

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

Working Party No. 2 on Competition and Regulation

DRAFT COMPETITION ASSESSMENT RECOMMENDATION

20 October 2008

This text is submitted by the Secretariat to the Working Party No. 2 of the Competition Committee FOR APPROVAL under item VI of the agenda at its forthcoming meeting on 20 October 2008. After the 20 October meeting, this text will be sent for comments to other OECD bodies, prior to returning to the Competition Committee for further consideration.

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DRAFT COMPETITION ASSESSMENT RECOMMENDATION

1. Increased competition leads to higher economic productivity and growth. In many jurisdictions, however, competition is, at times, severely limited by laws, regulations or other government-imposed barriers that unduly restrain market activities. One important step to eliminate these undue restraints is “competition assessment”: evaluating policies to find those that may unduly restrict competition and developing alternative policies that achieve the same objectives, with lesser harm to competition. Competition assessment has been a recent focus of OECD work. The OECD Guiding Principles on Regulatory Quality and Performance (C/2005(52)), suggested that regulations should be reviewed for their competition effects. Subsequently, after consultation with the Working Party on Regulatory Management and Reform as well as the Group on Regulatory Policy, the Competition Assessment Toolkit has been adopted by the Competition Committee, seeking to integrate and develop a best practice methodology for competition assessment.¹

2. A number of countries now have adopted some form of “competition assessment”. The methods used for competition assessment have seen considerable progress since 2005. Economies with some form of recommended market or competition assessment in place or under trial include at least: Australia, Brazil, Canada, Chinese Taipei, the European Commission, Korea, Japan, Mexico, Turkey, the United Kingdom and the United States. In addition, competition assessment materials have been circulated in the Czech Republic, Finland, Hungary, Indonesia, Israel, Italy, Norway, Romania, Russia, Singapore and Spain.

3. In February, 2008, the Chair of Working Party No. 2 on Competition and Regulation proposed that consideration be given to developing a Council recommendation related to competition assessment which could be of great value to many jurisdictions, especially to those in the process of introducing or reforming their existing procedures. In fact, while there are various approaches to examining and assessing market impacts of laws and regulations, these approaches have largely similar objectives and effects.

4. Competition assessment should develop in a way that works efficiently within existing structures of government bodies and agencies, not becoming an extra layer of bureaucracy that would delay and burden needed government action. Furthermore, because of the highly technical nature of competition assessment, bodies with expertise in competition policy should be associated to the process.

5. If adopted, the ultimate draft of the Recommendation would become part of the OECD acquis. As such, the position of accession candidates would have to be considered.

6. Seeking to take into account the comments of delegates that were made at the February 2008 meeting and later meetings, the Secretariat has prepared a draft text of a recommendation for discussion. This text is attached in Annex 1.

¹ See DAF/COMP(2007)5, DAF/COMP(2007)6, DAF/COMP(2007)7 and DAF/COMP(2007)8 or, for an integrated version of the Toolkit papers, www.oecd.org/competition/toolkit.

ANNEX 1.

DRAFT TEXT FOR A RECOMMENDATION ON COMPETITION ASSESSMENT

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the agreement reached at the 1997 Meeting of the Council at Ministerial level that restrictions on competition are often costly and ineffective in promoting public interests and should be avoided [C/MIN(97)10];

Having regard to the OECD Guiding Principles on Regulatory Quality and Performance [C/2005(52)], which call for governments to review proposals for new regulations, as well as existing regulations, with reference to competition;

Recognising that competition promotes efficiency, helping to ensure that goods and services offered to consumers more closely match consumer preferences, producing benefits such as lower prices, improved quality, increased innovation and higher productivity;

Recognising that higher productivity is essential to economic growth and increased employment;

Recognising that public policies serve a variety of commercial, social, health, safety, security environmental and other objectives;

Recognising that, at times, public policies unduly restrict competition;

Recognising that such undue restrictions can occur unintentionally even when the public policies in question are not focused on economic regulation and not intended to affect competition in any way;

Recognising that public policies that unduly restrict competition often may be reformed in a way that promotes market competition while achieving the public policy objectives;

Recognising that regulation and reform of regulated industries usually require detailed competition assessment of likely effects;

Recognising that, other things being equal, public policies with lesser harm to competition should be preferred over those with greater harm to competition, provided they achieve the identified public policy objectives;

Noting that a number of countries already perform competition assessment;

Noting that competition assessment is a technical matter that requires appropriate skills; and

Recognising that the Competition Committee has adopted a Competition Assessment Toolkit for guiding Governments in their competition assessment activity;

I. RECOMMENDS as follows to Governments of Member countries:

A. Identification of existing or proposed public policies that unduly restrict competition

1. Governments should introduce an appropriate process to identify existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for performing competition assessment, including the preparation of screening devices.
2. In performing competition assessment, governments should give particular attention to policies that limit:
 - i) The number or range of market participants;
 - ii) The actions that market participants can take;
 - iii) The incentives of market participants to behave in a competitive manner;
 - iv) The choices and information available to consumers.
3. Public policies should be subject to competition assessment even when they pursue the objective of promoting competitive outcomes and especially when they:
 - i) Set up or revise a regulatory body or regime (e.g., the assessment could make sure that, among other things, the regulator is appropriately separated from the regulated industry);
 - ii) Introduce a price or entry regulation scheme (e.g., the assessment could make sure that there are no reasonable, less anticompetitive ways to intervene);
 - iii) Restructure incumbent monopolies (e.g., the assessment could make sure that the restructuring measures actually achieve their pro-competitive objectives);
 - iv) Introduce competition-for-the-market processes (e.g., the assessment could make sure that the bidding process provides incentives to operate efficiently to the benefit of consumers).

B. Revision of public policies that unduly restrict competition

1. Governments should introduce an appropriate process for revision of existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for evaluating suitable alternatives;
2. Governments should adopt more pro-competitive policies to achieve their objectives when the expected benefits exceed the costs.;

C. Institutional Setting

1. Competition assessment should be incorporated in the review of public policies in the most efficient and effective manner consistent with institutional and resource constraints.

2. Competition bodies or officials with expertise in assessing effects on competition should be associated with the process of competition assessment.
3. Competition assessment of proposed public policies should be integrated in the policy making process at an early stage.

D. Definitions

For the purposes of this Recommendation:

“public policies” means regulations, rules or legislation. With respect to proposed legislation, this recommendation applies to executive branch development of legislative proposals.

“unduly restricts competition” means that restrictions on competition needed for achieving public interest objectives are greater than is necessary, when taking into account feasible alternatives and their cost.

“market participants” means businesses, individuals or government enterprises engaged in supplying or purchasing goods or services.

“competition bodies” means public institutions, including a national competition authority, charged with advocating, promoting and enhancing market competition and not limited in these roles to a specific sector.

“competition-for-the-market processes” refers to the bidding processes organised by Government for allocating the right to supply a given market or for using a scarce government resource for a distinct period of time.

“competition assessment” means a review of the competitive effects of public policies including consideration of alternative and less anti-competitive policies. The principles of competition assessment are relevant to all levels of government.

II. INVITES non-member economies to associate themselves with this Recommendation and to implement it.

III. INSTRUCTS the Competition Committee:

To serve as a forum for sharing experience under this Recommendation for member countries and non-member economies that have associated themselves with this Recommendation;

To promote this Recommendation with other relevant Committees and Bodies of the OECD;

To report to Council in three years on experience with this Recommendation.