect related to strategies for ensuring that this commentary is actually taken into account by the government body.

- *Advocacy with regional (state) and municipal governments.* Policies and regulations imposed by these government bodies often impact competition. They include regulation of local bus and rail transportation, taxicabs, cable television and business licensing procedures.

6. A wide variety of mechanisms for intra-governmental advocacy exist. These range from informal consultation mechanisms to formal institutional structures which situate the competition agency within a particular government department. In advocacy terms, the more integrated within the governmental structure a competition agency is, the greater its voice and influence on policymaking is likely to be. Conversely, integration may impact negatively on the independence (or perceived independence) of the agency with regards to its enforcement mandate. A variety of tools, from market studies to competition assessments, may also be used. One objective of the discussion is to explore the range of tools employed by agencies, and the success of such tools in practice.

7. A second issue related to this aspect of competition advocacy was suggested by a few participants when consulted for the selection of the LACF topic. A shorthand definition of competition advocacy often used is that competition advocacy is everything that a competition agency does other than enforcing the competition law. This implies that law enforcement and competition advocacy are mutually exclusive, but they are not. The two are mutually reinforcing, but not binary in nature. Successful law enforcement is necessary to the creation of a national competition culture, and it enhances the competition agency's standing elsewhere in government. An active competition advocacy programme promotes more effective law enforcement, for example in detecting and prosecuting cartels. Accordingly, the typical portfolio of work of a competition agency necessitates a balance between complementary advocacy and enforcement efforts – ideally with some acknowledgement of how and why this balance has been reached.

8. Participants have also suggested, however, that in certain circumstances competition advocacy may be effectively employed as a substitute for law enforcement. This might be true, for example, in countries new to competition law enforcement, in which competition advocacy could persuade enterprises unfamiliar with the new law to abandon anticompetitive activity voluntarily, or where advocacy efforts cause government to address anti-competitive market structure rather than pursuing individual instances of anti-competitive behavior. On the other hand, the decision to focus on advocacy brings with it some costs. Absent an effective filtering mechanism, the cost to the competition agency in terms of the resources needed to identify those regulations with potential anti-competitive impact out of the bulk of legislation may be very great. Advocacy and enforcement utilize largely different skills sets, and by focusing on the former the personnel of an agency may fail to develop the skills necessary for the latter. There can also be a cost in terms of tangible results: the outcome of successful advocacy is more difficult to establish and quantify than enforcement action, and so it may be difficult to persuade a sceptical government that advocacy efforts are worthwhile. It would be interesting to explore situations in which advocacy and enforcement might be effective substitutes, taking into account the costs and benefits of each approach.

9. Finally, in-depth study of a given sector or market is a further place where advocacy and enforcement may intersect. Competition agencies sometimes sponsor or conduct comprehensive reports on a sector, which may serve to focus efforts in advocacy or in enforcement or both. Competition agencies may launch market studies in order to identify anti-competitive behavior as a precursor to enforcement action, but also, conversely, where the ultimate objective is to change market behavior without any recourse to enforcement powers. It is instructive to consider the uses of market studies in this context.

Submissions

10. Speakers will be selected on the basis of written contributions submitted to the OECD Secretariat in response to this call for country contributions. All participating countries are invited to prepare submissions to strengthen the quality and utility of this Forum discussion. It will be especially helpful if you include a discussion of one or more relevant cases from your jurisdictions. Your written contributions will complement an Issues Paper prepared by the Secretariat.

11. To help you to prepare your contribution, several questions are listed below that may help you to frame your response. This is not intended to be a restrictive or comprehensive list, however; participants are encouraged to address other issues as well, based on their own experience.

12. Please advise the Secretariat **by 15 July** if you will be making a written contribution. Contributions should be sent by **10 August at the latest** by email (Word format, 5 pages maximum in English or Spanish) to the OECD Secretariat to erica.agostinho@oecd.org (copy to: helene.chadzynska@oecd.org). All communications regarding documentation for this roundtable should be sent to them as well.

Questions for Consideration in Country Contributions

I. Regulatory reform

1. What role has your agency taken in regulatory reform – the creation or restructuring of regulatory regimes?
2. How do you ensure that the reform will provide for maximum application of the competition law and for effective interaction between the regulator and the competition agency?
3. Who besides the competition agency – if anyone – effectively represents the interest of consumers in ensuring a competitive outcome in the reform process?

II. Comments on proposed sector regulations and on other government policies

1. What steps have you taken to develop effective working relationships with sector regulators? With other agencies in the government?
2. Is there some formal requirement that regulators provide your agency with notice of proposed actions? In any case, what process do you use to select proposals on which you will comment? Is there some formal structure for consultation and cooperation with other government agencies? Does it work well? If not, what are the weaknesses and how should it be improved?
3. How do you deal with situations in which you think a comment would be appropriate but your agency lacks expertise necessary to make your views effective?
4. What have you done to build the credibility of your agency in other parts of government and with regulators? Have you encountered reputational problems of this sort when conducting competition advocacy?

III. Comments on proposed legislation

1. Describe your agency's role in the legislative process. Are your comments required in any situations? How are you notified, if at all, about proposed laws that could impact competition?

2. What political strategies do you employ in order to ensure that your comments are given appropriate consideration?

IV. Advocacy with regional (state) and municipal governments

1. Describe your agency's activities in this area.
2. What steps do you take to ensure that your input will be given appropriate consideration by these governments?

V. Interaction between competition advocacy and law enforcement

1. Does your competition agency use both enforcement powers and competition advocacy as a means to build relationships with other government bodies? How do you consider these two functions of a competition agency to be interdependent? How do you strike a balance between these functions?
2. What proportion of your agency's resources (personnel or funds) is devoted to competition advocacy?
3. Are there situations in which you think that advocacy can substitute for enforcement, or provides a more efficient means of achieving the desired outcome? Describe cases in which your agency has taken this approach, if any.
4. Are there situations in which individual instances of enforcement action provide a more efficient means of achieving a pro-competitive impact rather than higher level intra-governmental advocacy? Describe any cases in which your agency has pursued this route, if any.
5. Does your agency conduct market studies, and if so, what is the objective in conducting such studies? How do they contribute to enforcement and/or to advocacy? Market studies can be expensive; do you think they are worth it?