

**General Secretariat
GROUP ON REGULATORY POLICY**

**SG/GRP(2007)7
For Official Use**

Initial Experiences with Use of the Competition Assessment Toolkit

**3-4 December 2007
OECD Headquarters
New Conference Center, Room 10**

This paper was prepared by the OECD Secretariat. It is a contribution to the ongoing work on competition assessment and is submitted for discussion by the Group on Regulatory Policy.

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JT03236768

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INITIAL EXPERIENCES WITH USE OF THE COMPETITION ASSESSMENT TOOLKIT

By the Secretariat

1. Introduction

1. In February, 2007 the OECD's Competition Committee approved the release of the Competition Assessment Toolkit for initial usage, with a plan to learn from experience to better refine its method and materials and to gather information on its impact.¹ Prior to its release, the Competition Assessment Toolkit had been developed by the Working Party on Competition and Regulation and reviewed by both the Working Party on Regulatory Management and Reform and the Group on Regulatory Policy.

2. The Competition Assessment Toolkit provides a method and background materials for reviewing the impacts of regulations on competition. Reviewing the impacts of government policies on competition is important because policies often yield substantial restrictions on competition, and such restrictions can substantially distort market outcomes. The Toolkit can help governments to redesign regulations so that undue restrictions on competition are eliminated.

3. While many regulators are conscious of the beneficial impacts of market rivalry, and develop regulations to promote competition, at times regulations yield substantial restrictions on competition, often unintentionally. Such restrictions can substantially distort market outcomes, leading to prices that may be 200% higher (or more) than under a more competitive situation, scarcity of supply that restricts supply to 25% (or less) of what it would otherwise be, and slows innovation spurred by competition.² Restrictions on competition are often not intentional and not considered by regulators. The Toolkit is intended to provide guidance for governments on how to consider competitive effects of regulations.

4. The Toolkit need not be adopted by governments word for word, but can be adapted to domestic needs and circumstances.

5. The purpose of this note is to review recent experience with implementation of the Toolkit methodology and thus to provide a basis for discussing the role and utility of such competition-oriented guidance for governments.

2. Major experiences

6. The key questions related to implementation of the methodology embodied in the Toolkit are:

- How is the methodology being used?
- Does the methodology add value?
- What changes might be desirable to the Toolkit in light of experiences?

7. A number of countries reported their experiences at the 17 October 2007 meeting of the Competition Committee. At least five countries have made substantial progress in implementing a methodology close to that of the Toolkit: Australia, Canada, Korea, Mexico and the United Kingdom. These are not the only jurisdictions to have made progress in promoting competition assessment, and other jurisdictions will be mentioned later.

2.1. Australia

8. Australia's federal government adopted a new process of reviewing impacts of new laws and regulations in August 2007.³ This process includes a mandatory review of competitive impacts. The Office of Best Practice Regulation, a body within the Productivity Commission, has introduced a checklist process for new regulations. The items in the Checklist closely mirror the elements of the OECD Competition Assessment Checklist.

9. Australia's approach is to have a simple preliminary assessment of all regulatory proposals. There is a simple form, that government officers fill out electronically and send to the Office of Best Practice Regulation. The form asks about whether there are compliance costs and whether there are competition or other impacts. If there is a medium to high compliance cost, the government body proposing a regulation must complete a detailed compliance cost study. If there are effects on competition likely, the government body must perform a full regulatory impact assessment (see Box 1).

10. At this time, at least 155 regulations have gone through the revised regulatory Impact Statement process. The result led the government to conclude that the competition assessment questions were valuable but needed to be supplemented. It was noted that the list focused largely on supply side effects. In order to provide focus on demand-side effects of regulation, the Australian government added several questions related to consumer impacts, and several on other impacts.

11. One lesson learned was that many policy officers without an economics background find competition assessment complicated. Therefore the government is focusing on developing better training on how to evaluate competitive impacts.

Box 1. Competition assessment in Australia

The Office of Best Practice Regulation (the Regulatory Impact Analysis body of the Australian federal government) revised its guidance to government officers in August 2007. This revision was based on a draft that had been distributed for comments in November 2006. The draft policies reportedly were reportedly put into effect on a trial basis shortly after their issuance.

The User's Guide to the Best Practice Regulation Handbook includes a set of questions, a number of which are similar to the questions in the Competition Assessment Toolkit's Checklist. The full set of questions is below:

'Other' Impacts Checklist

The following checklist will help you to assess whether a proposal has a potential impact on business and individuals or the economy.

Will the proposal:

Potentially affect the number and range of businesses in an industry?

For example:

- change the ability of businesses to provide a good or service;

- change the requirements for a licence, permit or authorisation process as a condition of operation;
- affect the ability of some types of firms to participate in public procurement;
- significantly alter costs of entry to or exit from an industry; or
- change geographic barriers for businesses.

Potentially change the ability of businesses to compete?

For example:

- control or substantially influence the price at which a good or service is sold;
- alter the ability of businesses to advertise or market their products;
- ban certain types of products or business practices;
- set significantly different standards for product/service quality; or
- significantly alter the competitiveness of some industry sectors.

Potentially alter the incentives for business to compete?

For example:

- create a self-regulatory or co-regulatory regime;
- impact on the mobility of customers between businesses;
- require/encourage the publishing of data on company outputs/price, sales/cost; or
- exempt an activity from general competition law.

Potentially impact on consumers?

For example:

- alter the choices available to consumers;
- affect the quality of consumer products or services;
- create or remove restrictions on access to a product;
- promote or restrict information dissemination to consumers; or
- add to or reduce the complexity of consumer products or services.

Potentially have any other impacts on business and individuals or the economy?

For example:

- mandate payments from one party to another (excluding taxes);
- have environmental or social impacts (including distribution of resources);
- create or amend government cost recovery arrangements;
- impact on Australia's international capital flows or trade;
- impact on mobility of labour;
- impact on resource allocation, saving or investment;

- transfer risk between business, individuals and government; or
- impose any other financial costs.”

The focus of a full competition assessment is described in Box 6.6, for which the text is as follows:

Competition assessment

If the answer to any of the questions in the Competition Assessment Checklist in box 3.5 is ‘yes’, then a competition assessment should be done.

The extent of this assessment should be commensurate with an initial assessment of the extent of the anti-competitive impact identified. It should involve an evaluation of the impact (for primary and relevant related markets) of the regulatory proposal on the following:

- Incumbent businesses. Will the proposed regulation affect incumbent firms differently, altering competitive relations between them in a way that would reduce the intensity of competition in the market as a whole?
- Entry of new businesses. Will the proposed regulation restrict entry for all (or particular types of) new businesses? What is the likely degree of this restriction and is it likely to significantly reduce competitive pressures in the longer term?
- Prices and production. Will the regulation raise prices by imposing new costs on producers? Will it facilitate information exchange among producers, raising the prospect of collusion and increasing prices? Is it likely to lead to the exit of some incumbent firms, reducing supply and increasing prices?
- Quality and variety of goods and services. Does the regulation include minimum standards requirements that will reduce the range of price/quality combinations available in the market? Is it likely to reduce product variety by restricting the entry of new firms?
- Innovation. Does the regulation restrict innovation (and therefore responsiveness to consumer needs)? Regulation may diminish pressures on incumbents to innovate by restricting entry by new firms or advertising of new products. Regulation may reduce entry of innovative products originating in other markets by restricting the movement of goods and/or services over borders.
- Market growth. Is the regulation likely to limit market growth, either by increasing costs to all producers or by limiting the possibility of entry by new firms?
- Related markets. Does the regulation in one market also have anti-competitive effects in upstream markets (those that supply inputs to the market in question), or in downstream markets (those in respect of which the product of the market in question constitutes an input, or intermediate good)?

The results of this assessment should be compared with assessments of feasible alternative policy options that would equally obtain the policy goal but be less anticompetitive.

If there are no available alternatives, the proposal should be assessed from the perspective of economic well-being (that is, whether there are net benefits from the regulation, taking into account the costs of the anti-competitive impacts).

For full documents, please see: www.obpr.gov.au/bestpractice/index.html

2.2. Canada

12. In Canada, one of the ministries is piloting competition assessment for new laws. They are assessing the effectiveness for detecting competition issues, assessing related resource costs of competition assessment and refining the framework for the use in Canada.

13. Steps taken over the last several months include development of training materials by the Competition Bureau and training officials from line ministries to perform assessments.

2.3. Korea

14. In Korea over the last year, training in competition assessment has developed for both the national assembly and other regulatory bodies. Under the Korean statutory review system, government actions that restrict competition must be reviewed by the Korean Fair Trade Commission (FTC). So far, the Toolkit has been applied in 13 cases. It has been very successful and useful for suggesting options. The Korean FTC found that the guidance of the toolkit can still be improved, for example by providing more guidance on regulations designed to protect small stores, such as laws that restrict opening hours.

2.4. Mexico

15. The Mexican competition authority has the statutory obligation to review regulations that can have a negative impact on competition. Starting in 2007, the authority has begun using the Competition Assessment Toolkit with staff responsible for these reviews. In addition, an agreement has been reached, subject to Budget Committee approval, to provide OECD help in applying international best practice to Mexico for developing proposals on reforming anti-competitive regulations. This significant new policy initiative is expected to cover many different sectors.

2.5. United Kingdom

16. In February, 2002 the OFT issued guidance on performing competition assessments that included a competition filter with nine questions.⁴

17. “The OFT has provided advice and training to other government departments on competition assessments in RIAs since 2003.”⁵

Box 2. Competition assessment in the United Kingdom

One of the main elements of the OFT's 2002 guidance consisted of a competition filter with nine questions. If more than half the questions have a yes answer, government officials were expected to proceed to a detailed assessment.

The OFT Competition Filter (2002)

Question / Answer:

yes or no

Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?

Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?

Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?

Q4: Would the costs of the regulation affect some firms substantially more than others?

Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?

Q6: Would the regulation lead to higher set-up costs for new or potential firms that existing firms do not have to meet?

Q7: Would the regulation lead to higher ongoing costs for new or potential firms that existing firms do not have to meet?

Q8: Is the market characterised by rapid technological change?

Q9: Would the regulation restrict the ability of firms to choose the price, quality, range or location of their products?

According to the OFT, "In 2006, we reviewed the effectiveness of the competition assessment. We concluded that it was too heavily focused on market structure and market shares, rather than on identifying the likely impacts on competition. Consequently, the OFT has redesigned the competition assessment and redrafted the guidelines, so that they focus more on the likely effects on competition of proposed regulations."¹

In August, 2007 the OFT issued Guidelines for Competition Assessment entitled "Completing competition assessments in impact assessments."² These Guidelines include a framework as follows:³

In any affected market, would the proposal:

1. Directly limit the number or range of suppliers? (Chapter 4)

This is likely to be the case if the proposal involves:

- the award of exclusive rights to supply, or
- procurement from a single supplier or restricted group of suppliers, or
- the creation of a form of licensing scheme, or
- a fixed limit (quota) on the number of suppliers.

2. Indirectly limit the number or range of suppliers? (Chapter 5)

This is likely to be the case if the proposal significantly raises the costs:

- of new suppliers relative to existing suppliers,
- of some existing suppliers relative to others, or
- of entering or exiting an affected market.

3. Limit the ability of suppliers to compete? (Chapter 6)

This is likely to be the case if the proposal:

- controls or substantially influences
 - the price(s) a supplier may charge

- the characteristics of the product(s) supplied, for example by setting minimum quality standards
 - limits the scope for innovation to introduce new products or supply existing products in new ways,
 - limits the sales channels a supplier can use, or the geographic area in which a supplier can operate,
 - substantially restricts the ability of suppliers to advertise their products, or
 - limits the suppliers' freedoms to organise their own production processes or their choice of organisational form.
4. Reduce suppliers' incentives to compete vigorously? (Chapter 7)

This may be the case where a proposal:

- exempts suppliers from general competition law,
- introduces or amends intellectual property regime,
- requires or encourages the exchange between suppliers, or publication, of information on prices, costs, sales or outputs, or
- increases the costs to customers of switching between suppliers.

Note: Suppliers or firms include any private entity, any local authority acting in a private capacity and any not-for-profit firm which is competing in the market

1. OFT website, September 27 2007 at www.of.gov.uk/advice_and_resources/resource_base/guidelines/
2. OFT 876. This final guidance was preceded by draft guidance released in November 2006.
3. OFT (2007), "Completing competition assessments in impact assessments," OFT 876, p. 8.

For full document, please see: www.of.gov.uk/advice_and_resources/resource_base/guidelines/

3. Other developments

18. Other jurisdictions have made steps towards competition assessment in the last year. For example, in Japan, a group in the Cabinet Office recommended that competition assessment occur. In Turkey, the Prime Ministry issued guidelines for regulatory impact assessment in 2007, and these contain a part on competition assessment. Previously, in 2004, the European Commission established guidelines for reviewing regulations that call for a consideration of competitive impacts.

4. Conclusion

19. Based on experiences reported to the OECD's Competition Committee on October 19, 2007, the OECD's Competition Assessment Toolkit appears to encompass a useful methodology, provide helpful questions and generally serve as a useful tool. Initial experience has suggested some areas in which the Toolkit can be usefully refined in the future and the Working Party on Competition and Regulation is undertaking such revisions.

20. In order for tools such as this to have impact, there is need to convince officials from line ministries of the benefits of competition to them and how it can help them to achieve their goals. Perhaps more importantly, there is a need to find an appropriate institutional mechanism for use of the toolkit.

Notes

1. The driving forces behind the development of the Toolkit were (1) pro-competitive reforms in Australia that involved a review and revision of 1 200 regulations across the country that had been found to limit competition, (2) the UK Office of Fair Trading (OFT) developed a formal competition assessment process with a filter that was included in the Cabinet Office's review of impacts of new regulations.
2. Recent entry by discount airlines in Europe and Mexico shows that many consumers were paying prices 200% or higher than would exist in a more competitive airline market. Recent liberalization of the taxi market in Ireland, based on a court decision in 2000 saw the number of taxi license increase from about 4 000 to about 16 000, suggesting that license restrictions reduced supply as much as 75% below the level that would have prevailed without entry restrictions.
3. The Australian State of Victoria introduced competition assessment into its statewide guidance on regulations in November 2006 largely building on the approach of the OECD Competition Assessment Toolkit, suggesting that assessing the competitive impact of regulations is not only a process to be carried out at the national level, but can also be used at regional levels.
4. Guidelines for Competition Assessment, OFT Paper 355. February, 2002.
5. OFT website, Sept 25, 2007 at www.offt.gov.uk/advice_and_resources/resource_base/guidelines/

ANNEX 1. COMPETITION CHECKLIST FOR THE CONDUCT OF COMPETITION ASSESSMENTS

In order to place the new procedures in context, it is important to remember that the Competition Checklist is at the heart of the OECD Competition Assessment Toolkit methodology.

A competition assessment should be conducted if the proposal has any of the following 3 effects:

1. Limits the number or range of suppliers

This is likely to be the case if the proposal:

- Grants exclusive rights for a supplier to provide goods or services;
- Establishes a license, permit or authorisation process as a requirement of 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;
- Creates a geographical barrier to the ability of companies to supply goods or services, invest capital or supply labour.

2. Limits the ability of suppliers to compete

This is likely to be the case if the proposal:

- Controls or substantially influences the prices for goods or services;
- Limits freedom of suppliers to advertise or market their goods or services;
- Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would choose;
- Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).

3. Reduces the incentive of suppliers to compete vigorously

This may be the case if the proposal:

- Creates a self-regulatory or co-regulatory regime;
- Requires or encourages information on supplier outputs, prices, sales or costs to be published;
- Exempts the activity of a particular industry or group of suppliers from the operation of general competition law;
- Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers.