INTERNATIONAL COMPETITION NETWORK

Report
on
Interface between Competition Policy and other Public Policies

Prepared by

Turkish Competition Authority

Presented at the 9th ICN Annual Conference
Istanbul, Turkey

CONTENTS

INTRODUCTION

This Background Report has been prepared by the Turkish Competition Authority for the discussions on the Special Project, to be conducted in a panel session during the 9th Annual Conference of the International Competition Network (ICN) in Istanbul, Turkey.

The topic of the Special Project was chosen by the Turkish Competition Authority as "Interface between Competition Policy and other Public Policies". By taking into account the importance of ensuring coherence and consistency among different policies, the Turkish Competition Authority considers that the interface between competition policy and other public policies should be well understood. However, although there are some studies on the relation of competition policy and specific policies like development and industrial policy, consumer policy and environmental policy, there is insufficient information on how competition policy interacts with other public policies in general. Furthermore, defining competition policy objectives and reconciling them with other public policy objectives is a complex and challenging task for national governments. The Turkish Competition Authority considers that the subject matter is of crucial importance, especially for developing countries, as policy governance may be weaker in these countries than in developed ones. Therefore, the Special Project is intended to stimulate discussion on how competition policy and other public policies interact with each other by focusing on balancing conflicting objectives of competition policy and other public policies, and on the role of competition authorities in this process.

In this Background Report, competition policy refers to all state measures having an impact on the conditions of competition in markets, and thus extends beyond enforcement of competition law. In that sense, competition policy is one of the policies which interacts with many other public policies. Some examples of the other public policies are, *inter alia*, policies designed to promote economic development, increase the competitiveness of the economy, and protect the environment, health, and security. Although these policies and competition policy can complement each other, it is also accepted that conflicts between their objectives may arise.

This Background Report is based on the responses to a questionnaire prepared by the Turkish Competition Authority which was then completed by competition authorities[1] from 33 jurisdictions: **Argentina**, **Australia, Barbados**, **Belgium**, **Bulgaria**, **Cyprus**, **Chile**, **Croatia**, the **Czech Republic**, **Denmark**, the **European Union**, **Finland**, **France, Germany**, **Honduras**, **Hungary**, **Israel**, **Japan**, **Jersey**, **Lithuania**, **Mauritius**, the **Netherlands**, **Norway**, **Romania**, **Russia**, **Singapore**, **Slovakia**, **Korea**, **Poland**, **Spain**, **Switzerland**, **Turkey**, and the **United States**.

Based on the questionnaire and the responses to it, the Background Report is organized as follows. The first part will analyze generally the design of competition policy in respondent countries in terms of its objectives, the impact of other public policies on competition policy, and the role of responsible institutions, including the competition authority. The second part is divided into two sections. The first section will address how the interface between competition policy and other public policies affects competition law enforcement, by focusing especially on exceptions and exemptions, and on the impact of other public policy objectives in substantive assessment of particular competition law enforcement areas like mergers. The second section will summarize the responses on interaction between competition policy and other public policies in the adoption of state measures. In that context, the following issues will be addressed: the general framework for competition advocacy, balancing between competition policy and other public

[1] Argentina (National Commission for the Defence of Competition), Australia (Australian Competition and Consumer Commission), Barbados (Fair Trading Commission), Belgium (Belgian Competition Authority), Bulgaria (Commission on Protection of Competition), Cyprus (Commission for the Protection of Competition), Chile (Fiscalia Nacional Económica - FNE), Croatia (Croatian Competition Agency), the Czech Republic (Office for the Protection of Competition), Denmark (Danish Competition Authority), the European Union (European Commission), Finland (Finnish Competition Authority), France (Autorité de la concurrence), Germany (Bundeskartellamt), Honduras (Comisión para la Defensa y Promoción de la Competencia), Hungary (Hungarian Competition Authority), Israel (Israel Antitrust Authority), Japan (Japan Fair Trade Commission), Jersey (Jersey Competition Regulatory Authority), Lithuania (Competition Council of the Republic of Lithuania), Mauritius (Competition Commission of Mauritius), the Netherlands (Netherlands Competition Authority), Norway (Norwegian Competition Authority), Romania (Romanian Competition Council), Russia (Federal Antimonopoly Service), Singapore (Competition Commission of Singapore), Slovakia (Antimonopoly Office of the Slovak Republic), Korea (Korea Fair Trade Commission), Poland (Office of Competition and Consumer Protection), Spain (Comisión Nacional de la Competencia), Switzerland (Swiss Competition Authority), Turkey (Turkish Competition Authority), and the United States (U.S. Federal Trade Commission and U.S. Department of Justice, Antitrust Division). For the ease of reference, the term "competition authority" will generally be used in the text where appropriate.

policies where conflicts may arise, balancing criterion and mechanisms, the role of competition authorities as competition advocates, and challenges especially for developing countries.

The Turkish Competition Authority would like to thank all respondent countries and other contributors, who took the time to answer the questionnaire and provided additional comments on the preparation of the Special Project. Furthermore, the Turkish Competition Authority hopes that all competition authorities will benefit from the public discussion of the Special Project.

I. DESIGN OF COMPETITION POLICY

The first section of the questionnaire asked the respondents about the objectives of their competition policy, factors taken into account in the design of competition policy and the authorities responsible for its implementation.

A. Objective of Competition Policy

First of all, it should be emphasized that there is a common agreement among competition authorities that the main objective of competition policy is to protect competition. In this framework, many respondent competition authorities state the objectives of competition policy similarly. These objectives can be listed as ensuring free and fair competition in the markets, maximizing consumer welfare, and promoting economic efficiency. Beside these objectives, some other long run goals such as supporting growth, decreasing inflation, and the creation of new jobs are also mentioned.

For instance, according to the **Czech Republic**, the objective of competition policy is to ensure and safeguard functioning and efficient competition in the markets. In addition to this objective, it also mentions consumer welfare, lower prices, and wider choice as secondary objectives of competition policy.

Korea responds that the primary objective of competition policy is to promote free and fair competition. **Chile** agrees with this response and adds promotion of economic efficiency as another objective of competition policy. Interestingly, **Chile** indicates that previously its competition policy stressed the importance of economic freedom and the goal of preventing

restrictions on the firms' autonomy.

Bulgaria points out in its answer that the aim of competition policy is to promote competition and free economic initiative and to make markets work better. Similarly, **Barbados** states that one of the primary objectives of competition policy is to guarantee equal conditions for all enterprises in the market. According to the **Belgian** response, competition policy in **Belgium** mainly aims to enhance consumer welfare.

Similarly, **Spain** reports that the competition act recognises that the objective of competition policy is to guarantee competition in the markets, bearing in mind that more competition leads to achieving more efficiency, lower prices, better quality, more quantity and greater variety of products and services, and greater consumer and social welfare, and also to higher productivity and competitiveness of the economy.

In **France**, the French commercial code specifically provides that the mission of the competition authority to guarantee competition includes a contribution to competition enforcement and advocacy at European and international levels.

Finally, **Jersey** summarizes its answers as follows: "the objective of competition policy in **Jersey** is to further economic efficiency and to make markets work well for consumers".

B. Factors in the Design of Competition Policy

The majority of the few jurisdictions that discuss the factors taken into account in the design of their competition policy answer that they do not weigh factors other than ensuring competition in the marketplace.

Mauritius notes that the concentration of ownership, income disparity, suspected excessive pricing and suspected collusion are among the factors that help to inform the design of their competition policy. Additionally, **Honduras** states that avoiding abuses from irregular market structures, securing economic development, and allocating resources efficiently are the main criteria in the competition policy design process.

Romania's answer indicates that other policy objectives are also taken into account in particular

cases although this does not negatively affect the main objective of competition policy, which is "*to protect, maintain and stimulate competition and a normal, competitive environment, with a view towards promoting consumers' interests*."

Several countries state harmonization of competition policy with that of another jurisdiction as a factor in the design process. For instance, **Norway, Cyprus** and **Lithuania** seek to harmonize their competition policy with EU competition policy.

C. Design of Competition Policy

First of all, it should be said that the respondents answer the question on design of their competition policy by considering competition policy in its narrow sense, covering only application of competition rules to anti-competitive conduct, instead of comprising all public measures affecting competition. In this narrow context, most of the countries have similar competition laws. In their laws, eliminating anti-competitive agreements, preventing abuse of a dominant position and controlling mergers and acquisitions are the key elements of competition legislation. For example, **Barbados** and **Germany** note these elements as the key components of the competition act in their countries. **Korea** also points out that preventing abuse of market dominance and the excessive concentration of economic power, and regulating improper cartels and unfair business practices are the main elements of its competition policy.

The **European Union (EU)** competition policy is described more broadly because **EU** legislation covers not only traditional competition rules but also includes state aid controls. Similarly, competition authorities in **Croatia** and **Lithuania** also enforce state aid rules. The competition authority in **Spain** is entitled to draft general or specific reports on the impact of state aid on effective competition in the markets.

Bulgaria states that fighting against unfair competition is one of the main pillars of its competition policy. In addition, **Lithuania** points out that competition law contains provisions relating to unfair competition and anticompetitive activities of public and local authorities. The competition law in **Spain** also deals with anticompetitive activities of public and local authorities.

Among the respondents, some competition authorities have enforcement responsibility that

includes consumer protection in their legislation. For example, the **U.S. Federal Trade Commission** deals with unfair and deceptive practices that harm consumers. Likewise, the competition authority in **Barbados** points out that its duty also covers prevention of practices that may harm the interests of consumers. Similarly, the **Polish** competition authority has consumer protection powers as well.

To sum up, most of the respondents mention the same basic elements for competition policy, such as merger control, prevention of anti-competitive agreements, and abuse of a dominant position. In addition, in a few other countries competition policies include other components, like consumer protection, state aid controls and prevention of unfair competition.

D. Responsible Authorities in the Design of Competition Policy

The answers from all respondents to the question about the responsible agency that shapes competition policy reflect varied perspectives. Some respondents indicate that ministries solely design competition policy, while others point out that competition authorities also play a role in its design.

Chile states that the Ministry of Economy is responsible for the design of competition policy and consults regularly with the competition authority. In **Spain**, competition policy is part of the whole economic policy, designed by the government. However, the competition authority may address its proposals to the government on competition policy guidelines.

The **Norwegian** competition authority notes that the framework of its activities is determined by the Ministry of Government Administration and Church Affairs. Moreover, **Norway** also provides that the minister has the overall responsibility for the instruments in the government's competition policy, including competition law and regulations for businesses, regulations on public support, and regulations on public procurement.

Germany states that shaping competition policy, at the federal level, is first and foremost the responsibility of the Federal Ministry of Economics and Technology. Similarly, the competition authorities in **Finland, Honduras, Jersey,** and **Spain** also answer that related ministries are

responsible for the design of competition policy.

On the other hand, some countries respond that the competition authority both designs and implements the competition policy. For example, **Cyprus** declares that competition policy is designed by the competition authority. **Bulgaria**'s answer also points out that the **Bulgarian** competition authority is the only body responsible for the design and implementation of competition policy. Similarly, competition authorities in the **Czech Republic** and **Korea** state that they are responsible for the design of competition policy. **Korea**'s response states that the **Korean** competition authority has the authority to enact or revise the competition law. Likewise, the **Czech** and **Slovak** competition authorities are responsible for drafting new bills and amendments to existing competition law.

In **France**, the reform that entered into force in March 2009 created the *Autorité de la concurrence* which is a unified, independent and fully-fledged competition authority and which has taken over the competition powers previously shared between the *Conseil de la concurrence* and the Minister of economy, as a means of fostering efficient enforcement and advocacy while fully guaranteeing due process.

The **European Commission**, as a supranational competition authority, answers in a different manner. The **European Commission** points out that it has the exclusive power to initiate any change in the legislative framework for EU competition policy, with the exception of the competition rules in the Treaty on the Functioning of the EU, where it shares the right of initiative with the Government of any Member State and the European Parliament.

Some findings emerging from the responses to the initial questions of the questionnaire can be summarized. First, the main common objectives of competition policy are stated as the promotion of economic efficiency and increasing consumer welfare, although some respondents state some other policy objectives, such as supporting growth, decreasing inflation, and creating new jobs. Second, most competition authorities describe their competition policy mandates in terms of provisions that prevent anti-competitive agreements, combat abuse of a dominant position, and control mergers. However, some competition authorities have wider enforcement mandates that may contain consumer protection and state aid rules. Finally, designing and enforcing

competition policy varies from country to country. Numerous respondents declare that related ministries have the authority to design their broader competition policy whereas national competition authorities enforce competition rules. On the other hand, in some countries both design and implementation of competition policy are within the responsibilities of competition authorities.

II. IMPLEMENTATION OF COMPETITION POLICY IN THE CONTEXT OF OTHER PUBLIC POLICIES

A. Competition Law

In order to evaluate the impact of other policy objectives on competition policy, this section will address how the interface between competition policy and other public policies affects competition law enforcement by focusing especially on exceptions and exemptions, and on the impact of other public policy objectives in the substantive assessment of particular law enforcement areas like mergers.

A.1. Exceptions and Exemptions

As exceptions or exemptions from the enforcement of competition laws mainly reflect other policy objectives, jurisdictions were asked about the existence of relevant legal provisions and practices. The majority of the countries have industries or economic activities that are excluded from competition law enforcement to some extent, either directly or indirectly.[2] When the

[2] In **Singapore,** postal, piped water, wastewater management, bus, rail, cargo terminal, and cheque and GIRO clearing services; in **Bulgaria**, telecommunication, energy, transportation; in **Cyprus,** agreements on salaries and terms of employment in labor markets; in the **Netherlands,** agreements involving undertakings entrusted with the provision of services of public economic interest, collective labor agreements, agreements within an industry or sector between one or more employers' organizations and one or more employees' organizations that pertain exclusively to pensions; and agreements or decisions by organizations of practitioners of a profession that pertain exclusively to participation in an occupational pension scheme; in **Lithuania,** the sectors that are regulated; in **Norway**, labor markets, agriculture and fisheries, book market; in **Finland**, labor markets and agriculture; in **Croatia**, banking, telecommunications, labor markets; in **Romania,** labor, monetary, the market of securities; in the **EU**, undertakings entrusted with the operation of services of general economic interest, agricultural sector; in **Japan**, certain activities of entrepreneurs or trade associations under the Antimonopoly Act and 14 specific laws such as the Insurance Business Law; in **Hungary**, communications, electricity, railways; in **Barbados,** labor markets, intellectual property; in **Germany**, agriculture and public water; in **Korea,** intellectual property, small sized

relevant responses are examined, it is seen that exclusions are generally encountered in regulated industries where sector specific expertise is needed. In addition, the industries in transition are granted exemptions in some countries. Moreover, it can be mentioned that labor markets, agricultural markets, and issues related to intellectual property are mostly excluded areas from enforcement in many countries.

According to respondents, the general economic interest is one of the biggest concerns among those exceptions. Furthermore, other public policies are taken into account in granting exceptions, such as public health, security, and increasing agricultural productivity. Lastly, market failures may be considered in some cases to justify exceptions.

Japan once had a history of granting extensive exceptions. In 1940s and 1950s, some activities were excluded from competition law practice as necessary and imperative with a view to achieving other policy objectives. Those objectives were development and expansion of industries, stabilization and rationalization of business management to enhance international competitiveness, and security of employment. However, most of the exemptions have been reviewed and abolished in recent years because exemptions undermine efficiency motives and creative initiatives of the companies and entrepreneurs.

In certain countries, competition authorities are or may be consulted before the decision to exclude some areas from competition law enforcement is taken.[3]

In less than half of the responding countries,[4] competition authorities are empowered to exempt/exclude some activities of undertakings from the application of competition law. A

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business; in **Denmark,** labor markets; in **Israel,** agriculture and international sea transport; in **Switzerland,** intellectual property; in **Poland,** gambling; in **Turkey,** mergers involving banks with a below 20% market share and conduct authorized by another specific act; in **Australia,** employment, intellectual property, agricultural products, payment systems, electric licences, granting of certain exclusive gaming licences, and chicken growing; in **France**, trend indices relating to the dairy markets. Finally, see http://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf for the list of immunities and exceptions from the **US** antitrust laws.

[3] The **Czech Republic**, **Croatia**, the **EU**, **Finland**, **France, Hungary**, **Germany**, **Japan**, **Jersey**, the **Netherlands**, **Norway**, **Poland**, **Singapore**, **Slovakia, Switzerland**, and the **US**.

[4] **Barbados**, **Bulgaria**, **Denmark**, **Jersey**, **Norway**, **Romania**, **Korea**, **Poland**, **Singapore**, **Switzerland**, and **Turkey**.

number of countries chose to adopt block exemptions regarding those activities. The exemption criteria are mostly compatible with Article 101 (3) of the Treaty on the Functioning of the EU. Therefore, those jurisdictions take into account provisions like improving the production or distribution of goods, promoting technical or economic progress, consumer benefit, proportional restrictions to the attainment of their objectives, net economic benefit, economic development, consolidating the competitive position of the small and medium-sized undertakings, efficiency, and R&D. For instance, in **Korea**, in order to get the exemption, higher industrial efficiency, cost cutting, production capacity improvement, or getting through a sluggish economy must be shown. In another example, in the late 1990s, in the **Netherlands**, Stibat (a Dutch union of battery producers and importers) requested an exemption for a plan involving the collective collection and disposal of used batteries. This plan required a contribution via charging battery users a certain amount which would be jointly determined by all participants. In their defense, Stibat claimed economies of scale but also argued that environmental laws forced them to charge battery users a certain amount for covering the costs of collection and disposal. Stibat's positive environmental arguments were taken into account.

A.2. Implementation of Substantive Provisions

In order to analyze a different aspect of the interface between competition policy and other public policies, jurisdictions were asked whether other public policy objectives are taken into account in the enforcement of competition law, especially in merger cases. It can be argued that a number of the respondent countries[5] apparently consider some objectives other than competition in their enforcement activities in some circumstances, either by the competition authority or another governmental entity. Those can be listed as the public (general) interest, social and employment policy, energy security, economic progress, public security, plurality of media, and prudential rules.

In some respondent jurisdictions (mostly in the **EU**), particularly in merger cases, the government or the related minister has authority to review the merger, taking into account criteria like defense

[5] **Barbados**, **Belgium**, **Bulgaria**, **Croatia**, **Germany**, **Korea**, **Mauritius**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Russia**, **Spain**, **Singapore**, and **Turkey**.

and national security, protection of public security or public health, free movement of goods and services, environmental protection, promotion of technological research and development, plurality of media and prudential concerns. For example, although the **Romanian** competition authority takes into account other policy objectives together with competition policy objectives, the government has the authority to take into account public interest considerations to overrule the competition authority's decisions about mergers involving public utilities. Similarly, the government in **Spain** can also authorize mergers blocked by the competition authority on general interest grounds other than competition. This is also the case in **France**, but the government can only do so once the competition authority has taken a final decision on the merits; the government's decision, which must be based on public policy grounds only, is specifically barred from reviewing the competition authority's competition analysis. However, these powers have only been exercised in a few cases in the relevant jurisdictions.

Some of the countries also mention that they may consider other concerns in mergers involving failing firms. For example, in **Turkey**, the competition authority considers the "failing firm defense" as reflecting the social dimension of competition law in addition to other dimensions. In one case involving the failing firm defense, while considering whether it was inevitable that the relevant assets would exit the market or the market share of the failing undertaking would be acquired by the acquirer, the competition authority considered that authorization of the transaction would lead to positive social benefits in favor of the employees compared to the case where the transaction would be blocked. In another case, where the failing firm defense was claimed, the competition authority overtly mentions that negative social impacts could only be taken into account where it could be proved that the transaction would not have any negative impact on competition. Moreover, the decision states that negative social impacts should not be decisive in authorizing a transaction if the transaction creates or strengthens a dominant position. Nevertheless, the decision also considers the fact that the number of people, who could possibly lose their jobs in case of denial of authorization for the transaction, would not create serious social problems.

Ensuring a minimum standard of quality is also a concern for clearing a merger in some jurisdictions. For example, in the **Netherlands** in 2009, a merger between two Dutch hospitals,

which would have been problematic if the merger had been based on market shares alone, was approved because of efficiency arguments. Parties claimed that the merger was necessary in order to be able to offer a minimum standard of health care quality. The merger was cleared, based on the assumption that it would lead to higher price/quality ratios for consumers, as the merging parties had offered, among other remedies, to restrict their average price level to the average national level.

On the other hand, some public policy concerns and claims are also considered or dealt with in the enforcement of competition law apart from mergers. Certain respondents cited cases where the undertakings referred to the provisions of other specific laws to justify their practices.[6] In addition, the parties also defend their cases by referring to other public policy objectives like general interest, public health, and the interests of consumers, and/or involvement of some governmental bodies or their officials.[7] Some examples of these cases are as follows:

In **Lithuania**, in 2008, the competition authority imposed sanctions upon the undertakings engaged in the milk purchase and processing business. These undertakings had been exchanging confidential information about the quantities of raw milk purchased, as well as the quantities of individual milk products produced and marketed. The investigation also found that the exchange of information had been facilitated by an Order of the Minister of Agriculture, which established recommended purchasing prices. In this case, the Ministry of Agriculture was requested to revise the Order.

In a case handled by the **European Commission**, an undertaking was alleged to have abused its dominant position by hindering the entry of independent producers of nails into the market for nails compatible with its nail gun product. The undertaking argued that its practices were justified because its competitors' products intended to be used with the nail gun it manufactured and sold were dangerous. Moreover, it also claimed that the obstacles it created to prevent entry of competitors into the market were justified by its duty of care as a manufacturer under product-

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[6] **Bulgaria**, **Croatia**, the **EU**, the **Netherlands**, **Korea**, and **Turkey**.
[7] **Argentina**, the **EU**, **Denmark**, **Finland, Hungary**, **Japan, Jersey**, **Korea**, **Lithuania, Slovakia, Turkey, and** the **US**.

liability law. The **European Commission** found that an abuse of a dominant position cannot be justified by considerations of product safety. The decision explained that if the undertaking was concerned about liability, it should have referred the matter to the competent authorities and asked them to take action against the independent producers whose products it considered dangerous. The **European Commission**'s decision was upheld by the Court of Justice. The Court of Justice argued that it was not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regarded as dangerous.

In **Hungary**, in the "egg cartel" case, the Hungarian Association of Layer Hybrid Breeders and Egg producers operated a "price commission", recommended minimum prices, called its member companies to increase prices, ran an authorization system of egg imports, circulated price schedules, and obliged certain member companies to offer a certain proportion of their production for export. During the proceedings of the **Hungarian** competition authority, the undertakings referred to the fact that the representatives of the Ministry of Agriculture and Rural Development participated in the meetings of the Association and did not contest the practice of the Association. However, the **Hungarian** competition authority imposed fine.

Also in **Hungary**, Hungarian banks set uniform interchange fees in transactions by payment cards of Visa and MasterCard, which the **Hungarian** competition authority found to distort market competition. The practice of the payment card schemes infringed competition rules since it enabled the banks to conclude agreements that hindered competition. The banks originally drawing the agreement and the two payment card schemes Visa and MasterCard have been fined. The parties argued that the National Bank of Hungary (NBH) was aware of this practice. In the calculation of the fine imposed, the **Hungarian** competition authority considered this fact as a mitigating circumstance. However, it was also underlined in the resolution that the role of the NBH did not reach the level which could eliminate the responsibility of the parties for violating the law.

In the *National Society of Professional Engineers v. U.S.* case, the **U.S. Department of Justice** brought a civil suit against an association of professional engineers, alleging that the association's canon of ethics prohibiting competitive bidding by its members violated the Sherman Antitrust Act. In upholding a judgment in favor of the United States, the U.S. Supreme Court rejected the

association's claim that the public policy objective of promoting safety in construction – an objective allegedly advanced by a ban on competitive bidding – should preclude application of the Sherman Act. The Court stated: "*The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad. . . . Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. . . . The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.*"

In **Korea** between late 1999 and March 2000, the Ministry of Information and Communication called on three mobile operators to lower mobile phone call charges by around 5-6%. The operators had a meeting to minimize the price decreases by agreeing to reduce the phone charges less than what the Ministry recommended. The **Korean** competition authority decided that such agreements were unlawful.

In **Denmark**, in the "*Post Danmark"* case, a complaint was made against the Danish universal postal carrier Post Danmark, for the abuse of its dominant position in the national market for magazine mail. The alleged abuse consisted of imposing exclusionary pricing and rebate schemes and discriminating between customers, thereby placing the customers at a competitive disadvantage. Post Danmark claimed that its prices had been approved by the Danish Minister of Transport. As it was obvious that the prices had not been approved by the Minister, Post Danmark was ordered to arrange its pricing and rebate scheme for magazine mail to comply with the competition rules.

In **Turkey**, concerning bid rigging in a tender organized as part of the School Milk Project by the Social Assistance and Solidarity General Directorate under the Prime Ministry for the provision and distribution of packed milk to primary schools, it was alleged that the outcome of the tender was influenced by guidance of the relevant Ministry, which considered that the School Milk Project had pure social objectives with no profit target. Actually, the relevant Ministry accepted that it advised milk producers to act responsively and encouraged them to make their bids below market prices. Moreover, the Ministry requested milk producers to determine their prices below

the estimated value and distribute the amount among them. The fact that the price in the tender occurred below the estimated value proved that the Ministry had an impact on the behavior of the milk producers during the tender process. The **Turkish** competition authority agreed that several attempts by the Ministry had an impact on milk producers and regarded them as mitigating circumstances while imposing fines. Moreover, the Regulation on Fines adopted by the **Turkish** competition authority in 2009 provides that reduction in the basic amount of fine is possible if it is proved that there has been incentive by public authorities concerning the violation.

In sum, most jurisdictions report some exceptions and exemptions from the competition laws. The questionnaire responses indicated that exceptions and exemptions were typically associated with application of some other public policies and a general public interest standard. Responses also indicated that undertakings claim other public policy objectives and involvement of other public agencies as justification for their conduct. However, from the examples included in the responses, it appears that those defenses are not successful in most of the cases.

B. Competition Advocacy

Competition advocacy is one of the important mechanisms by which competition policy objectives are incorporated into other policy objectives. In addition, the interaction of competition policy and other public policies is mainly evident in competition advocacy activities. Therefore, a significant part of this report will be devoted to the interface of competition policy and other public policies in the context of competition advocacy activities.

B.1. General Framework for Competition Advocacy

In order to analyse the interaction between competition policy and other public policies the questionnaire asked respondents about the general framework for their competition advocacy activities and the role of competition authority.

Legal framework

The instruments a competition authority uses to engage in advocacy activities are established on a formal or an informal basis. In some jurisdictions, competition law explicitly authorizes the

competition authority to submit its opinions on competition policy matters to relevant governmental bodies, to regulatory agencies, or to the legislature. In other countries, however, the competition authority does not possess explicit statutory discretion in this regard although the competition authority may be deemed to have "the inherent authority to engage in competition advocacy".[8] It should be noted herein that although the legality of advocacy powers provides the competition authority with a solid field to operate, the efficacy of advocacy activities is not necessarily dependent on the advocacy measures' having a statutory basis.

A considerable number of the respondents to the questionnaire[9] report that the competition authority has explicit statutory powers concerning competition advocacy. The nature and effects of legal powers of the competition authority, however, vary from one jurisdiction to another. Nearly all of the competition authorities enjoy consultation powers, which may appear in the form of opinions, recommendations, market studies, guidance to stakeholders, cooperation agreements with sector regulators and, in a few jurisdictions, an additional mandate to challenge acts and/or regulations before the competent courts. Opinions, binding or non-binding, mandatory or optional, are the most common tools for a competition authority to draw attention to potential distortions or restrictions on competition. In most countries, competition authorities may submit opinions on draft acts, regulations, or legislation in force with respect to anti-competitive effects likely to arise and to competition policy in general, while some competition authorities take action on their own initiative and the others upon the request of ministries, regulators and other public authorities.

Despite the fact that opinions are of importance as an instrument to bring competition policy concerns to the table in a legislative or a regulatory process, three key factors can affect the effectiveness of legislative or regulatory consultation - namely, the timing of the consultation, the compulsory or non-compulsory status of the consultation and the degree of bindingness of the

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[8] The jurisdictions where the competition authority has no statutory advocacy powers in their general competition laws are namely **Australia, Belgium**, **Germany**, **Israel,** the **Netherlands** and the **US**.

[9] **Argentina**, **Barbados**, **Bulgaria**, **Cyprus**, **Chile**, **Croatia**, the **Czech Republic**, **Denmark**, the **EU**, **Finland**, **France, Honduras**, **Hungary**, **Japan**, **Jersey**, **Lithuania**, **Mauritius**, **Norway**, **Romania**, **Slovakia, Spain,** and **Russia**.

recommendation made.[10] With respect to the timing of the consultation, the emphasis is on providing the competition authority with sufficient time to assess the impact of draft projects on competition and the stage that the competition authority presents its contribution to the process. The replies of some ICN members have demonstrated that the competition authorities are not always consulted with respect to proposals containing competition issues at the beginning of the legislative procedure. Consequently, in case of a late contribution, the legislator may be reluctant to integrate the technical evaluation of the competition authority into the draft legislation since they are almost completed.

There is a dichotomy between respondents with mandatory consultation mechanisms, such as **Hungary**, the **Czech Republic**, **Bulgaria, Slovakia** and **South Korea**, on the one hand, and countries where the competition authority expresses its opinion on its own initiative or upon request of legislative bodies, ministries, or the government on the other hand.[11] A mandatory consultation procedure can help ensure wider access for the competition authority to the regulatory decision process in addition to allowing for a privileged position in terms of transmitting its views to the legislator. Furthermore, in an optional consultation system, the competition authority is under the burden of following the entire legislation, regulatory decision, and other administrative decision processes, and of receiving information in this regard in order to contribute to the process in a timely fashion to identify potential restrictions on competition and/or recommendations on improving competition conditions in a specific sector.

Regarding the third factor, the majority of respondents state that a non-binding consultation mechanism may contribute to dissatisfaction as to the degree of consideration of the opinions and recommendations by the competition authorities.[12] However, it is also reported that there are

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[10] International Competition Network, *Advocacy and Competition Policy*, at 59–67, 2002, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf (hereafter, "ICN Report, 2002"). Since the underlying survey of the ICN Report, 2002 was much more comprehensive in terms of the data collected and of the content of the questionnaire; this study does not elaborate the application of those three factors aforementioned to all of the respondents and only refers to those respondents which submitted information in this regard.

[11] In **France**, there are both mandatory and voluntary consultation mechanisms: the competition authority must be consulted inter alia where draft legislation leads to restrictions on markets, geographical exclusivities of rights and/or price fixing. In other instances, it may be consulted or it may intervene ex officio.

[12] **Belgium**, **Bulgaria**, **Cyprus** and **Jersey** explicitly mentioned that opinions of the competition authority are not legally binding.

several legal systems, such as the one in **Romania**, where the competition authority's opinions on draft laws and governmental ordinances are binding.

Another important advocacy tool may be the ability to bring an action before the competent courts when public authorities' decisions do not consider the opinions of the competition authority such as the case in **Chile**. Although this instrument may be activated only after the regulatory decision process is finalized, when it is combined with the power to stay the enforcement of the relevant regulation when challenged in court, the result might be as effective as a binding opinion mechanism.

In addition to the aforementioned instruments, there are several competition authorities authorized under competition law or relevant legislation to issue annual reports on the current status of competition and other relevant public policies, to carry out market studies and to issue reports on particular sectors (mostly regulated industries).[13] On the public awareness side of competition advocacy, some competition authorities are empowered to organise conferences and seminars and to perform other activities in order to inform consumers, legal professionals, academics and the business community on competition policy.[14]

There are also a number of jurisdictions, such as **Australia,** the **US**, **Germany**, the **Netherlands**, **Belgium,** and **Israel** where the competition authority has no explicit legal power regarding competition advocacy. However, as remarked earlier, the lack of an explicit statutory basis in the general competition laws does not deprive the competition authority of the power to undertake advocacy initiatives. All of the respondents without explicit advocacy powers in their statutes declared that advocacy is used as a competition instrument.

Although there is no specific statutory provision in the **US** competition rules directly mandating advocacy, it is accepted that the **Department of Justice** and **Federal Trade Commission** have an inherent authority to engage in competition advocacy activities. Accordingly, the **US**

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[13] Annual reports and reports on performance of regulated industries are referred as an advocacy tool by **Australia, Belgium**, the **Czech Republic**, **Denmark**, **Finland**, **Hungary**, **Japan, Russia**, **Romania**, **Slovakia, Spain**, **Turkey** and the **US**.

[14] The respondents preferring conferences and seminars in this regard are **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**, **Honduras**, **Israel**, the **Netherlands, Romania** and **Spain**.

competition authorities advocate competition through the submission of comments and other participation in regulatory agency proceedings and the legislative process, publication of reports on regulated industry performance, participation in **US** governmental policymaking task forces, etc.

Finally, **DG Competition** requires a separate assessment since it is one of the services of the **European Commission**, i.e. the institution of the **EU** with exclusive power to initiate legislation. As such, **DG Competition** can advocate pro-competitive policies in all areas of legislation at the **EU** level, for example, through being involved in impact assessments concerning policy initiatives by other services within the European Commission. In addition, in the context of the **EU**'s economic policy, the **European Commission** can propose to the Council to address recommendations to a Member State of the EU relating to competition such as recommendations to improve the competition framework, competition in services and network industry sectors in the given Member State.

Cooperation with Other Government Authorities

Dialogue and cooperation between competition authorities and other public authorities play a substantial role in the efficacy of competition advocacy. In particular, consultations in legislative and regulatory procedures may be considered as an opportunity for the competition authority to ensure that the regulatory framework is established in accordance with competition policy. Furthermore, cooperation between authorities may have a positive impact particularly on regulated sectors and in the design and implementation of privatization or deregulation initiatives. More than ten respondents specifically mentioned the consultation activities of competition authority towards the regulatory bodies.[15] In addition to the opinions submitted by the competition authority, some of the ICN members sign memorandums of understanding or cooperation agreements with particular regulatory bodies in sectors such as banking, financial services, telecommunication, energy, and broadcasting with the aim of promoting competition, preventing duplication, and minimizing regulatory burdens in these sectors. There are also some

[15] These respondents are namely **Barbados**, **Croatia**, **Cyprus**, **France, Honduras**, **Hungary**, **Lithuania**, **Mauritius**, **Poland**, **Romania**, **Singapore**, **Slovakia, Spain, Switzerland, Turkey** and the **US**.

jurisdictions where cooperation with the competition authority and other regulators is a legal duty.

Other than sector regulators, the government authorities with which responding competition authorities cooperate most frequently are the ministries of economy and finance. In addition, according to the responses, regional state administrative agencies, consumer authorities, public procurement commissions, health care authorities, ministries of employment and ministries of commerce prefer to cooperate with and consult the competition authority in general.

In the jurisdictions that criminally sanction cartel activities, cooperation with public prosecutors appears as a natural activity of the competition authority (where the competition authorities do not have the authority to prosecute criminal violations themselves).

One of the most significant relationships reported by respondents is collaboration with the legislatures and cabinets. In some countries, representative(s) of the competition authority participate in preparatory governmental meetings to provide technical assistance and, in some jurisdictions, the competition authority serves as an advisory body to the parliament.[16]

Finally, a few respondents state that although other public authorities do not cooperate to defend competition, at times competition authorities consult with or submit opinions to governmental bodies, ministries and regulators.[17]

B.2. The Role of Competition Authority

Design and Implementation of Economic Policies

Due to the transition of economies from centrally planned systems to market economies, including programmes providing for the accession to and the acceptance of obligations under

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[16] For instance, **Belgium**, **Finland**, **Germany**, and **Israel** mentioned the function of the competition authority as an advisory body to the parliament. On the other hand, in **Israel**, **Japan**, **Korea**, **Poland, Romania**, **Singapore**, **Slovakia**, **Turkey** and the **US**, the competition authority communicates to government directly via various methods such as participation in intergovernmental meetings or in the governmental policy making task forces.

[17] **Belgium** states that there is no cooperation between the competition authority and other public authorities as to advocacy whereas any authority can promote competition.

international economic agreements, the legal systems in these countries, experienced and, in some cases, continue to experience a rapid change in a short period. For these countries, it became highly important to take competition principles into consideration in determining the legal framework of economic policies such as privatization and liberalization/deregulation.

According to the responses to the questionnaire, the most common advocacy activities of competition authorities in privatization and deregulation processes are opinions, recommendations, merger enforcement, notification procedures, statements, expert examination of draft legislation and sector specific regulation, and market studies and cooperation agreements with regulatory authorities. Some ICN members mention as an additional indirect activity of the competition authorities, attendance at privatization or deregulation initiatives, either as a board member or as a technical assistant to give opinions on market conditions, and on competitive concerns, and to present pertinent recommendations.[18] It was also the case in some countries[19] that at times of intense privatization, competition authorities participate in the boards of government committees established to enforce privatization measures. No competition authority reported a formal, established role or a direct authority in the design of all government privatization and liberalisation policies. On the other hand, in some jurisdictions,[20] representatives of the competition authority may be called on from time to time by the parliament or the congress to provide technical assistance or to issue reports regarding possible proposals in the field of economic policies in question.

The specific situation of Europe within the structure of the **EU** shall be emphasised once more at this point. As is confirmed by the responses of some of the member states, liberalisation policy is usually decided at the EU level. With regard to the new members of the EU, since liberalisation and deregulation are mainly specified by the EU accession process, any restriction to free movement of services and freedom of establishment was repealed. Furthermore, the **European Commission** has direct powers to address binding directives or decisions to Member States if

[18] **Hungary**, **Japan**, **Poland** and the **US** state that the representative(s) of the competition authority participated in the meetings of privatization or deregulation initiatives or relevant governmental task forces.
[19] For instance, **Korea**.
[20] **Belgium**, **Japan**, **Jersey** and the **US**.

these enact or maintain in force any measure contrary to the competition rules of the Treaty on the Functioning of the EU in the case of public undertakings and undertakings to which Member States grant special or exclusive rights.

Increasing Awareness of Policy Makers and the Public

Competition culture is an indispensable component of competition advocacy, since the effectiveness of advocacy activities is closely related to the level of awareness of policy makers on the one hand and the public in general on the other. The competition authority's task in building a competition culture is of vital importance in jurisdictions where the introduction of competition law is relatively recent and the competition authority is not yet well-known by the entire community.

Respondents indicate that the competition authorities convey competition policy objectives to the policy makers via direct and indirect methods. Direct methods cited include attendance at preparatory governmental meetings and advisory committees of the sector regulators, regular meetings with ministries, organisation of roundtables and conferences on competition issues where policy makers are invited, regular visits and invitations to parliament, submission of proposals regarding improvement of competition and of conclusions to the parliament and/or government as to draft laws, contacting or submitting statements to the relevant minister to raise concerns as regards certain proposals or events, and presenting annual reports to the legislature.

There are also more formal ways established as a platform to communicate with policy makers, which are classified under a variety of titles such as "interministry comment procedure" and "inter-agency policymaking groups". Prominent among these direct instruments is addressing the parliament or the council of ministers which function as a more forward way of indicating competition principles. Furthermore, **DG Competition** is involved in the preparation of all major policy proposals put forward by other services of the European Commission that may have an impact on competition. The European Commission can also propose to the Council of the EU to address recommendations to a Member State relating to competition. On the other hand, although it is not an inter-agency group, in **Hungary**, a specific institution called "Competition Culture Centre" is devoted to activities in order to build a competition culture among the related groups

which uses a variety of tools (website, publications, professional events etc) to communicate with those interest groups for dissemination of knowledge about competition policy.

According to the responses, the competition authorities may adopt indirect methods as well to highlight competition principles. Those methods may be in the form of documents or guidelines published by the authority, publications of its decisions on websites, press releases, expressions of views in public hearings, comments on governmental proposals and strategies, holding competition seminars, sharing research findings by means of conferences or presentations, market studies, and the organisation of workshops and advocacy campaigns.

On the public side of competition culture, some of the respondents refer to examples of cases where the competition authority took action on its own initiative to share its views with the public that a certain draft legislation or an administrative measure conflicted with competition policy objectives. The majority of the examples provided in the responses are related to regulated industries, where the competition authority pointed to the far reaching restriction or to the possible entry barriers which might be established under a draft regulation. On the other hand, where the legislature stipulates a price regulation or any other economic regulation as to relatively competitive markets, the competition authority may share its concerns in this regard with the public, in addition to submission of a written opinion to the legislature. The most common platforms for expressing its position against draft legislation or any other administrative measures are the website of the competition authority or seminars, conferences, press releases or panels. On the other hand, one respondent to the questionnaire explicitly states that the competition authority would not share its criticism in this regard with the general public, whereas a few others reported that the competition authority in their jurisdiction has not yet experienced a need to communicate its opposition to the public.

B.3. Balancing between Competition Policy and other Public Policies

General

In formulating policies or legislation with an impact on competition, the responsible public authorities or legislative organs have to consider various policy objectives which are not always compatible with each other. In some jurisdictions, although there may be neither clear rules nor

criteria to ensure that competitive principles are upheld, as mentioned in the previous section, it is nearly common in almost all jurisdictions that the competition authorities have the opportunity to offer their views during the preparatory stages of the policy or legislation via different instruments, such as participation in meetings held within various levels of the administrative or legislative structures or issuance of opinions. However, in most cases the ultimate decision maker has the upper hand to decide on the final policy outcome, which may not always be as competitive as advocated for by the competition authorities.

The impact assessments that accompany procedures involving policy and legislative proposals may enable the public authorities to assess potential impacts on competition, and competition authorities may have the opportunity to advise alternative options which satisfy the policy objectives with the least negative impact on competition. It is sometimes useful for the competition authorities to employ quantitative techniques in arguing for pro-competitive policy or legislative options. While advocating for competition, it is not uncommon that the competition authorities encounter various challenges or difficulties in advocating for pro-competitive policy or legislation, which may require a lot of resources to address. This section is intended to explain these aspects of competition advocacy in various jurisdictions, with examples provided where appropriate.

Balancing Criterion and/or Circumstances

One objective of the questionnaire was to determine whether jurisdictions have any criteria or standards to balance competition policy objectives with other public policy objectives, or to prioritise in case of conflict. To begin with, it seems there are no criteria or standards commonly used across jurisdictions.

In **Belgium** and in the **European Commission** in the **EU**, there are no explicit rules to balance conflicting competition policy objectives and other public policy objectives. Moreover, there are no criteria used under these circumstances by the **Netherlands** competition authority. The **Norwegian** competition authority has no formal powers, whereas the competition authority in **Jersey** has no role in balancing conflicting policy objectives. **Chile** and **Israel** state that no formal institutional mechanisms exist to ensure the balance. Competition authorities in **France,**

Mauritius and **Jersey** provide that they do not balance between conflicting policy objectives, although the latter accepts the importance of other policy goals, such as planning concerns, population growth, and environmental impact, which could be taken into account by the relevant authority. In contrast, in **Poland,** the head of the competition authority prepares a competition policy strategy which is adopted by the government. As the strategy document is intended to reflect opinions of all public and private stakeholders, it naturally tries to balance various policy objectives. Moreover, the **Polish** answer states that competition policy (which is an integral part of economic policy involving various government authorities and includes both economic and political priorities of the government) aims to reach consensus between different policies. **Turkey** acknowledges the presence of conflicting policy objectives, such as revenue maximization and ensuring a competitive market, especially in privatization transactions. **Turkey** provides an example, where the opinion by the competition authority to privatise the incumbent operator in the telecommunications market by separating its cable TV infrastructure from the scope of the transaction was favoured against opposing views, after relevant stakeholders were convinced that there would be an increase in tax revenues and employment in a more competitive market.

It should be said that competition authorities in nearly all jurisdictions generally share their views with the relevant public authority or the legislative body as to the competitive concerns likely to be caused by relevant draft legislation or any other instrument during the preparatory stages where all policy objectives could be taken into account and possible conflicting policy objectives might be balanced. For instance, **Israeli** competition authority's experience is that competition is considered a priority by both the government and the parliamentary committees, and therefore anti-competitive legislation is not likely to gain broad support. However, the **US** competition authorities explain that as the legislative and regulatory bodies consider a wide range of public policy objectives and the public policy objectives granted priority may differ in each case, it may not be possible to determine which policy objective was granted priority in any particular matter.

In certain countries such as **Bulgaria**, **Spain**, and **Russia**, the competition authorities may take into account other policy objectives in addition to competition policy objectives and may propose options with less anti-competitive impact or may agree to the policy option by accepting the

justification based on other public policy objectives. Similarly, the **Slovak** competition authority once agreed to admit other public policy objective within its advocacy efforts.

The **Bulgarian** competition authority tries to propose alternatives satisfying the regulatory target which are also compatible with competition rules whenever there is a conflict between competition policy objectives and other policy objectives. For instance, although the **Bulgarian** competition authority objected to any form of regulation on fares for taxis, it complied with the restriction on the number of taxis as this was the most appropriate way to satisfy the interests of consumers and service providers and there were some safeguards to alleviate the negative impacts of the restriction on the number of taxis, such as technical requirements for market entrants, and the annual review of the number to avoid market foreclosure. However, the objection by the **Bulgarian** competition authority to the fare regulation was not accepted in the draft law, which foresees maximum prices to be set by municipal councils. It should be said that the criterion used in Bulgaria to decide on the priority of the policy objective for the final policy option is the public interest. Similarly, the **Spanish** competition authority takes account other policy objectives, which the draft legislation aims to achieve; it considers whether the restriction of competition is necessary to achieve those policy objectives and whether the likely positive impact of these objectives is proportionate to the harm likely to be caused. Based on these considerations, if it thinks that the restriction is justified, it then seeks to find the alternative with less impact on competition. The **Russian** competition authority employs two criteria to ensure a balance between competition policy objectives and other public policy objectives. Firstly, it considers whether social and economic policy objectives take precedence over those of competition policy. If so, then it considers whether they can be achieved in a way compatible with competition policy. The **Russian** competition authority cites examples of objectives granted priority over competition policy objectives, including maritime, air and other forms of traffic security; national security and defence; outer space exploration; and compliance with international agreements. However, it also states that quasi-competitive means are used to the extent possible while pursuing the requirements of these objectives such as bidding procedures controlled by it. In their response to the questionnaire, the **Slovak** competition authority indicated that despite initial objections, the authority agreed that the justification to fight organized crime and protection of citizens had precedence over competition policy objectives, when the relevant

ministry proposed to create a provisional monopoly in gambling activities.

In some jurisdictions like **Jersey, Norway**, the **EU**, **Romania** and **Spain**, the ultimate decision maker may decide on the final policy option by granting priority to other objectives despite contrary views by the competition authority.

In **Norway**, the relevant public authority considers all the policy objectives, including those expressed by the **Norwegian** competition authority, and decides on the solution which least distorts competition. However, in one case where the health studio within a local sports centre operated by a municipality was subsidized via the municipal budget, thereby putting the only private competitor in a disadvantageous position, the views by the competition authority (including some suggested remedies such as divestiture of the health studio and setting charges reflecting actual costs) were not taken into account by the relevant ministry, due to other policy objectives concerning municipal independence and health.

In the **EU**, there are no specific criteria used to balance competition policy objectives with other public policy objectives in policy making at the European level. Within the legal framework established by the Treaties, different policy objectives are balanced – both within the European Commission and between the European Commission and other EU institutions – according to political priorities. It follows that other policy objectives may occasionally overcome competition policy objectives and the legislation adopted might be less competitive than proposed by the **European Commission**.

Similarly, **Slovak** competition authority also mentions that its views are not binding for the government, which also has the right to adopt political solutions/decisions. However, it is also possible that the Parliament may consider the views ignored by the government and the outcome may comply with the views of the competition authority.

There are some more examples where the views by competition authorities were not taken into account by the relevant administrative or legislative bodies. For example, **US** competition authorities' statements advocating removal of legal provisions in laws and regulations or proposals restricting competition in professional services (such as the ones preventing non-lawyers from performing real estate closings without offering any legal advice) were not always

accepted by state legislatures, due to countervailing "protection of the public" justifications. Similarly, the **Hungarian** competition authority's proposals to ease entry requirements for the provision of certain postal services in a market where the state-owned company was given exclusive rights in certain mail delivery services were not accepted under the possible justification of the protection of employment. Moreover, in another case in **Hungary**, environmental concerns regarding regulation of public water utilities were granted priority by the relevant ministry over other concerns including competition. A final example concerns the second licence to be granted by the regional government in **Spain** for the opening of superstores in addition to the municipal licence. The grant of the second licence depends on the adequacy of retail stores in the relevant area and the likely impacts of the new stores in this area. Among the major policy concerns for the introduction of the licence was the protection of traditional retail trade patterns. The **Spanish** competition authority has argued and continues to argue in disfavour of the second licence, as it constitutes an entry barrier limiting competition which might lead to some negative impacts such as higher prices for consumers.

Mechanisms and Tools

In addition to the observations provided in the previous sections on general competition advocacy mechanisms and tools, this section will deal with more specific mechanisms aiming at balancing conflicting policy objectives by focusing on competition assessment mechanisms. In a majority of the responses, it is said that there is no formal competition assessment procedure.[21]

Although they have no formal competition assessment procedures, **Israeli**, **Norwegian** and **Romanian** competition authorities mention using the OECD's Competition Assessment Toolkit in various ways. For instance, **Israeli** competition authority uses OECD's Competition Assessment Toolkit to ensure that competitive considerations become integral part of legislative and regulatory process. In **Romania**, there is an informal instrument used by inter-ministerial groups on competition as part of regulatory impact assessments to identify possible distortions of

[21] **Argentina**, **Barbados**, **Belgium**, **Bulgaria**, **Chile**, **Croatia**, **Cyprus, Denmark**, **France, Honduras**, **Hungary**, **Germany**, **Israel**, **Jersey**, **Lithuania, Mauritius**, the **Netherlands**, **Norway**, **Romania**, **Russia**, **Slovakia**, and the **US**.

competition caused by regulatory processes and the **Romanian** competition authority recommended that a competition filter based on OECD's Competition Assessment Toolkit be adopted as part of regulatory impact assessment to detect likely negative impacts of draft policies and regulations on competition via ex-ante analysis.

Competition authorities from **Japan** and the **Czech Republic,** where there is more formal competition assessment, also cite use or expected use of OECD's Competition Assessment Toolkit. In the **Czech Republic**, it is obligatory to send legislative bills to the competition authority, which is entitled to conduct competition assessments. The **Czech** competition authority believes that implementation of OECD's Competition Assessment Toolkit will contribute to the competition assessment. In **Japan**, regulatory impact assessment is compulsory since 2007 and it is stipulated in the Guidelines for Ex-ante Evaluation of Regulations that impacts on competition shall be considered in the assessment if it is apparent that the enactment, revision or abolition of regulations has such impacts. The **Japanese** competition authority uses OECD's Competition Assessment Toolkit in training the relevant personnel of the administrative organs.

Like the **Czech Republic**, in **Spain** there is also mandatory competition assessment since January 2010. The **Spanish** competition authority believes that its "Report on Recommendations to Public Authorities for more Efficient and Pro-competitive Market Regulation" and its "Guide to Competition Assessment" have played a crucial role in the enactment of the relevant act that makes competition assessment mandatory. For each legal act, regulatory impact assessment including effects on competition is done in **Poland** and the analysis includes, among others, impact on the competitiveness of the economy, entrepreneurship, as well as operation of the companies. **Australia** is another country where competition assessment is part of the relevant mechanism called Regulation Impact Statement, which is necessary for all new regulation as well as amendments to existing regulation if significant impact is likely with respect to business, individuals or the economy. In **Turkey**, the scope of the competition assessment under regulatory impact assessment, which is compulsory for certain legislation since early 2007, is to determine whether the relevant regulation strengthens the market position of the firms or makes them dominant, increases or decreases the number of firms, and strengthens or weakens the level of competition.

In the **EU**, competition assessment is done as part of economic, social and environmental impact assessments of different policy options in order to determine the impact on competition in the internal market. The European Commission's Impact Assessment Guidelines suggest to determine, for example, if the policy option includes measures exempting a market/sector from competition rules, raising or lowering the barriers to entry or exit, introducing special commercial rights or facilitating companies to agree on prices or divide up customers/markets.

According to the Regulation Impact Assessment Guideline issued by the Prime Ministry, the **Korean** competition authority has the powers to carry out competition assessment for regulations by government agencies to determine the possibility of creation of entry barriers, maintenance of monopolistic structures or encouragement of cartels. As part of a two-stage evaluation, first a checklist is used to determine the likelihood of negative impact on competition. Possible negative impacts identified at this first stage are then subject to a detailed analysis at the second stage. The **Korean** competition authority evaluates the effects on competition and tries to determine how to minimize the negative effects together with recommendations on alternative plans. The **Finnish** competition authority has also drafted a checklist and regulatory impact assessment is a key focus of its competition advocacy work.

Despite the absence of formal competition assessment procedure in **Bulgaria**, the competition authority adopted guidelines in 2009 to be used by policy makers for preliminary competition impact assessment regarding draft acts. The checklist in the guidelines aims to help policy makers identify likely restrictions on competition and alternatives to reach the relevant objective compatible with competition rules. Moreover, the relevant public authority may prefer to ask the competition authority to conduct a detailed impact assessment on competition which may issue non-binding opinions.

Similar to **Bulgaria**, the competition authority in **Singapore** has also issued guidelines on competition impact assessment to help government agencies detect competitive impact of proposed policies under the overall evaluation of policy options at the earliest stage during policy development. The policy makers weigh competition impact against other policy objectives while formulating policy.

In the **US**, although there is no formal competition policy assessment procedure, federal agencies are required to conduct a regulatory analysis for economically significant regulatory actions. Such assessment includes a competition assessment as part of the comprehensive evaluation of the need for the action proposed, alternative options, and benefits and costs involved. Similarly, policy makers consider competitive aspects of legislative and regulatory initiatives, for which the **US** competition authorities may express their opinions on potential impacts.

In **Switzerland**, government authorities assess the impact of the draft legislation according to their field of competence within the framework of department consultation. Conflicting opinions are assessed to find a solution during the consultation.

It is important that certain countries where there is no competition assessment procedure either plan to adopt such a procedure or accept its necessity. For instance, **Russia** considers having a special procedure on competition assessment in various sectors of the economy. In **Slovakia**, new rules to require detailed impact analysis are under preparation. Finally, the **Hungarian** competition authority always emphasises the necessity to conduct competition assessment. For certain draft legislation found in the annual plan of the government, the **Hungarian** competition authority indicates its interest – in advance – that it expects some explanation about the affect on competition of the planned legal solutions.

Only a limited number of jurisdictions (the **Czech Republic**, **Denmark**, the **EU Norway**, and **Turkey**) answered the question whether there is any criterion for balancing competition policy objectives and other policy objectives in competition assessment procedure and indicated that they had no such criterion. For instance, the **European Commission** mentions that the impact assessments, by listing all the policy options according to certain criteria such as effectiveness and efficiency together with their positive and negative impacts, enable the policy makers to consider trade-offs between economic, social and environmental impacts. However, it is emphasised that an impact assessment supports and does not replace decision-making – the adoption of a policy proposal is always a political decision.

Most of the jurisdictions[22] provide that they do not use quantitative techniques in supporting their competition advocacy activities.

As to tools to defend competition advocacy activities such as the quantitative techniques used, **Israeli** competition authority's advocacy work is usually supported with quantitative data. For instance, in the course of promoting a legislative reform to enhance competition in the air transport sector, the **Israeli** competition authority conducted a comprehensive market study that included quantitative research regarding the effect of agreements between airlines on competition. Moreover, in another case, the data collected regarding the price and sales volumes indicated that there was dynamic competition in the book sector and therefore introduction of RPM would limit competition and harm consumers. One proposal to introduce RPM was rejected in the ministerial meeting and another proposal was suspended. The **US Federal Trade Commission**'s report on the negative effects on consumer savings due to state bans on direct shipping of wine into states by suppliers located outside the relevant state was cited by the US Supreme Court in its decision that states violated the US Constitution by such bans.

Some other countries where competition authorities use quantitative techniques are **Spain**, **Finland** (econometrics and competition economics), **Norway** (quantitative econometric techniques used to see how cultural policy objectives developed after slight deregulation of the book market), **Russia** (fair cost calculation -including cost of capital- and benchmarking costs in regulated and competitive sectors) and **France**.

Institutional Setting and the Role of Competition Authorities

Besides mechanisms and tools such as competition assessment dealt with under the previous section, one must consider other institutional mechanisms to ensure the necessary balance if different public policies conflict when regulation, measure and laws are prepared. Some countries such as **Chile**, **Cyprus**, **Germany** and **Norway** explain that they do not have such mechanisms and the **Netherlands** states that its competition authority is not part of the relevant institutional

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[22] **Argentina**, **Barbados**, **Chile**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**, **EU**, **Germany**, **Honduras**, **Hungary**, **Japan**, **Lithuania**, **Mauritius**, **Netherlands**, **Poland**, **Romania**, **Slovakia**, **Switzerland**, and **Turkey.**

process. In **Germany**, any conflict is handled within general administrative coordination involving federal ministries where the competition authority is not represented.

However, in many jurisdictions,[23] the competition authorities are either represented in the relevant mechanisms involving government authorities responsible for draft regulations or are usually allowed to express their opinions during administrative or legislative/parliamentary decision making processes.

Some competition authorities such as those in **Korea**, **Romania**, **Slovakia**, **Hungary** and **Israel** are represented in high level administrative structures or procedures, which are effective in addressing competitive concerns during preparation of policies or legislation.

For example, since 1995 the **Korean** competition authority participates in the State Council, vice ministerial meeting and economic policy coordination meeting, to ensure that the competition perspective is reflected while formulating government policies and that conflicting public policy objectives are addressed. As the State Council is the top policy making body, composed of high level officials such as the president, prime minister and heads of ministries, which reviews important government policies, the presence of the competition authority is of crucial importance to promote competition principles. Moreover, the **Korean** competition authority has the power to review draft bills proposed by the government to the National Assembly, and to address anti-competitive elements in them.

In **Romania**, there is an inter-ministerial working group, which was established upon the initiative of the **Romanian** competition authority to promote competition in the entire economy and ensure primacy of competition legislation over other normative acts. It meets on a monthly basis and performs regulatory impact analysis from a competition perspective. Moreover, the **Romanian** competition authority is represented in preparatory governmental meetings with senior officials and in advisory committees of regulatory authorities with a member of its professional staff to identify unforeseen potential anti-competitive effects of the relevant draft

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[23] **Argentina**, **Barbados**, **Belgium**, **Bulgaria**, **Chile**, the **Czech Republic**, **Cyprus**, **Denmark**, **EU**, **Finland**, **France, Honduras**, **Hungary**, **Israel**, **Japan**, **Jersey**, **Korea**, **Mauritius**, **Netherlands**, **Norway**, **Poland, Romania**, **Russia**, **Singapore**, **Slovakia**, **Spain**, **Switzerland**, **Turkey** and the **US.**

and propose solutions to remove such effects. In **Slovakia**, there is an inter-ministry comment procedure whereby the competition authority may submit opinions and articulate its objections to bills proposed by government. Its views, together with all other views, are published in a website dedicated to this procedure. Moreover, the **Slovak** competition authority is also represented through an advisory role in weekly cabinet meetings where the proposals are adopted. The **Hungarian** competition authority engages in the inter-ministerial coordination and receives the majority of the draft acts and decrees for comment. However, the possibility for its senior staff to participate in meetings of administrative secretaries of state to discuss draft legislation was terminated in the early 2000s. **Israeli** competition authority is also consulted in the ministerial committee chaired by the Ministry of Justice while it discusses government bills that include policy objectives conflicting with those of competition policy.

In some countries such as **Bulgaria** and **Norway**, the relevant public authorities are required to provide explanations in response to views by the competition authorities regarding draft legislation.

For instance, one mechanism in **Bulgaria** enables the competition authority to send its views regarding draft normative acts, which have to be published by the relevant public authority on its website, and the public authority is obliged to explain the rationale in case it does not follow the views by the competition authority. Similarly, the **Norwegian** competition authority is entitled to require the relevant public authority, which asks the opinions of all public and private stakeholders, to explain how competitive concerns have been taken into account.

In the **EU**, **DG Competition** may use its advocacy powers within the **European Commission** during the work of an "impact assessment steering group" or in the course of a subsequent inter-service consultation to verify whether competition assessment for the policy proposal, which should be part of a comprehensive impact assessment, is conducted and whether the proposal does not restrict competition disproportionately. During the process, **DG Competition** may propose amendments to the relevant proposal to alleviate competitive concerns. Moreover, it is compulsory to consult **DG Competition** by way of an inter-service consultation in case a policy proposal prepared by another DG may impact on competition. It should be said that although a negative opinion expressed by **DG Competition** may not block a policy proposal, it can put

significant pressure on the relevant DG to amend the proposal. Similar to compulsory nature of consultation to the **DG Competition** in case a policy proposal impacts on competition, the **Polish** and **Spanish** competition authorities have to be consulted by other government authorities in case draft legal acts may effect competition.

In **Switzerland**, special commissions are created by the Federal Council to prepare legislative drafts. The commissions are attended by experts from government and other interested parties. The drafts prepared are later examined by the responsible department, the federal council and the parliament. The process aims to balance different public policy objectives and the **Swiss** competition authority is also represented in the process.

Finally, the **Bulgarian** competition authority chairs the working group on competition policy responsible to draft legislation to align with the *acquis communautaire*, and it is also represented in other working groups whose work may be relevant to competition.

Except for jurisdictions like **Chile**, the **EU**, **Honduras**, **Hungary**, **Lithuania**, **Romania**, **Russia** and **Spain**, in most of the respondent jurisdictions,[24] the competition authorities do not have powers to challenge regulations or laws in court.

In **Lithuania**, the competition authority may file a suit in court against non-compliance by the government authorities with an opinion of the competition authority requesting repeal or amendment of relevant acts as incompatible with the competition act except for the normative acts of the government.

Chile's competition authority may file a suit in a special court. For example, the court ordered the telecommunications regulator to reduce final consumer switching costs, which prevented telephone companies from offering their service in their competitors' phone units. Moreover, it recommended that the regulator order mobile phone companies to make open offers of wholesale facilities for resale, in order to develop a retail mobile phone market. In another ruling, it issued

[24] **Argentina**, **Australia, Barbados**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**, **France, Germany**, **Israel**, **Japan**, **Jersey**, **Korea**, **Mauritius**, **Netherlands**, **Norway**, **Poland**, **Singapore**, **Slovakia**, **Switzerland**, **Turkey,** and the **US** (except in unusual circumstances).

several suggestions about the optimal voice-over-internet service regulation, aimed at ensuring free competition.

The **European Commission** is empowered, for instance, to challenge a Member State in front of the European Court of Justice if that Member State facilitates anti-competitive conduct that is contrary to the Treaty on the Functioning of the EU.

The **Russian** competition authority may file suits against statutory legal acts or non-normative acts of public authorities such as federal executive authorities in case they contradict the competition act with the possibility for partial or total invalidity of the relevant act.

The **Hungarian** competition authority may file a suit in the constitutional court in case an act or decree, which was already in force, violates free competition according to the act of the constitutional court. This option was used only once in 19 years.

In **Spain**, the competition authority is legally authorised to bring actions before the competent courts against administrative acts and regulations which cause unnecessary or disproportionate obstacles to competition.

The **Swiss** competition authority argues that as it participates in the legislative process with the possibility of avoiding any conflict with the competition policy objectives, there is no need to challenge regulations in court.

In some countries such as **Switzerland**, **Bulgaria**, **Slovakia**, **Russia, Hungary**, and **Spain,** the competition authorities may either ask the relevant government authority (including municipalities) to repeal or amend anti-competitive regulations or decisions or may initiate proceedings as part of their regular enforcement powers.

For example, the **Swiss** competition authority has the powers to ask cantons or municipalities to amend anti-competitive rules and conduct. Similarly, although the **Bulgarian** competition authority can not challenge laws or acts in court, it may ask the relevant authority to repeal or amend acts distorting competition. Despite a lack of power to challenge laws in court, the **Slovak** competition authority can challenge regulations by state administrative bodies and municipalities

and impose fines in case they restrict competition. During the relevant proceedings the competition authority makes assessments whether the particular policy objective such as environmental protection could be achieved by less restrictive means. The courts have upheld the approach by the **Slovak** competition authority that the state administrative bodies and municipalities should respect competition rules. For example, in one case where the municipality restricted consumer choice in the supply of heating services, the **Slovak** competition authority intervened and argued that the relevant policy objectives including environmental protection could be achieved without violating competition rules, and this position was upheld in court. Moreover, the **Russian** competition authority may also cancel the anti-competitive decisions of public bodies, although the authority's decisions are subject to appeal in court. Similarly, the **Hungarian** competition authority may ask the municipalities to amend or withdraw a decision that infringes competition rules within one year of its entry into force. In case of non-compliance, the competition authority may ask the court to review the relevant decision of the municipality, except where such review of the decision is excluded by another law. Finally, the **Spanish** competition authority may issue reports on sectors which may include proposals for the introduction of more competition and even proposals to remove or amend laws and regulations; and reports on the action of the public sector and on the obstacles to competition resulting from the application of laws and regulations, which may also include recommendations to amend or remove such laws and regulations.

Challenges for Competition Authorities

The competition authority of **Mauritius** indicated that the competition authorities should refrain from balancing competition policy objectives, and other policy objectives and focus on promotion of competition if they do not want to risk their credibility as independent authorities. The competition authority argues that independence may be compromised if competition authorities take into account general policy objectives other than competition policy objectives. The balancing exercise should be left to the discretion of the legislative bodies. The Mauritanian response indicated that focusing only on competition objectives is particularly important in developing countries where there may be limited awareness of competition and independent authorities generally, and where there may be a certain prejudice against institutional decisions

sometimes mainly for political reasons.

Similarly, the **US** competition authorities do not balance competition policy objectives and other policy objectives. They analyze only the impact on competition caused by the legislative or regulatory proposal. In answering the question about developing countries in particular, the **US** response recognized that developing countries faced particular difficulties and challenges, but the agencies indicated that they do not believe that these factors should affect the substance of competition advocacy filings. Indeed, in countries facing major developmental challenges, it may be particularly important for competition authorities to advocate in favour of pro-competitive policies that benefit consumers who may not have another advocate.

The **Korean** competition authority contends that in developing countries policy makers and market players are suspicious of the competitive market economy, which may not be the case in developed countries. Therefore, it is likely that policies and regulations incompatible with competition principles will remain in force. The Korean economy achieved significant growth in the 1960s and 1970s as a result of intense government intervention in the economy in the form of support to strategic industries and firms operating in these industries. However, when such measures began to distort the market and create monopolistic structures, attempts to introduce a competition act failed due to a lack of awareness of the benefits of competition policy and opposition from the business community, which argued in favour of some other objectives such as strengthening national champions, accumulating corporate capital, and increasing supply. Although the Monopoly Regulation and Fair Trade Act was introduced in 1981 and the **Korean** competition authority began to enforce it at that time, the real awareness of the need for competition principles became apparent during the 1997 Asian financial crisis. As market operators were heavily dependent on state support, they could not cope with changing economic conditions. A resulting outcome was economic restructuring based on market principles, an effort led by the **Korean** competition authority. Competition policies and enforcement of competition rules were strengthened as a result of the opportunity offered by the crisis. It was the market system and competition policies that enabled Korea to overcome the economic recession in a short period of time. The **Korean** competition authority is of the opinion that the lessons experienced by Korea prove that competitive principles should be adopted and competitive

policies should be developed as early as possible for a successful and long term economic development, contrary to the suspicions of these principles in some developing countries.

Although the **Belgian** and **Czech** competition authorities claim that they faced no challenges, various challenges have been mentioned by some other competition authorities in balancing competition policy objectives and other policy objectives in their competition advocacy activities. For instance, the **Bulgarian** competition authority cites lack of a competition culture and, as an effective solution, a long term and dedicated approach to improve it. Similarly, the **Polish** competition authority also cites how lack of a competition culture caused negative reactions towards its efforts to convince the ministries to follow policies favouring competition and adopt pro-competitive solutions, and to explain to consumers that predatory prices could be harmful. The competition authority in **Honduras** considers heavy intervention of the state in the economy, which is frequently seen in developing countries and, as a possible solution, discussion with the government and the congress to abolish or amend laws restricting competition. Similarly, the **Russian** competition authority thinks that the presence of state or municipality-owned corporations endowed with some preferential treatment (such as exclusive rights and certain exemptions to the disadvantage of private firms, and state functions) is an important challenge, the effects of which could be alleviated by some measures such as increasing competition oversight, stripping such corporations of their state functions, an equal competitive environment, and privatisation. The need to promote competition in addition to its protection during economic transformation in transition economies is another challenge mentioned by the **Romanian** competition authority with the solution to allocate vast resources on competition advocacy, such as review of existing legislation and legislative drafts, and activities to promote a competition culture.

Chile considers it a challenge to create a formal institutional mechanism to perform competition assessments and balance competition objectives against other public policy objectives. The **Turkish** competition authority argues that the absence of compulsory mechanisms requiring relevant administrative and legislative organs to consult the competition authority regarding draft legislation or policy texts which may impact on competition is an important challenge.

The competition authority in **Barbados** is of the opinion that lack of information or data is the

main difficulty in the balancing exercise, and this prevents a complete assessment of other policy objectives. The competition authority is of the opinion that it is likely that this could be common in developing countries and capacity building could be a way to overcome the difficulty.

The **European Commission** thinks that the major challenge in balancing competition policy objectives and those of other public policies is the ability to demonstrate to other stakeholders in decision making process that pro-competitive solutions facilitate rather than jeopardize achievement of other policy objectives. Presenting competition policy as a "supporting policy" may be helpful to establish legitimacy and may contribute to the success of advocacy activities. Similarly, according to the **Israeli** competition authority, balancing competition policy objectives and other policy objectives is a challenge frequently faced by the competition authorities which have to convince other authorities that promotion of other policy objectives should not necessarily disregard competition and consumers. Based on its own experience, the **Israeli** competition authority's view is that solid quantitative data generally makes competition advocacy more effective.

According to the **Japanese** competition authority, close relations and coordination between the competition authority and other public authorities may ensure compatibility of other policies with competition policy objectives. Similarly, the **Spanish** competition authority thinks that improving coordination and formal and informal relations with public authorities could make advocacy activities of competition authorities more effective, as it is always a challenge to convince the law makers that they should not institute unnecessary obstacles to competition.

The **Slovak** competition authority thinks that the main difficulty it is facing is the attitude of the government to take political decisions instead of following expert opinions. The main difficulty faced concerning conduct by state administrative bodies and municipalities is the fact that the competition authority needs to take into account other legislation such as sectoral rules or environmental protection rules while deciding whether the same objective could be achieved by less restrictive means. However, this challenge is not different from the necessity to have knowledge of different sectors of the economy in deciding ordinary cases. The ability to impose fines against state administrative bodies and municipalities proved to be a good solution, as prior to May 2004, this was not possible, leading to non-compliance with the decisions of the **Slovak**

competition authority.

The **Danish** competition authority is of the view that the financial crisis is a challenge especially regarding mergers. **Danish** competition authority has, however, stressed the importance of not weakening competition policy at times of crisis. Similarly, the **Polish** competition authority mentions calls for lenient treatment during times of economic downturn, with rising protectionist approaches and political interventions that the competition authorities should resist.

Finally, formulating a stakeholder strategy to promote competition policy objectives and emphasise consumer benefits is seen as an effective solution to the challenges faced by **Finnish** competition authority regarding competition advocacy. Similarly, the requirement in the Lithuanian competition law that public authorities should ensure fair competition while regulating economic activities has proved to be very efficient in the **Lithuanian** case.

CONCLUSION

Although the responses sometimes focus on a narrow enforcement-specific meaning of implementation of competition law (perhaps because enforcement constitutes the main or the exclusive field of responsibility of many of respondent competition authorities), competition policy has a wider meaning covering all government measures having an impact on the conditions of competition in the marketplace.

Questionnaire responses indicated that promotion of competition, economic efficiency, and increasing consumer welfare are the main common objectives of competition policy in all jurisdictions. Some other public objectives, mainly based on the public interest notion, are also considered by some jurisdictions in the design of competition policy. However, it can be argued that promotion of competition is the pivotal concern in almost all jurisdictions. It is understood from the responses that, although competition authorities have a decisive role in the design of competition policy in some jurisdictions, relevant ministries of the government or legislatures are the main designers of competition policy in most of the jurisdictions.

Responses indicate that the interface between competition policy and other public policy objectives is a complex and difficult subject, perhaps explaining why there is not a clear common

understanding on the subject among respondent jurisdictions.

The questionnaire aimed to survey the interface between competition policy and other public policies by focusing on the role of competition authorities in competition law enforcement and competition advocacy activities.

As to competition law enforcement, in most of the jurisdictions, there are some exceptions and exemptions from the competition laws mostly caused by some other public policies and for the sake of the public interest. Moreover, it is seen that other public policy objectives such as environmental protection and employment concerns are taken into account in some jurisdictions by the competition authority or the relevant governmental authority especially in merger cases. Responses also suggest that undertakings concerned sometimes claim other public policy objectives, and point to the involvement of other public agencies to justify their anti-competitive conduct. However, it appears that that those defenses are not generally accepted by competition authorities.

As to competition advocacy activities, competition authorities, regardless of the presence of statutory powers, conduct advocacy activities. Submitting opinions, whether solicited or unsolicited, on draft legislation is the most common advocacy tool employed although the timing of consultation, the compulsory or non-compulsory status of the consultation, and the degree of bindingness of the views expressed differ to a significant extent across jurisdictions. A system requiring consultation with the competition authority for draft legislation and regulation can help ensure access for the competition authority to the legislative and regulatory process. A direct relevant factor complementing the advocacy powers of the competition authority to ensure pro-competitive regulations is the power to go to court to annul anti-competitive regulations, which is available in some countries. Some competition authorities may even directly challenge certain anti-competitive regulations or in some cases decisions adopted by some administrative bodies, or ask them to repeal or amend them.

In policy making and in the legislative process, there may naturally be a need to consider various policy objectives, especially during the preparation and adoption of a policy or legislation. Whereas some competition authorities consider other policy objectives in addition to competition

in some circumstances, other authorities assert that they should follow only competition policy objectives. Although competition authorities have a say in nearly all jurisdictions during the stage of policy and decision making, their views are not always followed and there may neither be explicit rules nor criteria to balance conflicting policy objectives or decide which policy objective should prevail. Participation in high level administrative structures or procedures, such as ministerial meetings, may be important in allowing competition authorities to promote more competitive options for the design of policies or legislation. It could also be valuable if the relevant government authority has to explain which policy concerns are taken into account, and provide a rationale for not complying with the views expressed by the competition authority, as is the case in few countries.

Although the majority of the respondents have no formal competition assessment procedures, responses indicate that competition assessment is or could be valuable to identify competitive concerns in draft legislation and regulation and to propose alternatives that will satisfy the policy objective with the least negative impact on competition. In some jurisdictions with no formal mechanism for competition assessments, the competition authorities adopt some guidelines on competition assessment or plans are underway to initiate such mechanisms. Some countries support use of quantitative techniques, which could strengthen the views of the competition authorities, although the majority of the replies indicate that no use of such techniques exists.

Finally, while advocating competition policy objectives, competition authorities face various challenges or difficulties in advocating for pro-competitive policy or legislation. Challenges identified include: lack of a competition culture among government authorities and the public, presence or intervention of the state in the economy, difficulty in convincing the administrative or legislative organs that competition does not have to be in conflict with other policy objectives (and that competitive solutions could be found without compromising other policy objectives), the absence of compulsory mechanisms to make relevant administrative and legislative organs consult the competition authority regarding draft legislation or policy texts which may impact on competition, calls for lenient treatment during economic crises, the absence of formal institutional mechanisms to conduct competition assessments and to balance differing objectives.