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Session III: Strategies for Competition Advocacy

Background Paper by the Secretariat

8-9 September, San José (Costa Rica)

This background paper was prepared on behalf of the Secretariat by Niamh Dunne, Corpus Christi College, University of Cambridge. It 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).

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LATIN AMERICAN COMPETITION FORUM

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

Session III: Strategies for Competition Advocacy

Strategies for Competition Advocacy: Background Paper by the OECD Secretariat*

*. This background paper was prepared on behalf of the OECD Secretariat by Niamh Dunne, Corpus Christi College, University of Cambridge under session III of the Latin American Competition Forum to be held on 8-9 September 2010, Costa Rica. The author wished to acknowledge the support of H el ene Chadzyska, John W. Clark and Hilary Jennings for their contribution to this report.

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STRATEGIES FOR COMPETITION ADVOCACY

Background Paper by the OECD Secretariat

1. Introduction

1. Competition advocacy involves a broad spectrum of activities undertaken by competition authorities in order to promote and advance competition law and policy. A commonly-accepted definition 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.¹

2. Thus conceived, competition advocacy is distinct from competition enforcement² and furthermore, comprises two aspects: advocacy efforts directed towards specific government entities, and efforts directed more generally towards generating support for competitive markets and the building of what is often referred to as a “competition culture” in society.

3. The latter, competition culture advocacy, aims to increase the understanding within the wider society about competition and its benefits, including among consumers, civil society, academia and the business community. The objective is, thereby, to increase support for competitive markets and compliance with competition law. Competition culture advocacy is a matter of educating members of society about competitive markets and the role of competition law. In the main, this occurs through the provision of information, using a variety of communication tools – for example, booklets, posters, advertisements on television, radio or the internet or in magazine or newspapers, training seminars or presentations – which are targeted at particular stakeholders or groups in society and designed to an appropriate level accordingly.

¹ International Competition Network, *Advocacy and Competition Policy* (2002), available online on the ICN’s website, at <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>, hereafter “*ICN Advocacy and Competition Policy*”.

² The appropriateness of this dichotomy is explored in section 4 below.

Box 1. Examples of Competition Culture Advocacy

In June 2010, in anticipation of public tenders relating to the 2014 World Cup and the 2016 Olympic Games to be held in **Brazil**, the Brazilian competition law investigative body, the Secretaria de Direito Econômico (Secretariat of Economic Law, or SDE), launched a multidimensional campaign against bid rigging.³ One element of the campaign is aimed specifically at increasing competition awareness among the general public, and in particular the negative effects of cartels on consumers; it involves anti-cartel advertisements placed in four of the country's most prominent weekly magazines.

Many competition authorities in Latin America organise annual competition or consumer days, which focus public attention on these issues. The Fair Trade Commission of **Jamaica** holds an annual "Consumer Day", during which it disseminates information in public places by means of Q&A sessions with agency staff and hands out bulletins.⁴ In **Chile**, the competition authority, the Fiscalía Nacional Económica, holds an annual "Competition Day" geared towards competition law practitioners.⁵ In **Brazil**, the 8th October has been designated "Anti-Cartel Enforcement Day" by presidential Decree. During the first Day, held in 2008, an information campaign was conducted in seven major Brazilian airports, where 450,000 brochures and other materials were distributed.⁶

Since the establishment of the Competition Superintendency of **El Salvador** in 2006, it has engaged in a wide range of competition culture advocacy activities, considered to be particularly necessary in a country new to competition policies. These include: the holding of public meetings and making presentations on competition issues to, *inter alia*, business associations, individual firms, law firms, the academic community and other government bodies; the production of a website containing information on competition and the work of the authority; and the publication of a pamphlet explaining the agency and its work to the general public.⁷

4. Competition culture advocacy has a broad ambit and expansive aims, inasmuch as it attempts to influence the views of the whole of society regarding competition matters. Nevertheless, it is relatively straightforward to perform the task of competition culture advocacy, and as the examples above demonstrate, it is performed by the vast majority of competition authorities, albeit with varying degrees of success. By contrast, intra-governmental advocacy is typically more difficult to perform and it is arguably more difficult again to achieve successful results. Accordingly, the remainder of this Background Paper focuses primarily on intra-governmental advocacy.

³ See Ministério da Justiça, *SDE Releases Campaign Against Bid Rigging*, press release of 23 June 2010, available online on the website of the Ministério da Justiça, at <http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTsvc.asp?DocumentID={471FE780-6391-4227-A623-CBBF3CED756C}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}>.

⁴ United Nations Conference on Trade and Development, *Voluntary Peer Review on Competition Policy: Jamaica* (2005), available online on UNCTAD's website at http://www.unctad.org/en/docs/ditcclp20055_en.pdf, p.13.

⁵ See the website of the Fiscalía Nacional Económica at http://www.fne.cl/?content=dia_competencia for further information on competition days held since 2003.

⁶ OECD, *Competition Law and Policy in Brazil – A Peer Review* (2010), available online on the OECD's website, at <http://oecd.org/dataoecd/4/42/45154362.pdf>. hereafter "*Brazil Peer Review*", p.22.

⁷ OECD, *El Salvador - Peer Review of Competition Law and Policy* (2008), available online on the OECD's website at <http://oecd.org/dataoecd/8/49/41597078.pdf>, hereafter "*El Salvador Peer Review*", pp.37-38.

2. Intra-Governmental Advocacy

2.1 *The scope of intra-governmental advocacy*

5. One description of intra-governmental advocacy is that it involves “[a]dvising government on how public policies and institutions interact with markets and on how to minimise the impact of government interventions on competition.”⁸ Government in this context refers to the three branches of government, namely executive, legislature and judiciary. Advocacy encompasses assistance and advice about competition matters provided to all three branches, although the degree to which a competition authority can intervene in the activities of any branch is restricted by the fundamental constitutional principles of a country, notably judicial independence, executive sovereignty and/or legislative supremacy. In countries where there is a substantial distinction between the central or federal government level and the regional, municipal or local government level, advocacy efforts must similarly address the activities of all divisions of government. This is so as to avoid, for example, the re-imposition by local government of restraints eliminated from central government regulation.

6. The scope for competition advocacy with regard to the judicial branch is quite limited. It is essentially restricted to the provision of training to judges in competition law and economics, and the submission of *amicus curiae* briefs in cases concerning significant competition issues. The heavily political nature of the activities of the legislative branch in practice limits the scope for successful competition advocacy interventions. At the very least, however, parliamentarians can also benefit from training in competition matters that is pitched at an appropriate level and which takes into account their requirements as politicians. The greatest scope for competition advocacy efforts is generally the executive, which frequently has the greatest impact on the nuts and bolts of policy formulation at central government level. This includes regulatory bodies exercising delegated law-making powers, such as sectoral regulators for privatised utilities, as well as regional or other authorities which may impose large numbers of regulations at a local level.

2.2 *The importance of intra-governmental advocacy*

7. Why do competition authorities engage in intra-governmental competition advocacy? Simply put, addressing the anti-competitive activities of private economic actors through competition law enforcement alone may be insufficient to make markets work and to secure the wider benefits resulting from competition. Some competition problems stem, instead, from the anti-competitive impact of governmental actions (or inaction) on the market.⁹

8. Government activity can have a substantial adverse effect on the efficiency of markets. This may be the result of domestic legislation, regulatory or industrial policy, regulations imposed by a regional authority, rules regulating international trade or other interactions between the state and the market. Government failures in this regard are rarely self-correcting, such that, absent reform or further intervention by the state, existing inefficiencies will persist and continue to impact negatively on efficiency, growth and, ultimately, the economic development of a country. Moreover, competition law enforcement may be legally impossible (for example, due to exemptions for regulated conduct or state action, or where the competition problem discloses no anti-competitive conduct by an economic actor), politically impractical or simply incapable of providing a remedy to the market problem.

⁸ Office of Fair Trading, *Evaluation of OFT Competition Advocacy* (OFT866), prepared by London Economics, April 2010, available online on the OFT’s website at http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft866.pdf, hereafter “*OFT Competition Advocacy*”.

⁹ See, for example, Eleanor M. Fox, “An Anti-Monopoly Law for China—Scaling the Walls of Government Restraints” 75 *Antitrust Law Journal* 173.

A much-criticised proposed modification of competition law in *Venezuela*, for example, would see state and public corporations excluded from the scope of substantive competition law.¹⁰ In such circumstances, the market can be improved only by tackling the problem at its root, namely, the anti-competitive legislation, regulation, policy or other governmental activity.

9. Government action may, unintentionally or otherwise, have an adverse effect on competition in a variety of ways. The following is a non-exhaustive list of competition problems that can result from government activities, and which accordingly may require a competition advocacy- rather than an enforcement-based solution:

- Regulatory requirements can operate as a *barrier to entry*, thereby preventing or limiting new competitors from entering a particular sector of the market.
- *Unnecessary, excessively prescriptive or bureaucratic regulation* acts as an impediment to doing business, and thereby inhibits growth and economic development.¹¹ Such regulations may be imposed by central or local government; examples include “red tape” and superfluous price or quality regulation that serves mainly to suppress competition.
- *Regulatory capture*: where regulators act primarily in the interests of regulated entities, rather than the general public, this can distort sectoral regulation and lead to inefficiency. This may be a result of bribery, perverse incentives of regulators or simply excessively close relationships between the regulator and the regulated.
- Domestic *barriers to international trade*, such as import tariffs or quotas, shrink markets, which results in greater concentration and less competition.
- Prioritisation of *industrial policy goals*, such as rural development or reducing unemployment. Although these may be legitimate policy objectives, they can lead to market inefficiency. For example, when the state props up a failing but nationally-significant firm through the provision of subsidies, which damages a more efficient but unsubsidised competitor firm.
- *State-sponsored monopolies* typically have fewer incentives to engage in efficient market behaviour than firms operating in a competitive environment. A monopoly may result from State-ownership of a particular industry, from the granting of exclusive rights to private sector actors or from privatisation of formerly state-owned enterprises. Although effective regulation can potentially counter the anti-competitive effects of monopoly, it is unlikely to secure an efficient outcome where the regulatory regime is inadequate or where the regulator is captured (see above).

¹⁰ See Section 7: “Venezuela Overview”, in Global Competition Review, *The Antitrust Review of the Americas 2010*, available online at <http://www.globalcompetitionreview.com/reviews/20/sections/76/chapters/809/venezuela-overview/>.

¹¹ For further discussion of the role of competition policy in furthering economic development in Latin America, see José Tavares de Araujo Jr, “Schumpeterian Competition and Its Policy Implications: The Latin American Case” 7 *Law & Business Review of the Americas* 153 (2001) ; Eleanor M. Fox, “Economic Development, Poverty and Antitrust: The Other Path” 13 *Southwestern Journal of Law & Trade in the Americas* 211 (2006-7); R. Shyam Khemani & Ana Carrasco-Martin, “The Investment Climate, Competition Policy, and Economic Development in Latin America” 83 *Chicago-Kent Law Review* 67 (2008).

10. Furthermore, in certain instances governments find themselves in the position of wishing to improve the efficiency of the national market but without the necessary skills to identify and design the means to do so. Particularly in countries that are newly transitioning to market economies where competition was not previously a valued market tool, the government may be thinking about competition for the first time and from a first principles perspective. For many countries in Latin America, state ownership and centralised price regulation have been the norm historically. Even in more developed market economies, liberalisation is not always easy to achieve, as numerous examples of unsuccessful privatisations worldwide illustrate. Indeed, sometimes the cure can be as bad as the initial problem. Instances of liberalisation provide useful opportunities for a competition authority to engage in advocacy with government agencies. Intervention *ex ante* can avoid the need for further, more extensive intervention to correct market failures resulting from inappropriate regulation in the future.

11. What the above list suggests is that, sometimes, restrictions of competition may stem from other legitimate policy aims pursued by government, such as regional development or environmental protection. So, for example, import tariffs may be used to protect domestic industries from overseas competition, thereby protecting local employment. But, on the other hand, if the domestic industry requires protection in the first place, it is likely to be considerably less efficient than its foreign competitor(s), and so consumers in the country that imposes the tariff lose out, in terms of lower quality goods or higher prices. Competition is not an absolute value in itself, and other policy goals may legitimately take priority – the objective is to maximise the benefit to society.¹² Nevertheless, intra-governmental competition advocacy remains pivotal in such circumstances, as a means of highlighting the costs to society in deviating from the competitive markets model. The balancing of these competing costs and benefits requires a political decision that is generally beyond the remit of a competition authority.

2.3 *Competition advocacy can help promote a competition environment*

12. How can competition advocacy directed towards government departments and bodies alleviate competition problems? More specifically, why is the competition authority best placed to pursue this role?

- Competition authorities are specialist agencies, staffed with experts on competition matters who are attuned to identifying competition problems in a market. Accordingly, competition authorities are likely to prove both more effective and more efficient at identifying competition problems than other government officials whose expertise lie in other policy areas.
- In view of their specialist expertise, competition authorities may also be best placed to identify and design solutions to existing competition problems, in conjunction with any sectoral regulator where sector-specific knowledge is required. The most effective forms of intra-governmental advocacy will not merely bring to the attention of government the existence of anti-competitive restraints but will also indicate how the competition problems can be remedied.
- In many jurisdictions, the competition authority has a significant degree of independence from central government. This independence allows the competition authority a rather more detached perspective, so that it can step back and identify competition problems that frontline public officials implementing a particular policy may be too close to catch. Being one step removed means also that the competition authority may be less prone to regulatory capture, corruption or simple policy indifference.
- On the other hand, the competition authority remains nevertheless a part of the state apparatus and therefore its opinions may have a greater influence on government than comments advanced

¹² See Maurice E. Stucke, “Better Competition Advocacy” 82 *St. John’s Law Review* 951 (2008), pp.1006-7.

by non-state agencies or actors. Additionally, the competition authority is better placed than non-state actors to establish formal communication mechanisms with other government agencies, which can enable it to perform its advocacy function in the most targeted and effective manner.

- As noted, the balancing of competition policy objectives against other policy aims – such as industrial policy – is a task to be performed by the political branch rather than the competition authority. Nevertheless, the competition authority can perform the invaluable task of ensuring that the competitive impact of these alternative policies is included within the balancing equation, and also highlight the costs of prioritising other national policies over competition. With due consideration, moreover, in many circumstances it is possible to implement competition and other policy agendas in a mutually reinforcing manner.¹³
- Competition problems which are susceptible to intra-governmental advocacy are, conversely, generally outside the ambit of competition law enforcement powers. “Sovereign” activities, such as the law-making function and government policy decisions, for example whether to liberalise a statutory monopoly market, cannot be scrutinised under competition law. Many competition law regimes also contain express or implied exemptions for conduct already subject to sector-specific regulation, and in some cases, for conduct applying in certain sectors or by certain companies. There can be situations where enforcement is viable legally but simply impossible politically. Or the competition problem may not disclose any market conduct by particular economic actors that violates the competition rules as such, but nevertheless there remains a substantial market failure, which can be traced back, in whole or part, to governmental action or inaction. In such circumstances, where enforcement powers cannot have a role, usually the most feasible alternative approach to addressing the competition problem is to seek to have it remedied at source, i.e. to persuade the government to remove the state-imposed restraint.
- Finally, and paradoxically, the fact of establishing an independent competition authority within a jurisdiction may force that agency to take up the role of competition advocacy. The existence of a separate body to perform competition-related functions can lead to less direct interest in competition among the executive branch, and less direct involvement by government in the day-to-day administration of the competition system. Where there is less familiarity with competition issues, there may be a risk of less advocacy of competition at government level, and so the competition authority must take on this role.¹⁴

2.4 Areas of government activity that may benefit from competition advocacy

13. The necessity for advocacy interventions aimed at government departments or state agencies may arise in a variety of fora and levels of government, which include:

- Privatisation of previously state-owned industries – both in the design of the ownership structure and in designing the regulation;
- Reform of inadequate regulatory regimes;

¹³ Geraldine Emberger, “How To Strengthen Competition Advocacy Through Competition Screening” (2006) *Competition Policy Newsletter* No.1, p.28, hereafter “Emberger”, p.31.

¹⁴ See *Competition Advocacy in Time of Recession: The UK Competition Commission’s Approach*, speech by Peter Freeman to the International Competition Forum, Warsaw, on 15 April 2009, available online on the Competition Commission’s website, at http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_warsaw_150409.pdf.

- Reform of existing restrictive legislation;
- Advocacy efforts with regards to proposed or pending legislation;
- Other government policies that may unduly restrict competition;
- Activities at a regional/local/municipal government level;
- Advocacy regarding existing or proposed regulations imposed by sectoral regulators; and
- Outreach with judicial authorities.¹⁵

2.5 *Difficulties in conducting competition advocacy*

14. The foregoing illustrates the broad range of sectors in which competition problems may arise as a result of government action (or inaction), as well as the many categories of government activity that can lead to such restraints. The magnitude of the potential problem in itself presents competition authorities with substantial difficulties when setting about the business of intra-governmental advocacy. Added to this is the fact that, although competition advocacy generally seeks to improve market efficiency in order to increase consumer welfare, frequently it targets issues and interests that lie at the political heart of government policy. Where a competition authority tackles politically-sensitive market issues, its advocacy efforts may receive a hostile reception at government level. Indeed, the very subject-matter of this Paper – strategies for competition advocacy – is an acknowledgement that intra-governmental advocacy is not a straightforward business. Rather, it frequently presents a competition authority with a range of obstacles that require the authority to adopt a variety of tactics to advance its views. The key notion of *strategies* to counter these obstacles is explored in detail in section 3 below. The *difficulties* that a competition authority embarking on the task of intra-governmental advocacy may encounter include the following:

- There may be, first and foremost, a problem of identification: how to recognise and isolate, from the great bulk of legislation, regulatory requirements, local government regulations, market institutional structures and other government actions and policies, those which may have an adverse impact on competition? Absent an effective filtering mechanism, the process of regulatory review is likely to prove highly inefficient at best, and at worst may risk overwhelming the competition authority completely, channelling excessive proportions of agency resources into an ultimately futile exercise.
- Ideally a competition authority would wish to engage with government during the course of the law-making process, to secure modification of any proposed new legislation that has potential anti-competitive effects prior to its enactment. However, in order to do so effectively it requires advance knowledge of pending legislation, as well as a mechanism by which to convey its views on the draft law to legislators.
- Following on from this, intra-governmental advocacy might be considered effective only if it has some positive effect on government action in practice. Many competition authorities, however,

¹⁵ For a more comprehensive discussion of the areas of state activity in which competition advocacy may be necessary, see International Competition Network, *Report on Assessment of ICN Members' Requirements and Recommendation on Further ICN Work on Competition Advocacy* (2009), available online on the ICN's website, at <http://www.internationalcompetitionnetwork.org/uploads/library/doc362.pdf>, and John W. Clark, *Competition Advocacy: Challenges for Developing Countries*, presented at the Second Annual Meeting of the Latin American Competition Forum, June 2004, available online at <http://www.iadb.org/res/publications/pubfiles/pubS-208.pdf>.

face an uphill battle to persuade government to take on board their observations with respect to anti-competitive restraints originating in government policy and activities, and crucially, to reflect these recommendations in reform efforts. Proposals for reform may clash with vested interests or be otherwise politically inconvenient; they may lack populist appeal with voters; or simply fall upon the disinterested ears of policymakers. Without a degree of government buy-in, intra-governmental advocacy risks being reduced to an academic exercise.

- There is a potential for overlap and conflict with sectoral regulators, where advocacy efforts are targeted at anti-competitive restraints within a regulatory regime. Ideally, competition authorities and sectoral regulators should work in tandem to devise the most competition-enhancing solution to the market problem identified: the competition authority contributing competition expertise, the sectoral regulator providing specialist knowledge about the intricacies of the specific sector. In practice, however, the competition authority may find itself engaged in a “turf war” with its fellow state agency, which ultimately works against the interests of consumers.
- In addressing competition issues in regulated sectors, the competition authority typically faces a significant information deficit in comparison with the sectoral regulator and the regulated entities themselves. In order to be able to analyse and provide cogent commentary on these markets, an authority requires information-gathering techniques that enable it to gain a sufficiently deep understanding of the market concerned without duplicating the work of other agencies and without diverting too great a proportion of its resources to market research.
- Where a competition authority does not have the benefit of public support for its reform efforts, due to a lack of competition culture, it will lack the required ability to bring political pressure to bear on government in support of reform.
- Competition advocacy presents a further problem to competition authorities in terms of the tangibility of results. The outcomes of successful advocacy efforts are more difficult to identify, quantify and convey than successful enforcement action. Even where a competition authority can point to recommendations for reform that have in fact been implemented by government, for example improvements to a regulatory regime, a successful outcome is more difficult to convey to the general public as opposed to highlighting fines or prison sentences imposed for breaches of the competition rules.

3. Strategies for Competition Advocacy

15. How might a competition authority go about its task of intra-government competition advocacy successfully? A number of *general principles for successful intra-governmental advocacy intervention* have been identified:

- High quality advice, requiring technical expertise, a reputation for accuracy and a robust knowledge of the sector concerned on the part of the competition authority;
- Adequate timing for the provision of advice – generally, the earlier within the policymaking process the better;
- Impartiality and objectivity of the competition authority;
- Adding value – ideally, advice should bring new information, analysis or insight to bear on the policymaking process.¹⁶

¹⁶ *OFT Competition Advocacy*, pp. 9-10.

16. In general the more well-informed about the sector a competition authority is, the earlier it intervenes, the more comprehensive its contribution is and the more unbiased and fair it is perceived to be, the greater the likelihood that its proposals will be considered and implemented by the government body. The more difficult task is to translate these higher level principles into advocacy tools and techniques that are capable of practical application. This section outlines a variety of ways in which a competition authority might go about the task of influencing government in order to advance competition policy.

3.1 *Educating government actors*

17. Educating the public about the societal benefits that result from competition in the market place, and how competition law seeks to protect the competitive process, is a key component of competition culture advocacy. Education has an important role in intra-governmental advocacy as well, but requires a more expansive approach than the education of the public more generally regarding the benefits of competition and well-functioning markets. This necessitates informing public policymakers about how the choices that they make, at the government level, can have negative effects on competition. For example, it is not always obvious to the competition layman how regulatory requirements may function as a barrier to entry into an industry and thereby restrict competition. It is argued that the importance of competition policy goes beyond the mere introduction of competition into regulated markets; rather, all government policy-making should be based on competition policies.¹⁷

18. Educating public officials about basic competition concepts, as well as the benefits of competition, can lay the foundations for more targeted advocacy efforts to follow. More advanced training for policymakers should focus on how effective competition in the market can be introduced or maintained. It could also include working with policymakers to introduce a process to assess the impact upon competition of legislation, other regulations and public policies. The OECD's *Competition Assessment Toolkit*,¹⁸ to be discussed in detail below, is one methodology which provides policymakers with a practical and easy-to-use framework for competition assessment. Competition information can be conveyed to policymakers in a variety of ways, including:

- Face-to-face *presentations* made by competition authority staff to public officials;
- Interactive *training sessions* for officials, which are probably more suitable for individuals who are likely to have a substantial role in policy-formation;
- Authorship of *articles* explaining the benefits of competition and competition principles, for publication in journals or newsletters that are distributed exclusively to public sector employees or among government agencies;
- Publication of *information booklets* on competition and the competition authority, for dissemination among public officials. Such publications can also function as training materials for use at face-to-face presentations or training sessions by the competition authority. By explaining the role of the competition authority to other government agencies and how it can assist in competition-related matters, these materials may serve to open channels of inter-agency communication.

¹⁷ United Nations Conference on Trade and Development, *Developing A Competition Advocacy Model In The Context Of The Introduction Of Competition Policies In Latin America* (1996) UNCTAD/ITCD/CLP/Misc.12, available online on UNCTAD's website, at http://www.unctad.org/en/docs/itcdclpmisc12_en.pdf, hereafter "UNCTAD Competition Advocacy Model", p.12.

¹⁸ OECD, *Competition Assessment Toolkit*, Volume I, Version 2.0 (2010), hereafter "*Toolkit*", available online on the OECD's website, at www.oecd.org/competition/toolkit.

- Production of a *website* on competition, including publicising this to public officials. This may also serve as a first point of contact between the competition authority and public officials, encouraging closer co-operation on competition issues.
- Issuance of *guidelines on competition assessment* which could, for example, draw on the OECD's *Toolkit* or other methodologies, and the holding of specific training sessions on the technique.

19. Competition advocacy has a role beyond the executive branch. Competition policy concerns may have to give way to political decisions to prioritise other policy objectives, but nevertheless, legislators too should be educated about the benefits of competitive markets and how these may be distorted by government action. Even where other social or economic concerns are to be prioritised, efforts to minimise the adverse effects on competition can result in significant benefits. Competition authorities might consider holding information sessions for parliamentarians as well as for public officials. Presentations made to the legislative branch should be targeted accordingly. For instance, for an audience composed of politicians rather than public administrators, it might be appropriate to shift the emphasis of the presentation or training provided from technical aspects of competition law and policy to bigger picture aspects of competition, principally its benefits to society as a whole and particularly to consumers. Alternatively, the competition authority could make a presentation to legislators about any major cases or studies that have recently been completed, in order to convey the pro-competition message in a less didactic format. The receptiveness of the political branch to competition advocacy may be linked to public demand for competitive markets, and so the effectiveness of this form of advocacy depends also, in part, on the development of a competition culture in society.

20. Conversely, where training is provided for statutory draftsmen charged with transforming legislative proposals into written law, it may be appropriate to pitch the presentation or discussion at a more technically sophisticated level. In addition, the competition authority can offer that it be consulted with any questions relating to the drafting of legislation that may affect competition.

21. A further area in which competition authorities have engaged in education efforts is in the provision of competition training to the judiciary. Competition cases can involve complex issues of law, policy and economics. It is necessary for the judicial branch to have an understanding of basic competition law and economics, in order to ensure the coherent development of legal precedent in this area, as well as sound results in individual cases. Techniques for judicial education include the organisation of training events and workshops for judges dealing with substantive aspects of competition law, which may benefit from technical assistance from more experienced competition authorities, and the preparation and publication of technical guidelines to aid courts in reaching judgments in cases dealing with anti-competitive practices or mergers.¹⁹

3.2 Identifying anti-competitive restraints

3.2.1 Proposed or existing legislation

22. Identifying anti-competitive restraints in proposed or existing legislation is a key component of intra-governmental advocacy. With regard to legislation that has been proposed or is in the process of enactment, including privatisation proposals, the key challenges for the competition authority are (1) how to find out about the proposal in sufficient time to review and formulate comments prior to passage into law; and (2) how to persuade the government to incorporate any amendments to the legislative proposals

¹⁹ UNCTAD *Competition Advocacy Model*, p.34-5.

suggested by the competition authority into the final statute. As regards the first challenge – timely discovery – a number of techniques to assist in this process can be identified:

- Some competition authorities conduct an ongoing review of the work of the parliament in market competition matters.²⁰ Where a thorough, systematic review of the legislative agenda takes place, this approach has the clear benefit of ensuring that all relevant proposals are identified. However, there is a need to ensure that, on the one hand, this review process does not become so resource-intensive as to impact negatively on the authority's other activities, while conversely, making sure that significant legislation does not escape scrutiny. It is important to find out about pending legislation sufficiently early in the legislative process to be able to submit comments on it where necessary. Sources of information on pending legislation include official publications, such as reports of parliamentary debates, reports issued by parliamentary committees or any official journals published by the government institutions; a programme for government published in advance; and trade publications published by the private sector which may highlight proposals that will have an effect on the market concerned.
- In some countries, it is a legal requirement that the competition authority be informed about, and be given an opportunity to comment on, proposed legislation with a potential impact on competition. This can be within a wider framework of regulatory impact analysis.²¹ Such an obligation brings at least two benefits to the competition authority: it prevents the authority having to expend considerable agency resources monitoring legislative developments on its own initiative, and it creates a formal channel through which to convey its views to policymakers. Generally, however, even in those jurisdictions which have such a requirement, the legislator is not legally obliged to incorporate any amendments proposed by the competition authority into the final draft of the statute.
- An authority could also seek to develop informal contact channels with key government bodies or regulators, in order to be kept informed on a less official basis about relevant proposals. Additionally, it may be able to develop relationships with certain legislators that have displayed a particular interest in competition issues in the past, or with members of parliamentary committees considering law reform. The feasibility of doing so is related to the education function outlined above: where the competition authority has succeeded in making the case for competition to public policymakers in advance, whether through competition culture advocacy or more targeted efforts, it is more likely to have competition considerations voluntarily taken into account by

²⁰ See United Nations Conference on Trade and Development, *Voluntary Peer Review on Competition Policy: Costa Rica* (2008), available online in UNCTAD's website, at http://www.unctad.org/en/docs/ditcclp20081overview_en.pdf, hereafter "UNCTAD Costa Rica Review", p.26.

²¹ Certain jurisdictions make it obligatory to conduct an impact assessment prior to the enactment of some categories of legislation and other regulation. The assessment process is intended to identify the likely impact of policy proposals prior to their adoption, in order to make clear for policymakers the costs as well as the benefits of proposed measures. In the *European Union*, for example, an integrated approach to impact assessment was introduced in 2002. All major policy initiatives and legislative proposals on the European Commission's Annual Legislative and Work Programme are required to undergo an impact assessment, as well as some other proposals that do not feature in the CLWP, but which potentially have significant impacts. The Commission's revised *Impact Assessment Guidelines* (SEC(2009) 92), issued on 15 January 2009, set out six key analytical steps to be followed in conducting an impact assessment: (1) identify the problem; (2) define the objectives; (3) develop the main policy options; (4) analyse the impacts of the options; (5) compare the options; and (6) outline policy monitoring and evaluation arrangements. Further information on the impact assessment process in the European Union is available online on the Commission's website, at http://ec.europa.eu/governance/better_regulation/impact_en.htm.

government in the future. Members of the business community who may be adversely affected by pending anti-competitive regulations may be more likely to seek out and voluntarily inform a competition authority about such proposals, and so the competition authority should consider developing contacts with the private sector. Although any information thus received should take into consideration the degree of self-interest of the provider, the business community nevertheless represents a fertile source of information regarding developments in a sector, if not necessarily a reliable source of disinterested viewpoints.

Box 2. Identifying advocacy opportunities: the approach of the United States Department of Justice²²

According to the internal Manual of the Antitrust Division of the *United States* Department of Justice, the primary means by which it becomes aware of agency proceedings in which it should get involved is by reviewing the Federal Register (which is the official journal of the US federal government) and the trade press to identify important regulatory matters. Additionally, the Antitrust Division may be invited to participate in rulemaking proceedings. While either legal or economic staff may lead the effort, the Manual asserts that both legal and economic staff should be assigned to support the activity and to ensure that an important contribution is made to the proceedings. The Manual emphasises two further points for Antitrust Division staff when filing pleadings in regulatory matters: the need to act promptly, on the basis that most regulatory proceedings have short time limits; and the need to respect any rules of regulatory agencies that prohibit contact with outside parties which may include the Department of Justice.

3.2.2 Methodologies for identifying unnecessary regulatory restraint: the OECD's Competition Assessment Toolkit

23. The OECD's *Competition Assessment Toolkit* provides policymakers with an analytical framework within which to examine whether legislation raises competition concerns. Although the majority of regulations are unproblematic in competition terms, where potential restraints exist – because the regulation limits the number or range of suppliers, limits the ability of suppliers to compete, reduces the incentive of suppliers to compete and/or limits the choices and information available to customers – the competition assessment process assists regulators and legislators in mitigating or avoiding the competition harm. It does so by aiding them in identifying possible alternatives that might reduce or eliminate competition problems while continuing to achieve the desired policy objectives.

24. As a first step, the method employs a set of threshold questions, a “Competition Checklist”, which indicates when proposed laws or regulations may have significant potential to do harm. For example, a proposal is likely to limit the number or range of suppliers if it:

- Grants exclusive rights for a supplier to provide goods or services;
- Imposes a licence, permit or authorisation requirement for operation;
- Limits the ability of some types of suppliers to provide a good or service;
- Significantly raises cost of entry or exit by a supplier; and/or
- Creates a geographical barrier to the ability of companies to supply goods, services or labour or invest capital.²³

²² US Department of Justice, *Antitrust Division Manual* 4th ed. (2008), Chapter V: Competition Advocacy, available online on the DOJ's website, at <http://www.justice.gov/atr/public/divisionmanual/chapter5.pdf>.

25. Most proposals pass this initial screening process without raising any competition concerns. Where a potential restraint is identified, the assessment mechanism mandates more comprehensive scrutiny. A thorough competition assessment includes: (1) clearly identifying policy objectives; (2) stating alternative regulations that would achieve the policy objectives; (3) evaluating the competitive effects of each alternative; and (4) comparing the alternatives.²⁴

26. Competition assessment provides competition authorities with an invaluable tool in structuring their intra-governmental advocacy efforts. The technique provides authorities with an ordered mechanism for the review of existing and proposed legislation by the authority itself. Moreover, where the competition authority successfully advocates for inclusion of competition assessment as an element of the regulatory process, for example where competition assessment is incorporated into regulatory impact analysis, legislators and regulators are obliged to internalise and perform the assessment function directly.

27. Competition assessments may be conducted both prospectively, for proposed new legislation, and retrospectively, relating to legislation already in force. It is more efficient for the competitive impact of a new legislative proposal to be assessed prior to the enactment of new law, so that (ideally) the proposal can be modified before the potential anti-competitive impact is realised. Nevertheless, it remains a worthwhile exercise to conduct competitive assessments of existing legislation, particularly in sectors where competition problems may exist and where no competitive assessment was conducted when the legislation was enacted initially.

Box 3. Competition assessment: the Mexican Experience²⁵

In 2008, *Mexico* and the OECD launched a programme aimed at improving the competitiveness of the Mexican economy by reforming and modifying the regulatory and institutional framework. This multi-year project aims to support higher levels of investment, employment and growth. The Mexico-OECD Co-operation to Strengthen Competitiveness in Mexico is constructed around two pillars: competition and regulatory improvement. The competition pillar focuses on increasing competition in product markets. The 2008 OECD Economic Survey of Mexico states that lack of competition is an important determinant of weak growth performance. Using the framework of the OECD Competition Assessment Toolkit, this process identifies regulations and policies that unnecessarily restrict competition, and develops alternatives to make regulation more pro-competitive. The competition work is done in co-operation with Mexico's Comisión Federal de Competencia (Federal Competition Commission, or CFC) and the Ministry of Economy of Mexico.

28. In selecting sectors for review, competition authorities might take into account some of the following factors:

- The size and importance of the sector in the country;
- Whether evidence of competition problems in that sector has come to light in the past;
- The potential for knock-on anti-competitive effects in related markets, stemming from competition problems in the primary market;

²³ *Toolkit*, pp.8-9.

²⁴ *Toolkit*, p.35.

²⁵ Further information on the *Mexico-OECD Co-operation to Strengthen Competitiveness in Mexico* is available online on the OECD's website, at http://oecd.org/document/34/0,3343,en_2649_40381664_44948578_1_1_1_1,00.html.

- The potential of detrimental effects on innovation and growth, resulting from the competition problems; *and*
- Where the harm to competition has its greatest detrimental impact, e.g. if the harm falls principally on the most disadvantaged in society or on more affluent social groups.

29. A competition authority may wish to keep confidential the fact that it is conducting a competition assessment of a particular sector, in order to avoid the risk of corruption of the assessment process. This risk may be particularly acute where the sector concerned is large and important in a country, and where it could call upon significant resources (including lobbyists and political pressure) to counter any negative findings or recommendations regarding competition in the sector. Against this, however, the competition authority may itself prioritise the value of transparency in public administration, as well as the good will that may be generated by keeping the public informed of its activities and use of resources.

30. Once anti-competitive restraints have been identified, whether in proposed or existing legislation, the focus turns to the formulation and delivery of commentary directed towards the relevant government body.

3.3 *The importance of relationship-building with government stakeholders*

31. Intra-governmental advocacy is not a unilateral pursuit. Indeed, it can often involve as much if not more action on the part of recipients, in order to implement recommendations, as on the part of the competition authority engaging in advocacy efforts.²⁶ Advocacy can benefit immensely from strong, open relationships between competition authorities and other government bodies and departments. Moreover, where advocacy efforts incorporate the building of a political consensus with other interested parties regarding the most appropriate direction for action or reform, the advocacy process is likely to progress more smoothly and to experience more success in the long run, as the successful introduction of competition law in *El Salvador* in the last decade demonstrates.²⁷

3.3.1 *Sector regulators*

32. As noted, the overlapping jurisdiction between competition authorities and sectoral regulators creates the potential for counter-productive “turf wars” between these government bodies. Conversely, where competition authorities and sectoral regulators work together, pooling their skills-base to devise and implement the most efficient regulatory regime, competition in regulated sectors can be maximised. Competition authorities should seek to engage with sectoral regulators at an early stage, putting in place channels of communication that allow for exchange of information on a regular basis and technical assistance. Jurisdictional conflicts may be avoided by putting in place a formal memorandum of understanding between the agencies, setting out the terms of co-operation and delimiting their respective spheres of influence. Alternatively, informal contact mechanisms may be preferred, depending on the legal culture of the country and the institutional structure of the agencies involved.

33. In *Brazil*, the Central Bank previously asserted exclusive jurisdiction over banking mergers, on the basis of security of the financial system, a position long disputed by Brazil’s independent competition agency, the Conselho Administrativo de Defesa Econômica (Administrative Council for Economic Defence, or CADE). Legislation to resolve the jurisdictional dispute was introduced in 2003 but this has yet to complete its passage through parliament. Nevertheless, in 2005 CADE and the Central Bank entered

²⁶ Simon J. Evenett, “Competition Advocacy: Time For A Rethink?” 26 *Northwestern Journal of International Law & Business* 495, hereafter “Evenett”, 505.

²⁷ *El Salvador Peer Review*.

into a co-operation agreement providing for the exchange of information. The agencies have collaborated on a set of merger guidelines for the banking sector, and in 2008, reached agreement providing for joint review of bank mergers, pursuant to which such mergers are now notified to both agencies.²⁸

34. In *El Salvador*, the Competition Superintendency has entered into co-operation agreements with various regulators and government agencies, including the superintendencies responsible for financial systems, electricity and telecommunications, securities and pensions, the marine ports authority, the civil aviation authority and the Central Bank. These agreements provide for the exchange of information, technical assistance and co-operation in the execution of the agencies' missions. A close relationship has been established with SIGET, the electricity and telecommunications regulator. A study conducted by the Competition Superintendency in the electricity sector identified a lack of competition between generators in the wholesale market, while a study conducted by SIGET reached a similar conclusion. As a result, the agencies came together to co-author a report setting out a new method for determining wholesale electricity prices, limiting the ability of generators to manage capacity strategically. The Competition Superintendency has provided comments to SIGET on draft regulations in the electricity market, and on the terms of a proposed long term contract involving a large distributor, as well as on issues in the telecommunications sector that emerged from the Superintendency's market study in that area.²⁹

3.3.2 *Government departments*

35. Another set of key associations may be formed between the competition authority and government departments that are involved in formulating and enacting legislation with potential market impact. Where compatible with the governing legal structure, a competition authority should consider offering its advisory services to these key departments. Again, this may be done through informal channels or as a result of a formal memorandum of understanding between the competition authority and relevant department. By conveying a willingness to provide assistance, and putting in place the communication channels necessary to allow public officials to seek advice as a matter of routine, the competition authority can increase the likelihood that government departments will involve it in policy formulation.

3.3.3 *Regional or local authorities*

36. Similar considerations apply with regard to policy-making by regional or local authorities. The competition authority should seek to build relationships and increase its involvement in order to ensure that restrictions avoided at the central or federal level are not reinstated at regional or local government level. In *Mexico*, for example, the competition authority (CFC) participated in the national meeting for state representatives held by the Federal Economics Ministry, during which the CFC held a workshop for state officials, with the aim of establishing channels of communications between the competition authority and officials at the state level.³⁰

²⁸ *Brazil Peer Review*, pp.66-68.

²⁹ *El Salvador Peer Review*, pp.35-36.

³⁰ Comisión Federal de Competencia, *Informe Annual 2008*, available online (in Spanish) on the CFC's website at <http://www.cfc.gob.mx/images/stories/Publicaciones/Informes anuales/informe2008completo.pdf>, hereafter "CFC *Informe Annual 2008*", p.25.

3.3.4 Consumer authorities

37. In jurisdictions where the competition and consumer protection functions are not combined in a single organisation,³¹ the competition authority should seek to develop links with the consumer protection agency. There are considerable synergies between the tasks of protecting competition and protecting consumers.³² Generally, each agency seeks to achieve the same ultimate objective, namely the advancement of consumer welfare. Co-operation can allow these agencies to communicate more effectively the benefits of competition to the public. Moreover, there is overlap between the types of complaints received and cases pursued by competition authorities and consumer protection agencies, albeit each agency will approach a particular form of market failure working within its own legal framework and from its individual policy perspective. In *Argentina*, for example, the competition authority and consumer protection agency exchange case files between them when examination of a complaint discloses a more appropriate fit within the alternative legal framework.³³ In *Mexico*, the competition authority and the consumer protection agency signed a formal co-operation agreement in 2008, which put in place mechanisms for information sharing and collaboration between the agencies.³⁴

38. Consumer protection agencies in Latin America are typically more well-established, better funded and more powerful than competition authorities.³⁵ Ideally, the competition authority should be resourced on a par with the consumer agency, not least because consumers are the principal beneficiaries of more competitive markets. In any event, strengthening the relationship between these bodies not only delivers the benefits of collaboration and synergism regarding the mandate of each agency, but it can also bolster the standing and authority of the competition authority in particular by association with its more influential partner agency.

3.3.5 Establishing competition contact points within government bodies

39. Identifying individuals within the government department, regulatory agency or local or municipal body who can serve as a first point of contact for policymakers seeking competition advice can be a useful exercise. For routine queries, it may be more convenient for public officials to liaise with the legal advisors within their own department or agency in the first instance. Staff that have moved from the

³¹ In many Latin American countries, there are separate agencies to perform these functions. In *Costa Rica*, for example, the *Law for the Promotion of Competition and Effective Consumer Protection*³¹ covers deregulation, protection of competition and consumer protection, but keeps the three substantive aspects as strictly independent, establishing separate agencies – the Commission for Regulatory Improvement, the National Consumer Commission and the Commission for Promoting Competition, respectively – to oversee each area (see UNCTAD *Costa Rica Review*, pp.2&8.) By contrast, the Autoridad del Protección del Consumidor y Defensa de la Competencia in *Panama* and the Superintendencia de Industria y Comercio in *Colombia* (see OECD, *Competition Law and Policy in Colombia. A Peer Review* (2009), available online on the OECD’s website, at <http://oecd.org/dataoecd/32/49/44110853.pdf>) each have jurisdiction over both competition and consumer protection issues.

³² For further information on the relationship between competition and consumer protection, see OECD Roundtable on Competition Policy *The Interface between Competition and Consumer Policies* (2008) DAF/COMP/GF(2008)10, available online on the OECD’s website at <http://oecd.org/dataoecd/22/34/40898016.pdf>.

³³ *Ibid.* p.64.

³⁴ CFC *Informe Annual 2008*, p.23.

³⁵ In *Panama*, for example, while a single agency, ACODECO, performs both the competition and consumer protection functions, the vast majority of its resources are dedicated to the latter, which also enjoys far greater prominence than its competition role. See OECD, *Competition Law and Policy in Panama – A Peer Review* (2010), hereafter “*Panama Peer Review*”.

competition authority to other agencies also provide a good source for informal contact points, while the hiring of staff with experience of working in other agencies by the competition authority can similarly bring cross-pollination benefits. Movement of staff between the competition authority and other government agencies has proven to be helpful in *Panama*, for example.³⁶ Competition authorities should seek to develop strong relationships with these contact persons. Training in competition law and policy should be provided as appropriate, so that routine issues can be dealt with by in-house counsel. For more complex matters that require the direct involvement of the competition authority, a straightforward referral mechanism should be put in place to facilitate requests for information and advice from the in-house team.

3.3.6 *Staff exchanges*

40. Staff exchanges – whereby personnel from a regulatory agency are seconded to the competition authority for a short period of time – are another effective means of exporting competition policy knowledge and skills to other government agencies,³⁷ while secondments from the competition authority to other agencies can be particularly useful for the provision of in-depth technical assistance on specific projects.

3.3.7 *Institutional frameworks*

41. One issue is the degree to which the competition authority should be incorporated within the government structure itself, or alternatively, whether it should remain removed, as far as possible, from the political sphere. On the one hand, institutional issues of this nature are largely outside the hands of the competition authority itself; generally this choice is made even before the competition authority comes into existence. However, it is an issue that is worthy of some consideration, because it may have significant impact on the effectiveness of the competition authority in performing its various roles. In some countries, the competition authority is an independent agency, for example the CFC in *Mexico*.³⁸ In others it is incorporated within the executive, for example the Secretaria de Acompanhamento Econômico (Secretariat for Economic Monitoring, or SEAE) in *Brazil*.³⁹ The latter form of institutional arrangement brings with it the advantage of closer access to other government agencies, and the competition authority may even be permitted to participate in the process of formulating legislation or sectoral regulation. On the other hand, integration within the executive increases the risk of political influence being exerted over the authority's activities, particularly in the politically-sensitive intra-governmental sphere. It is generally considered that competition advocacy requires a substantial degree of agency independence in practice in order to be effective.⁴⁰ The balance, therefore, is between the benefits of access and autonomy and their importance in the circumstances.

42. In any event, it is clear that the task of intra-governmental advocacy benefits from having a “competition champion” at a high level within the government organisation in addition to buy-in from officials working on the frontline of public administration. High level support of this kind can not only assist a competition authority in realising its advocacy goals, but may also help the agency deflect some of the political backlash that may result if advocacy efforts target vested interests.

³⁶ *Panama Peer Review*.

³⁷ Emberger, p.32.

³⁸ The CFC is attached to the Economics Ministry for purposes of budgetary administration. See OECD, *Competition Law and Policy in Mexico – An OECD Peer Review* (2004), available online on the OECD's website at <http://oecd.org/dataoecd/57/9/31430869.pdf>, hereafter “*Mexico Peer Review*”, p.36.

³⁹ *Brazil Peer Review*.

⁴⁰ ICN, *Advocacy and Competition Policy*, p. 40.

Box 4. Regulatory reform in Korea⁴¹

In *Korea*, the Korea Fair Trade Commission (KFTC) pursues a two-pronged approach to advocacy towards restrictive government regulations. *Ex ante* review is the preferred option. With regard to restrictions contained in pending legislation, any government ministry that wishes to enact or amend laws that might have anti-competitive effects is required to consult with the KFTC in advance. The KFTC then has the opportunity to advocate in favour of more competitive solutions. As of 1 January 2009, government ministries are required to conduct a competition impact assessment of pending legislation and to report to both the Regulatory Reform Committee (RRC) and the KFTC. The RRC is a high level body composed of government and civilian members, including the Chairman of the KFTC, which, *inter alia*, determines the direction of regulatory policy and evaluates regulatory proposals. The KFTC assesses the potential competitive impact of the proposed laws, and presents its opinion to the relevant ministry and the RRC, which uses the KFTC's opinion as reference material in reviewing the proposal.

With regard to restrictions contained in existing legislation, the KFTC conducts an examination of various sectors of the market, and where anti-competitive regulations are identified, the KFTC consults with the relevant ministries with regard to proposals for reform. In this manner, in 2008 the KFTC identified 56 anti-competitive regulations in major industries like finance, telecommunications and aviation, and by virtue of consultation with the relevant ministries, secured reform of 34 of these regulations. These efforts also extend to regulations made by local or metropolitan municipalities, so that restrictions abolished at the central government level do not re-appear at the local level.

3.4 Providing advice and input to government bodies

43. Having identified anti-competitive government restraints, developed channels of communication with policymakers and primed public officials to be responsive to pro-competitive advocacy efforts through competition education, a competition authority then needs to convey its critique and recommendations to the appropriate government body. This commentary may take different forms in different jurisdictions and relating to different factual circumstances, including:

- Comments advanced in public hearings or during public consultation processes held by sectoral regulators, concerning review of a regulatory regime;
- Reasoned opinions, issued by the competition authority and either made available publicly and/or sent directly to the relevant government department or body;
- Advice (whether oral or written) provided by the competition authority to a sectoral regulator or government department as a result of informal communication channels opened up between the two bodies;
- *Amicus curiae* briefs filed in civil or criminal litigation, in which the impact, effect or legality of anti-competitive legislation or other regulations is in issue. These may also serve to educate the judiciary regarding issues of competition law, economics or policy;⁴²

⁴¹ The material used here is taken from Korea Fair Trade Commission, *Annual Report 2009*, available online on the Fair Trade Commission's website at <http://eng.ftc.go.kr/files/bbs/2009/Annual%20Report%202009.PDF;jsessionid=xg8c8249V9VcAICjgQRysS3bopGIakufMUbm39UZ54PU2Z21216bouQOxaDNe>, pp.22-25.

⁴² *Amicus curiae*, or "friend of the court", briefs are filed in legal cases by third parties concerned about the wider implications of a case. Generally, an *amicus* brief will provide more detailed knowledge or opinion about a contested issue in the case, which is within the specialised expertise or interest of the third party

- Reports of market studies (see below) or competition assessments conducted by the competition authority;
- Presentations made by the competition authority to officials of the relevant government department or body. Where an anti-competitive practice has been identified by frontline public officials, and where a formal direction issued by the centralised government authority responsible is likely to prove ineffective at curbing the conduct, a series of training and information sessions run by the competition authority may offer a productive alternative approach. In **Brazil**, for example, the SDE ran a programme on fighting bid-rigging in public procurement in collaboration with the OECD in five key cities. In each city, two training sessions on detecting and prosecuting bid rigging were held, one for procurement officials and another for public prosecutors.⁴³

Box 5. Advocacy in Finland: Working Groups and Opinions⁴⁴

In **Finland**, a key focus of the intra-governmental advocacy work of the Finnish Competition Authority (FCA) is membership in competition-related working groups, which are established by government ministries to examine and submit a memorandum on policy issues in various sectors. For example, the FCA participated in a working group under the auspices of the Ministry of Transport and Communications, which considered the commercialization of radio frequencies. The working group advocated the future allocation of radio frequencies in a service- and technology-neutral and market-oriented manner, as well as the creation of conditions for the establishment of after-markets in these services. The reforms would facilitate entry into the communications market and enforce the use of the frequency resources. The group concluded its work in the spring of 2008, and legislation based on its recommendations was passed by the Parliament in June 2009.

The FCA also delivers opinions to government ministries on competition aspects of legislative or policy proposals. These opinions may, *inter alia*, draw attention to potential competition problems in pending regulations or legislation; propose or support calls for policy reform; make suggestions as to how competition may be increased in a sector; or propose or support calls for the establishment of a working group to examine a sector. The FCA Yearbook 2009 reports varying degrees of success in terms of government take up of its proposals.

concerned, with a view to ensuring that the court has the most comprehensive or rounded knowledge of a topic prior to deciding the case. An *amicus* brief does not have to take a particular side in the dispute; the purpose is to ensure the coherent and correct development of legal precedent by assisting the court to fully understand the issues involved, rather than to secure a victory for one or other of the parties to the case as such. *Amicus* filings can be particularly valuable in competition cases involving complicated questions of economics and policy. In the **United States**, both the Department of Justice (DOJ) and the Federal Trade Commission submit *amicus curiae* briefs in cases where important competition law issues are under consideration, such as the DOJ brief filed in the recent *American Needle* Supreme Court case (see *American Needle, Inc. v. National Football League, et al* (No. 08-661) *Brief for the United States as Amicus Curiae Supporting Petitioner*, available online on the DOJ's website at <http://www.justice.gov/atr/cases/f250300/250316.htm>). In the **European Union**, under Article 15(3) of Regulation 1/2003, both the European Commission and the competition authorities of Member States can submit *amicus* briefs in competition cases before the national courts.

⁴³ *Brazil Peer Review*, p.22.

⁴⁴ Finnish Competition Authority, *FCA Yearbook 2009*, available online on the FCA's website at <http://www.kilpailuvirasto.fi/tiedostot/vuosikirja-2009-englanti.pdf>, pp.17-21.

3.5 *Communications campaigns*

44. The formulation and delivery of a policy critique and/or recommendations may not, in itself, have sufficient force to persuade a government to take on board the comments and make the necessary policy or legislative changes. Additional influence may be gained by harnessing the forces of public opinion behind the proposed reforms. In order to do so, however, the public must be informed about the proposals – and so the competition authority needs to generate some publicity for the reforms. For example, when making recommendations relating to governmental restrictions on competition, some competition authorities issue a press release with this information, which they may also publish on their websites. Where the recommendations are the result of a particular market study, considered further below, the report of the study typically is published and gets considerable publicity.

45. Two points should be borne in mind when considering adoption of a communications strategy. The first is that the public is likely to support pro-competitive reforms only if it appreciates the benefits of competition and the potential improvements to be brought about by the proposed reforms. To this extent, intra-governmental advocacy is linked to competition culture advocacy, insofar as a public informed of the benefits of competition in the market is more likely to demand that anti-competitive restraints be abolished in both the private *and* public spheres.

46. Secondly, the tenor of any communication campaign should be pitched appropriately. Before embarking on a “name-and-shame” campaign targeting certain public officials or government bodies, for example, a competition authority should consider any potentially harmful political fallout that may follow a negative communication campaign. Excessive deference to other public bodies impairs an authority’s ability to realise effective reform of public regulations. However, destroying hard-sought relationships or “burning bridges” with other public agencies for the sake of political points-scoring is equally inadvisable. Competition authorities must bear in mind that they are, most likely, going to have to work with the relevant government department or public body on other occasions and so a more positive and less antagonistic approach may reap greater rewards in the longer term.

4. **Advocacy and Enforcement**

4.1 *Mutually-reinforcing relationship*

47. How do the advocacy and law enforcement functions of a competition authority relate to each other? Although a shorthand definition of competition advocacy portrays it as everything a competition authority does excluding its enforcement function, thus setting up a dichotomy between advocacy and enforcement, in practice these functions are neither binary nor are they mutually exclusive in nature. Advocacy and enforcement activities do not merely overlap; rather, they can shade into each other. An example of this blurring can be seen in the construction bid rigging case sanctioned by the Office of Fair Trading (OFT) in the *United Kingdom* in 2009. On the day that the OFT announced that it had taken a decision imposing fines on 103 construction companies for illegal bid rigging activities,⁴⁵ it simultaneously issued an information note on the ramifications of its findings for procurers in the public and private sectors. The note made a non-binding recommendation to procurers that firms found guilty in the decision should not be automatically excluded from future tenders, while at the same time directing procurers to

⁴⁵ See OFT press release of 22 September 2009, *Construction firms fined for illegal bid-rigging*, available online on the OFT’s website, at <http://www.offt.gov.uk/news-and-updates/press/2009/114-09>. The non-confidential version of the decision is available at http://www.offt.gov.uk/shared_offt/business_leafllets/general/CE4327-04_Decision_public_1.pdf.

guidance available on design of tender procedures to ensure maximum competition.⁴⁶ Advocacy and enforcement are, therefore, mutually-reinforcing, so that one facilitates and strengthens activities in the other sphere.⁴⁷

4.1.1 *Advocacy facilitates enforcement*

- Market studies or competition assessments conducted with respect to a particular sector may uncover, in addition to or instead of structural problems that restrict competition, individual instances of anti-competitive behaviour by entities falling within the purview of competition law, thereby creating opportunities for enforcement actions.
- Advocacy efforts aimed at the development of a competition culture may improve familiarity and compliance with competition laws among the general public, and also increase use of a competition authority's leniency programme. Likewise, advocacy efforts directed towards both the general public and government bodies are likely to increase support, at both the public and government level, for enforcement efforts.
- The education of other institutions of the criminal justice system (for example, the judiciary, police force or white collar crime agencies) in competition law and concepts is an important precondition for successful competition law enforcement, particularly where the courts are involved at first instance level in enforcement proceedings.

4.1.2 *Enforcement facilitates advocacy*

- A record of successful enforcement actions taken against firms in breach of the competition rules tends to raise the profile and standing of a competition authority with both the general public and among other government agencies. It also assists in deterrence and the generation of a culture of competition compliance, by presenting a credible threat that anti-competitive conduct will be uncovered and sanctioned.
- Enforcement activities (in particular, a pattern of enforcement actions taken in a particular market) may identify sectors where market structures impede competition or create opportunities for anti-competitive behaviour, such as collusion. This recognition may lead the competition authority concerned to conduct a market study or competition assessment to uncover the extent of restraints in the sector. Identification of the problem may in itself provide sufficient material for intra-governmental advocacy efforts to improve competition in the sector.

4.2 *Balancing advocacy and enforcement*

48. The typical competition authority has a broad portfolio of work, encompassing functions under the advocacy rubric (market studies, competition assessments, liaising with government and sectoral regulators etc) and case work relating to its enforcement powers. On one view, the competition authority must strike the appropriate balance between the proportion of advocacy work in which it engages in comparison to its enforcement work. Too little advocacy neglects this aspect of a competition authority's mandate, and may also have negative consequences for its enforcement function in view of the mutually-

⁴⁶ See OFT, *Information note to procuring entities in the public and private sectors regarding the OFT's decision on bid rigging in the construction industry*, published 22 September 2009, available online on the OFT's website, at http://www.of.gov.uk/shared_of/business_leaflets/general/Information-Note2.pdf.

⁴⁷ ICN, *Advocacy and Competition Policy*, p. iv.

reinforcing nature of these activities, and *vice versa*. Yet, the complementarities between advocacy and enforcement mean that this balancing exercise is not a zero sum game. It is a reasonable aim for any competition authority to seek to maximise effectiveness and results compared with available resources—in whatever way this equilibrium is to be achieved.

49. Therefore, while the actual budget of a competition authority may depend on political forces beyond its control, judicious resource allocation can maximise an authority's ability to perform its advocacy function. Firstly, clear priorities for advocacy should be established: this involves identifying types of rules that typically impact adversely on competition, and selecting particular sectors for scrutiny, for example because they display a high degree of market concentration.⁴⁸ Secondly, the authority should seek to ensure maximum benefit, or “value for money”, from all the functions that it performs. An OECD Peer Review of *Argentina* in 2006 noted that while the country's competition law made express provision for competition advocacy, at that time the competition authority was inundated with work relating to merger reviews and so was unable to engage in competition advocacy in regulated sectors in an ongoing fashion.⁴⁹ By ensuring that unnecessary or ineffective activities are kept to a minimum, an authority can maximise the resources that it can devote to both enforcement and advocacy efforts.

4.3 *Prioritisation of advocacy versus enforcement*

50. To what extent should a competition authority in transition (whether due to its institutional structure or the national legal framework) focus on competition advocacy primarily, rather than competition law enforcement, at least in its formative years? This question can arise with regards to the activities of young authorities that are just getting started, or authorities operating in an economy in transition. Particularly with regard to transition or developing countries, it has been suggested that advocacy efforts should be the primary or even sole focus of competition authority activity.⁵⁰ The reasons for this approach include: the high rates of state ownership in such countries with attendant complex regulatory structures; the role of interest group lobbying in newly-liberalised sectors; the lack of experience of new competition authorities and the judiciary in dealing with complex competition issues;⁵¹ and the fact that in such countries often the challenge is to create competition, not merely to protect it.⁵²

51. Other arguments lean against this view, however. Although advocacy and enforcement are complementary activities, they utilise different skill sets. If a competition authority concentrates on advocacy alone, its personnel will fail to develop the skills necessary for effective enforcement, and so going forward, its enforcement activities may suffer. Furthermore, where an authority fails to develop a convincing track record for enforcement, it risks losing credibility and wasting goodwill towards it, both among other government agencies and with the wider public. The deterrent effect of its advocacy efforts may suffer similarly.

52. More generally, it has been argued that, in the absence of robust quantitative evidence regarding the effectiveness of either intra-governmental or “competition culture” advocacy, the policy

⁴⁸ Emberger, p.31.

⁴⁹ OECD, *Competition Law and Policy in Argentina – A Peer Review* (2006), available online on the OECD's website at <http://oecd.org/dataoecd/36/57/37970045.pdf>, p.43.

⁵⁰ See ICN, *Advocacy and Competition Policy*; John W. Clark, *Competition Advocacy: Challenges for Developing Countries*, presented at the Second Annual Meeting of the Latin American Competition Forum, June 2004, available online at <http://www.iadb.org/res/publications/pubfiles/pubS-208.pdf>.

⁵¹ ICN, *Advocacy and Competition Policy*, p. iii, 34-7.

⁵² UNCTAD *Competition Advocacy Model*, p.19.

recommendation that developing countries prioritise competition advocacy over enforcement lacks the necessary empirical support,⁵³ although attempts have been made to evaluate the effectiveness of competition advocacy in a more systematic manner.⁵⁴ Against this, advocacy efforts might be viewed as akin to a long-term capital investment by competition authorities.⁵⁵ On another view, young competition authorities frequently adopt a pragmatic programme for action, which focuses, initially, on the “low hanging fruit” of cartel enforcement and more basic advocacy efforts directed at, for example, education and information about competition law. Later, as expertise develops, merger review and vertical agreements are also addressed, while advocacy efforts directed towards regulated sectors are attempted only once the authority has reached a certain maturity and level of sophistication in its work.⁵⁶

53. Whether advocacy can and should be used as a substitute for, rather than a complement to, enforcement action is an issue worthy of further consideration. In certain instances, the principles of fairness or procedural economy might lean in favour of adoption of an advocacy-based solution over an enforcement-based one. In the case of naïve cartels in developing countries, for example, where the participants were wholly unaware of the existence of competition law and its requirements, an advocacy-based approach may be considered more appropriate. Yet again, however, it is necessary to balance the educational effects of advocacy against the deterrence that arises from successful enforcement. The OECD Peer Review of *Mexico* from 2004 reported that, in the early years of competition law enforcement in that country, cartel cases involving small firms were common, as small businesses were often unaware that price fixing was unlawful and they argued that joint action was necessary to compete effectively against larger rivals. However, as awareness of that fact that the competition law exists has spread, as well as the fact that it permits no such defence, the number of cases against small firms has reduced greatly.⁵⁷

54. Another instance in which advocacy may substitute for enforcement is where a sizeable enforcement investigation fails to result in prosecution or an administrative finding of a breach of the competition rules. There may be insufficient evidence of individual culpability to sustain a conviction, or procedural difficulties in pursuing the matter such as expiry of the statute of limitations. A decision may likewise be taken by the competition authority that the potential benefits of a successful outcome do not outweigh the agency resources required to take the matter further. In these circumstances, the information gathered during the investigation might be “re-packaged” as an advocacy effort. This could take the form of a recommendation to central or local government regarding market reforms that might prevent the competition problems identified from recurring. It could prompt an education campaign for market actors and/or public officials regarding the implications of competition law for the sector, utilising, for example, presentations or information sessions, workshops, or publication of information booklets or more comprehensive guidelines. Alternatively, advocacy efforts may consist of informal representations or advice to government and/or the business community on competition issues. To an extent, the acceptance of binding commitments by a competition authority in settlement of an enforcement case has an advocacy component, insofar as greater emphasis is placed on addressing competition concerns rather than securing a formal finding of breach.⁵⁸

⁵³ Evenett, 507-510.

⁵⁴ *OFT Competition Advocacy*

⁵⁵ William E. Kovacic, “Rating the Competition Agencies: What Constitutes Good Performance?” 16 *George Mason Law Review* 903, 922

⁵⁶ D. Daniel Sokol, “Limiting Anticompetitive Government Interventions That Benefit Special Interests” 17 *George Mason Law Review* 119 (2009), 144.

⁵⁷ *Mexico Peer Review*, p.20.

⁵⁸ On this distinction, see the recent decision of the European Court of Justice in *C-441/07 European Commission v Alrosa Company Ltd* (Judgment of 29 June, 2010), particularly at paragraphs 35 and 46.

4.4 *Market studies as an advocacy and enforcement tool*

55. Many competition authorities conduct market studies as part of their portfolio of work. Market studies involve an examination and assessment of the state of competition in a particular segment of the economy, generally undertaken in light of some indication that the market is not working well at that point in time. The output of a market study is, typically, a report outlining the competitive structure of the sector concerned, highlighting any potential or existing competition problems and making recommendations as to how these barriers to free competition can be remedied.⁵⁹ The final portion of this Background Paper considers how market studies can facilitate both advocacy and enforcement by competition authorities.

56. Conducting a market study can be a time-consuming and resource-intensive process for a competition authority, yet the frequent rate at which such studies are conducted by competition authorities⁶⁰ suggests that there are also considerable rewards to be gained by the process. In fact, market studies can potentially assist competition authorities with both their competition advocacy and competition law enforcement functions.

57. As regards the *advocacy function*, market studies can be used by competition authorities to:

- Identify the causes of competition problems in a market – whether structural, government-imposed or other – by uncovering how competition works within the sector, and conversely, what inhibits its proper functioning. This is particularly useful where it is clear that a market is not working well, but where no evidence of anti-competitive conduct in violation of the competition laws can be detected, and the structural or other problems are not readily discernible.
- Design more effective solutions to remedy a competition problem that can be implemented by government. Market studies can provide the competition authority with a thorough knowledge of the particularities of the market and a more holistic understanding of the variety of issues to be factored into any plan to improve competition in the sector.
- Provide concrete market information to substantiate claims and recommendations made by a competition authority when engaging in advocacy efforts towards other government entities. Advocacy interventions are more likely to be effective where the competition authority has a reputation for expertise and is considered to be well-informed about the relevant market sector. The quality and up-to-date nature of advice given are also important factors in influencing the take up of policy recommendations.⁶¹ A market study can provide the competition authority with the necessary market data to meet each of these conditions.

⁵⁹ For further information on market studies and how they are conducted, see the OECD's roundtable discussion *Market Studies* DAF/COMP(2008)34, available online on the OECD's website at <http://www.oecd.org/dataoecd/47/54/41721965.pdf>, hereafter "OECD *Market Studies*", and the International Competition Network's *Market Studies Project Report*, prepared by the ICN Advocacy Working Group and presented at the 8th Annual Conference of the ICN in Zurich in June 2009, available online on the ICN's website at <http://www.internationalcompetitionnetwork.org/uploads/library/doc363.pdf>, hereafter "ICN *Market Studies*".

⁶⁰ ICN *Market Studies*.

⁶¹ *OFT Competition Advocacy*.

58. Market studies can also assist a competition authority with *enforcement activities*:

- A survey of competition in the broader context of a market can bring to light individual instances of anti-competitive conduct in breach of the competition laws, which might otherwise have gone undetected. This evidence may then provide a basis for enforcement action by the competition authority against the firm(s) concerned.
- In circumstances where a market study is proposed or in progress, the prospect of what may be uncovered could prompt firms that are engaged in anti-competitive collusion in the sector to blow the whistle on the illegal cartel and apply for leniency. Evidence provided from a leniency application can lead to enforcement action by the competition authority.
- Related to the issue of enforcement, or rather an absence of need for it, where changes are made to the structure of competition on a market pursuant to recommendations made by a competition authority at the conclusion of a market study, these market modifications may reduce the likelihood of or opportunities for violation of the competition rules. For example, removal or amendment of government regulations that previously functioned as a barrier to entry and made the market excessively transparent would likely make it more difficult for anti-competitive collusion to occur between firms operating in the sector and therefore decrease the occurrence of cartel activity.

59. Some jurisdictions conduct market studies principally as a prelude to enforcement action; others use such studies primarily as a tool to assist competition advocacy.⁶² A market study may, indeed, facilitate both: for example, at the conclusion of the *European Commission's* sector enquiry into pharmaceuticals, it made policy recommendations on how the sector could function better, and furthermore, stepped up its competition law enforcement in that sector.⁶³ Whether market studies are better suited to achieving one objective over the other is, perhaps, not an issue that can be determined in the abstract. Rather, it may depend on the particularities of the problem in the relevant market and whether this stems from anti-competitive conduct within the ambit of the competition laws or conversely, from structural or government-imposed restraints which require legislative or regulatory changes. The discoverable results in a given case may determine the usefulness of a market study in terms of advancing advocacy or enforcement in the circumstances.

⁶² In their contributions to the OECD Roundtable on Market Studies held in 2008, *Chile* indicated that it found market studies to be of use for both enforcement and advocacy activities, whereas the experience of *Mexico* was that, typically, pervasive market problems would come to light during enforcement activity which prompted an in-depth study of the market concerned, feeding into advocacy work. See OECD *Market Studies*.

⁶³ Fabio Domanico and Elena Kamilarova, *Final Results of the Commission Pharmaceutical Sector Inquiry: Competition And Regulatory Concerns To Address* (2009) Competition Policy Newsletter 3, available online on DG Competition's website, at http://ec.europa.eu/competition/publications/cpn/pharma_si.pdf.

Box 6. Market Studies in the United Kingdom

In the *United Kingdom*, the Enterprise Act 2002 established a bifurcated institutional structure for the conduct of market studies: there are now two independent public bodies with competition jurisdiction, the Office of Fair Trading (OFT) and the Competition Commission (CC), each of which performs market studies

The OFT⁶⁴ is the body that enforces competition and consumer laws in the United Kingdom. By statute, one of its functions is to obtain information and carry out research about competition and consumer matters, and it is under this power that the OFT conducts market studies. Market studies are one of the tools that the OFT has at its disposal to address competition problems, alongside its enforcement and advocacy activities. The OFT states that, where there is a clear case of a breach of competition law by an individual business, taking enforcement action is usually preferred over starting a market study. Evidence of breach may also come to light during the course of a market study, in which case enforcement action may be taken following the study. Where, however, enforcement action would be impractical or ineffective – for example, because it would not address all of the root causes of any problem, or behaviour across a whole market or markets – a market study may be viewed as a better way of identifying a remedy to a perceived problem.

The principal outcomes of a market study by the OFT are one or more of the following:

- a clean bill of health for the market;
- consumer-focused action, such as an OFT-led information campaign;
- recommendations to business, for example development of a voluntary code of conduct;
- recommendations to government as to how the market could be improved by state action;
- investigation and enforcement action, and
- a reference to the CC, requesting a more comprehensive study of the market.

Where recommendations are made to government, the OFT meets with the relevant government agencies and departments to explain its findings and proposals and to answer any questions. The UK government has committed to responding to the OFT's recommendations within 90 days of a market study report being published.

The CC⁶⁵ has a more specialised competition remit, limited to the conduct of market or sectoral investigations. It does not have own initiative power of investigation: instead, cases are referred to the CC by sectoral regulators, the government Minister responsible for Business, Innovation and Skills, and most frequently, by the OFT. Referrals are made in three different contexts:

- *Market* investigations, when it appears that competition is being prevented, distorted or restricted in a particular market;
- *Merger* investigations, when it appears that a proposed concentration will lead to a substantial lessening of competition in one or more markets; and
- *Regulated sector* investigations, where aspects of the regulatory system are not operating effectively or to address disputes between regulators and regulated companies.

When performing its market investigative function,⁶⁶ the CC examines whether one or more features of the relevant market(s) prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK. Where such an “adverse effect on competition” is found, the CC has broad powers to order remedial action, or it can make non-binding recommendations for action by others including government bodies. In determining what remedies are necessary, it must take into account the appropriateness, cost and proportionality of the proposed remedies.

⁶⁴ This information is taken principally from the OFT publication, *Market Studies: Guidance on the OFT Approach* (2010, Crown copyright), available online on the OFT website at http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft519.pdf.

⁶⁵ Further information on the Competition Commission is available online on its website, at <http://www.competition-commission.org.uk/>.

⁶⁶ See Competition Commission, *Market Investigation References: Competition Commission Guidelines* (CC3) June 2003, available online on the Competition Commission's website, at http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc3.pdf.

60. When the results of a market study are recommendations falling within the advocacy function of a competition authority, the emphasis of its task shifts from investigation to implementation. In seeking to have a market study report put into effect by government, a competition authority faces many of the same difficulties that it encounters in other regulatory reform efforts. Nevertheless, a market study provides a solid platform from which to advocate for reform.

61. In the experience of *Mexico's* CFC, success in implementing market study recommendations depends on four central elements:

- A communications strategy that works with the media to create a public debate about the issues identified in the study;
- Outreach and advocacy efforts directed towards both market participants and consumers, in order to increase awareness of the problems;
- Co-ordination with other regulators, in order to gain a better understanding of the market and identify problems in the initial stages and later in order to resolve issues identified; and
- Lobbying with the executive and legislative branches.

62. Other factors identified by the CFC include ensuring analyses are technically sound, isolating political issues from public discussion of the proposals, building a reputation for independent decision-making; building momentum to push for rapid change and fostering transparency about the subject matter.⁶⁷

63. In *Spain*, the competition authority, the Comisión Nacional de la Competencia, has a particularly robust power insofar as it is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived. The fact that such action could be commenced on the basis of the findings of a market study lends greater weight to the market study process in Spain.⁶⁸

64. The scope for intra-governmental advocacy efforts continues beyond the publication of a market study report and the making of recommendations for remedial action. It is worthwhile for the competition authority to follow up on prior market studies, to determine whether recommendations made were put into effect and to continue advocacy efforts in respect of issues raised in previous studies that remain unresolved. Monitoring the uptake of recommendations made previously may also help the competition authority to assess what does and does not work in relation to communicating with and influencing government, and to devise strategies for better advocacy going forward.

5. Concluding Remarks

65. Intra-governmental advocacy can be a complex and delicate exercise. Yet when performed successfully it yields significant benefits in the form of better functioning markets, by solving competition problems that competition law enforcement alone cannot address. At a high level of generality, one can say that the more well-informed about a sector a competition authority is, the earlier it intervenes, the more comprehensive its contribution and the more unbiased and fair it is perceived to be, then the greater the likelihood that its proposals will be considered and implemented by government.

⁶⁷ OECD *Market Studies*, Contribution of Mexico, pp.76-77.

⁶⁸ OECD *Market Studies*, Contribution of Spain, p.107.

66. In practice, intra-governmental advocacy depends on a combination of techniques. It requires education of all branches of government regarding competition and its benefits as well as about how governmental activities can restrain competition. A competition authority must be able to identify potential restrictions in proposed regulations and policies, as well as existing laws and policies that are in need of reform, with competition assessment providing one method by which to do so, both *ex ante* and *ex post*. Inasmuch as the task of intra-governmental advocacy makes demands on recipients, who must implement reforms, as well as on a competition authority, the building of constructive relationships with addressees within government is another key aspect. Once a target for reform has been identified, an authority needs to convey its message to government in the most appropriate and persuasive format. Generating awareness of proposed reforms can be an effective tool by which to exert public pressure on government to implement an authority's advocacy recommendations. This is, however, reliant on the existence of a sufficient competition culture within a society, the establishment of which comprises a related task for competition authorities.

67. The relationship between advocacy and enforcement is an issue deserving of further consideration. There is no consensus as to the proper balance between these activities within the portfolio of work of a competition authority. The most that can be said is that an authority ideally would perform both advocacy and enforcement functions, and that these tasks tend to be mutually reinforcing and can overlap. Market studies provide an example of the nexus between advocacy and enforcement, insofar as studies can facilitate either or both activities. Nevertheless, in the end the goal is the most efficient and effective use of agency resources, wherever the balance between the various functions of a competition authority is to be set.