ADVOCACY AND COMPETITION POLICY

Report prepared by the
Advocacy Working Group

ICN's Conference
Naples, Italy, 2002

INTERNATIONAL COMPETITION NETWORK

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EXECUTIVE SUMMARY

1. INTRODUCTION

The Steering Group of the International Competition Network (ICN) decided to undertake a study on competition advocacy with the purpose of analyzing its relevance in fostering competitive markets and promoting social welfare. To this end it established the Advocacy Working Group with the mandate to undertake projects with a view to recommend best practices to ICN members and to provide them with information to support their advocacy task.

The first project undertaken by the Advocacy Working Group was to hold a questionnaire among ICN members about their advocacy activities. The questionnaire was designed and implemented by a special team of the Mexican Federal Competition Commission, headed by Fernando Sánchez Ugarte, vice-chairman of the Steering Group.

The report presents a summary of the answers to the questionnaire. It comprises four sections: first an introduction; a second section setting out a conceptual framework for competition advocacy; the third section forming the main body of the report presenting the results of the questionnaire and a final section containing conclusions.

2. COMPETITION ADVOCACY: A CONCEPTUAL FRAMEWORK

In the present report the following definition of competition advocacy was adopted:

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.

The first part of this definition refers to practically all activities of the competition authority that do not fall under the enforcement category. The second part defines two main branches of advocacy: (i) activities directed at other public authorities in charge of regulation or rule making and (ii) activities directed at all constituencies of the society with the aim of raising their awareness of the ben-

efits of competition and of the role competition policy can play in the promotion and protection of competition.

Competition may not only be hindered by *private* anticompetitive conduct, such as collusion among competitors, anticompetitive mergers, vertical arrangements in restraint of competition and unilateral abuse of dominant positions, but also, in certain circunstances, by *public* regulatory intervention and rulemaking. Such regulatory intervention may be warranted in sectors featuring extensive economies of scales or other market failures. In particular, without intervention, some markets may fail to provide minimal levels of services considered of public interest. However, regulatory intervention may go beyond the strictly necessary and may impede competition in those sectors.

Moreover, economic regulation may give rise to the emergence of *interest groups* (or interested parties) lobbying with the relevant authorities for the imposition of regulatory measures to their own benefit but eventually to the detriment of the society as a whole, particularly the consumers. Some examples of the latter are: unions of taxi-drivers lobbying with municipal authorities to limit the number of permits; trade associations lobbying for the imposition of compulsory safety standards difficult to be met by new entrants or foreign suppliers. In contrast, regulators doing their job properly resist such pressures. There are examples of public regulator acting against anticompetitive behavior of incumbent operators or publicly owned companies after market opening: the telecommunication sector provides good examples in the respect.

Apart from the induced welfare losses, such conduct may lead to a substantial waste of scarce resources in rent-seeking behavior by members of the interest groups. At the same time there is a danger of *regulatory capture* of the involved public authorities.

In countries with a competition law in force private anticompetitive conduct can effectively be combated with the *enforcement* of such laws. In contrast, public regulatory intervention, whether or not adopted in response to pressure from special interest groups, is perfectly legal as a rule, and therefore harder to be influenced. What competition authorities can do in such cases is advocating with the relevant government agencies for the rejection of unnecessarily anticompetitive regulatory measures, or at least for the adoption of measures as competition friendly as possible. In other words, it is no longer enforcement powers but convincing arguments that matter.

Competition advocacy comprises all activities by competition agencies promoting competition, which do not fall in the enforcement category. On one hand, this implies convincing other public authorities to abstain from adopting unnecessarily anticompetitive measures, and helping regulatory agencies to clearly delineate the boundaries of economic regulation, i.e. to determine which markets are characterized by natural monopolies or other market failures, where regulation rather than competition should be the disciplinary force, and which markets are more susceptible to the competitive process. On the other hand, competition advocacy comprises all efforts by competition authorities intended to make other government entities, the judicial system, economic agents and the public at large more familiar with the benefits of competition and with the role competition law and policy can play in promoting and protecting welfare enhancing competition wherever possible. This implies a variety of activities among which seminars for business representatives, lawyers, judges, academics, etc. on specific competition issues, press releases about current enforcement cases, the publication of annual reports and guidelines setting out the criteria followed to resolve competition cases, are just a few examples. It is generally recognized that such activities enhance the transparency of competition policy along with the credibility and the convincing power of the enforcement agencies.

All those activities contribute to establish, what is often called, a *competition culture*, which is perhaps best characterized by the awareness of economic agents and the public at large about competition rules. Thus, all efforts on behalf of competition authorities to make these rules known and understood are positive contributions to the competition culture.

It has often been argued that in transition and developing countries competition authorities should give priority to advocacy over enforcement activities. One of the arguments is that in those countries many state assets are privatized which gives rise to an intensive rule making process in which competition advocacy has an important role to play. A second reason is that most of these countries have recently undergone a substantial trade and investment liberalization which has triggered the emergence of interest groups lobbying with public authorities for the reinstallation of lost privileges. Last but not least, it is argued that competition law enforcement requires a sophisticated adjudication of cases for which recently installed competition agencies and a judicial system with little experience in that field are poorly equipped.

Regarding the last argument, it may be argued against that even though the adjudication of competition cases often requires the application of well-developed investigatory and analytical skills, the proper conduct of advocacy activities also benefits from the application of these skills. Although lessons can be learned from the experience of more developed countries in this field, their experience with regulatory reforms of the type needed in developing and transition economies is much shorter-lived than their experience with competition law enforcement. Moreover, it is generally believed - and this is also confirmed in various responses to the questionnaire - that enforcement and advocacy cannot be considered as completely independent activities. To the contrary, they mutually reinforce each other. Enforcement is strengthened by an active advocacy, and advocacy is less effective in the absence of enforcement powers or when enforcement lacks credibility. Thus, enforcement and advocacy rather go hand in hand.

Finally, it is important to mention that competition law enforcement is much older than competition advocacy. Even though in jurisdictions with a very long enforcement tradition competition advocacy efforts date back to the early decades of the 20th century, there was a renewed emphasis on competition advocacy in the 1970s, or even later in some jurisdictions. Evidently, recently installed competition agencies may take advantage from such developments and take up their advocacy role right from the start.

3. COMPETITION ADVOCACY AS SEEN BY ICN MEMBER COUNTRIES: THE RESULTS

Before presenting a summary of the results of the questionnaire, it should be noticed that in some questions competition authorities were asked to report about variables that can hardly be measured in an objective way. For example, what is meant by the strength of the competition culture or by the effectiveness of advocacy? The answers depend on the perceptions of the respondent. Therefore, while interpreting the results of the questionnaire, it should be borne in mind that such variables are not the result of rigorous measurement but rather reflect subjective perceptions of the respondents.

Competition Authorities

Today there are almost 100 competition authorities in the world enforcing some kind of competition law. More than half of them were installed during the last decade of the 20th century. These competition agencies are different in almost all aspects of life, such as the institutional set-up, the competition regime they enforce, their organizational structure, the degree of autonomy of decision making, etc. This makes their comparison a difficult task and there are hardly any one-fits-all solutions for the problems they face.

In half of the jurisdictions surveyed in the questionnaire one-and-the-same agency is in charge of both investigating and adjudicating anticompetitive practices. In other countries the competition agency's role is limited to investigation only, particularly when it is a specialized department of one of the ministries. In those countries adjudication takes place in the judicial system, either by a specialized competition tribunal or by normal courts. In most countries the judicial system functions in some way or another as a body of appeal.

Depending on the institutional set-up, the heads of competition agencies are appointed by the President, Prime Minister, sometimes by the Council of Ministers, either with or without the consent of Congress, or by the Minister when the agency belongs to a Ministry. Mostly appointments are made for a fixed term ranging from 2 to 12 years. Competition authorities are structured either as a collegiate body or as non-collegiate. The collegiate structure is most accustomed for agencies with adjudication powers whereas the non-collegiate structure corresponds in the majority of cases to agencies which only have investigative powers.

Evidently, the institutional set-up and the way in which competition authorities are structured have a direct bearing on the enforcement task of the agencies. From the answers to the questionnaire no inferences can be made, however, on whether institutional and/or structural aspects are somehow related to advocacy activities and if so which set-up is most propitious to that purpose.

Autonomy

It is difficult to define the degree of independence of a competition authority. Moreover, independence can be interpreted in legal, political and economic as

well as in factual terms. How independent is an agency that has to struggle each year to obtain the funds necessary to carry out its mission? Or when its head can be dismissed any time? At the other extreme, even in the absence of formal autonomy - e.g. when the agency forms part of a Ministry so that their choices and decisions can be overruled by the Minister - the agency may successfully enforce competition policy when its decision making is respected in an environment of transparency and accountability.

As regards budgetary independence there is a wide variety of budget allocation mechanisms reported by the agencies. In many cases, their budget is part of that of a Ministry, but usually identified as a clearly separate item. On other occasions the competition agency's budget figures as a separate item of the government budget which is approved by Congress. Four countries reported even a self-financing mechanism mainly through the collection of a certain percentage of the fines they impose.

Autonomy of the agency is generally considered important by the respondents to shield their decisions from outside interventions. However, this seems to be more significant for enforcement than for advocacy efforts which are usually directed at influencing other processes where the ultimate decisions are taken by other authorities. Therefore, outside interventions in these processes are more likely to be directed at the competent decision maker and not at the advocate of a certain position.

An important prerequisite for effective competition advocacy is that authorities be informed about regulatory initiatives in a timely manner. This is echoed by several agencies which complain that they are informed rather late in the consultative process when the main decisions are already made. In such cases some form of integration of the competition authority in the governmental structure may be helpful in obtaining an early access to the relevant information.

Another issue is whether competition agencies have the power to undertake advocacy activities on their own initiative. Some authorities complained that they can only conduct studies or make recommendations when requested by the Ministry they belong to and that they cannot decide on their own to make the contents of their reports public or to pressure for their recommendations to be taken into account.

Most of the agencies surveyed consider that competition authorities should have sufficient powers to advice other public entities on their legislative and regulatory programs both ex-officio and upon request and to make comments on restrictions imposed on competition by any law, regulation or administrative ruling.

Institutional Representation in Government

In some jurisdictions, the head of the competition authority is represented in the Cabinet of the national Government. This is believed to have a double advantage. In the first place, the representative of the competition authority is well positioned to influence the final outcome of legislative and regulatory reform projects. Secondly, the agency is likely to be informed at a very early stage of the drafting process of new policy initiatives.

At the other extreme, one finds authorities that have no direct access to Government at all. These are typically, at least in the majority of cases, the authorities that are relatively independent from Government. In some instances, such a position may weaken the advocacy efforts due to the difficulty in conveying the message to the policy makers during the elaboration of new projects. Moreover, such an authority may find itself at a strategic disadvantage in terms of timely and comprehensive information on reform projects.

In most cases, however, the representation of competition authorities in Government is partial. In the first place, the authority may participate in meetings of the Government on an occasional basis, e.g. upon invitation to pronounce its view on a specific project. Secondly, not the competition authority itself, but a "caretaker" institution can bring competition issues to the attention of the Ministers. Such a caretaker is often the Minister under whose auspices the competition authority is set up. Finally, the competition agency may be integrated into Government at lower levels than the Council of Ministers, e.g. by interdepartmental working groups. Such groups may be organized on an ad-hoc basis or instituted in a permanent structure, and are generally regarded as a very useful tool to advocate competition issues at the early drafting stages of new projects.

The Design of Advocacy in the Regulatory Process

Participation in legislative and regulatory procedures is generally seen as the most important component of competition advocacy having a direct impact on the

normative environment which allows market forces to operate. Its influence is usually more palpable than that of longer-term advocacy tasks such as the raising of awareness. Participation in the regulatory process can take many forms, however. Here we describe some key factors that are likely to determine the effectiveness of competition advocacy in this field and report about the findings of the agencies surveyed.

As mentioned above, it is generally considered that the timeliness of the consultation is of utmost importance. Much depends on whether the competition agency is consulted at a moment that there is still opportunity for considerable feed-backs. Fortunately, a significant proportion of the authorities report to be informed early on. This will typically result in a relatively close association of the competition authority with the reform process.

A second element to be considered is whether the consultation of the competition authority is mandated by the law or discretionary. Only in few cases consultation is mandatory but, when it is, the results are encouraging. Usually such mandatory consultation is limited to certain specific issues and does not apply at a general level. When consultation is discretionary it is important to what extent the discretion is exercised in practice. The responses to the questionnaire provide little evidence in this respect.

Another question is whether the opinions issued by the competition authority upon a consultation are binding on the policy maker. Some agencies are dissatisfied with the non-binding nature of their opinions. Evidently, when opinions would be binding, the impact of competition advocacy would be enormous. It does not seem reasonable, however, that such wide-ranging powers be given to competition authorities, in particular because they do not posses a democratic mandate as Government or Parliament.

It has been mentioned by some agencies that their advocacy role would be strengthened if rule-makers were obliged to give reasons in case they would not adopt the recommendations of the competition authority. Where specific rules on consultation procedures are absent it is expressed by many agencies that some procedural safeguard or formalization of the consultation process is desirable. Such desire is less pronounced in mature competition regimes where consultation seems to work satisfactorily.

Regarding transparency of advocacy in the regulatory process, an important question is whether advocacy initiatives are made public. Although the benefits of publishing the position of the competition authority are generally recognized, the degree to which this is actually done in practice varies widely. Some agencies publish all their advocacy initiatives, mostly through websites, press releases or newsletters, while others only provide overviews, e.g. in annual reports. Moreover, in many jurisdictions there is some reticence to publish opinions on reform projects that are still in the domain of the Government and have not yet been released for public debate.

Advocacy with Sector-Specific Regulators

The need for competition advocacy in sector-specific regulation arises out of the often very substantial impact sector regulation has on competition in the regulated sectors. Moreover, in a number of jurisdictions such sectors are exempted from competition law which makes the need for the competition authority to have itself heard ever more urgent. Most of the agencies surveyed expressed that their advocacy efforts would probably be more effective if such exemptions were eliminated.

The dialogue between the competition authority and the regulatory framework for specific sectors plays at two levels. In the first place, the competition authority may seek to influence the rules that govern the activity of the sector regulator, in particular by ensuring that the concerns of competition policy are taken into account at the time the regulatory system is set up or reformed. In the second, advocacy may take place at the implementation level. Several respondents have stated that they mainly collaborate on an informal basis.

A real challenge for many competition authorities is to acquire a sufficient base of expertise in the sectors at stake. These sectors sometimes pose complex and often unique competition problems. A useful tool to achieve this is by organizing exchanges of staff between regulators and the competition authority which enhance not only sector-specific knowledge, but also help to develop a mutual understanding of the concerns among the agencies.

Sectors Targeted by Advocacy

The sectoral coverage of competition advocacy varies among countries but most advocacy efforts have been directed at public utilities, either privatized, partly privatized or in the process of opening up to competition. The sectors most frequently mentioned by ICN members are telecommunications, energy, transport, professional services, financial services and postal services. Other areas mentioned are distribution, pharmaceuticals, international trade, standards and intellectual property rights.

Evidently, the successfulness of advocacy initiatives varies widely from one case to another. However, respondents reported successful advocacy intervention in roughly the same sectors. In order of importance, telecommunications, electricity, transport and financial services were the most mentioned sectors.

Competition Culture

Competition culture, as perceived by the respondents, is closely related to the age of the market economy and, thus, in most instances, to the experience of the competition authority. Because most transition and developing countries have short-lived competition regimes this implies that respondents from these countries tend to perceive a weaker competition culture than those from the more developed countries.

Some reasons mentioned why competition culture is strong are: participation of the competition agency in regulatory reform and privatization processes; a long experience with competition policy; resolution of cases with significant media coverage; existence of specialized competition tribunals; interaction with universities, publication of decisions, case studies and personal leadership of the head of the competition authority. Reasons mentioned for a weak competition culture are: recentness of competition legislation; lack of experience by courts, lack of acceptance of competition principles by authorities and economic agents and interventionist economic policies, among others.

As regards the tools to promote competition culture respondents suggested a variety of means: official media (annual reports, Official Gazette, guidelines), mass media (websites, press releases, radio and tv), selective media (seminars and workshops, business meetings, overviews, speeches, articles in journals) and studies in general (newsletters, discussion papers, surveys, study groups).

Attitudes towards Competition Advocacy

Competition advocacy, and competition policy in general, finds different degrees of acceptance by different constituencies. Some groups of society support it, others heavily oppose competition policy. Within the constituencies there is no consensus either. Some are in favor, others are against and many are neutral.

According to the perceptions of the respondents to the questionnaire the strongest support is to be found among the academic community, consumer associations, the media and NGOs. There are also many allies among Congressmen and in the political parties, in entrepreneurial and professional associations, in local governments and even in labor unions. However, in those constituencies opinions are more divided. Particular strong opposition is reported to exist in entrepreneurial associations, local governments and labor unions.

Interactions between Enforcement and Advocacy

Most respondents agree that enforcement and advocacy activities are interrelated and that a proper enforcement of the competition law and a widespread diffusion of enforcement decisions contribute to the credibility and relevance of advocacy activities. Only a few agencies consider that there is no interaction between the two or that they should just be considered as alternatives. It is also claimed that advocacy encourages enforcement activities because by raising awareness about competition, it facilitates the filing of complaints regarding anticompetitive conduct and it makes regulatory authorities more receptive to competition problems.

The Importance of Advocacy within the Agencies

Most agencies do not have precise data of how many persons in their agencies are involved in advocacy work and of what percentage of their budget is spent on advocacy. This is mainly because advocacy goes hand in hand with enforce-

ment and is scattered over many different departments or divisions in the authorities, such as enforcement divisions, economic divisions, international affairs and press offices. Moreover, it is not always easy to draw a clear separation line between enforcement and advocacy activities.

On the average, agencies report to engage 32% of their personnel in advocacy activities, but this percentage varies enormously, from agencies reporting less than 10% to others claiming 100% of their personnel to be involved. Probably such wide variations also reflect differences in what agencies perceive advocacy really is.

Similarly, most agencies expressed difficulties to determine the percentage of the budget devoted to advocacy activities as they do not make a statistical distinction between advocacy and enforcement. Those countries that were able to quantify the resources devoted to advocacy reported percentages up to 30%. Almost one third of them reported between 20 and 30%; the rest below 20%.

Improving Advocacy

Most agencies agree that a lack of resources, both material and of human expertise, is an important factor limiting their advocacy activities and therefore recommend increased budgets. However, such recommendations only seem realistic if competition authorities have strong arguments that their workload is likely to increase significantly and that the increased workload cannot be met by internal cost-savings. To underpin the arguments it is desirable to have a clearer distinction between enforcement and advocacy in the internal accounts of the authority. It has even been suggested that enforcement and advocacy might be separated in different departments. However, with such a solution much of the synergies between enforcement and advocacy might be lost.

Following are some suggestions by respondents to improve competition advocacy:

- the enactment of competition laws granting greater autonomy to competition authorities
- install mechanisms of mandatory consultation of the competition authority in legislative and regulatory procedures
- enhance transparency of consultation procedures and oblige public authorities that do not follow the recommendations of the competition authority to justify their decision and eventually raise the controversy to a dispute before the political level of Government
- disseminate the benefits from competition both among government agencies and private constituencies
- promote competition related issues through websites and press offices.

International Dimension of Advocacy

Many agencies receive support from international organizations or from other jurisdictions for their advocacy work. Such support comes as technical assistance, consultants' studies, training programs, seminars and expert meetings, among others. The organization most often mentioned is the OECD, the second most the European Commission particularly by member and applicant countries. Other international organizations involved in advocacy promotion are UNCTAD, APEC, WTO and ICN.

Several countries mentioned to have received support from competition authorities from other jurisdictions or assistance in the framework of bilateral cooperation agreements, even when such agreements rather apply to enforcement activities and do not have special provisions related to advocacy.

4. CONCLUSIONS OF THE STUDY

The main conclusions are:

- The vast majority of competition authorities reported that advocacy plays an important role in addressing restraints to competition among government, the business community, as well as the public in general.
- Autonomy of competition authorities is generally considered important to keep effectiveness of competition advocacy.

- Competition authorities consider participation in legislative and regulatory processes as the most important component of competition advocacy. A more systematic consultation, at an early stage, possibly enshrined in law is considered to produce best results and could also apply to privatization processes.

- Transparency enhances the effectiveness of advocacy by building public support. Credibility and political neutrality of competition authorities were also considered important to the acceptance of their recommendations or opinions.

- Developed countries with a strong competition culture sustain their advocacy effort through selective communication media and studies, while for developing countries with a weaker competition culture the first option is mass media.

- Few but relevant differences between developed and developing countries were found. The level of competition culture is probably the most important. Surprisingly, there are no significant differences reported between developed and developing countries as regards the advocacy role of competition authorities.

- Additional resources would allow competition authorities to strengthen competition advocacy. Moreover, many transition and developing countries reported the need to acquire more expertise about regulated sectors.

- Concerning international cooperation, clear objectives should be established, to enhance technical assistance. Exchange of expertise through case studies or enforcement assistance is recommended.

1

INTRODUCTION

The International Competition Network (ICN) is a project-oriented initiative. Its Steering Group decided to undertake a study on competition advocacy with the purpose of analyzing its relevance in fostering competitive markets to enhance economic efficiency and promote social and economic welfare. To this aim it established the Advocacy Working Group with the mandate to undertake projects with a view to recommend best practices to ICN members and to provide them with information to support their advocacy activities.

The Chairman of the Mexican Federal Competition Commission, Fernando Sánchez Ugarte, heads the Advocacy Working Group. It is comprised of thirteen competition authorities from 4 different continents, the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and two international civil associations, the Consumer Unity & Trust Society (CUTS) and the International Chamber of Commerce (ICC). The group also has the support of the Law and Economics Consulting Group (LECG) and the American Bar Association (ABA).

The first project undertaken by the Advocacy Working Group consists in developing a Report on advocacy, revisiting a number of relevant issues on the subject and presenting the results of a questionnaire on competition advocacy to be implemented among ICN members. This information will be presented and discussed at the First ICN Annual Conference. It is hoped that the Report contributes to the understanding of how competition advocacy is implemented by ICN member countries. The Report will also lay the foundations for the eventual identification of the most successful practices across diverse contexts.

On this basis, it is envisaged in the medium term, to draw conclusions and issue recommendations to enhance the effectiveness of competition advocacy and promote the convergence of interests and policies among competition authorities. Due account will be taken of the different legal, political and economic contexts into which advocacy efforts are set in different jurisdictions. Therefore, at this early stage of the discussions, it is unlikely that one-size-fits-all recommendations will be ultimately available.

The present report is the result of the first project of the Working Group. It presents a summary of the answers to the questionnaire. It comprises four sections: first an introduction; a second section setting out a conceptual framework for competition advocacy; the third section forming the main body of the report pre-

senting the results of the questionnaire and a final section with conclusions and recommendations.

Advocacy is closely linked to communication functions carried out by authorities to promote a competitive environment among government agencies, legislators and courts, as well as among business and consumer associations, academics and society as a whole. The questionnaire was aimed at:

a) identifying the institutional strengths and weaknesses of competition authorities' advocacy role

b) understanding the relationship between competition authorities and policy-makers, as well as, with courts and legislative bodies

c) providing some indication of how competition authorities conduct their advocacy programs and assess their effectiveness

d) developing recommendations for the improvement of advocacy by ICN member countries.

Today approximately 100 countries have competition laws and a specialized organization for its enforcement. The ICN gathers more than 63% of these agencies and thus has already an important representation of authorities of all countries. The questionnaire was sent to the 64 ICN members in March 2002. Fifty-three authorities from 50 countries responded the questionnaire.[1] Participation by such an important part of the membership enhances the results of this practical study which can further be improved by a more intense contribution of all ICN members.

The answers received were fed into a database that was processed to generate statistics which enabled the identification of the most important trends in the advocacy role of competition authorities. Additionally, quotes from members' answers were also introduced to provide illustrations of the situations prevailing

[1] The list of respondents is presented in Annex II. Belgium and Romania sent separate contributions for each of their competition authorities while the US sent a single response for its two agencies.

in different jurisdictions. This information constitutes the basic input of the Report and can be consulted by members at the ICN website.[2]

The Questionnaire on Competition Advocacy comprises 44 questions, distributed in seven sections:[3]

a) The Competition Authority

b) General Advocacy

c) Advocacy in the Regulatory and Legal Frameworks

d) Sector Specific Advocacy

e) International Dimension of Advocacy

f) The Advocacy Team within the Competition Authority

g) Improving the Advocacy Role of the Competition Authority.

Most of the questions are open as to allow competition authorities to explain extensively their advocacy activities and express their opinions. A few multiple choice questions were designed to simplify answers.

The responses submitted by ICN members were also divided into two categories utilizing the UNCTAD classification of development.[4] The purpose of the exercise was to identify the most important differences between the advocacy role of competition authorities in developed and developing countries. Former socialist nations (transition countries) were included as developing countries.

[2] http://www.internationalcompetitionnetwork.org

[3] The full text of the questionnaire is presented in Annex I.

[4] UNCTAD classification can be consulted at: http://un.org

Special mention must to be made of the work of Alberto Heimler and Georg Roebling, who contributed with essential inputs to the preparation of the Report. Comments issued by Chris Martin, Chris West, Shyam Khemani, Mark Schechter, Kirtikumar Mehta, William Kovacic, Paul Crampton, Paul Karlsson, DOJ staff, Nitya Nanda, DGC-CRF (France), Victoria Steeples and the ICC enriched the content of this study. The Advocacy Working Group is also grateful for the contributions by the competition agencies of Japan, France and Canada.

A specialized team was created within the Mexican Federal Competition Commission. The ideas provided by Commissioners Pascual García Alba, Adalberto García Rocha and Fernando Heftye deserve special acknowledgement, as well as the work coordinated by Chairman Fernando Sánchez Ugarte to process information and to do the conceptual research on Advocacy, undertaken by Adriaan Ten Kate, Manuel Sandoval, Rebeca Escobar, Justino Núñez, Renato Guerrero, Antonio González Quirasco, Mónica Zegarra, Lorena Padilla and Georgina Santiago.

Most important of all is the enthusiastic contribution of ICN members who provided the essential inputs for the Report through detailed answers to the questionnaire, as well as the support received from the Interim Steering Group, and particularly by its Chairman, Mr. Konrad von Finckenstein.

2

COMPETITION ADVOCACY: A CONCEPTUAL FRAMEWORK

2.1. Competition Advocacy: Definition

For the purpose of the present report the following definition of competition advocacy was adopted:

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[5].

The first part of this definition defines competition advocacy in terms of what it is not. Advocacy is almost everything except enforcement. However, it is not always clear what exactly enforcement is and this may be different from one jurisdiction to another. In most of the older jurisdictions competition law applies exclusively to private economic agents but in several recent jurisdictions in developing and transition economies competition authorities claim that their law also applies to public authorities, among them regulators. If so at least part of what we have considered advocacy becomes enforcement.[6]

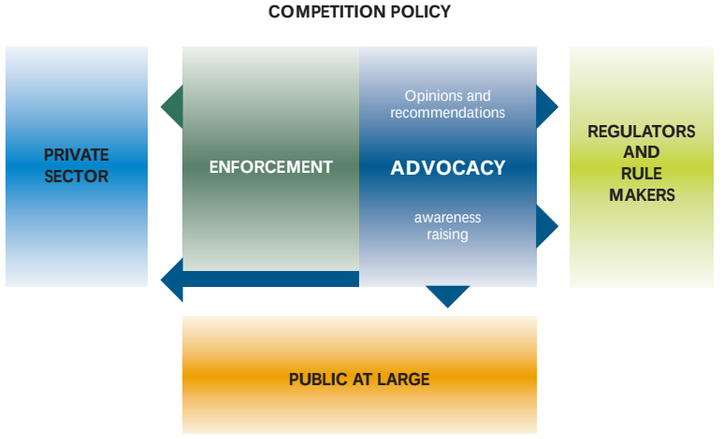
The second part of the definition identifies the two main branches of competition advocacy. The first comprises initiatives undertaken by the competition authority towards other public entities in order to influence the regulatory framework and its implementation in a competition-friendly way. The second covers all activities by competition authorities aimed at raising the awareness of economic agents, public authorities and the public at large about the benefits of competition to the society as a whole and about the role competition policy can play to promote and protect competition.

[5] Definition adopted by the AWG for the purpose of this study.

[6] See for example Kovacic (1997). "Getting Started: Creating New Competition Policy Institutions in Transition Economies", *Brooklyn Journal of International Law*, Vol. 23, No. 2, pp. 403. Kovacic recommends that new competition authorities in transition economies start their enforcement activities with advocating for the elimination of entry barriers, among others. In our terminology this would be advocacy, not enforcement.

The division of competition policy in enforcement and advocacy, and of advocacy in influencing regulation and awareness raising is schematically represented, albeit in a somewhat simplified way, in the following graph.

Graph 1. **Competition Policy: Enforcement and Advocacy.**



2.2. Competition and Regulation

The main objective of competition policy is to promote and protect free competition and open markets, generally accepted as the guiding principles of the modern market economy. In markets with a sufficient number of competitors (or potential competitors) and in a static setting, free competition is supposed to lead to low prices for the consumers, an efficient use of resources by the producers and maximization of social welfare. Apart from that, in a dynamic setting the competitive process induces technological innovation, enhanced product quality, wider product differentiation and improvements in productive efficiency.

However, there is a variety of intrinsic factors that limit the scope of the competitive market mechanism. Some of them are of an institutional nature - i.e. markets need strong institutions to work properly.[7] Others have to do with incomplete or asymmetric information of producers and consumers. Still other market failures are related with an excessive concentration of market power and externalities. Last but not least, without intervention some markets may fail to provide minimal levels of services considered of public interest.

An example of information asymmetries is when producers are better informed about the quality of their products and about the risk of consuming them than the customers. In such instances the imposition of quality and safety standards may be warranted even though this intervenes with the free market mechanism and may limit competition to some extent.

An excessive concentration of market power - i.e. one or just a few suppliers in the market - may either be caused by the behavior of the suppliers or be the result of structural characteristics of supply and demand. If the source of market concentration is anticompetitive conduct, such as exclusionary practices or anticompetitive mergers and agreements among competitors, competition policy combating such conduct seems to be the proper answer. If, on the other hand, market concentration derives from the cost structure of the supply, e.g. from extensive economies of scale, the situation is different. Under such circumstances, the optimal number of firms in a market may be just one firm, so that free competition would lead to the survival of one single fittest; i.e. competition tends to destroy itself and protecting competition would be a self-defeating strategy. It is generally recognized that in such cases not competition policy but regulation should discipline the market players.

Another situation is obtained when there are externalities, i.e. when the actions of some economic agents in the market cause positive or negative effects upon other agents, which are not or cannot be properly compensated for by payments. In that case free competition is perfectly feasible but does no longer lead to optimal social outcomes. Also in such cases regulatory intervention may be warranted. Such intervention may take several forms. On one hand, regulatory intervention may be designed in such a way as to simulate a competitive market, i.e. imposing prices, quality standards and supply obligations among others

[7] World Bank (2002), *Building Institutions for Markets,* World Development Report 2002, Oxford University Press, New York.

upon the regulated entities. On the other, regulation may simply attempt to internalize the externalities by implementing compensation schemes between the economic agents involved. The latter type of regulation is usually more competition-friendly.

Where markets, when left on their own, fail to provide services to broad classes of the population, and such universal service provision is considered of the public interest, regulatory intervention, often in the form of granting exclusive rights in exchange for the commitment to provide minimal levels of service or by subsidizing the provision of those services to classes of the population otherwise unattended, may also be necessary.

In spite of the necessity to subject certain sectors to regulation it should be recognized that from an organizational point of view competition is often superior to regulation as a guide to economic decision making. Competition has the advantage of being a decentralized mechanism that does not require information to be concentrated at a higher level of decision making. Every economic agent decides for himself with the information he has access to. In contrast, under regulation the regulator decides what the regulated company must do to the benefit of the society. To do that properly, the regulator must have information about what the regulated company is able to (cost structures, state of technology, etc.) and what society wants (consumer preferences). He seldom has all that information (nor an approximation of it) and largely depends on the regulated company to light his way. However, the profit-maximizing regulated company has incentives to provide biased information.

To give an example of how regulated agents may attempt to abuse the regulatory framework once put into place, these agents may form interest groups lobbying with the relevant government authorities for the imposition of anticompetitive regulatory measures to their own benefit but usually to the detriment of the society as a whole, particularly the consumers. Some examples of the latter are: unions of taxi-drivers lobbying with municipal authorities to limit the number of permits; trade associations lobbying for the imposition of compulsory safety standards difficult to be met by new entrants or foreign suppliers.

Apart from the induced welfare losses, such conduct may lead to a substantial waste of scarce resources in rent-seeking behavior by members of the interest groups.[8] At the same time it may result in *regulatory capture* of the involved public authorities losing sight of the public interest and protecting the privileges of established firms.[9] Evidently, public authorities doing their job properly would resist such pressures. There are examples of public regulators acting against anti-competitive behavior of incumbent operators or publicly owned companies after market opening: the telecommunication sector provides good examples in that respect.

Moreover, special interest groups may occasionally convince public authorities of the need to impose regulatory restrictions (e.g. legal entry barriers) even in markets where economies of scale, externalities and other market failures are not sufficiently strong to justify such intervention. Sectors frequently mentioned as examples of that situation are trucking, professional services, among others. This is particularly prone to happen in situations where the interest groups benefiting from the regulation are smaller, and thus easier to organize, than the groups negatively affected by it, usually the consumers. In such cases, there is a strong case for deregulation.

For the above mentioned reasons, it is important to limit regulation to the strictly necessary. Where economies of scale, externalities and other market failures are so strong that competition cannot do the job, regulation is imperative, but when such market imperfections are present but not causing all too much trouble, one may wonder what is worse: live with them or adopt a regulation that suffers from its own imperfections.

The problem is that it is not at all clear where to draw the line between where regulation is necessary and where it is not. In traditionally regulated sectors such as transport and professional services the need for regulation has increasingly been criticized. Likewise, public utilities have long been considered to be exclusive territory for regulation or State ownership but in the 1970s this position came under fire. Since then, public utilities have been progressively opened up to competition, often segment by segment, leaving a continuously decreasing core area of infrastructure where duplication is costly subject to regulation. This also

[8] For a short description of rent-seeking behavior see Jean Tirole (2000), *The Theory of Industrial organization,* The MIT Press, Cambridge, Massachusetts, Eleventh Printing, pp. 76.

[9] The concept of regulatory capture was introduced by George Stigler and Sam Peltzman. For a brief description see Kip Viscusi, John Vernon and Joseph Harrington Jr. (2000), *Economics of Regulation and Antitrust,* The MIT Press, Cambridge, Massachusetts, Third Edition, pp. 317.

poses particular problems with respect to vertical integration. Should incumbent companies possessing the core infrastructure be allowed to operate in the downstream liberated segments? Do the efficiencies associated with vertical integration outweigh the harm to competition downstream?

An additional difficulty is that the separation line between regulation and competition is constantly moving. Technological developments may wipe out or weaken economies of scale where they used to be strong, so that competition becomes feasible where it was not before.[10] Similarly, technology may weaken links in vertical production chains, so widening the scope for competition.

Under such developments regulation is usually obstinately persistent. Once put into place it may take decades to get rid of it, even when it is commonly accepted that it outlived its justifications. Regulators, particularly when captured by specific interest groups, may be resistant to give up their fields of competence. Moreover, the rule making process necessary to achieve such changes is slow and subject to many influences from the political arena.

This makes the interface between competition policy and regulation a particularly delicate field; moreover a field where straightforward competition law enforcement may not work. It is precisely there where competition advocacy comes in as the most powerful instrument of competition policy.

2.3. The Role of Advocacy

From the foregoing it follows that competition may not only be hindered by *private* anticompetitive conduct, such as collusion among competitors, anticompetitive mergers, vertical arrangements in restraint of competition and unilateral abuse of dominant positions but also by *public* regulatory intervention and rulemaking. Such regulatory intervention may be warranted in sectors featuring extensive economies of scale, externalities or other market failures but may go beyond the strictly necessary and may impede competition in those sectors.

[10] For example, the development of the combined-cycle turbine has made low-scale electricity generation much more efficient than it was before.

In countries with a competition law in force *private* anticompetitive conduct can effectively be combated with the *enforcement* of such laws. In contrast, *public* regulatory intervention, whether or not adopted in response to pressure from special interest groups, is perfectly legal as a rule, and therefore harder to be influenced. What competition authorities can do in such cases is *advocating* with public authorities and the legislative power to adopt a regulatory framework as competition-friendly as possible and with the relevant regulatory agencies for the rejection of unnecessarily anticompetitive measures. In that field it is no longer enforcement powers but the persuasiveness of arguments that matters.

Competition advocacy comprises all activities undertaken by competition agencies to promote and protect competition, which do not fall in the enforcement category. On one hand, this implies convincing other public authorities to abstain from adopting unnecessarily anticompetitive measures that protect specific interest groups but harm the public interest. It also implies helping regulatory agencies to clearly delineate the boundaries of economic regulation, i.e. to determine which markets are characterized by natural monopolies or other market failures, where regulation rather than competition should be the disciplinary force, and which markets are more susceptible to the competitive process.

There is another important component to competition advocacy, which is not exclusively directed at public authorities and the legislative power but also at economic agents and the public at large. It comprises all efforts by competition authorities intended to make other government entities, the judicial system, economic agents and the public at large more familiar with the benefits of competition and with the role competition law and policy can play in promoting and protecting welfare enhancing competition wherever possible. This implies a variety of activities among which seminars for business representatives, lawyers, judges, academicians, etc. on specific competition issues, press releases about current enforcement cases, the publication of annual reports and guidelines setting out the criteria followed to resolve competition cases, economic studies of competition issues including the impact of regulation in markets and industries, are just a few examples.

All those activities contribute to establish, what is often called, a *competition culture,* which is perhaps best characterized by the attitudes of consumers and producers. A consumer attitude of easy surrender to monopolistic abuse of dominant positions and producers complacent with the status quo of their privileges are typical for a weak competition culture. On the other hand, consumers look-

ing actively for better options and a producer attitude of working hard on providing more and cheaper options to the consumers are characteristic for a strong competition culture. Also the awareness of the economic agents about competition rules - i.e. what is allowed and what is not - reinforces competition culture. Thus, all efforts on behalf of competition authorities to make these rules known and understood are positive contributions. Likewise, the awareness of public authorities of the long-run benefits of competition to the society as whole, even when the competitive process may bring difficulties for capturing interest groups in the short run, is an important ingredient of a competition culture. Last but not least, a judicial system more familiar with competition principles and less focused on procedural shortcomings is essential to an effective enforcement of competition laws and thus enhances competition culture.

It is generally recognized that such awareness-raising activities enhance the credibility and the convincing power of competition authorities. This does not only contribute to the effectiveness of competition advocacy towards the regulatory system but also enhances the effectiveness of the enforcement of the law. Moreover, awareness raising is usually much less controversial than the other components of competition policy.

In the present study competition advocacy is conceived so as to include all initiatives of competition authorities towards the regulatory framework intended to promote a competitive environment and to convince regulators to withhold from an unnecessarily anticompetitive implementation of their mandate. This is also the way most of the respondents to the questionnaire understood the questions. The other component of competition advocacy is what can be caught under the general denominator of "awareness raising". As mentioned before this second component is closely linked to both advocacy towards the regulatory framework and law enforcement.

2.4. The Political Content of Competition Policy

The objectives of competition laws vary widely from one jurisdiction to another. Some competition laws expressly pursue economic efficiency. Others put a greater emphasis on consumer welfare alone, which forms part of economic efficiency. However, parallel objectives, possibly conflicting with that of economic efficiency or consumer welfare, are present in many competition laws. Encouraging small

enterprises, protection of employment, redistribution of income or full integration of a common market (as in the European Union) are just a few examples.

The alternative objectives go mostly hand in hand. Fighting monopoly power increases economic efficiency, favors small enterprise, reduces prices and thus redistributes income and enhances consumer welfare, all at the same time. However, occasionally there may be conflicts The principal reason is that competition often provokes a process of Schumpeterian *creative* destruction by means of which the less efficient get displaced by the more efficient. This process can, and often does create efficiency both in the short and in the long run but generates opposition from threatened groups. However, while the people who bear the costs of economic change are usually small and well-organized groups, the people who reap the benefits are the numerous unorganized consumers.

Even where economic efficiency is the only objective of competition policy, conflicts may arise between the competition agency responsible for the implementation of that policy and other public authorities in charge of other policies with different objectives. This may give rise to differences between competition agencies and other authorities, and a good deal of competition advocacy occurs in the interface of such conflicting goals.

Moreover, as mentioned before, other public authorities, particularly sector-specific regulators, are exposed to pressure from strong interest groups lobbying for the obtainment of privileges usually harming the consumers. Because such interest groups are smaller and easier to organize than a group so disperse as the consumers, it cannot be ruled out that in some instances sectoral regulators are captured by the interest groups. This is aggravated by the fact that regulators depend on the affected agents for information essential to their regulatory task. As a consequence, consumer interests are easily underrepresented in the decisions of regulators and there is an important advocacy role to play for competition authorities to restore the balance.

It is generally assumed that competition authorities are less prone to fall into regulatory capture than sector regulators. There are several arguments supporting this point of view. The first is that a regulatory policy when favoring special interest groups may be in conflict with the objectives of the competition regime. Second, competition policy is essentially horizontal, i.e. it treats many sectors at the same time, whereas most sectoral regulators are in a continuous dialogue

with one or a few parties. Last, sectoral regulators may be less independent from the Executive Branch of Government than competition authorities, and thus more susceptible to political pressures.

This is not to say that competition authorities are completely shielded from capture. Some groups or parties may resort to competition policy by filing complaints against more efficient competitors and putting a heavy burden of competition litigation upon them. However, competition agencies defending competition, not individual competitors, are less likely to fall in the trap. Moreover, the representation of interests is usually less unbalanced between one competitor and another than it is between regulated companies and the consumers.

Altogether, competition policies have an important role to play in the arena of political forces, usually defending the interests of the consumers, a group having difficulty in having its voice heard, against exploitation of market power by dominant firms and defending long-term interests for the sake of industrial competitiveness rather than short-term employment preservation in inefficient companies. For these purposes competition advocacy seems to be the most appropriate instrument, although law enforcement is evidently guided by the same principles.

2.5. Advocacy First?

In the older competition jurisdictions advocacy has long been a relatively unimportant part of competition policy. Although in the US noteworthy competition advocacy activities by the Justice Department and the Federal Trade Commission date back to the 1920s and 1930s, there was a renewed emphasis on competition advocacy in the 1970s, when a wave of deregulation efforts hit their regulatory system. In many other jurisdictions, the awareness of the need for competition advocacy came even later. The reasons why this occurred so late are varied. Among them one may mention developments in economic theory, increased emphasis on efficiency, changes in technology and organizational methods, as well as increased activity in privatization and regulatory reform.

Various authors have suggested that new competition authorities in developing and transition countries should do it the other way around: i.e. during the early implementation stages confine themselves to advocacy and only gradually introduce enforcement, first concentrating on conduct relatively simple to evaluate,

such as horizontal agreements and mergers, and leave the investigation of vertical restraints and abuse of dominance for a far away future in which competition culture and accumulated experience allow them to do so.[11]

A variety of arguments have been brought up in support of this point of view. We only discuss two of them. In the first place, to investigate anticompetitive conduct of private firms, competition authorities need access to private information of those firms. In developing and transition countries, where judicial systems and competition culture need further strengthening, firms may be reluctant to release such information.[12] Competition advocacy, on the other hand does not require that sort of private information. If advocacy is of the awareness-raising kind, there is hardly any such problem and if advocacy is towards the regulatory framework, the necessary information even when it is not in the public domain, is at least available with other public entities.

Regarding this latter argument about the comparative easiness of access to information about regulatory initiatives it may be objected that this would indeed be so if the other public entities were cooperative, which needs not always be the case. In practice, the relationship between regulators and competition authorities is an area that merits further attention to ensure that actual cooperation between these bodies is as smooth as possible. As set out in the next section, several competition authorities that responded the questionnaire complained about being informed in an untimely manner about regulatory reform projects and other initiatives. Still, it should be admitted that, generally speaking, access to the information required for advocacy is easier than to strategic information of private companies, particularly in developing and transition economies.

In the second place, it is often argued that law enforcement requires a sophisticated adjudication of competition cases for which inexperienced competition authorities, and even more so the judicial systems of many transition and developing countries, are poorly equipped. Even where adjudication is done by the

[11] See Kovacic (1997), Op.cit. and Armando E. Rodríguez and Coate, M.B., (1997), "Competition Policy in Transition Economies. The Role of Competition Advocacy", *Brooklyn Journal of International Law,* Vol. 23, No. 2, pp. 365.

[12] See Kovacic (1997), Op.cit.

competition authority itself or by specialized competition tribunals, the judicial system functions as an appeal body, which pays more attention to procedural matters than to the substance of the cases. Moreover, they usually take a long time, often several years, to resolve a case. Under such circumstances competition law enforcement runs a great risk of running out of steam and jeopardizing its credibility and sustainability. This is at the same time an argument for young competition authorities not to get involved in sophisticated rule-of-reason cases at early stages of competition policy development.

Although there is a great deal of truth in the above reasoning, the bad news is that competition advocacy, at least advocacy towards the regulatory framework, is hardly any simpler. As mentioned before, establishing the proper boundaries of regulatory regimes is a difficult task. Competition authorities often lack the sector-specific expertise the regulators do have. As a consequence, they may easily get caught in a scrimmage of technical arguments with a great risk to lose the fight. Moreover, regulators have relevant objectives. They safeguard the continuity of the supply of services of public interest. They promote universal service. These are respectable arguments to protect incumbent companies in public utilities. Moreover, in certain circumstances, specific missions can be attributed by governmental bodies to regulators such as protecting employment, consumer health and safety against dangerous products and services, they protect national producers against unfair competition from abroad or even protecting national champions in the global environment. In other words, regulatory authorities have at their disposal strong and appealing arguments. To balance those arguments with the cause of competition is not always an easy task. However, an equilibrium between competition goals and part of these arguments con be reached.

The state of the debate is such that no final conclusions can be drawn. At least there seems to be a strong case for new competition authorities in developing and transition economies not to wait with advocacy until enforcement takes root, as most developed countries did, but to pick up their advocacy role from the very beginning. On the other hand, it is often argued - and this is confirmed in the answers to the questionnaire – that enforcement and advocacy reinforce each other and that leaving enforcement for the future altogether may weaken advocacy today. After all, arguments are usually more convincing when expressed by someone with a stick in his hand. For example, advocating for a competition-friendly privatization scheme is more likely to be successful when

the candidates must obtain clearance from the competition authority to participate in the auction.

This is not to say that new competition authorities should necessarily engage in a broad field of enforcement activities at the beginning of their mandate. Probably a temporary concentration on horizontal agreements and merger control is desirable. The same applies to advocacy. To give an example, the removal of legal entry barriers in otherwise contestable markets seems less controversial and easier to explain than issues regarding the regulation of the prices of access to essential facilities. In other words, the choice among different enforcement activities and among different advocacy activities is at least as important as the choice of where to put the emphasis: on enforcement or on advocacy.

2.6. Developing and Transition Economies versus Developed Countries

There are several other differences that affect competition advocacy between developing countries and transition economies, on one hand, and the developed countries, on the other. Without pretending to be exhaustive we mention the following.

First of all, in developing and transition countries market institutions are much weaker than in the developed economies. This is particularly true for transition countries that recently adopted the market mechanism as the guiding principle of their economies. In such circumstances the benefits of competition are less understood by economic agents and the public at large and many of the pains of economic transition are easily blamed on competition, which is accused of being unfair, excessive, destructive, etc. Indeed, in developing and transition economies extreme competition is often the favorite scapegoat of pressure groups fighting for the preservation of privileges established under the old regime. This poses special challenges for competition advocacy in those countries.

Second, in developing and transition countries the transparency of procedures and the accountability of public authorities is usually lower than in developed countries. This has important consequences for both enforcement and advocacy but complicates advocacy work in a particular way. Public authorities in the former type of countries, less familiar with competition principles, are less accustomed to give public account of their actions and often do what they deem

appropriate simply disregarding the advice of competition advocates. Of course, this is not to say that resistance against competition advocacy would be weak in the developed countries.

A third difference is that in developing and transition countries, particularly in the latter, there is a lot of privatization of state-owned enterprises going on which gives rise to an intense rulemaking process. Such rule making is necessary to avoid that former state monopolies are simply converted into private monopolies by which much of the envisaged welfare gains and improvements in incentive structures might be lost. Therefore, competition advocacy, which helps to shape privatization processes in a competition-friendly form and to avoid an excessively restrictive regulatory framework for the privatized companies and their competitors, seems to have a more important role to play in developing and transition economies than in developed countries where privatization of state assets is relatively less frequent.

In the fourth place, most developing and transition countries have recently undergone a substantial trade and investment liberalization which has triggered the emergence of interest groups lobbying with public authorities for the introduction of selective measures in order to reinstall lost privileges. Competition advocacy has an important role to play in convincing trade and investment authorities to abstain from unnecessarily harmful measures in this field.

Last but not least, in most developing and transition economies, particularly in the smaller ones, there are severe limitations upon the availability of the resources necessary to set up an efficient competition authority. Such limitations seem to be less important in developed countries.

2.7. Institutional Aspects

There is a wide variety of institutional frameworks in which competition authorities operate. Apparently, the institutional framework is mainly relevant for competition law enforcement and much less so for competition advocacy. Still a brief discussion of the basic models seems to be in order.

Perhaps the most important distinction to be made is between settings in which the authority has both investigative and adjudicative powers and settings in which these powers are separated. The former case is called the integrated model; in the latter case we speak about the bifurcated model.

In the integrated model the investigation of violations of the competition law and the adjudication of competition cases is combined in one single agency solely responsible for competition law enforcement. For reasons of accountability the decisions of such integrated agencies are usually subject to appeal before the judicial system, i.e. the judiciary functions as an appeal body. In the integrated model private right of action is usually limited.

The bifurcated model is very heterogeneous. On one hand competition authorities in charge of investigating anticompetitive conduct and mergers may bring competition cases before the courts of the judicial system for adjudication. Usually there is a parallel right of action by private parties doing their own investigation and bringing their case directly before court. In that model competition authorities are mostly free to choose their cases and to turn their back on cases of minor importance which can properly be dealt with by private action. In many other settings competition authorities have the obligation of investigating all the complaints filed, which may limit their freedom to direct competition policy and may lead to an allocation of scarce investigation resources to relatively unimportant competition cases.

On the other hand, adjudication may be concentrated in a specialized competition tribunal belonging to the judicial system. The rationale for such a setting is that the adjudication of competition cases requires special expertise usually not held by judges adjudicating all sorts of civil and criminal matters at the same time. In some jurisdictions this model has been adopted as a reasonable compromise between the lack of expertise of the judicial system in competition matters and what some may see as the all too great concentration of power in fully integrated competition authorities.

It should be noticed that the choice of a proper institutional setting taking into account the special characteristics of the country at stake (strength of the institutions, competition culture, etc.) is of crucial importance for competition law enforcement. It is not clear, however, how competition advocacy is influenced by these factors. At first sight there does not seem to exist a direct relation between the type of model chosen and the intensity and effectiveness of advocacy.

Another institutional aspect that may be of more direct relevance to competition advocacy is the degree of independence of the competition authority. In some jurisdictions the competition authority forms part of a Ministry where the direction of its investigations and the orientation of its advocacy work can directly be influenced by the Minister. At the other extreme, there are competition authorities with the status of a Ministry on their own and fully represented in the Council of Ministers. In most jurisdictions, however, the agency is a kind of decentralized entity of the Executive Branch of Government with a certain degree of autonomy. Also the appointment mechanism of the head and higher officials of the competition agency and the easiness with which they can be removed as well as the budget allocation mechanism are important elements of its degree of independence.

It is generally considered that autonomy is essential to the effectiveness of advocacy work. However, a distinction should be made between formal and factual independence. In some countries a high degree of formal independence goes together with a certain isolation of the competition authority from the Executive Branch of Government which definitely does not favor the advocacy activities of the agency. In other jurisdictions competition agencies with a low degree of autonomy, forming a Directorate of a Ministry subject to Ministerial oversight, claim that their decisions are generally respected in an environment of transparency and accountability. That is to say, formal independence need not coincide with factual independence and it is factual independence that really matters.

2.8. The International Dimension of Advocacy

Competition advocacy has a basically national dimension: i.e. national competition authorities advocate with public authorities of *their own jurisdiction* for the adoption of competition-friendly rules and measures, and competition authorities try to raise the awareness of *domestic* constituencies about the benefits of competition and competition policy. Advocacy initiatives are not directed at foreign public authorities or constituencies. An outstanding exception is the European Commission: being a supranational body, it is partially empowered to lay down binding instructions to the Member States of the EU in the area of competition policy, (under Article 86 of the Treaty establishing the European Communities) if a certain set of conditions are fulfilled. In practice, this applies in particular to the regulated sectors. These powers of the Commission supplement the basic Regulatory Competences of the EU Member States and the European Parliament, for example in the telecommunications, postal and energy sectors.

It should be recognized, however, that various international organizations such as the Organization for Economic Cooperation and Development (OECD), the World Bank (WB) and the United Nations Conference on Trade and Development (UNCTAD), among others, provide support, usually of a technical nature, to national competition authorities to carry out their advocacy activities. Particularly the Competition Committee (CC) of the OECD has been active in this field. In the future the Advocacy Working Group (AWG) of the International Competition Network (ICN) will have an important part to play in technical assistance and benchmarking in competition advocacy. A number of competition authorities, including the US Department of Justice, the Federal Trade Commission of the US and the European Commission, are also involved in technical assistance programs, both individually and in consultation with international organizations.

There is also attention for competition advocacy in multilateral trade organizations and agreements, such as the World Trade Organization (WTO), the Free Trade Agreement of the Americas (FTAA) and the Asia Pacific Economic Cooperation (APEC), among others. Last but not least, some bilateral cooperation agreements on competition policy, though primarily focused on matters related to law enforcement, also have some provisions regarding competition advocacy.

3

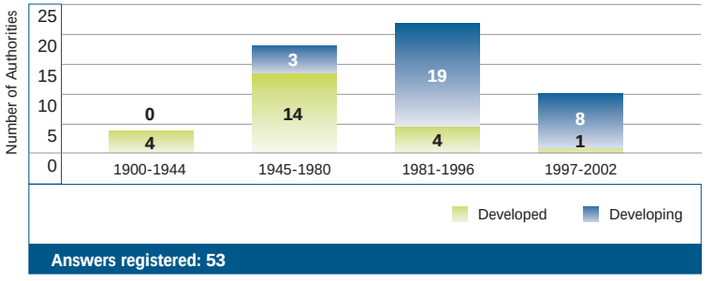
COMPETITION ADVOCACY AS SEEN BY ICN MEMBER COUNTRIES: THE RESULTS

3.1. The Competition Authority

As countries have adopted competition legislation, specialized authorities have been instituted to investigate and prevent anticompetitive business practices. With this mandate competition authorities are promoting one of the fundamental economic liberties related to free access and the possibility to compete in markets.

The first competition authorities were established at the beginning of the 20th Century, in later periods three major movements can be observed: the first starts at the end of the Second World War for developed countries; the second one took place between 1981 and 1996. Fifty percent of the competition agencies surveyed were established during this period, including countries in Latin America, Asia and former socialist economies in Europe. The last period is from 1997 up to present. *(Chart 1)*

Chart 1. **Foundig year of competition authorities.**

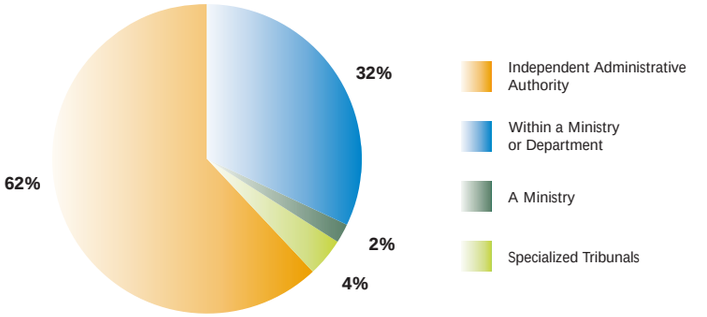


The number of competition authorities has increased extraordinarily over the last ten years alone. It is often estimated that today almost 100 jurisdictions enforce a competition regime of some sort. It is safe to say that not one agency is like another. This applies even to those younger competition regimes that were modeled on existing jurisdictions, such as, for example, those of Eastern Europe where the preparations to join the European Union gave a strong incentive to imitate the competition law of the European Commission.

Institutional Status

The institutional setup of competition authorities varies enormously. Sixty-two percent of all countries have an administrative independent authority in charge of investigating and adjudicating restrictions on competition *(Chart 2).*

Chart 2. **Institutional status of competition authorities.**



Answers registered: 50

In other countries, the competition authority is part of the executive branch of Government, conforming a Ministry (2%), or part of such Ministry or its equivalent (32%). Authorities that have this setup do not consider that such structure affects their autonomy to perform their activities.

> *[…] (Commission is integrated) within a Ministry or Department (…) However, decisions of the Commission are independently done by a Board of Commissioners without Government or political interference.*

Following the judicial tradition, some countries decided to separate the investigative activities from adjudication. In this situation, the investigative function is conferred to a department or directorate within the ministerial structure. At the same time, an independent or specialized administrative or judicial tribunal applies adjudication and sanctioning.

The judicial authority (civil or criminal) intervenes in several countries, either as an appeal or sanctioning body, or as an investigative entity. Few countries report the existence of specialized judicial courts on competition.

The varied mix of bodies renders any attempt to discuss inter-institutional relationships in a horizontal manner very difficult from a conceptual point of view. The diversity of institutional setups is even wider when considering the range of supranational competition regimes (European Union, European Free Trade Area, Andean Community) whose institutional organization betray any approach based on concepts suited to describe sovereign states

Appointment of Heads of Competition Authorities

In accordance with each country's political structure and depending on whether a distinction is made between investigative and adjudicative powers, the heads of competition authorities are appointed by the tutoring authority (whenever they belong to a Ministry) or by the Government, represented by the head of State or the Council of Ministries, either with or without consent of Congress (in the case of independent administrative quasi-judicial entities).

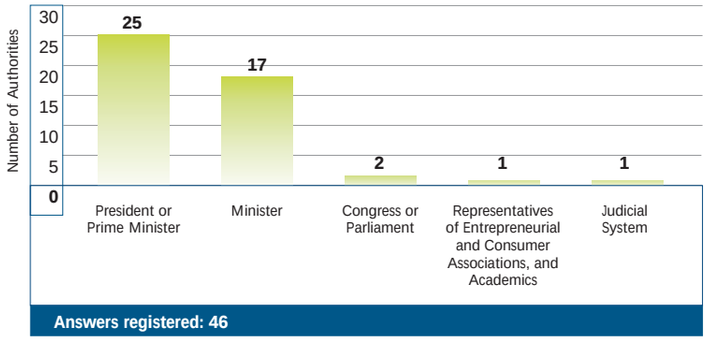
There is only one case where professional, academic and consumer associations may have a say in the appointment of the competition authority. Seldom is the congress exclusively empowered to make such a designation. Whenever the competition authority is part of the judicial power, it is this authority that makes the appointment *(Chart 3).*

Structure of the Competition Authority

Two different types of structures may be distinguished regarding the decision-making agencies: collegiate and non-collegiate.

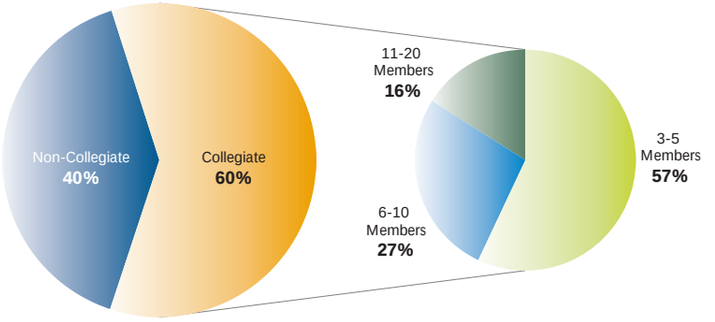
The collegiate structure (reported by 60% of the countries) is generally empowered to investigate and adjudicate anticompetitive practices (e.g. quasi-judicial). Chart 4 shows that these structures usually comprise from three to five members.

Chart 3. **Competition authorities' head appointment mechanism.**



Answers registered: 46

Chart 4. **Competition authorities' decision-making structure.**



Answers registered: 50

The non-collegiate configuration (amounting to 40% of the cases) corresponds, in the majority of cases, to structures located within the executive or administrative branch (ministries) endowed exclusively with investigative powers.

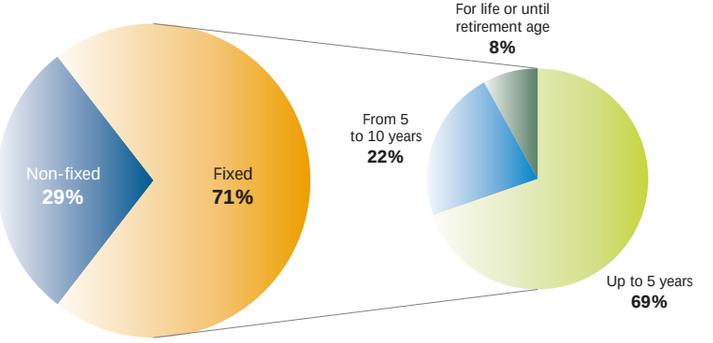
In developing economies collegiate decision-making is the predominant structure: 71% of the countries in that category report such structure. In contrast, non-collegiate decision-making is more common in developed countries as reported by 55% of those authorities. In the latter, there is almost always jurisdictional control of enforcement decisions.

In most cases, the heads of competition authorities are fully dedicated to their responsibility in the Competition Agency. In a few cases, the competition authorities comprise professionals and academics, who carry out their independent activities along with their competition-related tasks.

Only three countries grant lifetime tenure to high-ranking officers. The duration of office ranges from 2 to 12 years, but most appointments last from 3 to 5 years. In one third of the cases the appointment of members is not subject to a specific time period, but rather depends on the decisions and discretion of the appointing authority. The latter corresponds in all cases to appointments made by the head of the Executive Power *(Chart 5).*

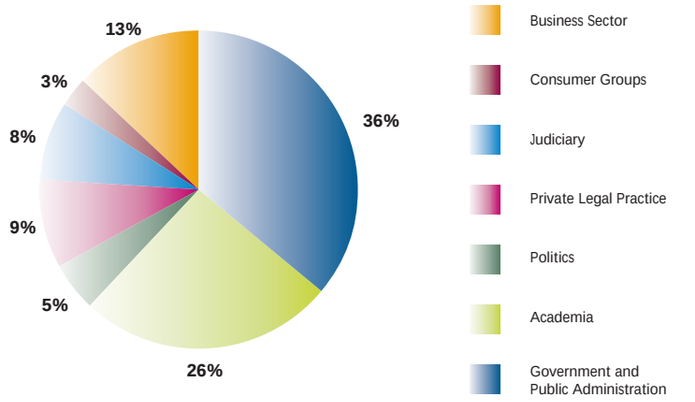
In most cases, the permanence of competition authority officers and members is ruled by each country's civil service statute. As regards the professional back-

Chart 5. **Term of competition authorities' heads.**



Answers registered: 51

Chart 6. **Professional background of competition authorities' heads.**



Answers registered: 48

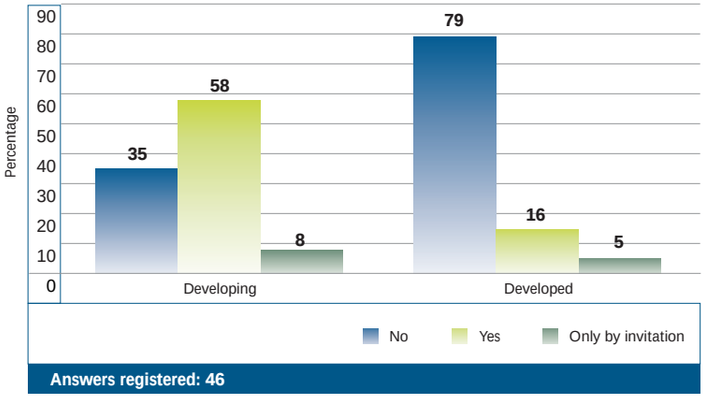
ground of high-ranking officers, 36% report to have a public administration background. However, there is also a strong interdisciplinary representation (26%), mainly from law and economic academics *(Chart 6).* Whenever judges from the judicial system participate, they are ruled by their own legal statute.

The Institutional Representation of a Competition Authority in Government

In many jurisdictions (21), high-ranking officials of the competition authority are represented in the Cabinet of the national Government. This is generally thought to have a double advantage, as far as competition advocacy is concerned: for one thing, the representative of the competition authority is well positioned to influence the final outcome of legislative or regulatory reform projects. Thereby, policymakers can be directly alerted to any concerns from the point of view of competition policy. Secondly, the representative of the competition authority is likely to be informed at a very early stage of the drafting process of new policy initiatives.

Cabinet representation is more frequent in developing than developed countries, 58% of the former report such representation while 16% of the latter do *(Chart 7).* Participation in the Council of Ministers or Cabinet is an important element to influence government actions but in practice the extent of this influence may be restricted by the relative weight of the competition authority's vote within Cabinet.

Chart 7. **Participation of competition authorities in council of ministers or cabinet.**



Answers registered: 46

Generally speaking, there are three main different ways in which competition authorities are represented among the policy-makers of their Governments.

The first group is comprised of those authorities that have a formal seat at the table of Government. One of the ICN respondents mentioned:

> *[…] The Antitrust Division is represented in the President's cabinet by the Attorney General. The Antitrust Division frequently represents itself on sub-cabinet policy or working groups within the Executive Branch when market competition is at issue.*

In general terms, such a design is deemed to allow for the most direct influence on the shape of intended legislation or regulator proposals, as some other members pointed out:

> *[…] The Chairman and Vice-Chairman regularly attend both Cabinet and Vice-Ministers' meetings to present strongly the standpoint of the competition authority. In particular, attending Cabinet meetings enables the competition authority to instill the competition principle at the highest levels of Government agencies, which try to intervene in various ways whenever socio-economic problems arise. Also, participation in Cabinet meetings gives the competition authority the opportunities to coordinate/finalize differences of opinion on legislative Government proposals.*

At the opposing extreme one would find the authorities that do not have direct access to Government at all. Competition authorities that are relatively independent from Government find themselves in such a position.

In some instances, such a situation may complicate the advocacy efforts due to the difficulty in conveying the message to the policy-making addressees during the elaboration of new projects. Equally, such a competition authority may find itself at a strategic disadvantage in terms of timely and comprehensive information on new reform projects. The following responses show this condition.

> *[…] the competition authority, as an authority which is independent of the Government, is not allocated any explicit competition advocacy role which is not specific to its case work.*

> *[…] the Competition Commission is independent of the administrative authorities. Therefore, the Commission does not take part in any high-level official group or council of Ministers. Parliamentary commissions sometimes invite the competition authority to give advise on questions relating to competition*

Most competition authorities find themselves in a situation where their representation in Government is partial. There are several variations to this theme.

First of all, a competition authority may participate in meetings of Government on an infrequent basis, often upon invitation, to pronounce its view on a specific project. Then the crucial question will be how often its view is requested, and whether the authority has the power to demand itself to be heard by Government. ICN members frequently commented on this practice, as is evidenced by the following statements:

> *[…] Law [XXX] provides that the Authority may express opinions on regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the Government departments and agencies concerned. The Prime Minister may also request the opinion of the Authority in relation to legislation or regulations whose direct effect is: i) to place quantitative restrictions on the exercise of an activity or access to a market; ii) to lay down exclusive rights in certain business areas; iii) to impose general pricing practices or conditions of sale.*

> *[…] The President of the competition authority is given the opportunity to attend the meetings of the Economic Cabinet of the Government as an invited participant. In practice this opportunity is rarely used, the President was invited to these meetings only a few times in our eleven years history.*
>
> *[…] The Vice President of the competition authority attends the weekly meetings of the Administrative Secretaries of State regularly, where he can give opinion concerning drafted measures and draft legislation. (This meeting is operating as a decision-preparatory board for the Government).*

Secondly, not the competition authority itself, but a "caretaker" institution can bring issues of competition advocacy directly to the attention of Ministers. Such caretaker institutions are likely to be either the Minister under whose auspices the competition authority is set up. Alternatively, and in particular for institutionally independent authorities, another department or Ministry of Government may be entrusted with competition advocacy issues.

> *[…] The competition authority does not participate in such a group. The National Competition Council is responsible for ensuring that Governments in our jurisdiction comply with the National Competition Policy and so is involved in high-level consultations with various Government bodies.*

[…] In this connection we refer to the activities of the Monopolies Commission, an institution which operates independently of the competition authority. According to Section 44 ARC it is function of the Monopolies Commission to issue an opinion every two years on topical issues of competition policy, in particular merger control (so-called "main opinion".) In addition the Monopolies Commission may deliver opinions (so-called "special opinions") at its discretion.

Such caretaker bodies would often however not only be concerned with issues of competition, but be mandated to balance competition issues with a wider mix of policy objectives. Therefore, sometimes the analysis from a competition policy point of view may get dissipated in the political process already at the advocating stage.

Finally, a competition authority may be integrated into Government at the technical or managerial level, without being represented at cabinet level. Such interdepartmental working groups are frequent, and often regarded as a very useful tool to advocate competition issues at the early drafting stages of new projects. These interdepartmental working groups may be more or less formal, may be organized on an ad hoc basis to look into specific projects, or grow into a permanent structure as well. Members mentioned:

[…] The Commissioner of Competition does not directly participate in the Cabinet. However, the Commissioner does participate at high level officials' groups in the Ministry such as the Senior Policy Committee and also participates in discussion at the deputy minister level.

[…] The Commissioner of Competition makes representations to Standing Committees of Parliament to comment on issues related to the Competition Act, other statutes, or any other matter that is relevant to competition policy (…)

[…] The Authority does not participate in any Council of Ministers, Cabinet or any other similar high-level political group. However, following on from the OECD Regulatory Review the Prime Minister set up a High Level Group on Regulation, which has representation from a variety of Government departments and agencies, to monitor implementation of our response and to develop appropriate regulatory reform proposals for the Government's consideration. The Competition Authority is represented on the High Level Group. It contributes to the work of the Group and seeks to ensure that legislation prioritises, or gives due weight to, consumer choice and benefits over producer interests and that any restrictions on competition are strictly proportionate to the benefit they are intended to produce.

As will be explained in the following sections, both the institutional representation of a competition authority and the interdepartmental working mechanism where it participates are determinant for its autonomy and the effectiveness of is its advocacy efforts.

3.2. Operational Autonomy of the Competition Authority

At the outset, it should be noticed that an agency's degree of independence is notoriously difficult to define. 'Independence' can be interpreted at least in legal, political and economic as well as in factual terms. For instance, how independent is an agency that each year anew has to struggle to obtain from Government or Parliament the funds necessary to carry out its mission? Also, an agency that is subordinated to a Ministry, but whose head is appointed by Parliament, certainly enjoys some degree of independence. Finally, also competition authorities that are fully integrated into Government may successfully enforce competition policy, provided that a generally accepted competition culture leads to a respect of their decisions.

[…] In (…) Governmental tradition, the authorities have a high degree of independence under the law, which means that the responsible minister would never interfere in the authority's day-to-day handling of individual cases. The Government controls an authority by giving broad instructions as to the purpose and means of the Authority's work and by allocating means of the State budget.

A sufficient degree of independence is sometimes put forward as a key ingredient to allow authorities to enforce competition policy in a satisfactory manner. Probably, these statements are mainly made with the enforcement side of members activities in mind. But does the underlying rationale also apply to advocacy?

In contrast to enforcement work, for which many authorities enjoy decision-making powers, advocacy is usually directed at influencing other processes, without however being ultimately decisive. Therefore, interventions in these processes are more likely to be directed at the competent decision-maker, and not at the advocate of a certain reasoning, or position.

The available evidence supporting unequivocally either a higher or a lesser degree of independence is scant. Certainly, most agencies take the view that they are benefiting in their advocacy work from a relatively high degree of independence:

> *[…] The competition authority has a legal status that guarantees autonomy in its decision-making. This facilitates the promotion of economic competition according to the requirements and criteria of the competition authority.*

> *[…] The degree of autonomy of the competition authority will contribute to its advocacy activities. Under the new Act, the competition authority will become an independent authority and will receive formal advocacy powers.*

> *[…] The competition authority has independent statutory authority for the administration and enforcement of the Competition Act. The competition authority also has independent authority under the Competition Act to make representations in regard to competition before certain regulatory bodies …*

> *[…] The competition authority maintains high Governmental status as an independent agency with authority equal to other ministerial agencies, and therefore the competition agency's function of competition advocacy holds standing corresponding to […].*

However, one member pointed out that independence should not impede a full participation of the competition authority in the governmental structure, as is succinctly summarized in the following observation:

> *[…] The independence of the Authority is very important to ensure quality of its advocacy reports to Government. At the same time, however, independence can be a problem in terms of the actual adoption of its recommendations. This problem can be particularly serious when the advice is given on new legislation and the advice arrives when all parties in Parliament have already found a suitable compromise.*

This perception is echoed by several other agencies which complain that they have difficulty in making their views heard at the Governmental or political level, or that they are informed rather late in consultative processes, in absence of mandatory consultation mechanisms.

The budget allocation mechanism was one element that members frequently brought up when assessing their autonomy. As will be explained further on, the allocation of budget is considered to have some influence on autonomy and the powers to advocate depending on which is the responsible entity of the allocation, how the resources are integrated as part of the national budget, and what degree of independence members enjoy to spend resources. *(Chart 8)*

Chart 8. **Institutional autonomy, budget allocation and head's appointment mechanisms.**

Almost 40% of the respondents found the budget allocation mechanism favorable as parliament or congress allocation mechanisms are deemed to provide them in practice with more autonomy[13]. Some members expressed the following:

[13] Self–financing mechanisms consist mainly in the collection of fixed percentages of fines and monetary sanctions imposed.

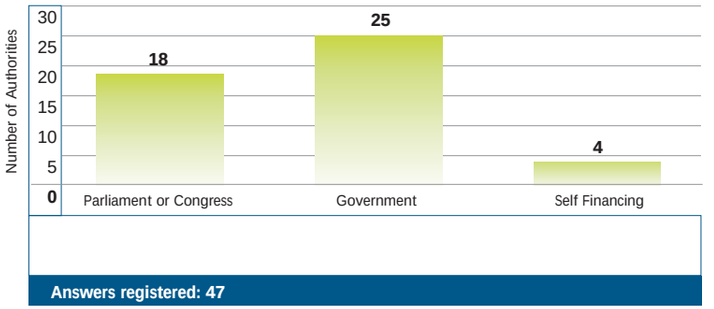
> *[…] The mechanism of allocation of the budget contributes to the autonomy of competition board because although the board is administratively subordinated to Ministry of Finance, its budget is assigned by parliament.*

> *[…] (the authority) finances 80% of its own budget, the other 20% is assigned by the Ministry of Industry, from the budget assigned to it by the Public Treasury.*

> *[…] The bulk of the Commission's funding is by Government Appropriations. The Commission also collects application fees for some of its activities*

In 18 cases the budget is identified as a separate item, within the nation's general budget, approved directly by the Parliament or Congress. 25 respondents reported that their budget is allocated as part of a Ministry, however most of them seem also to have different means to enhance autonomy. For example, some authorities are empowered to discuss and negotiate the budget directly with the legislative powers. This power makes them better off than those who only have access to their head Ministry. *(Chart 9)*

Chart 9. **Budget allocation mechanism.**



Additionally, most competition authorities which reported budget dependence considered that other issues such as the appointment mechanism of the head of the competition authority or the liberty to dispose of the assigned budget were enough to offset this dependency. In some cases, the budget of the competition authority is clearly identified as a separate item within the relevant Ministry's budget.

> *[…] The (…) budget constitutes a separate chapter of the central budget. This means on the one hand, that it is not incorporated in any of the ministries' budget, and that it forms a part of the central budget designed by the Government and approved by parliament.*

> *[…] The budget for competition authority is assigned as a separate budget for an independent administrative agency.*

In the absence of legal provisions that guarantee autonomous decision-making, some transition and developing countries reported that the budget allocation mechanism may restrict the autonomy of the competition authority.

> *[…] Dependency on Ministry of Finance for the amount of budget funds detracts the autonomy of the authority. If the Committee finds some actions of the Ministry of Finance in violation of antimonopoly legislation, the Ministry of Finance influences the decision with budget cuts.*

> *[…] The mechanism for the appointment of the members contributes (to the autonomy of the competition authority), but the allocation of the budget detracts. It should be independent of the minister.*

A conclusion that can be reached at this point, is that budgetary considerations can hinder operational autonomy of the competition authority only to the extent that the operational activities have to be limited by lack of financial resources. The budgetary dependence would have little effect on the independence with which the competition authority makes decisions or imposes sanctions, because no matter how the budget allocation mechanism is carried out, several countries consider that autonomy can be enhanced on the basis of one of the four following modalities:

- budget assignment approved by the legislative power as a separately identified item;

- use of a reference amount (the previous year budget) combined with an increase calculated as percentage of the total amount of sanctions that such authority imposes in the period of reference; or

- multi-annual budget assignment;

- transparency in the budget elaboration process with capacity to appeal at the highest level of the executive branch.

Additionally many member countries considered that technical and decision making autonomy can be attained whenever:

- the budget may freely be used once it has been assigned;

- there is an appointment mechanism for the authority members that guarantees their independence; and

- there is an operational autonomy guaranteed by the legal framework.

Finally, some authorities consider that, operational independence can be fostered by seeking alternative sources of financing choosing preferably those not restricted by the budgetary approval process.

3.3. Advocacy in the Regulatory and Legal Framework

Regulation can have a substantial impact on competition in markets. For this reason, the competition authority may be interested in participating in the drafting of sector specific regulations, as well as in the formulation of public policies in specific economic activities.

Consultation in legislative or regulatory procedures is generally seen as one of the primordial tasks of the competition agencies, placing the dialogue between the competition authority and the regulatory authority, or the Congress or Parliament as a key area of competition advocacy.

Consultations in legislative or regulatory procedures have a relatively direct impact on the normative environment which allows market forces to operate. In

particular, the results of advocacy initiatives directed at individual reform processes are often more palpable than other, more long-term advocacy tasks such as the raising of awareness.

The dialogue between the competition authority and the regulatory authority for these specific sectors often plays an important role when drafting the regulatory framework. The competition authority may seek to influence the set of rules that govern the activity of the regulatory authority, in particular by ensuring that the concerns of competition policy are taken into account when the regulatory system is set up. The suppression of unnecessary barriers to entry and of abuses of a dominant position are among others important aspects to be considered.

The dialogue between the competition authority and the regulator may also take place when designing and implementing a privatization scheme, when licensing valuable resources or during the day to day administrative process whenever an impact on competition may be produced by Governmental actions.

This can be envisaged in various degrees of formality. Several ICN Member agencies have stated that they mainly collaborate on an informal level with sector regulators. In these cases, the initiative for the authority to take a position may either come from the authority itself, or it may advise upon invitation by the regulator.

Based on the inputs provided by ICN members, and without seeking to be exhaustive, three key factors that are likely to affect the effectiveness of competition advocacy in the course of legislative or regulatory consultation are examined in what follows, specifically: the timing of the consultation, the compulsory or non compulsory status of the consultation and the degree of bindingness of the recommendations made.[14]

It is not suggested that any one of these factors alone is ultimately decisive for success or failure of advocacy initiatives. Rather, it is fair to assume that it is the appropriate combination of these factors, adapted to the local political and legal environment, that matters most. In addition, the political culture in a given jurisdiction may play a key role as well. Evidently, for the very few ICN Member

[14] Evidently, a fully binding recommendation is no longer a recommendation.

agencies which are not at all involved in the legislative or regulatory process, this position is not conducive to efficient competition advocacy.

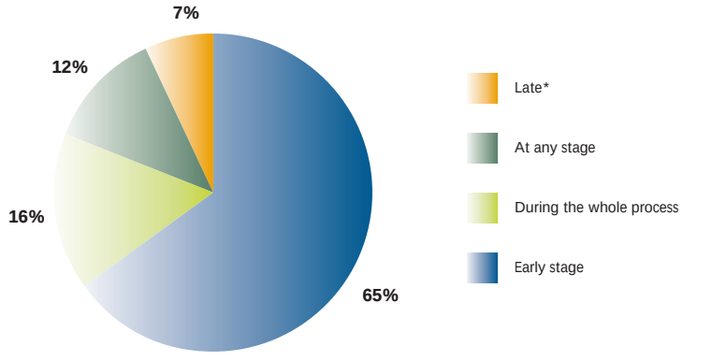
The Timing of Consultation in the Legislative or Regulatory Process

One of the most important topics in this context is the appropriate timing of the authority's advocacy involvement during the legislative or regulatory process. The aspect of timing potentially comes into play at two stages.

First of all, the competition authority itself depends on being informed well in advance of pending reform projects, in order to have sufficient time to assess their impact on competition. If the consultation time is too limited, any consultation risks becoming a mere procedural formality.

Secondly, the impact of advocacy initiatives on an on-going legislative or regulatory process may differ depending on the moment that the competition

Chart 10. **Participation of competition authorities in regulatory process.**



* Authorities participate only when the draft has been presented to Congress or Parliament, or once it is subbmitted by the regulator to Cabinet.

Answers registered: 43

authority feeds its view back into that process. As long as reform projects are still on the drawing board, technical observations may still be integrated into the body of rules without major difficulty. On the other hand, where a draft set of rules has already been presented to the Cabinet or even Parliament, the competent legislator may be less inclined to make changes to the almost completed draft.

The replies of ICN Members to the questionnaire demonstrate that the moment when a competition authority is consulted during the legislative or regulatory process varies immensely. *(Chart 10)* Whereas some agencies will be consulted at one or the other stage of the process on a one-off basis, others are able to intervene at several stages of the procedure, or even to accompany the whole procedure continuously:

> *[…] The competition agencies can and do provide formal testimony at legislative hearings, and are routinely consulted by legislative staff at various times during the legislative process.*

A considerable proportion of agencies state to be informed in some way of legislative or regulatory projects already during the early stages of the reform procedure. A few agencies even claim that they are informed from the very beginning of such procedures. This will typically result in a relatively close association of the authority with these procedures.

> *[…] The CA participates from the beginning of the process with the executive in the formulation of the proposal for the legislative body (Congress) and continues participating in the discussion in the Congress as a technical support.*

An early consultation of the competition authority in the legislative or regulatory process is generally evaluated as an important and efficient tool in its advocacy role, as is well illustrated by the following statement:

> *[…] It is generally most efficient to be involved at an early stage of the legislative process or even before this process has started. The Competition Authority's own initiatives enable the Authority to identify the relevant problems and to propose measures aimed at enhancing competition at its own discretion. Opinions requested by a Ministry or*

by other Government authorities […], typically leave less discretion to the Competition Authority. On the other hand, since the Competition Authority has been explicitly asked to submit a statement, there is a better chance of the statement receiving proper attention.

Agencies that are consulted rather late in the process tend to see this as an impediment to fulfilling their advocacy mission. More concretely, the following problems are likely to arise in such circumstances. Either there is too short notice for the agency to make a proper analysis of the situation, as is exemplified in the following statement:

[…] In some cases, important initiatives have only come to light at too late a stage in the process for any intervention on the part of the Authority to be decisive, particularly in relation to secondary legislation (e.g. Ministerial Orders) on which consultation does not tend to occur.

[…] Nevertheless, sometimes we only get informed on the above issues on the meeting of the Administrative Secretaries of State, and therefore in these cases we are left out from the previous debates.

or the legislative procedure may already be so far advanced that technical comments are not easily taken on board anymore by the legislator or regulator. In this sense several authorities have suggested that earlier information and consultation would substantially enhance their advocacy role:

[…] Improvement could be achieved by being included in the legislative process from the very beginning, in particular being invited to participate in the expert group/interdepartmental group designing the regulatory framework. Being invited to give an opinion of a new regulation in the course of the consultation procedure of the offices concerned is too late for satisfying results.

Mandatory or Discretionary Consultation Mechanisms.

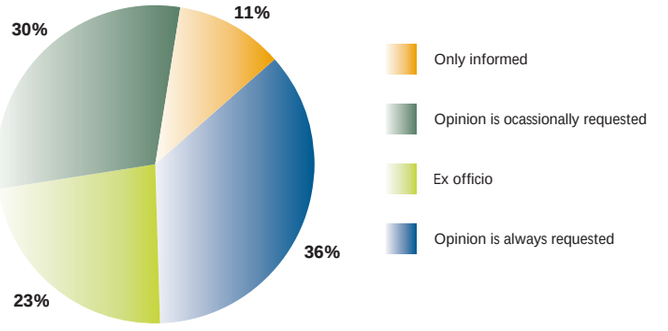
A second factor that may determine how effectively an agency can fulfill its advocacy role, is whether the domestic law makes it mandatory that the competition authority be consulted.

More than one third of the competition authorities in the survey reported to be always informed about sector regulation projects *(Chart 11).* This excludes those agencies that have only jurisdictional powers and that are therefore exempted from participating in the formulation of sector and competition policy. This result derives from the following:

- In several instances competition or other legislation mandates that the competition authority be consulted by the executive or legislative before issuing a law or regulation;

- In other instances, the competition authority participates by its own right or by request of the regulating authority in the high level policy and legislative development committees.

Chart 11. **What triggers the participation of the competition authority in sector reform proposals?**



Answers registered: 47

Where consultation is mandatory, the competition authority is in a privileged, and possibly even legally safeguarded, position to make its observations known to the legislator. In these cases such mandatory consultation applies horizontally and the results seem encouraging:

> *[…] The competition authority is conferred the authority of Prior Legislative Consultation by obligating the head of any relevant administrative agency, intending to establish a law or enforce a policy of an anti-competitive nature, to consult with the competition authority in advance. Moreover, even under other laws (such as Foreign Trade Law or Insurance Business Law), some provisions are included making it compulsory for the responsible Government agencies to consult with the competition authority beforehand when they intend to execute anti-competitive measures.*

In contrast, other competition authorities assert to have limited access to the regulatory decision process. Commenting on how the system works, some seem dissatisfied with the frequency and the timing of consultations:

> *[…] The Authority is not consulted by Government on a regular basis on new legislative proposals and regulations. We believe that a provision that would make the Authority part of the consulting mechanism within Government would be extremely helpful.*

These limitations to a systematic consultation may be partially offset by the ex officio opinions that 23% of the respondents are empowered to issue. Ex officio actions are a restricted alternative as they require a previous and timely knowledge by the competition authority about a reform or drafting process. Authorities would prefer a more systematic consultation, possibly enshrined in law:

In some particular jurisdictions a mandatory consultation is limited to issues that directly affect the competition legislation as such, whereas for all other projects that affect competition, consultation is discretionary, as exemplified by the following:

> *[…] The Competition Service is informed immediately by the executive about reform proposals to competition legislation. As to other reform proposals with impact on competition the Competition Service is informed at a later stage.*

The situation reported by ICN members from developing countries is deemed to be less favorable than in industrialized countries. Competition authorities in transition and developing countries considered that on average their opinions and recommendations to policy makers are effectively observed in 57% of the cases, while this figure reaches 75% in developed countries. In the former countries discretionary policy making is deemed to be higher.

Bindingness of opinions

A third factor to consider when evaluating the effectiveness of competition advocacy is whether opinions issued by the competition authority are binding on the decision-makers authorities. The possibility to influence the outcome of a policy or regulatory process is enormous whenever decision-makers organs are obliged by law to heed the advice of the competition authority.

Evidently, when opinions are binding, the impact of competition advocacy might be enormous. It should be borne in mind, however, that competition authorities do not usually possess a democratic mandate as direct as Government or Parliament. Therefore, it does not seem realistic that such wide-ranging powers be given to competition authorities, apart from the accountability problems it would raise.

However, according to the respondents there is a some dissatisfaction due to the non-binding nature of opinions and recommendations:

> *[…] We spent an enormous amount of time on advocacy activity, yet recommendations, opinions and expert advises only have a limited effect on the public awareness of the benefits of competition. Therefore, to some extent, the advocacy role of the competition authority can be rather unsatisfying. This is also due to the fact that the advocacy services rendered are non-binding.*

Some members mentioned that by obliging policy-makers that disregard the authority's advise to justify why they decided against that advise could improve their advocacy capabilities. This has in fact already been implemented in a few jurisdictions:

> *According to the Competition Act, if anti-competitive practice is a direct or necessary consequence of public regulation, the Council cannot use*

the rule of prohibition. However, the Council may point the potential detrimental effect on competition to the competent Authority and make recommendations. The Authority is obliged to respond within three months. The "letter" is made public and is interesting for the media. In many cases the Authority abolishes or changes its anti-competitive practice.

Where this is not yet the case, some agencies have commented that they would expect improvements to their advocacy role if rule makers would be under the onus of giving reasons when not adopting the advise of the competition authority:

It would be extremely helpful if there were some onus on legislating bodies to respond to recommendations made by the Authority, particularly if the Authority's views are not heeded.

Modifying the laws so that Regulators must ask for the Free Competition Commission's opinion before resolving on any pending matters. This would imply an obligation to back up their decision in case it did not agree with the Commission's opinion.

However, realistically speaking, even such a step may not be feasible where competition advocacy is directly addressed to Parliament.

Another variation of the same theme is to put a dispute between the drafting department of a Ministry and the competition authority before the political level of Government.

It has also been observed that in many jurisdictions, there are no formal rules that govern the competition advocacy process. In some instances this observation may be attributed to the fact that in the past competition advocacy was not always regarded as a key task for competition authorities, and hence no legislative provision was made to that effect.

Where specific rules on advocacy are absent, there is often a general desire among many Member agencies to establish some kind of procedural safeguard, or "institutionalization" or "formalization" of the consultation process. This is thought to strengthen their advocacy role. Such desire is however less pronounced in mature competition regimes. In these systems, informal consultation mechanisms may work satisfactorily.

[…] There is no explicit requirement on Government agencies in our jurisdiction to give the Competition Authority the opportunity to comment on draft decisions or new regulations. However, two important aspects should be put forward in order to complete and qualify that answer to your question.

First, there is a well-established system of consultation in our jurisdiction (…) The Competition Authority is very frequently invited to give its views on such proposals (…)

Secondly, (…) the Authority also analyzes existing laws and regulations and reports about any distortions of competition that may be the effects of those regulations.

Competition Advocacy in the Privatisation and Deregulation Process

Where the activities previously reserved to the State are being liberalized, privatization processes are taking place, and permissions and licenses are granted to allow investors to enter to previously foreclosed sectors. Concessions are also granted to private parties in sectors with a strong development potential, with or without the divestiture of assets held by State-owned companies.

[…] The Competition Authority advocates the speedy and effective development of competition in sectors newly opened up to competition, and to work with regulators to achieve this aim. Some sectors of the economy, such as electricity generation, telecommunications and transport, are dominated by State-owned companies, which have, or had until recently, a statutory monopoly. Many of these sectors are currently in transition towards a more competitive structure. Aspects of the transition, such as the way in which a monopoly is broken up, the powers granted to a regulator, or the retention of special privileges by a particular organization, will affect the speed and effectiveness of the development of competition. The Authority monitors these sectors, comments on proposals (e.g. Green Papers or White Papers) and on

draft legislation, and publicizes its views. The Authority has also been active in other areas including liquor licensing, taxis, pubs and pharmacies and the professions generally.

The regulatory reform linked to these liberalization processes, has led in some cases, to the application of competition law in those sectors. However in others, full jurisdiction is granted to a regulator, charging it with the responsibility to design and enforce a sector-specific competition policy.

Having the power to issue opinions or recommendations, the competition authorities expressed concerns regarding competition distortions in deregulation and privatization processes, particularly to avoid undue allocation of the privatized assets, as well as the emergence of competition-unfriendly market structures.

[…] The Commission also verifies that the privatization procedure is structured and conducted in a non-discriminatory manner. Thereby, potentially less competitive bids from bidders preferred by the adjudicating authority on the grounds of origin/nationality must not be given priority.

[…] Examination of privatization agreements to determine whether there were certain provisions which would result in a substantial lessening of competition.

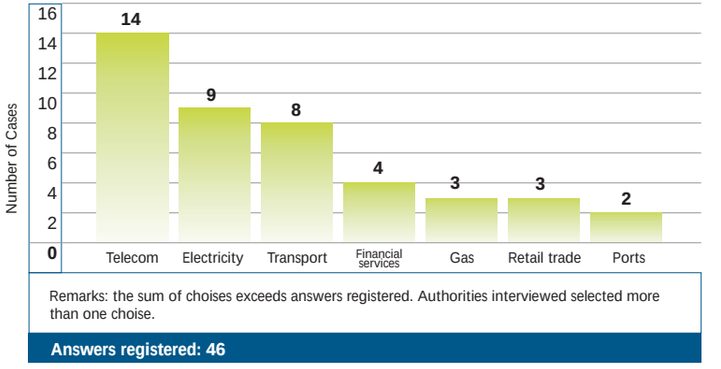
[…] Privatization processes should be pursued in a way that would create a competition endorsing market structure and it is necessary to carry out this pursuit in parallel with improvements to the market economy.

Members mentioned that in those cases in which competition authorities do not directly participate in privatization processes because they lack the power to do so, their non-binding opinions and recommendations are more likely to be observed by regulators whenever the competition authority keeps its powers to review and block the participation of candidates in the auctions of the assets to be privatized.

Additionally, competition authorities consider that their advocacy role is also enhanced when they have kept the power to conduct investigations of anticompetitive practices. This element is important to all countries carrying out privatizations and sectoral reform, but have been of special relevance to transition and developing countries as they have been particularly busy with such processes.

Competition authorities report a successful contribution, in terms of the positive effect of advocacy on the competition process in sectors such as telecommunications, electricity and transport, among others *(see Chart 12).* In these cases their major contribution has been related to the privatisation processes followed by price regulation and the granting of licences and permits by regulatory agencies *(Chart 13).*

Chart 12. **Most successful advocacy by sector.**



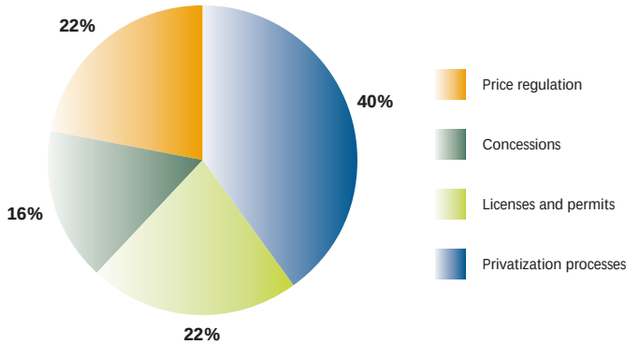
Remarks: the sum of choises exceeds answers registered. Authorities interviewed selected more than one choise.

Answers registered: 46

Mechanisms Most Frequently Used by Competition Authorities to Advocate.

The competition authorities participate in regulatory reform processes, providing opinions, recommendations or testimonials to ensure that sector specific regulations do not interfere with competition laws. According to chart 14, competition authorities were involved in advocacy in regulated sectors, such as telecommunications, energy, transport, among others.

Chart 13. **Most successful participations of the competition authority in privatization, concessions, price regulation, licenses and permits.**



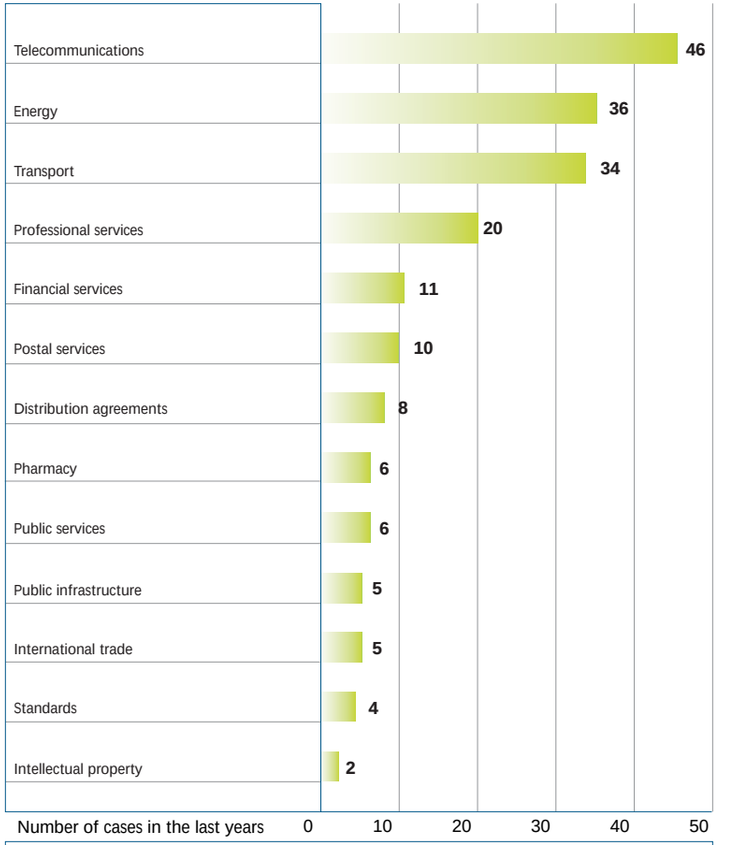
Answers registered: 25

According to the answers to the questionnaire, contributions by the competition authorities to the deregulation and privatization processes may also be submitted at least in three different ways.

The first consist in the elaboration of sector specific studies that look at market structures, emphasizing the benefits of allowing access and of introducing competition. According to some of the competition authorities, such studies have provided them with elements to participate actively and effectively in deregulation and privatization processes, triggering actions by the regulator (possibly in close cooperation with the competition authority), leading to a more competitive environment.

Market studies enable competition authorities to provide the regulatory authorities with elements to detect and suppress market distortions and entry restrictions, thus helping the regulator to establish better price regulation, set adequate access conditions in network industries, and impede harmful mergers.

Chart 14. **Advocacy in specific sectors.**



Remarks: the sum of choices exceeds answers registered. Authorities interviewed selected more than one choice.

Answers registered: 47

The respondents consider that apart from the studies, other factors also promoted the liberalization and opening up of some sectors. The active participation of industrial or professional groups is important, but overall, the strongest motivation to the liberalization processes comes from the obligations derived from bilateral or multilateral international economic agreements.

A second mechanism to induce competition-friendly regulation and privatization schemes consists in the subscription and implementation of cooperation agreements between the sector regulatory agencies and the competition authorities. Such agreements are specially useful to detect restrictive practices on competition by the regulated agents.

A third way is the drafting of guidelines and sector codes of conduct or compliance with the competition law, directed at the recently liberalized sectors.

Major Obstacles to Competition Advocacy in Specific Sectors

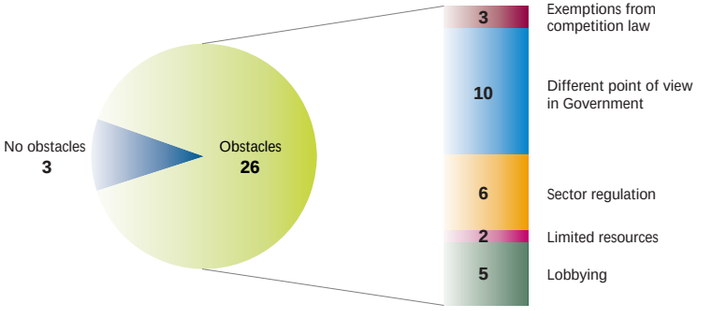
ICN members considered that the most important obstacle to their advocacy work surges from the different objectives and opinions held by other Governmental authorities.

Responsible agencies in privatization processes or regulatory reform may seek among others, to maximize Governmental income, protect particular social groups, foster investment by granting a certain degree of protection, attend environmental or labor concerns, as well as the preservation of sector specific interests that gain support from politicians, and may thus be reluctant to give priority to competition related recommendations.

According to the answers to the questionnaire, this problem is more important in jurisdictions where a competition culture is less well-entrenched. In such cases it may be crucial to build public support for regulatory reform, and to provide persuasive arguments for change. Arguably, the regulator may often find it more difficult to override the advocacy position of the competition authority when it is in the public domain.

A challenge for many competition authorities is to acquire a sufficient base of expertise in the sectors subjects to specific regulation, ensuring that the representative of the competition authority be well positioned to influence the final outcome of legislative or regulatory project. This is specially true for some transition or developing countries that have reported to be trapped in a combination of the following: lack of expertise, scarce public recognition and lack of cooperation with other public authorities. Such countries also report as a frequent reason for advocacy failure, the social effect of failing firms and scarce financial resources, while general interest or universal service considerations prevailed in developed countries. *(Chart 15)*

Chart 15. **Obstacles to advocacy in privatization, regulation and concessions.**



Answers registered: 29

Sector specific regulations may limit the reach of competition agencies by establishing a specific competition regime in certain regulated sectors.

Moreover, there are a number of ICN jurisdictions where the regulated sectors are explicitly exempted from the competition law enforcement. The competition authority may however use its informal, or persuasive, powers in trying to influence the regulatory framework:

> *[…] to the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over*

the provisions of the Act on Cartels. Yet according to art. 45 ACart, the Commission may address recommendations to the authorities at all times.

Competition exemption regimes were also mentioned as a challenge to competition advocacy. Some competition authorities indicate that they promote the elimination of such regimes, particularly in sectors where monopolies have traditionally existed. Although it is not the competition authority's responsibility to decide on the validity of exemption regimes, they recommend a standstill and rollback. They also issue recommendations to limit the number of exemptions to a minimum justified by legitimate political considerations, and offer advice on changes to the regulations making them more compatible with competition principles.

In many developing countries exemptions are established by the National Constitution which limit the possibility to advocate for their elimination. A few developing ICN members have expressed their agreement with exemptions to competition law enforcement. Both situations partially explain why developed countries advocate more often for the elimination of exemption regimes (82%) than transition and developing countries (60%).

To enhance the effectiveness of advocacy work authorities surveyed considered that they should have the possibility to:

- advise other authorities or public entities on their legislative or regulatory programs;
- identify and make comments on restrictions imposed on competition by any law, regulation or administrative ruling within the economy;
- study and analyze any practice or behavior that affects or may affect competition in goods and services markets;
- inform the public about competition matters, as widely and openly as possible.

These activities are carried out more easily when the consultation mechanisms are mandatory. This ensures that the authority is informed at the very early stage of the drafting process of new policy initiatives, and enhances the effectiveness of its advocacy work.

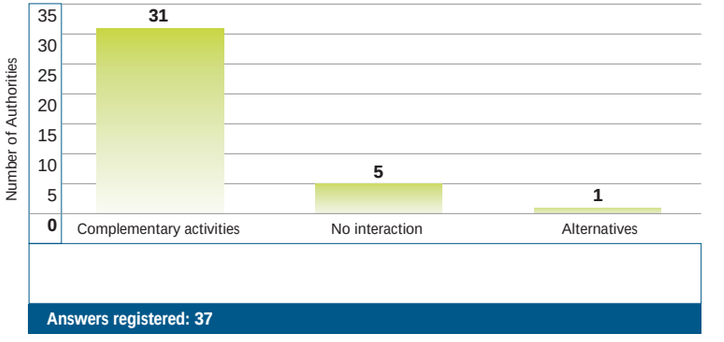
3.4. Interaction Between Enforcement and Advocacy

Some countries indicate that enforcement and advocacy actions pursue different objectives. They make the following distinction:

Enforcement is aimed at tackling anticompetitive behavior of agents and preventing undue concentration of market structures. Competition advocacy is aimed at promoting the elimination of regulations that distort market competition or impose barriers to entry. Most countries agree that enforcement and advocacy activities are interrelated and complement each other because the widespread diffusion of the authority's enforcement actions contributes to the credibility and relevance of the advocacy activities. They also indicate that competition advocacy has contributed to liberalize previously foreclosed sectors and has therefore increased the scope of competition enforcement activities in those sectors. Additionally, respondents consider that enforcement has provided competition authority's staff with expertise. *(Chart 16)*

On the other hand, competition advocacy programs complement competition law enforcement because they spread the awareness of competition legislation, thereby promoting its observance and encouraging the filing of complaints regarding anticompetitive practices and other restrictions to competition.

Chart 16. **Interaction between enforcement and advocacy programs.**



These opinions are illustrated by the following observations made by respondents:

> *[…] There is a direct interaction between these two programs, because they are parts of one entire program. In general, advocacy program implementation assists that of enforcement program.*

> *[…] Enforcement activities and advocacy are both highly important in their own right. Enforcement work is essential for reducing or preventing behavioural and structural barriers to competition erected by businesses. Advocacy work is needed, however, to promote the removal of Government and regulatory barriers to competition.*

> *[…] The main tangible link between enforcement and competition advocacy can be found where successful advocacy has led to the opening-up for competition of formerly protected/regulated sectors. Once it is accepted that market forces have a role to play in a certain sector, competition enforcement will be the natural successor to advocacy.*
>
> *Thus the competition advocacy promoting regulatory reform and the law enforcement are inseparable, and should be addressed at the same time.*
>
> *A more futile interaction can also be seen where - in the long term -successful advocacy programs directed at policy-makers or the public at large lead to less political opposition that needs to be overcome for enforcement decisions.*

> *[…] Advocacy stimulates the introduction of competition cases (lodging of complaints, notification of agreements,…) to the Competition Authority and increases the awareness of competition problems in general.*

> *[…] Strong enforcement can increase the credibility of the advocacy.*

In sum, advocacy and enforcement support each other in a remarkable way. Enforcement becomes more effective as knowledge of competition law and policy disseminates as a result of the advocacy programs; meanwhile advocacy is facilitated as successful enforcement activities generate solid and consistent results that give prestige and prominence to competition agencies.

3.5. Competition Advocacy and Public Opinion

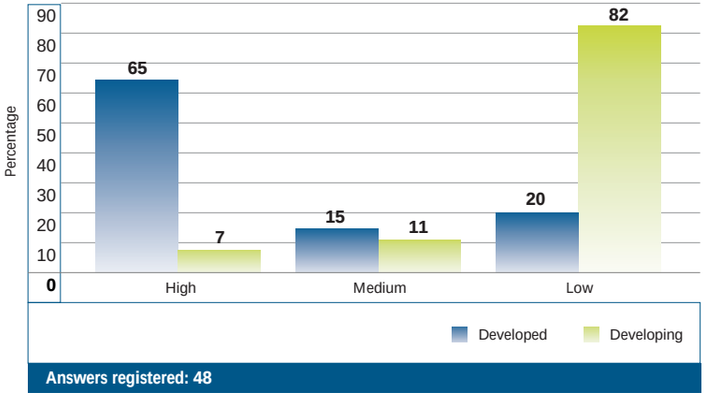
Competition Culture

Effectiveness of competition advocacy is significantly affected by the extent to which the country in question has acquired a competition culture. Awareness of the benefits of the market mechanisms among the business community, other governmental agencies, academia and, in general, the society as a whole, enhances the advocacy capabilities of competition authorities.

In this regard, 15 countries considered to have achieved a high degree of competition culture, while six competition authorities deemed that competition culture had reached an intermediate level and 27 considered to still face a low level of competition culture *(Chart 17).*

Perceived competition culture is closely related to the age of the competition legislation and the experience of the competition authority. Those countries that reported a strong competition culture have been active on average for 29 years.

Chart 17. **Competition authorities perception of the level of competition culture in their countries.**



This figure falls to 21 years for those countries that report a medium level of competition culture and to only 9 years for those with a weak competition culture. Similarly, perceived competition culture is also associated to the level of development. High levels have been attained mostly by industrial countries, while almost all transition economies and less developed countries report low levels of competition culture.

A weak competition culture in certain developing countries is explained by the relatively recent changes in public policies, from centrally planned or protectionist schemes to market oriented policies and liberalization. Their shorter enforcement experience can undoubtedly explain that more work has to be done to influence interest groups and constituencies of developing and transition countries.

Competition authorities of developing countries reporting to have an intermediate awareness of the benefits of competition related this outcome to the experiences in sectors opened up to international competition, including some of the most dynamic activities such as telecommunications and electricity.

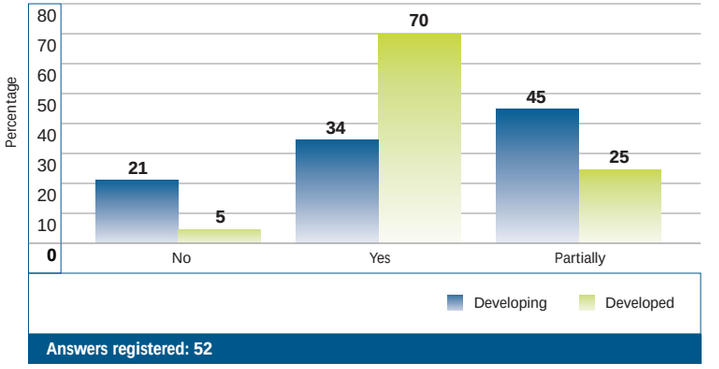
One developing country that reported a high level of competition culture considered that this result is due to the good reputation of its competition authority. On the other hand, when asked about the awareness of specific groups such as other authorities and the courts, 66% of competition authorities in developing countries affirmed that such groups were scarcely familiar with or not aware at all about the benefits of competition. In contrast, Governmental entities and courts in industrialized countries are perceived to have a strong awareness, since 70% of the members in that category answered accordingly *(Chart 18)*.

Generally speaking, resistance against pro-competitive advocacy actions seems to be lower in developed countries than in developing and transition economies. In developing countries more actions of advocacy have to be conducted, mainly trying to cover the omissions and neglect of other authorities and to prevent anti-competitive conducts of private parties. When doing so authorities often find themselves with little support.

In the absence of a common denominator between all competition authorities, differences in competition culture are derived from the time necessary to spread out over the economic activity and society, the time necessary for economic transition and regulatory reform, the influence of the political and labor unions in

developed and in transition or developing countries, and the authority's relationship with other institutions, such as government, parliament, the courts, etc.

Chart 18. **Familiarity with benefits of competition in government and courts.**



Once the main causes of differences in competition culture are pointed out, it is important to detect the interest groups and constituencies that should be targeted by advocacy tasks. Regarding this issue, most agencies considered that the academic community, the consumer associations and the media are the three groups most supportive of competition policy and advocacy. An intermediate level of support is found among congressmen, professional associations and business associations. The weakest support is granted by entrepreneurial associations, labor unions and local governments.

Within the selected groups there are both supporters and opponents. This mainly reflects the fact that one group can be supportive on one issue and opponent on another. The results obtained probably reflect the fact that competition authorities base their decisions mainly on technical and legal considerations. It is therefore easier to get the sympathy of, for instance, the academic community that relies more on technical considerations. More politically inclined organizations will more often base their decisions on the political gains they might obtain

Competition Culture

Reasons mentioned by members explaining a solid competition culture ranked in order of importance are:

- Participation of the competition agency in the regulatory reform and privatization processes
- Period elapsed since the enactment of the competition legislation/ experience of the judges
- Resolution of important cases with significant media coverage
- Existence of specialized competition tribunals
- Competition legislation that imposes obligations on federal or state entities and organizations
- Public discussion of competition issues within the administration or in Parliament
- Interaction with regulators / opinions to Government
- Interaction with professional associations
- Interaction with universities
- Publication of decisions and case studies
- Information centers
- Personal leadership of the head of the competition authority
- Participation of the competition authority in the economic cabinet
- Mastering of competition techniques by judges

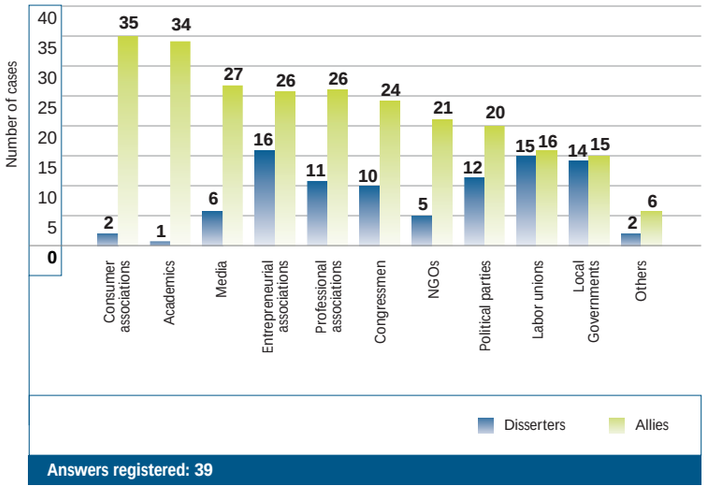
Reasons, in order of importance, explaining a low degree of competition culture are:

- Recent enactment of competition legislation
- Lack of experience by courts
- Lack of acceptance by other authorities and economic agents of competition principles (ideological opposition to competition)
- Interventionist economic policies
- Limited knowledge of the evolution of sectors opened up to competition and foreign trade
- Absence of complaints and cases presented to the competition authorities
- Sector specific regulations in contradiction to competition legislation (e.g. conflicts with labor or environmental legislation)
- Diffusion and promotion activities limited or non-existent
- Market structures that facilitate anticompetitive practices such as abuse of dominant position.

from supporting a specific issue. It is therefore expected that they will sway their sympathy in favor or against competition policy depending on the direction in which the political winds blow.

Considering only the answers of developing countries, entrepreneurial and professional associations, as well as congressmen would be specific targets for competition advocacy, since these groups appear as principal dissenters along with local governments and labor unions (which are dissenters identified in major competition culture countries).

Chart 19. **Attitude towards the advocacy role of competition authority.**



Publicity of Advocacy Initiatives

As a complement to institutionalizing the advocacy role of competition authorities, ICN Member agencies frequently highlight the importance of publicity, or transparency of their advocacy initiatives. This forms part of the broader efforts

to further raise public awareness of the issues at stake. Thereby it is hoped to rally some sections of society to the support of the authorities' agenda. Moreover, it puts some pressure on other public entities not to turn their back on advocacy initiatives so easily and increases their accountability.

Despite the general recognition of the benefits of publishing the position of the competition authority, the degree to which this is actually done in practice differs widely. Whereas some ICN Member agencies claim to publish all of their advocacy initiatives, a few do not tend to do so, or only provide an overview in Annual Reports.

The tool most frequently used to publicize advocacy activities are the agency's website, press releases or newsletters. Some authorities even publish their submissions systematically:

> *[…] The agencies typically issue press releases when they file formal comments at regulatory agencies. Speeches and congressional testimony are routinely made public, and all advocacy submissions are published on the agencies' websites.*

> *[…] Generally any submissions drawn up by the Authority are posted on the website. The Authority also makes use of the popular media and in many instances press releases are issued and/or press briefings given. Individual staff of the Authority will often make media appearances on TV or radio to help deliver the Authority's message to the widest possible audience.*

Many jurisdictions expressed some reticence to publish opinions on reform projects that are still in the domain of government and have not yet been released for public debate.

> *[...] The recommendations or opinions issued by the Competition Council are not binding. They are not available for public review.*

> *[...] Those responsible (either the executive or the legislative) of a reform process establish the openness of a process. They define which aspects of reform are diffused for the general public knowledge. This is the reason why the XXX specialized recommendations are not available to the general public in detail.*

> *[...] The XXX's recommendations on legislative drafts are not available for public review because the drafts are not public until they are approved by the legislative forum and published in the Official Journal.*

The most frequently used tools to publicize advocacy activities are presented in Chart 20.

Chart 20. **Tools most frequently used to publicize advocacy activities.**

MEDIA		PERCENTAGE/MEDIA
1 OFFICIAL		
	Annual reports on competition	52%
	Guidelines	30%
	Publication of decisions taken	
	in the Official Gazette	18%
2 STUDIES		
	Discussion papers	9%
	Study groups	41%
	Survey reports	50%
3 MASS MEDIA		
	Press Bulletins	32%
	Electronic media (Radio an TV)	21%
	Web-pages	47%
4 SELECTIVE COMMUNICATION MEDIA		
	Articles in specialized journals	6%
	Business meetings	4%
	Newsletters	26%
	Overviews	13%
	Presentation by the head of the authority	17%
	Seminars and workshops	34%

As competition advocacy is an intrinsically communicative activity, advocacy tries to reach very different sectors or categories of the population, some of them very involved in the competition process and deregulation. With regard to the more

frequently used advocacy tools, it is interesting to note that developed countries, which also have a stronger competition culture, sustain their advocacy efforts through selective communication media and studies, while developing countries, which are less aware of the benefits of competition, focus on massive communication media.

3.6. Resources Devoted to Competition Advocacy.

Among Member's answers to the questionnaire the following three conclusions stand out and lead to some institutional reflections.

A third part of the respondents identified the lack of resources as one of the key impediments to their advocacy work. These shortcomings apply primarily to a lack of financial and human resources, but also to a lack of expertise in certain general competition policy issues and in particular special sectors. In addition, a sizeable minority of agencies stated that the way their budget was allocated rather detracted from, than contributed to, their advocacy work.

Forty-five percent of the authorities do not have an exact overview of all their advocacy activities. It seems that advocacy is often undertaken alongside enforcement work, without keeping a comprehensive record of all advocacy initiatives launched.

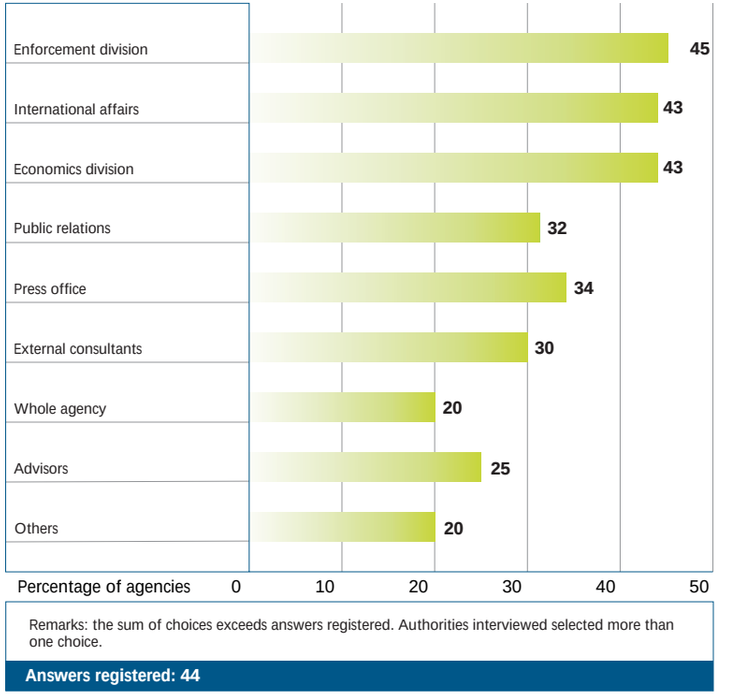
This implies that enquired authorities do not have precise data either of the resources they are currently spending on advocacy initiatives.

Human Resources

In general, the competition authorities answered that no particular division within their structure is specifically in charge of advocacy activities. Rather, all divisions develop both enforcement and advocacy activities. Enforcement departments, mainly investigations and mergers divisions, international affairs and the economic department are the ones that participate most in advocacy activities and devote more human resources to such activities. *(See Chart 21)*

> *[...] Advocacy work is performed across all areas of the XXX.*

Chart 21. **Departments engaged in advocacy.**



Remarks: the sum of choices exceeds answers registered. Authorities interviewed selected more than one choice.

Answers registered: 44

> *[...] There is no dedicated advocacy section or area within the XXX. Rather, all Branches and Divisions within the XXX engage in advocacy-related activities as appropriate within their area of responsibility and competence.*

> *[...] Actually, everybody is concerned/involved when there is a lot to do, no exemptions.*

> *[...] All the departments (…) are engaged in the advocacy activities*

[...]There is no specific division or department for advocacy activities.

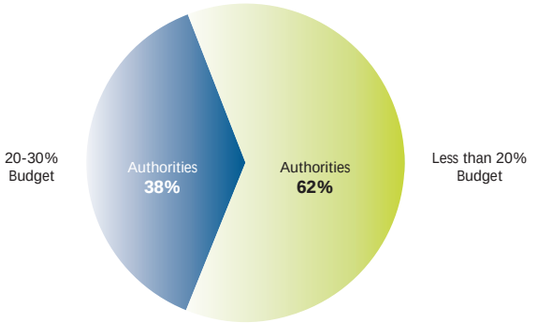
[...]Whatever the subject of the advocacy in question is, the corresponding department (infrastructure, products and services) takes it on and responds in due time.

Annual Budget Devoted to Advocacy Activities

Seventy percent of the authorities stated not to be able to report a percentage of the annual budget devoted to advocacy activities, as they do not make a statistical distinction between enforcement and advocacy activities.

Those countries that were able to quantify the resources spent on advocacy may be conveniently grouped into two categories. The first group (38% of the respondents) comprises authorities that devote 20 to 30% of their budget to advocacy; the second (62%) includes authorities that assign less than 20% of their budget to advocacy tasks *(see Chart 22).*

Chart 22. **Percentage of annual budget devoted to advocacy.**



Answers registered: 11

In the case of developing countries it was noticed that the availability of advocacy opinions for public review is proportionally smaller than in developed countries, 48% and 67%, respectively.

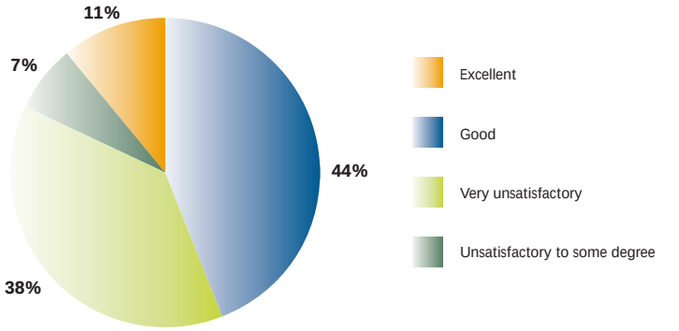
Many competition agencies lack a comprehensive overview of the advocacy initiatives launched during a given period, or of the resources invested to that end. Some agencies might benefit from enhanced internal transparency of their advocacy work. Benefits would specially accrue where accountability and transparency of competition authorities could be an important element to increase effectiveness of advocacy.

3.7. Evaluating and Improving Advocacy

Self-Evaluation of Competition Authorities' Advocacy Role

When competition authorities were asked to asses their advocacy role, 55% qualified their performance as excellent or good, while 45% expressed a non-satisfactory performance. *(Chart 23)*

Chart 23. **Self-evaluation of competition authorities advocacy role.**



Answers registered: 45

Examples of the comments provided by those authorities that deem to have done an excellent or good advocacy work may be illustrated by the following:

> *[…] The (…) has made improvements by putting forth opinions, which promote competition in the anti-competitive systems or laws of other Government agencies. It has also endeavored to create a competition culture by participating in the Regulatory Reform Committee and the Committee for Privatization of State-Owned Business.*

> *[…] The advocacy role of the (…) are felt by many to be of a generally satisfactory standard. This sentiment can be attributed both to the unique institutional structure of the (…) which allows these bodies to perform their tasks effectively, and to the continuous efforts which are made to provide a wide range of targeted and complementary advocacy initiatives.*

According to the opinions expressed by ICN members, the main issues that support a positive assessment may be grouped as follows (Satisfactory role of advocacy):

- Structure of the authority. The competition authorities' performance is deeply linked to the operational autonomy granted by their legislations. Success depends also on the authority's position within the administration (i.e. ministerial) as well as on conditions that guarantee its effective independence.

- Participation in policy making processes. Advocacy is more effective when the competition authority can participate in policy making processes, specially regarding regulatory reforms. This is so even when recommendations issued are not always taken into account.

- Advocacy objectives. Objectives of advocacy work shall be clear and in accordance with the specific features of each target activity. Devising and implementing precise schedules is also necessary for efficient monitoring.

- Communication policy. Advocacy is best accomplished when the promotion of recommendations, opinions and experts' advice as well as discussions on competition law and policy are carried out through press and electronic media.

- Image. Advocacy allows the general public to be acquainted with the competition authority and strengthens its image.

On the other hand, respondents pointed out that competition advocacy was most undermined by the non-mandatory character of its consultation mechanisms, which weakens its efficacy and makes the evaluation of its real impact difficult. Other reasons explaining a negative assessment are (unsatisfactory and unsatisfactory role of advocacy):

- Insufficient resources. Lack of human expertise and material resources prevent the allocation of resources to advocacy, specially when no provisions mandate this activity.

- Non–binding opinions. Some agencies report the fact that their recommendations are not taken into account.

- Advocacy seen as a second priority. Some authorities recognize that their primary concern is competition law and policy enforcement and not competition advocacy activities.

Improvement of the Advocacy Role of Competition Authorities

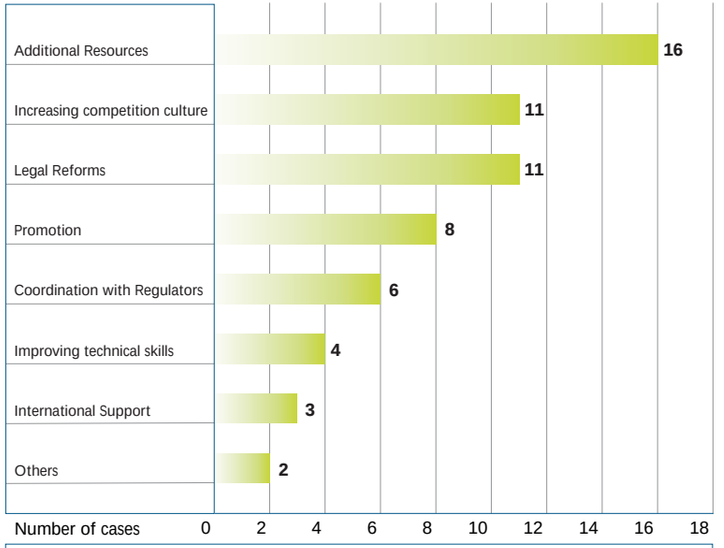
Several recommendations were proposed to enhance the advocacy role of competition authorities *(Chart 24).* The alternatives expressed include:

- Intensify diffusion of the benefits of competition both among government agencies and private constituencies, thereby enhancing competition culture and increasing the effectiveness of the advocacy activities.

- Amend competition laws so as to foster the autonomy of competition authorities and the concentration of competition provisions in one exclusive authority responsible for enforcing them. However, it might be argued that two competition authorities both acting in favor of competition at different levels could increase the efficiency of competition advocacy.

- Seek to influence government entities and specific regulators, by building public support which could bring the former entities to justify their position/

Chart 24. **Tools to improve advocacy role of competition authorities.**



Remarks: the sum of choices exceeds answers registered. Authorities interviewed selected more than one choice.

Answers registered: 44

regulation whenever they disregard the advocated position. However, it has to be taken into account that competition authorities do not posses a democratic mandate as Government and Parliament. This is the reason why the latter should not normally be accountable for their decisions *vis-a-vis* the former.

- Increase competition authorities' budgets in order to enable them to afford qualified staff, perform an adequate competition promotion and carry out support programs and conferences.

- A more systematic consultation between regulators and competition authorities, preferably enshrined in law.

3.8. International Dimension of Advocacy

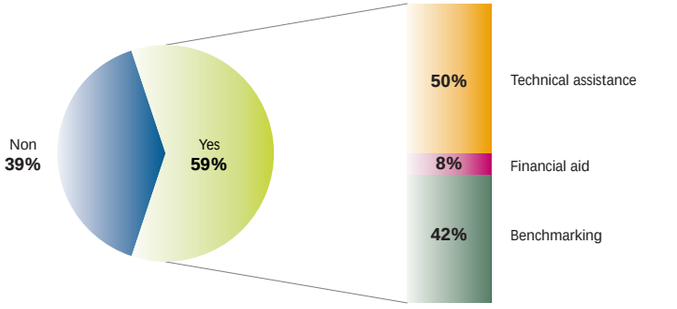
More than half of the countries mentioned that international organizations do support the advocacy role. The most frequently mentioned organization was the OECD, either for bringing specific support or as a contact point. ICN members mentioned that OECD supports activities such as: technical assistance, studies, consultancy, analysis, training programs and expert meetings.

The second most mentioned organization is the European Commission, mainly by its member countries. Other organizations mentioned are UNCTAD, APEC, WTO and ICN *(see Chart 25).*

Bilateral or Multilateral Agreements, Treaties or Fora

Several countries mentioned their advocacy role was supported by international cooperation received from other competition authorities or the assistance derived from bilateral cooperation agreements, while multilateral agreements or treaties do not have specific provisions on advocacy, except for regional integrations.

Chart 25. **International support for the advocacy role of competition authorities.**



Answers registered: 44

[…] The (…) became a member of the Intergovernmental Council on Antimonopoly Policy (ICAP) of (…) in 2001 on the basis of a multilateral agreement signed in 1993

[…] Bilateral agreements entered into by the (…) often contain technical assistance provisions that may allow for the (…) to contribute to competition advocacy in another country

[…] Stabilization and association agreement between EU member states and (…) does not have obviously stated provisions on advocacy, but as a subject it obliges compliance with EU legislation and implementation which implies active advocacy.

[…] Yes, there are organizations, which support the work of the GVH very much in terms of a theoretical backup and positive country experiences. These are experiences collected during the law enforcement but influencing positively also our advocacy. We learn a lot from the work of the OECD CLP meetings, especially from the work of the WP2.

Some of these countries mentioned that their agreements or treaties do include cooperation activities which may reinforce advocacy activities, particularly, notification on regulatory procedures foreseen in such agreements.

Other countries mentioned other cooperation provisions which help competition law enforcement but were not identified as advocacy provisions.

4

CONCLUSIONS

From the answers to the questionnaire it is possible to infer that no formal rules govern advocacy. The institutional setup of competition authorities varies enormously, and no conclusion can be established to define which is the most effective structure to promote advocacy.

In the past, competition advocacy was not regarded as a key task and, hence, no legislative provision was made to that effect. Today a clear consensus seems to have been reached on the importance of competition advocacy. Very few competition authorities do not carry out competition advocacy, and in these cases other governmental authorities have been empowered to advocate. The vast majority reported that advocacy plays an important role in addressing restraints to competition among government, the business community, as well as the public in general.

For those authorities that advocate, competition advocacy constitutes an important support in the enforcement of competition laws. The understanding of competition mechanisms sways in favour of competition policy and also rallies some sections of society to support the authority's agenda.

Autonomy of competition authorities is generally considered important to keep effectiveness of competition advocacy. However, there is nothing like a one-fits-all institutional setup to guarantee autonomy. Autonomous decision-making could be enhanced through legal provisions, making special emphasis on the appointment mechanisms of the head of the agency, provisions to prevent his political exposure and the powers to advice other public entities on their legislative and regulatory programs both ex-officio and upon request.

Budgetary considerations can hinder operational autonomy of the competition authority only to the extent that the operational activities have to be limited by lack of financial resources. Additionally the impact of budget allocation on the autonomy of the authority is reduced whenever the budget is assigned on a multi-annual basis or using an indexation mechanism, and when the allocation process is transparent. Even when there is not a fully budgetary autonomy, technical autonomy is strengthened if the competition authority is free to use the authorized budget as best considered.

Receptiveness to opinions and recommendations issued by the competition authorities is related to how embedded competition culture is among interest groups and society at large.

Awareness of the benefits from competition (competition culture) is linked to the enforcement experience of competition authorities. A time period to spread the benefits of competition advocacy throughout economic activity and society, seems to be necessary. Similarly, perceived competition culture is also associated to the level of development. High levels have been attained mostly by industrial countries, while almost all transition economies and less developed countries report low levels of competition culture. The lack of a general competition culture determines a weak support for the decisions made by the authorities of developing countries.

Competition authorities see their participation in legislative and regulatory processes as the most important component of competition advocacy. When consultation is mandatory the competition authority is in a privileged position to make its observations known to the legislator. A more systematic consultation, possibly enshrined in law as early in the process as possible, is considered by many to produce the best results. A certain degree of bindingness of the opinions issued to policy makers, enhances significantly the effectiveness of advocacy. When opinions are non-binding on policy makers, some competition authorities have commented that they would expect improvements to their advocacy role if rule makers would be under the onus to account for the reasons not to adopt the advise of the competition authority.

When regulated sectors are explicitly exempted from the competition law enforcement, the competition authority may however use its informal, or persuasive, powers in trying to influence the regulatory framework. It is considered that keeping legal powers to review and approve mergers enhances advocacy capabilities, as regulatory authorities and entities will be more inclined to take into account their opinions and recommendations.

Mandatory consultation mechanisms regarding privatisation processes or when the regulator intends to create exemption regimes (cf. regulated conduct doctrine) were also deemed by several authorities to enhance the effectiveness of advocacy. This is particularly important in transition and developing countries, where many state-owned assets are privatised or licensed, and give rise to an intensive rule making process from specific regulators or others. Cooperation in these cases depends on the extent to which competition authorities have attained proficiency in technical and specific issues of sector specific regulation. Credibility and political neutrality of competition authorities were also considered relevant to the acceptance of their recommendations or opinions.

As in other government activities, transparency may enhance the effectiveness of advocacy by building public support and providing persuasive arguments for change. Arguably, the regulator may often find it more difficult to override the advocacy position of the competition authority when it is in the public domain. This is particularly important in developing countries where competition culture is less well-entrenched and technical capabilities to advocate are less solid.

In certain cases interaction between competition authorities and regulatory bodies could be enhanced through mechanisms such as cooperation agreements, particularly when it is a question of detecting restrictive practices on competition by regulated agents.

Developed countries, which also have a stronger competition culture, sustain their advocacy efforts through selective communication media and studies, while developing countries, which are less aware of the benefits of competition, rely more on mass media.

Although there is no precise data on the resources currently spent on advocacy initiatives, ICN countries have reported that additional resources would allow them to undertake additional useful competition advocacy activities.

As to international cooperation, it is desirable to establish clear objectives on competition advocacy in accordance with the specific features of each economic activity, and at the same time, enhance coordination in the provision of general technical assistance.

ANNEX 1
Questionnaire on Competition Advocacy

Scope

This questionnaire is intended to:

- Identify the institutional strengths and weaknesses for the advocacy role of competition authorities.
- Understand the relationship among competition authorities and policymakers, courts and legislative bodies.
- Understand the interaction between competition authorities and regulators.
- Provide some indication of how competition authorities perform their advocacy programs and how effective they are.

On the basis of this information, the Advocacy WG hopes to

- Identify the most common restrictions on the advocacy role of competition authorities.
- Analyze the importance of competition advocacy in transition and developing countries.
- Share the most successful experiences in competition advocacy.
- Develop recommendations for the improvement of the advocacy role of ICN member competition authorities

For the purpose of this questionnaire, the following definition of advocacy is adopted:

Competition advocacy refers to activities of the authority related to the promotion of a competitive environment for the 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.[15]

[15] A wide definition of competition advocacy offered by the World Bank is included at the end of this Questionnaire.

Guides

- Additional comments on any question will be welcome.
- The space between questions does not indicate the expected length of the answer, so please add pages as needed to provide the most complete answers.

If the jurisdiction has more than one institution fill in a questionnaire for each competition authority

If you have doubts about filling in the Questionnaire, do not hesitate to contact:

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QUESTIONNAIRE ON COMPETITION ADVOCACY

Country
Institution

Contact for further information
Name
Title
Telephone
Fax
E-mail address

I. THE COMPETITION AUTHORITY

1) When was the competition authority established in your country?

2) Which characteristic best describes the institutional status of your competition authority? (You may choose more than one)

a. Independent-administrative authority
b. Within a Ministry or Department
c. A Ministry of its own
d. Investigatory body
e. Directorate within a Ministry
f. Judicial authority
g. Quasi-judicial authority
h. Within Congress or Parliament
i. Other (Describe)

Please feel free to elaborate on your answer.

3) Members (Commissioners, Chairman, Director) of the competition authority are appointed by:
a. President or Prime Minister
b. President or Prime Minister with consent of Congress or Parliament
c. Minister
d. Congress or Parliament

e. Representatives of entrepreneurial associations, academics and consumer associations
f. The judicial system
g. Other (Describe)

Please feel free to elaborate on your answer.

4) How many members (Commissioners, Chairman, Director) does your Authority have?

5) What was their background before appointment? (Academia, politics, business, professions, consumer groups, public administration, etc.)

6) Do appointments of the members (Commissioners, Chairman, Director) of the competition authority last for a specified period?

7) How long is the period? Is the mandate renewable?

8) How is the budget for the competition authority assigned (as part the budget of a Secretary or Minister, directly by the congress or parliament, etc.)?

9) Does the mechanism for the appointment of the members (Commissioners, Chairman, Director), and the allocation of the budget contribute to or detract from the autonomy of the competition authority?

10) Does the degree of autonomy of the competition authority contribute to or detract from its advocacy activities? Why?

11) Are the advocacy efforts of your competition authority supervised, or otherwise subject to modification or review, by another authority or the courts? Please explain.

12) Has the political environment restricted the competition authority's advocacy efforts? (Reversal of decisions, firing of competition officials of authority, etc.)

II. GENERAL ADVOCACY

13) What is the level of awareness of the benefits of competitive markets and competition policy in your country? In your opinion, does your country have a "competition culture"?

14) Are government entities and courts familiar with the competitive market mechanism and its benefits?

15) What activities has the competition authority undertaken to raise awareness in the society of the benefits of competitive markets? Which activities do you consider more successful in terms of their positive effect on the competition process?

16) The most common attitude towards the advocacy role of the competition authority:

GROUP	ALLY	DISSENTER
Academics		
Congressmen		
Consumer associations		
Entrepreneurial associations		
Labor unions		
Local governments		
Non-governmental organizations		
Political parties		
Media		
Professional associations (lawyers, economist or others)		
Others		

Please feel free to elaborate on your answer.

17) What is the interaction between the enforcement and advocacy programs of the competition authority?

18) Does the competition authority advocate the elimination or restriction of exemptions to the enforcement of the competition law?

III. ADVOCACY IN THE REGULATORY AND LEGAL FRAMEWORKS

19) Does the competition authority participate in any council of Ministers, Cabinet or a similar high-level official group? If the answer is affirmative, what role does it have? Please explain.

20) Does the competition authority advise policymakers about the competitive impact of public policies? Are these recommendations effective in modifying public policies?

21) Is the competition authority informed by the executive or by the legislative body about reform proposals? How is this done? At what stage of the procedure? Please explain

22) Does the law enable the competition authority to influence the design of the regulatory framework in the legislative process? If the answer is affirmative, explain briefly at what stage and through which mechanisms the authority can participate?

23) Is the general public informed about the advocacy reports or opinions issued by the competition authority? Through which means?

24) Are the recommendations or opinions issued by the competition authority available for public review? Please explain.

25) If the advocacy reports have been published, or if they are unpublished but not statutorily protected, would the competition authority of your country be willing to share them for inclusion in an ICN electronic database?

26) Choose from the following list the most frequent ways in which your competition authority becomes involved in advocacy:

a. Competition law empowers competition authority to analyze and offer opinion about the competitive impact of sector regulation, privatization process or franchising.
b. Sector specific law establishes intervention of the competition authority in the regulation, privatization or franchising

c. Competition authority was invited by the sector regulator to provide its opinion
d. Competition authority participated in regulation, privatization or franchising at the request of Congress o Parliament
e. Other (Please explain.)

Which are the most successful? Why?

IV. SECTOR SPECIFIC ADVOCACY

27) Indicate in which sectors the competition authority has been recently engaged in competition advocacy. [Describe the most outstanding activities.]

28) For each sector, what have been the three most successful participations by the competition authority, and why?

29) Which of the following reasons, if any, best account for failures to have the advocacy position of the competition authorities endorsed in specific sectors. Provide your answers filling in the following table.

LIMITATIONS	SECTOR (S)
A court prevented or restricted the participation of the competition authority.	
A ministry or regulatory agency prevented or restricted competition authority participation.	
Competition authority lacked expertise.	
Congress or Parliament prevented or restricted participation of competition authority.	

LIMITATIONS	SECTOR (S)
Environmental concerns were an obstacle to introduce or preserve competition.	
"National champion" considerations prevented the introduction of a more competitive environment	
Universal service or general interest considerations prevented the introduction of competition	
Not enough time to analyze the sector.	
Possibility of layoffs and/or bankruptcy in this sector hindered the introduction or preservation of competition.	
Scarce financial resources.	
Other (specify)	

Please feel free to elaborate on the restrictions faced by the competition authority in its advocacy role.

30) Does the competition authority perform advocacy activities in certain sectors even though immunities, exemptions or waivers deprive it of jurisdiction to enforce the competition law in those sectors? Please explain.

V. COMPETITION ADVOCACY IN THE PRIVATIZATION PROCESS, DEREGULATION, FRANCHISING, CONCESSIONS, RATE REGULATION, LICENSES AND PERMITS

31) What types of advocacy have been performed recently by the competition authority in privatization processes? Please explain.

32) Are privatization operations subject to merger control or other competition law review?

33) What have been the three most successful participations of the competition authority regarding privatization processes, franchising, concessions, rate regulation, licenses and permits?

34) What obstacles restricted the advocacy efforts undertaken by the competition authority regarding privatization processes, franchising, concessions, licenses and permits?

VI. INTERNATIONAL DIMENSION OF ADVOCACY

35) Does any international organization support the advocacy role of the competition authority in your country? How important is this support? Please explain.

36) Are there any advocacy provisions in bilateral or multilateral agreements, treaties or fora in which your country participates?

VII. ADVOCACY TEAM WITHIN THE COMPETITION AUTHORITY

37) Which units, branches or departments of the competition authority are engaged in advocacy activities? (You may choose more than one)

a) Advisor
b) Economics division

c) Enforcement division
d) Press Office
e) International Affairs
f) Public relations
g) Joint attorney/economist with expertise in the economic sector in issue
h) Other (Specify)

38) How many people work in advocacy activities?

UNITIES, BRANCHES OR DEPARTMENTS	PEOPLE	HOURS PER YEAR
Advisor		
Economics division		
Enforcement division		
Press Office		
International Affairs		
Public relations		
Other (Specify)		
Total		

39) Percentage of staff engaged in competition advocacy activities:

UNITIES, BRANCHES OR DEPARTMENTS	PERCENTAGE	
Advisor		
Economics division		
Enforcement division		
Press Office		
International Affairs		
Public relations		
Other (Specify)		
Total		

40) What percentage of the annual budget of the competition authority is devoted to advocacy activities?

IX. IMPROVING THE ADVOCACY ROLE OF THE COMPETITION AUTHORITY

41) How do you evaluate the advocacy role of the competition authority in your country?

a) Excellent
b) Good
c) Regular
d) Unsatisfactory in some degree
e) Very unsatisfactory
Why?

42) How could the advocacy role of the competition authority be improved?

43) What future plans do you have for your competition advocacy program?

44) How can the International Competition Network support the authority of your country in advocating an enhanced role for competition?

If you wish to add comments on competition advocacy, please attach them to this questionnaire.
http://www1.worldbank.org/beext/faq/q16.htm

What is competition advocacy and how important is it?

Competition advocacy refers to the ability of the competition office to provide advice, influence and participate in government economic and regulatory policies in order to promote more competitive industry structure, firm behavior and market performance. Creating a popular base of support for competition policy is also part of competition advocacy. Competition advocacy is particularly important in developing and transition market economies where an appropriate understanding or appreciation of the merits of competitive market economic systems is often lacking.

An important aspect of the advocacy function is spelling out the implications of public policies for competition and efficiency so that government decision mak-

ing takes them into account. Competition law has an interface with a broad range of economic policies affecting competition in local and national markets, including the regulation of transport, power, telecommunications, and other sectors where natural monopolies are likely to occur, international trade, foreign direct investment, intellectual property rights, financial markets, and privatization policies. These policies can enhance or impede the effectiveness of competition law.

For example, in Canada, high levels of tariff protection (prior to NAFTA) facilitated price fixing agreements in as many as fourteen cases covering products such as plate glass, fertilizers, pharmaceuticals and sugar. In many developing as well as industrialized countries, economic regulation of sectors such as electricity and telecommunications which are considered as "natural monopolies" has been extended through vertical integration and exclusive licenses to the provision of products and services where effective competition can exist, such as in the supply of equipment, generation of electricity and long distance telephone services. Governments are often caught in a conflict of interest situation with respect to state-enterprise reforms and privatization. In order to attract high bids for state assets so as to lower government debt, public monopolies may be transferred into private ones. This allegedly was a factor in the sale of British Caledonia airlines to British Air (instead of SAS) which prevented injection of new competition in the U.K. holiday charter market. The acquisition of Skoda by VW in the Czech Republic was accompanied with demands for "incentives" in the form of high levels of tariff protection and foreign investment restrictions which would limit import competition and new entry. In Jamaica, the telecommunications company was privatized with exclusive rights for a period of 25 years.

Through competition advocacy, such situations can be prevented or at least be subjected to greater accountability, transparency and public discussion. Effective advocacy by the competition agency can help increase awareness of the costs and benefits of alternative policies and ensure that government policy objectives do not work at cross-purposes.

The competition policy agency should also thus be vested with a statutory role of participating, formulating and commenting on government economic and regulatory policies impacting on competition in the market place. By having a competition advocacy role, the agency can counter or at least minimize the adverse effects of rent-seeking behavior prevalent in most countries but, particularly in developing and transition market economies. Given the limited administrative capacity and relevant enforcement experience in this field in the latter type countries, this role has been viewed by some commentators as being most important if not the sole function of a competition policy agency (Kovacic, 1995; Rodriguez and Williams, 1994). It is argued that a competition advocacy can also reduce the possibility of mis-applying the specific provisions of competition law which could induce further distortions into the economy. However, both the competition advocacy and enforcement functions of an appropriately structured agency are important.

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ANNEX 2
List of Contributors

NO.	MEMBER COUNTRY	THE COMPETITION AUTHORITIES
1	Andean Community	The General Secretariat of the Andean Community
2	Argentina	Argentina's National Competition Commission
3	Armenia	State Commission for Protection of Economic Competition
4	Australia	The Australian Competition and Consumer Commission (ACCC)
5	Belgium	The Competition Service
6	Belgium II	The Belgian Competition Council
7	Canada	he Competition Bureau
8	Chile	National Economic Prosecutor's Office
9	Cyprus	Commission for the Protection of Competition of Cyprus
10	Denmark	The Competition Authority
11	EFTA	The EFTA Surveillance Authority
12	Estonia	The Estonian Competition Board
13	European Union	DG Competition
14	Finland	The Finnish Competition Authority
15	France	Office of the Director General for Competition, Consumer Protection and Fraud (DGCCRF)
16	Germany	Bundeskartellamt (Federal Cartel Office)
17	Hungary	Hungarian Competition Office (GVH)
18	Indonesia	Commission for the Supervisory of Business Competition
19	Ireland	The Irish Competition Authority.
20	Israel	Israel Anti-trust Authority
21	Italy	The Italian Competition Authority
22	Jamaica	Jamaica Fair Trading Commission
23	Japan	Japan Fair Trade Commission
24	Kenya	Monopolies and Prices Commission of Kenya
25	Korea	The Korea Fair Trade Commission
26	Latvia	Competition Council of the Republic of Latvia

NO.	MEMBER COUNTRY	THE COMPETITION AUTHORITIES
27	Lituania	Competition Council of the Republic of Lithuania
28	Macedonia	Monopoly Authority of the Republic of Macedonia
29	Malta	Maltese Commission for Fair Trading
30	Mexico	The Federal Competition Commission
31	New Zealand	New Zealand Commerce Commission
32	Panama	Commission for Free Competition and Consumer Affairs (CLICAC)
33	Peru	The Free Competition Commission
34	Philippines	Dept. of Trade & Industry - Bureau of Trade Regulation & Consumer Protection
35	Romania	The Competition Council of Romania
36	Romania II	The Competition Office of the Romania
37	Russia	The Ministry of the Russian Federation for Antimonopoly Policy and Support to Entrepreneurship
38	Slovakia	The Antimonopoly Office of the Slovak Republic
39	Slovenia	Competition Protection Office of the Republic of Slovenia
40	South Africa	South African Competition Tribunal
41	Spain	Spanish Competition Tribunal
42	Sri Lanka	Sri Lanka Fair Trading Commission
43	Sweden	The Swedish Competition Authority (Konkurrensverket)
44	Switzerland	The Swiss Competition Commission
45	The Netherlands	The Netherlands Competition Authority
46	Turkey	The Turkish Competition Authority
47	Ukraine	The Antimonopoly Committee of Ukraine
48	United Kingdom	The UK Office of Fair Trading
49	United States	The Department of Justice
50	United States II	The Federal Trade Commission
51	Uzbekistan	State Committee of the Republic of Uzbekistan on demonopolization and competition development

NO.	MEMBER COUNTRY	THE COMPETITION AUTHORITIES
52	Yugoslavia	The Antimonopoly Commission
53	Zambia	The Zambia Competition Commission

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