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Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- Background Paper by the IDB Secretariat --

23-24 September 2015, Montego Bay, Jamaica

This document was prepared by Professor William E. Kovacic (George Washington University Law School) to serve as a background note for Session II of the 13th meeting of the OECD-IDB Latin American Competition Forum to be held on 23-24 September 2015 in Jamaica.

The views expressed in this paper are the personal responsibility of the author. They should neither be attributed to the IDB nor the OECD and their respective member countries.

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LATIN AMERICAN COMPETITION FORUM



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Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

EVALUATING THE EFFECTS OF COMPETITION ADVOCACY

-- BACKGROUND PAPER BY IDB SECRETARIAT* --

1. Introduction: Why Measure Advocacy Effectiveness?

1. The past fifteen years have featured a growing consensus among competition agencies that advocacy is a valuable complement to law enforcement as a policymaking tool. In its most common form, advocacy consists of efforts by competition agencies to persuade other public bodies to adopt procompetitive policies or to eliminate existing public policies that suppress business rivalry, especially by barring entry to the market. Common focal points for competition agency advocacy include cabinet ministries, legislatures, and political subdivisions such as states and municipalities. The modern emphasis on advocacy reflects an awareness that competitive restraints imposed by public bodies undermine economic performance as much (sometimes more) than measures taken by private enterprises.

2. Expanded recourse to advocacy raises a basic question about competition agency priority setting: How do we know that advocacy works? The answer to this query is important for at least three reasons. First, knowledge about the effectiveness of advocacy in practice – in absolute terms and by comparison to the application of other policy tools -- can improve agency resource allocation decisions. A competition agency resembles a health care provider with a mandate to diagnose apparent market failures cure anticompetitive pathologies. As in medicine, the selection of competition policy cures depends on the

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provider's judgment about which treatments work best in practice. Better means to assess efficacy can sharpen the judgment of competition agencies when they decide where and how to intervene.

3. Second and closely related to the first consideration, insights into the effects of various advocacy measures can inform the design of advocacy strategies and the choice of specific advocacy techniques. Increases in knowledge about the impact of different methods of advocacy, ranging from media campaigns to raise social awareness to technical reports that comment upon proposed regulations or legislation, can help competition agencies refine existing advocacy programs and introduce better methods.

4. Third, improvements in measuring effectiveness can give the agency a more confident basis for responding to inquiries by public bodies (notably, legislators) which set agency budgets. In dealing with competition agency budget requests, legislators can be likened to fund manager acting on behalf of taxpayers who entrust the fund manager with their tax payments. The competition agency is one of myriad public bodies that request the legislature for the investment of public funds. How should the legislature decide how much resource to give each public body that comes before it?

5. To make these decisions, legislatures in effect ask the agencies before it to indicate the rate of return the public can expect to receive from a specific investment of funds. The legislature will press the competition agency to give, even in rough terms, an estimate of the social benefits from its proposed budget and to justify the individual components of the budget proposal. If an agency includes a budget request for advocacy programs, it must be prepared to explain what benefits the advocacy program is likely to generate, and why the agency should spend additional funds on advocacy rather than bringing new law enforcement cases.

6. In making requests for new funds for advocacy, it is a considerable advantage for the competition agency to be able to point to positive results from previous advocacy initiatives. Particularly in current times of acute budget austerity, it is not likely to be enough for a competition agency, in seeking to protect existing levels of support or (even harder) to gain increases, to say simply, "Trust me."¹

2. Obstacles

7. For the reasons sketched above, there is a compelling theoretical case for conducting assessments of the effectiveness of advocacy programs. A systematic program of evaluation could be seen as an indispensable element of the cycle of good policy making. Three practical obstacles can stand in the way of realizing this theoretical aim.

8. First, agencies might resist evaluation because, even though evaluation can demonstrate the effectiveness of advocacy, ex post review also might show that advocacy has had little or no impact – or even that advocacy in some way made matters worse by arousing political backlash from elected officials or ministerial appointees who take offense at competition agency efforts to point out the social costs of a favored regulatory measure. Recognizing these adverse possibilities, a competition agency might prefer to simply assert the social benefits of advocacy without trying to assess them.

9. Second, it can be difficult to measure actual advocacy effects. In some instances, it may be hard to show that the competition agency's advocacy caused its target audience to follow its advice. In most policy making environments, many forces press upon elected officials who are considering how to use their discretion. If we ask why a cabinet minister took a specific action, or why a legislator voted for new legislation, the answer often may be that multiple impulses shaped the action we observe. Parsing out the

¹ An academic colleague who is expert in public administration has a sign on his office wall that says: "In God we trust. All others provide data."

impact of the competition agency's advocacy in a rigorous manner, or assign it a decisive role, can be tricky where a mix of considerations probably motivated the action taken by the elected official.

10. Even when the competition agency can clear the causation hurdle and persuasively show that its advocacy moved other public officials to act, a further stubborn question arises: Did the desired action improve social well-being, either by improving conditions for consumers (a consumer welfare standard), by increasing the sum of consumer welfare and production efficiency (a total welfare standard), or by accomplishing other goals set out in the competition law? Academic researchers have made progress in this arena, but it remains a challenge to develop practical tests that provide reliable quantitative and qualitative measures of market impact for the application of law enforcement powers and the application of non-litigation tools such as advocacy.

11. Third, the type of effectiveness assessment described here is not costless. An agency seeking to measure the effects of its advocacy work must spend its own funds or persuade other institutions (e.g., a university think tank) to pay for the evaluations. Underfunded mandates are the norm for most competition agencies. Legislatures routinely impose policy making obligations without providing adequate funds for implementation. An agency struggling to reconcile the demands of its mandate with its budget allocation may be reluctant to spend money on activities (i.e., evaluation) whose benefits become apparent in the longer term, if at all. Outlays for evaluation may be seen as coming at the expense of launching fewer cases or investigations – measures that tend to be observable by external constituencies that form impressions about the agency's effectiveness. Activity levels often are taken as proxies for effectiveness, and law enforcement initiatives provide the key activity-related index of agency quality. If external observers (e.g., academic commentators, legislators, journalists) assign heavy weights to activity levels, an agency will be less inclined to spend money on evaluation programs for which it receives little credit, even if evaluation can help ensure that the selection of cases in the future serves society's interests more completely.

3. Means

12. As suggested above, competition agencies seeking to justify outlays for advocacy face conflict impulses in deciding how to assess the efficacy of advocacy programs. On the one hand, legislators and other budget gatekeepers are likely to become ever more demanding in pressing competition agencies to demonstrate the social return from funds entrusted to them. This is true for all competition agency programs, including advocacy. At the same time, several other considerations (methodological challenges in proving causation and measuring market outcomes, political pressure to generate visible signs of agency activity, and the cost of conducting assessments) can weigh against doing impact assessments. These concerns are not easily reconciled.

13. On the whole, the imperative to demonstrate the benefits of advocacy provides a compelling reason for most agencies to continue to strive to show the effectiveness of these activities. The need to invest in assessment stems from several sources. Because investments in advocacy often have longer term and sometimes uncertain effects, a budget gatekeeper might ask why an agency would divert resources from more traditional and seemingly effective measures such as the prosecution of cases. Compared to the prosecution of cases, advocacy also can have special political implications. Legislators may feel wary about intervening in a case already in litigation. When an agency acts as a policy advocate, it enters a domain that is, in some sense, more inherently political. As an advocate, the agency is suggesting how legislators or other regulators should exercise their judgment. Particularly when the agency makes recommendations on legislation, members of the legislature may be more likely to see the agency as fair game for pressure than they would if the agency were engaged in activities related to adjudication. In this way, advocacy may have greater political risks, and the agency had best be prepared to justify its decision to operate in what can be a more politically charged environment.

14. The discussion below sets out an approach that a competition agency can take to assessing the effect of its advocacy work – specifically, the impact of its work on the targets of its advocacy, and the impact of its intervention on market performance.

3.1 *Initial Project Design: Definition of Goals*

15. An important first step in assessing advocacy outcomes takes place in the initial design of an advocacy initiative. The decision to pursue an advocacy project should proceed from a clear statement of the aims the agency hopes to achieve. Goals might range from very general aims, such as building broad public support for competition-oriented policies, to more narrow objectives, such as dissuading a legislature from adopting a statute that needlessly restricts entry into the market, or creating an empirical study that courts, ministers, and legislators might draw upon to address legal and policy issues in the future.

16. The articulation of goals ex ante provides the baseline against which actual effects are measured. Not only does the statement of goals supply the foundation from ex post assessment, it also provides discipline in the formulation of the project and in the agency's decision about whether to proceed with the initiative. Without a clear delineation of aims, it is impossible to make a thoughtful judgment about whether to commit resources to the project.

17. The identification of objectives is a core element of a larger inquiry that informs the agency's decision to pursue an advocacy initiative. The decision to proceed requires an assessment of:

- **Goals:** What does the agency expect to achieve from the advocacy measure? Among other steps, the specification of goals requires the agency to identify the intended audience for its advocacy messages. In some cases, this audience can be narrowly defined (e.g., a municipal government that is considering rules to restrict market entry). In others, the audience can be broad. Advocacy projects sometimes seek to build support for procompetitive government policies by educating the larger public about the benefits of business rivalry.
- **Resources:** Does the agency have the resources (its own human capital or analytical capability it can outsource) to pursue the project successfully?
- **Advocacy Tools:** Which advocacy technique or collection of techniques is best suited to achieve the project's aims? Competition advocacy can take various forms, including:
 - *Comments on proposed legislation or regulations
 - *Reports on the consequences of existing legislation and regulations
 - *Studies that analyse significant commercial phenomena
 - *Speeches by competition agency officials
 - *Publicity materials designed to reach a mass audience
- **Timing:** How long will the project take? Can effects reasonably be expected to appear in the relatively short term (e.g., in the immediate legislative session in which proposed legislation is under consideration) or in the longer term (e.g., the publication of a study that argues for reconsideration of long-standing public policies that restrict entry)?

- **Risks:** What risks – analytical, political, methodological – does the project entail, and what costs (e.g., reputational) will the agency incur if the project fails?
- **Impact:** How will the agency know that the project is working as intended?

18. As the last point suggests, it is helpful in the formulation of the project to consider what types of indicators will suggest that the project is achieving its aims. What developments can serve as signs of effectiveness? For example, if the purpose of the project is to prepare a report that supplies an empirical foundation for judicial analysis of an important issue, one sign of effectiveness would be citations of the report in judicial opinions. Citation patterns in legislative documents or parliamentary deliberations also would also help identify whether elected officials are relying on research, and are absorbing policy positions, suggested by the competition agency's advocacy work.

3.2 *Determining Causation*

19. The second step of the advocacy impact evaluation process is to determine whether the message communicated by the agency has influenced the thinking of the intended audience. This has two dimensions. The first is to look for evidence that the audience received the agency's message and responded favorably to it. Perhaps the clearest evidence consists of the citation of or reference to the agency's work in formal documents (e.g., judicial opinions, decisions issued by other regulatory bodies, reports of legislative deliberations). Citation patterns or references also can serve to identify if reports are having the desired effect of changing how researchers are paying attention to the agency's work. The routine monitoring of mass media can identify whether news organizations have picked up messages communicated by the agency, and social media analytics can seek to trace changes in larger social attitudes toward competition and specific commercial phenomena.

20. In addition to looking for observable external signs of causation, the competition agency from time to time can ask members of the target audience if the agency's work is affecting the thinking of the audience. For example, the agency can ask decision makers in a collateral regulatory agency if the competition authority's reports and comments are taken into account, and whether its views are seen as persuasive.

21. The second dimension of the assessment of causation is to determine the characteristics of advocacy that gives the competition agency's work influence in the eyes of the target audience. In short, what makes for good advocacy? As a rough rule of thumb, the agency is likely to be seen as most worthy of deference when it has demonstrated its expertise in the subject matter of its advocacy. In many instances, effective advocacy consists of empirical work that demonstrates the benefits of competition and documents the social costs of laws and policies that artificially limit rivalry.

3.3 *Economic Outcomes*

22. If the agency's advocacy caused the target audience to embrace the agency's preferences, did the change result in better economic performance? Suppose the agency persuades a ministry to abandon policies that artificially limit market entry. Did the policy adjustment improve economic performance in the sector? At times, there is an assumption that the only way to answer this question is to perform quantitatively sophisticated, data intensive economic studies. This type of research has an important role to play in ex post evaluation, but it is not the only way to obtain or approximate reliable insights into the economic effects of advocacy programs that inspire public officials to adopt more procompetitive policies.

3.3.1. *Before and After Comparisons*

23. The most basic and promising way to assess effects is to monitor industry developments to conduct a before and after comparison of market behavior in the affected sector – to see if the anticipated shift in market behavior took place after the advocacy-inspired adjustment in public policy took place. Take the example of a municipal government's restriction on entry into a service sector. One contemporary example is the practice in some cities of prohibiting the sale of prepared food from trucks which park during the lunch hour in commercial neighborhoods. An absolute ban on food trucks provides the starkest example.

24. The hypothesis supporting competition advocacy in this case would be that abandonment of artificial barriers to entry would bring new service providers into the sector, with the effect of reducing prices or raising service quality. The elimination or relaxation of the ban could be expected to induce new entry. Even a relatively simple ex post review of the alteration in policy would identify changes in the number of service providers and, perhaps, changes in prices and quality.

25. Conducting this type of simple before and after comparison may be feasible for most competition agencies. If the agency cannot devote any resources to this or similar forms of measurement exercise, there are still ways to perform an ex post review. One way is for the competition authority to form partnerships with universities to do the relevant studies. Another is to work with international competition agency networks to engage the resources of the networks in doing ex post reviews. This is an important area in which bodies such as the International Competition Network, the Organization for Economic Cooperation and Development, and the United Nations Conference on Trade and Development can assist in organizing and, in some cases, funding ex post assessments. All three of these international networks have shown increasing interest in advocacy as a policymaking tool and in performance measurement. The expansion of advocacy-related ex post assessment projects would be a natural and valuable extension of the work programs of these institutions.

26. Regional cooperation also provides a way for thinly funded agencies to perform advocacy-related performance reviews. The secretariat of bodies such as ASEAN and CARICOM could undertake the role of coordinating and conducting ex post assessments that might be beyond the reach of individual competition authorities. A single agency may not be able to fund the relevant research. A consortium of agencies, acting through regional alliances or even informal cooperative arrangements, may be able to pool resources to perform rudimentary before and after comparisons. Regional alliances also may be the best vehicle for coordinating the construction of research proposals to be presented to donor institutions which fund policy implementation projects. Particularly in the past fifteen years, there have been a number of encouraging examples of projects through which multinational and national donor bodies have funded national-level research to assess the impact of policy change.

27. A further source of possible support for advocacy assessment projects may be government bodies at the national level which are sympathetic to the aims of the competition agency's advocacy agenda. A finance ministry seeking to promote growth may be willing to support an inquiry into how advocacy initiatives that seek to promote entry have affected performance in a particular sector.

3.3.2. *Collecting Economic Precedents*

28. An important by product of a program to perform ex post assessments of advocacy on a national or regional basis is the development of an inventory of studies that document the consequences of procompetitive market entry. These studies can provide a² stronger basis for individual agencies to develop and pursue their own advocacy programs. By consulting a larger body of previous work, individual agencies can improve the selection of advocacy targets and the design of individual advocacy initiatives. Here, again, the international networks of competition agencies can augment important existing efforts to collect these studies and distill their insights into practical guidance documents.

4. **Implications for Advocacy Design**

29. As noted above, ex post review of advocacy programs not only illuminate the economic impact of specific advocacy initiatives, but they also show what it takes to build successful advocacy programs. Experience to date permits us to draw some general conclusions about what it takes to do effective competition advocacy. Three lessons stand out.

30. First, good projects require careful attention to the design considerations set out in the early part of this paper. A good project is grounded in a clear understanding of the project's goals, risks, and resource demands. Successful projects often involve close attention, at the outset, to the question of how causation and economic impact will be determined.

31. Second, advocacy is most successful when the agency draws upon demonstrated expertise in the sector in which it is active. Other public bodies are more likely to heed the competition agency's advice when the agency's recommendations are grounded in deep knowledge about the sector in question and the publicly imposed restrictions at issue. Building this expertise often requires long-term investments in building knowledge – through the agency's own research, through consultations with other experts and institutions, through reflection on the agency's earlier cases. These are the equivalent of policy research and development, and an agency must invest in policy R&D to make sound proposals and to be persuasive.

32. Third, the work that goes into creating a strong advocacy program can have the valuable consequence of building the agency's reputation for technical skill and policy acumen. By embellishing the agency's position as a source of great technical expertise, the agency acquires more capacity to resist pressures that would undermine the performance of its competition policy role.

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The OECD's regulatory analysis toolkit series is an important example of this type of work, likewise the competition advocacy working group of ICN and the advocacy-related dimensions of UNCTAD peer reviews.