

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

INSTITUTIONAL OPTIONS FOR COMPETITION ASSESSMENT

-- Note by the Secretariat --

This document is submitted to the Competition Committee for APPROVAL BY WRITTEN PROCEDURE. Absent comments, it will be considered approved by 25 January 2007.

This document is part of the Competition Assessment Toolkit. It is designed to help government officials assess whether laws or regulations unduly restrict competition and provide guidance on how to achieve policy objectives in ways consistent with competition.

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1. Introduction

1. Competition assessment is a process of evaluating government regulations, rules and/or laws to (1) identify those that may unnecessarily impede competition and (2) aid in their redesign so that competition is not unduly inhibited.

2. The goal of competition assessment is to increase beneficial competition, the process of rivalry in which suppliers challenge each other in order to gain customers. In this process, suppliers attempt to improve their position by offering better deals to customers, through, for example, lowering prices, increasing quality or making their offerings closer to the customer desires. Customers benefit from such rivalry. Suppliers take a number of actions in this process, such as advertising their products, investing in new and better productions capabilities, offering discounts to select customers, and developing new, better and more varied products through research and development.

3. Because government policies may unnecessarily or unintentionally hinder the competitive process, it is important to review policies to identify those that may hinder the process of competition and to improve such policies so that competition is not unnecessarily prevented.

4. Up until now, a broad guide and set of principles for performing competition assessment has not existed at an international level. The Competition Assessment Toolkit provides such a guide. With the Toolkit in hand, a major question still remains: How should a competition assessment approach, such as that of the Toolkit, be fitted into government operations and institutions? This note seeks to provide suggestions as to the main alternatives that may be pursued and, when possible, provides examples from actual government practice.

5. This note will focus on the following topics:

- Which policies merit a competition assessment?
- When should a competition assessment be performed in the policy development process?
- Who would be responsible for drafting and reviewing a competition assessment?
- How can policymakers without responsibility for regulatory quality or competition be given incentives to prepare an appropriate assessment?
- What resources are required for competition assessment?

6. There is no simple recipe for institutional implementation of competition assessment. The feasible solutions in a given jurisdiction may be based on a number of characteristics that are distinct, such as the extent to which there is a federal system, the staffing strengths of different parts of government and the political environment. Feasible institutional solutions are likely to vary substantially across jurisdictions. Involving government officials with competition experience in the process of implementing competition assessment will help both to ensure that assessments are performed within a strong analytical framework and that the assessments do not adequately address all likely competitive effects. While this paper will draw on existing experience to identify potential options, those options identified are by no means exhaustive.

2. Which policies merit a competition assessment?

7. Most individual laws or regulations do not have significant potential to unduly harm competition. Consequently, most would not require a detailed analysis from the perspective of competition effects. To simplify the process of identifying policies with the potential to unduly harm competition, the Competition Assessment Toolkit includes a Competition Checklist that permits a quick screening of policies so that those with the potential to unduly impact competition can be identified for further assessment. The depth of a competition assessment can be proportional to the extent of the potential negative competitive effects of a policy.

8. *Laws, regulations and rules.* Policies that may be subject to competition assessment would include laws, regulations and rules that implement laws or regulations. Not all jurisdictions would consider laws as potentially subject to competition assessment. However, it is worth noting that the jurisdiction with the greatest success in competition assessment is also one that applied competition assessment broadly, including to laws. (See Box 1.)

9. *New and existing policies.* Some governments have approached competition assessment both by looking at new and existing policies. This is the most effective way to broadly improve the competitive atmosphere across many sectors, but requires substantial political will. Other governments have implemented a form of competition assessment focused exclusively on new policies.

10. *National, regional, local.* Competition assessment is relevant to all government policies that may create substantial and undue restrictions on competition. Policies that create such limits are sometimes implemented at a national level, but are also implemented at a regional or local level. For example, taxi policies are often implemented at a local level. Professional regulation often occurs at a regional level. There is a strong economic case for suggesting that competition assessment be performed at both a national and a regional level.

Box 1. Australian National Competition Policy Reforms

Following the completion of the Hilmer Committee's report in 1993 that urged greater microeconomic openness with a focus on pro-competitive reforms, Australian governments agreed in 1995 to a programme of reviewing and revising legislation that limited competition and that was not in the public interest. This reform program resulted in the identification of 1700 laws that needed review. The national government offered funding to aid state and territorial governments with adjustment costs that might arise from revisions of legislation. Legislation was reviewed at a national and state or territorial level, with most reviews being completed by 2001. The program was notable because it systematically identified existing laws and regulations that merited review and because, since the implementation of the programme, Australia's economic performance has been among the strongest in the OECD.

3. When should a competition assessment be performed in the policy development process?

11. *New policies.* Competition assessments can positively contribute to the design of new policies. It is therefore important that, for new policies, competition assessments be performed *early* in the policy development process before a determination has been made by policymakers about exactly how they prefer to approach a given policy challenge. This permits the competition assessment to serve as a valuable analytical tool for identifying potential problems and addressing them early.

12. When a policy has the potential to unduly restrict competition, it is valuable to consult government competition experts or regulatory gatekeepers as early in the policy development process as possible, in order to develop alternatives for achieving the regulatory objectives with less harm to competition. Government competition experts or regulatory gatekeepers have substantial expertise in developing policy alternatives so they can often provide valuable input to a complex policy development process.

13. *Existing policies.* Most existing policies have not been subject to a competition assessment. Yet there are some existing policies that are more likely to merit review than others. In Australia, at the time of the National Competition Reviews, hundreds of existing government policies were identified that limited competition. These policies were prioritized for review and, if problems were found, revision occurred in almost all cases.

4. Who would be involved with drafting and reviewing a competition assessment?

14. In order to ensure that competitive effects are considered by policymakers, it is valuable to ask the governmental bodies preparing a policy to complete a competition assessment of that policy. The process of completing the competition assessment helps to ensure that policymakers will ask relevant questions early and will initially develop policies while taking due account of competitive effects. However policymakers may not take the process of competition assessment seriously unless an external party reviews their work. Reviews can be performed either by the regulatory gatekeeper, by officials with competition expertise such as those located in competition authorities or by some combination of the two. In the United Kingdom, for example, the Office of Fair Trading (OFT), a competition authority, was given the responsibility to develop guidelines for competition assessment and to review competitive impacts of new policies.¹ The OFT took up these responsibilities in conjunction with the regulatory gatekeeper, the Better Regulation Executive (BRE). In order to promote common working methods and understanding, a small number of officials from the OFT split their working time between the OFT and the BRE.

15. Completing a competition assessment involves competencies related to competition analysis and market definition. For this reason, in some countries, new laws or regulations with an economic impact are reviewed by competition authorities. In Mexico, for example, new secondary legislation with effects on competition require a mandatory review by the competition authority. In Korea, the competition authority has responsibility for reviewing selected new regulations. In Hungary, the competition authority was required to submit its comments on new regulations. Many other countries hold horizontal consultations prior to the adoption of new regulations. Such consultations work better when competition reviewers can enter the process early and are not required to submit their comments on all policies, but only on those where the competition reviewers believe there may be a significant potential problem.

16. In Australia, a new body was created in 1995 for overseeing the National Competition Policy reviews of national and state or territory laws and regulations. This body, the National Competition

¹ The 2006 OFT guidelines closely follow those of the OECD. See: <http://www.offt.gov.uk/NR/rdonlyres/BFD72799-03BD-428D-AB43-30408F794ACB/0/oft876.pdf>.

Council, was distinct and independent both from the regulatory oversight office for reviewing new regulations and from the competition authority.²

17. The degree of independence of the reviewing body merits consideration. Independent bodies may be particularly valuable for reviewing laws and regulations. But the more an independent body designs laws and regulations, as opposed to reviewing them, the more the independent authority may appear to be acting as a direct implementer of the current government agenda.

18. The involvement of a competition authority or other government body in forming a prediction about competitive effects should not preclude later government legal action under competition laws, as predictions may turn out to understate competitive harms or overstate competitive benefits.

5. How can policymakers without responsibility for regulatory quality or competition be given incentives to prepare an appropriate assessment?

19. The policymakers who develop a new regulation may have an incentive to under-report potential competition problems with a proposed regulation. They may perceive that identifying a potential competition problem or consulting with an outside agency, such as a regulatory gatekeeper or a competition authority, simply creates more work for them without a substantial benefit. It is therefore important to emphasize that competition assessment improves the policy output.

20. A number of options exist for improving incentives and abilities of policymakers with respect to competition assessment. These include:

- Including competition assessment in Regulatory Impact Analysis (RIA);
- Financial rewards; and
- Best-practice training.

21. *Including competition assessment in RIA.* RIA is a formalized process for reviewing new regulations to ensure that they achieve the given policy objectives. In general the objective of the RIA process is to ensure that the benefits of a regulation will exceed its costs. Both competition assessment and the RIA process itself can benefit from the inclusion of competition assessment as one part of the RIA process. This inclusion has the benefit of ensuring that dynamic, market-oriented considerations inherent in a competition assessment are dealt with analytically in the entire RIA and that competition assessment is widely performed by policymakers.. Giving the competition authority some responsibility in this area can help to avoid the need for regulatory agencies or gatekeepers to retrain staff.³

22. *Financial rewards.* Because Australia is a federal system, implementing the National Competition Policy (NCP) at the state or territory level required agreement of the states. The Australian government made significant payments to states and territories, consisting of per capita payments based on the extent to which reviews and revisions of legislation were completed. “The NCP payments are the means by which gains from reform are distributed throughout the community. The payments recognise that, although the states and territories are responsible for significant elements of NCP, much of the direct

² For more details, see <http://www.ncc.gov.au/articleZone.asp?articleZoneID=136>.

³ For more details on how to include competition assessment in RIA, see DAF/COMP/WP2(2006)4/REV1 “Executive overview: integrating competition assessment into RIA” and DAF/COMP/WP2(2005)5/REV2 “Methods of including competition as part of regulatory impact analysis.”

financial return accrues to the Australian Government via increases in taxation revenue that flows from greater economic activity.”⁴

23. The payments to states and territories have been significant. Table 1 states NCP payments since the introduction of the NCP.⁵

Table 1. Annual NCP payments received by jurisdictions (AUD million)

Jurisdiction	1997-98 (a)	1998-99 (a)	1999-00 (a)	2000-01 (a)	2001-02 (a)	2002-03 (a)	2003-04 (a) (b)	2004-05 (a) (b)	2005-6 (b) (c)
New South Wales	126.5	138.7	148.6	155.9	242.5	251.8	203.5	233.6	292.5
Victoria	92.8	102	109.2	114.7	179.6	182.4	178.7	201.6	197.9
Queensland	74.2	81.6	81.5	73	147.9	138.9	87.9	143.3	178.7
Western Australia	38.4	42.4	43.2	45.5	71.1	72	33.6	53.5	71
South Australia	34.3	38.4	34.5	35.9	55.7	57.1	40.7	50.4	54.3
Tasmania	12.6	13.9	10.8	11.2	17.4	17.7	17.2	19.8	19
ACT	6.2	7	7.2	7.5	11.6	12.4	11	13.6	12.7
Northern Territory	11.2	13	4.5	4.5	7.6	7.5	5.9	8.4	8
Total	396.2	436.9	439.5	448	733.3	739.9	578.5	724.2	834.1

Source: National Competition Council

(a) From Final Budget Outcome documents.

(b) Each jurisdiction's payments reflects the application of permanent deductions and suspensions.

(c) Costello, the Hon. P (Treasurer) 2005, 'National Competition Payments to States and Territories for 2005', Media release, 15 December 2005.

Note 1: Totals may not add due to rounding

Note 2: Figures up to and including 1999-2000 include Financial Assistance Grants

24. While the payments appear large, the Australian government has estimated the annual benefits to the economy of 2.5% of GDP, or 20 billion AUD, from productivity improvements and price rebalancing in many different sectors where NCP and related reforms have occurred.⁶

25. *Best practice.* Training to policymaking officials on best practice for competition assessment is of great importance if policymakers are to take account of competitive effects when preparing their policies. Many policymakers are specialized in a domain that does not relate to competitive effects or economics. Such officials could not reasonably be expected to address competition issues appropriately without training.

26. Best-practice training could potentially be provided by competition authorities, regulatory gatekeepers or the OECD.

⁴ See <http://www.ncc.gov.au/articleZone.asp?articleZoneID=40>.

⁵ See <http://www.ncc.gov.au/articleZone.asp?articleZoneID=40>.

⁶ See Productivity Commission (2005) *Review of National Competition Policy Reforms*, Productivity Commission Enquiry Report No. 33, 28 February. Available at <http://www.pc.gov.au/inquiry/ncp/finalreport/ncp.pdf>. The review notes that direct causal links are difficult to establish empirically.

6. What resources are required for competition assessment?

27. The minimum resources required for competition assessment can be relatively limited. For example, when the United Kingdom implemented competition assessment two staff members from the OFT played a very active role and only a small percentage of the roughly 400 regulations per year received detailed scrutiny. The rest were reviewed through a competition filter that permitted officials to quickly diagnose whether there was a significant chance that competition problems would materialize from new policies.

28. The OECD's Competition Toolkit includes a Competition Checklist that is likewise designed to limit the need for detailed scrutiny of existing or new government policies.

29. Competition assessment can benefit from high levels of resource commitment. The Australian example illustrates a far-reaching and resource intensive approach that has promoted a very strong economic performance since the microeconomic reforms related to the NCP began. The payments from the national government to state and territorial governments should not be construed directly as expenses, moreover, since the payments were used for the provision of government goods and services. Even so, the expected benefits from improved productivity and rebalanced prices likely exceed these payments by a substantial amount.⁷

30. Resource requirements will be highest at the initial implementation stage. A detailed program of best practice training, for example, would require one-time resources. Training in later years would not need to be as substantial as a system would be better functioning and personal relationships between relevant policy officials would have been established. However, due to staff turnover, ongoing training would still be needed after the initial implementation.

7. Conclusion

31. The introduction of competition assessment into government has the potential to yield strong economic benefits by identifying areas where market activity is unduly restricted and suggesting policy alternatives that will continue to meet policy goals while promoting competition as much as is possible.

32. This paper has identified a number of different institutional options for introducing competition assessment. Given that the institutional, legal and federal environment of OECD jurisdictions differ substantially, the most effective institutional structures will likely vary from one jurisdiction to another. But a few points stand out. Competition authorities are ideally suited for performing selective competition assessments, advising on assessments or providing training for competition assessment. Regulatory

⁷ See OECD (2006) Economic Survey of Australia, Policy Brief. "Recent macroeconomic performance continues to be impressive: gross domestic product (GDP) growth since the turn of the millennium has averaged above 3% per annum and, including the terms-of-trade gains, growth in real gross domestic income has averaged over 4%, among the handful of OECD countries achieving such rapid growth; the unemployment rate has fallen to around 5%, its lowest level since the 1970s; inflation has remained within the target range; and, following a long stretch of fiscal surpluses, Australia is now one of the few OECD countries where general government net debt has been eliminated. Living standards have steadily improved since the beginning of the 1990s and now surpass all G7 countries except the United States. *Wide-ranging reforms, particularly to promote competition, were instrumental in this respect.* They promoted productivity growth, most notably in the second half of the 1990s. The greater flexibility engendered by these reforms, together with the introduction of robust monetary and fiscal policy frameworks, has also bolstered the economy's resilience to a series of major shocks over the last decade: the Asian crisis in the late 1990s, the global downturn at the turn of the millennium, followed by a major drought, the ending of a house price boom and currently, the commodity price boom." (Emphasis added)

gatekeepers are also well-suited to performing such assessments, particularly when competition assessments are implemented as one part of a RIA process.