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Enhancing a Culture
Favorable to Competition

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I. INTRODUCTION: SUPERMARKETS UNDER THE SPOTLIGHT

The enactment of a competition law and creation of a competition authority are important elements to ensuring successful operation of economic markets, with businesses vying for the patronage of purchasers through rivalry between their product and service offerings. But the mere existence of an enforced competition authority will not alone set the groundwork of economic competition needed for generating a successful market economy. What is needed is to establish a competition culture, which can be defined as a set of attitudes and beliefs, by the many economic actors that support market outcomes constrained by limits on market power.

The difficulty in establishing a competition culture is not only because of the practical difficulties of enforcing a law—for example, because detecting a violation is difficult or because the number of violations is much higher than the capacity to prosecute them. The challenge is much deeper and more fundamental, lying in standardized forms of interaction and beliefs that may create a culture of ambivalent or hostile attitudes and practices towards competition. In countries that have newly created competition authorities, the challenge of creating a culture in favor of competition can be substantial. While laws may change overnight, traditional behaviors by business operators are unlikely to change with the same speed. Even in countries with a long history of competition law enforcement, values supporting competition can be lacking—not only in the general public,² but also among skeptical parliamentarians.³

There are a variety of factors mitigating against competition culture, including select societal values, economic rewards, and habits pre-dating competition law. For example, with respect to societal values, from a young age children are taught the benefits of cooperation. For adults, the long-held positive mental associations for cooperation may easily be extended to cartel activity, which is simply one form of cooperation, however nefarious. Even childhood

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² A survey in the United Kingdom found that only 6 in 10 people felt that price-fixing was a serious offense. See Andreas Stephan, *Survey of public attitudes to price-fixing and cartel enforcement in Britain*, 5(1) COMPETITION L. REV. 123-145 (2008).

³ Under the United Kingdom's Enterprise Act 2002, s.188, an individual is guilty of the criminal offense if he or she "dishonestly agrees with one or more other persons to make or implement, or to cause to be made or dishonesty requirement leads to few cases being brought due to the difficulties in proving that price fixing is subjectively dishonest." See Andreas Stephan, *How Dishonesty Killed the Cartel Offence*, 6 CRIMINAL L. REV. 446-455 (2011).

games may encourage anticompetitive behavior, with one notable example being the game Monopoly® in which the objective is to accumulate geographically local monopolies of hotels and the winner is often the one who has accumulated the most monopolies.

Economic rewards provide further reinforcement to the natural attractions of anticompetitive activities, by making anticompetitive behaviors profitable for the businesses involved. Habits that restrict competition, sometimes pre-dating the establishment of competition law, may also be difficult to change. Businesses and regulators may establish regimes that do not place pressure on businesses to compete aggressively and, even when competition law is understood by business operators, if fines and other penalties are too low, they will not effectively deter anticompetitive activity.⁴

This paper presents a framework of how to promote a more pro-competitive culture by considering different constituencies, what their strengths are, and how to reach them. It is not intended as a complete or comprehensive guide, but as a framework by which key actors can organize strategies, by which useful tools can be identified for different groups, and by which examples of successful competition advocacy can be classified. Tools are identified that can be useful in furthering a pro-market attitude in different communities.

An underlying theme of this discussion is that communication, personal relationships, and quantitative estimates all have an important role to play. The paper concludes by noting that it would be useful to develop measures for the level of competition culture by constituency to help identify the level of competition culture in different countries.

II. CONSTITUENCIES

The question of how to create and enhance competition culture is thus one of broad interest for those who believe in market solutions to the economic problem of producing goods and services and allocating them. This paper outlines a broad array of constituencies for competition culture and then identifies tools that can promote culture with these drivers, laying particular emphasis on the needs of constituencies, the roles they can play, and the tools for activating them.

The thesis of this paper is that competition culture is most effectively promoted by focusing on particular constituencies—their needs and interests—and relevant tools for increasing competition culture within those constituencies. It is worth noting that the same tool, such as studies showing the benefits of competition, can often be of use to multiple constituencies.

A. General Public

The support of the general public is important for ensuring that competition policy will continue to be respected as a policy priority. Even in countries with market economies, the

⁴ See G. Becker, *Crime and punishment: an economic approach*, 76(2) J. POL. ECON. 169-217 (1968), J. Connor, *Effectiveness of antitrust sanctions on modern international cartels*, 6 J. IND. COMPETITION & TRADE, 195-223 (2006), S. Ennis & S. Kim, *Criteria for setting fines for competition law infringements*, LACF Background Paper, OECD (2013).

general public may be skeptical of the value of competition law. For example, a survey in the United Kingdom found that about 4 in 10 people did not believe price-fixing is a serious offense.⁵

Tools to enhance competition culture with the general public can include:

- childhood and unconventional education tools;⁶
- information campaigns to help consumers identify better deals and lower priced stores;⁷
- the regular presence of the competition authority in the media with positive portrayals and reasonable quotes;
- newsletters by competition authorities that explain cases;⁸ and
- repeated emphasis of the benefits of competition resulting from careful, rigorous and unbiased studies.⁹

One aspect of holding a positive view to market competition is believing that private ownership and management of assets is beneficial. Enhancing the positive societal value placed on private ownership can be an important precursor of competition culture for the general public. One tool that increases support for market actions can be privatizations in which shares are sold directly to the public, thus raising funds for the public purse while ensuring a broad base of interested shareholders.¹⁰

For example, in the United Kingdom, utility privatizations under Margaret Thatcher, such as the British Telecom, Gas, and many other privatizations generally had a trading price of shares on first day of trading that was above the purchase price, so many purchasers had positive financial benefits from their first market investment. Support was built for these privatizations by ensuring that all citizens interested in purchasing shares could do so, while limiting the stake of institutional investors.¹¹ Again under Margaret Thatcher, the sale of state-owned council housing

⁵ See Stephan, *supra* note 2 at 123-145.

⁶ Jamaica's competition authority produced a children's book for distribution in schools with stories illustrating the benefits of competition for ordinary families and children. Singapore's competition authority produced a cartoon book ("manga") illustrating the harms that come from anticompetitive activity.

⁷ In Mauritius, the government introduced a price observatory to help consumers identify those stores that offered the best prices for many products. In the Netherlands, a private individual developed an application to help mobile telephone consumers identify the best calling plans and mobile phone operators, given their calling patterns. In Australia, the government introduced daily reporting of automotive fuel prices by petrol stations, which was communicated to consumers via the internet.

⁸ The Indian competition authority produces a regular bulletin about its work that is presented in a way that is attractive to the general public and which explains cases and other activities of the competition authority.

⁹ Such studies would often be carried out by academics or think tanks; for example, S. Davies, H. Coles, M. Olczak, C. Pike, & C. Wilson, *The Benefits from Competition: Some illustrative UK cases*, DTI Economics Paper 9 (2004).

¹⁰ While privatizations of government-owned assets or companies are frequently controversial, one way to make them less controversial is through extensive distribution of shares to the public, even if for a price.

¹¹ In 1979, when Margaret Thatcher took office as Prime Minister, 3 million Britons owned stock shares while at the end of the 1980s, more than 12 million owned stock shares.

to its current tenants helped to instill a culture favoring private ownership of assets, giving groups that were previously unable to purchase homes an opportunity to purchase their home.¹²

B. Government Officials

Government officials often have a profound effect on the competitive environment via the regulations they promulgate and the decisions they take that impact market operation. Regulation at times has profound and effects on competition—effects that can be beneficial or harmful. Assessing competitive effects of regulations and revising those that unduly restrict competition is an important activity that can lie in the domain of government officials. Governments can develop their own materials for such reviews, potentially basing them on other work including the Competition Assessment Toolkit of the OECD backed up by the 2009 Recommendation of the Council on Competition Assessment. Such material can be used by a center-of-government regulatory impact assessor, a ministry, or a competition agency.

The results of using such a Toolkit can be important for bringing government officials to consider competitive effects while developing their policies. Competition assessment of regulations has been used in a number of countries, including Australia, the European Commission, Greece, Mexico, Romania, Spain, the United Kingdom, and many others. To illustrate, when the European Commission establishes new regulations, these must undergo a comprehensive process of regulatory impact analysis. This process includes a review of competitive effects. When there are competitive effects from a proposed regulation, DG Competition may express its views on the regulation and the final analysis will consider these views. In this example, competition culture is developed through embedding competition within administrative processes of review for all government regulations.

To ensure officials developing policy can consider competition appropriately, useful tools—in addition to embedding within administrative processes—include enhancing technical capacities and establishing clearly approved communication channels. For example, to enhance capacities, training can be provided to those officials with a role in producing regulations. The training can be organized by experts in competition, e.g. from an expert ministry or competition authority.

To establish a communications channel, a useful technique is to establish points of contact between competition authority and ministries that issue regulations affecting competition. The contacts could involve regular meetings or communications between officials from different bodies, enshrined within memorandum of understanding agreements (“MOUs”). Many competition authorities, such as the Irish competition authority, have written MOUs with national regulatory bodies. Such contacts can exist not only between national government bodies but also between a competition authority and state, regional, or local level government bodies.

A subset of government officials that is particularly important to reach is those involved in public procurement. Public procurement at times is marred by bid-rigging that typically has the effect of raising prices paid by government. Ensuring that bid-rigging does not occur helps to

¹² When Council housing was sold via the Right to Buy scheme enabled by the Housing Act 1980, it was offered to current tenants at discounts of 33 to 50 percent below the official valuation, with about 2 million Council homes having been sold to tenants since 1980.

ensure an efficient use of funds by government. Appropriate public procurement policies can (i) avoid pre-selection of the winner through contractual conditions, (ii) prevent advance cooperation between bidders, (iii) ensure that penalties from malfeasance are clear (e.g., certificate of independent bid determination), and (iv) ensure that the operational details of cooperation are more complicated (e.g., uneven bid size, a ban on sub-contracting.)

Tools to reach the community of officials involved in procurement and increase their focus on competition include:

- utilizing the *OECD Guidelines for Fighting Bid Rigging in Public Procurement*, supported by the 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement;
- teaching competition workshops for officials, such as those that occurred in Chile and Brazil;
- embedding competition training in standard training programs for public procurement officials (Brazil, Canada, Mauritius, South Africa, among others);
- engaging in regular high-level discussions;
- requiring bidders to submit certificates of independent bid determination;
- establishing a MOU that allows sharing of information; and
- establishing contact points at an operational level between procurement bodies and the competition authority.

C. Politicians and Legislators

Politicians have a critical role to play with respect to establishing competition law and determining budget levels for the competition authority. While at times in many countries competition law has been a major national political issue,¹³ more generally competition policy has been a background technical issue that does not enter the daily political arena.¹⁴

Three tools for gaining political support are especially useful. The first is studies that show the benefits of competition. In Mexico, an academic performed a particularly interesting study showing that the poorest decile of the population is disproportionately disadvantaged by limited competitive conditions, spending 41 percent of their household budget compared to 37

¹³ One example includes the United States' 1912 election campaign, in which antitrust enforcement was a major topic of the three main candidates (see W. Kolasky, *The election of 1912: a pivotal moment in antitrust history*, 25(3) ANTITRUST (2011).

¹⁴ There are exceptions to this in modern times. For example, in Mauritius, competition law fell within a broad political platform based on "democratising the economy."

percent for the top decile.¹⁵ The ICN Benefits Project identifies further techniques and information for explaining the benefits of competition.¹⁶

A second tool is through occasional private briefings to key politicians about the work of the competition authority, without discussing cases under current evaluation. A final tool is through international policy comparisons that provide a motivation to politicians to keep up with other countries.¹⁷

D. Journalists and Media

Journalists influence general and specialist opinions about many aspects of business, and also influence business people who read their stories. Competition law cases can constitute regular sources of news, so media may assign particular journalists to cover competition law. Competition authority reputations can benefit from positive articles and suffer serious damage from the publication of articles that are damaging to the authority. At the same time, competition authorities can enhance their reputation and ability to perform their job when journalists write positive stories about the work of competition authorities.

Journalists generally have very specific needs, including short timelines, a desire for exclusive stories, and a need for high-level quotes and access. Competition authorities can help journalists to do their job better. Three specific tools that competition authorities can use with journalists include (i) issuing press releases that contain neutral phrasing and are thus appropriate as a source of text for the journalists; (ii) holding press conferences; and (iii) creating a cadre of journalists who are educated about competition law, and consider it to be one of their specialty areas. Further media tools can include competition authority officials writing regular columns and participating in radio and television programs, as in Zambia. The heads of competition authorities can also hold occasional briefings or lunches with reporters to help to ensure more detailed understanding by journalists of competition law.

E. Academic Centers

Academic centers focused on competition can (i) produce studies of domestic policy conditions and consumer impacts of competition, (ii) provide education, and (iii) train researchers. A tool for promoting such centers is the provision of government financial support.

For example, in The Netherlands, the Ministry of Economy partially financed the Amsterdam Centre for Law and Economics, which was created as a result of a competition between universities to receive a grant from the Ministry in 2003. This institution, which brought together law and economics faculties, is still providing workshops, serving as a center for

¹⁵ See C. Urzua, *Distributive and regional effects of monopoly power*, 22(2) *ECONOMIA MEXICANA NUEVA EPOCA*, 279-295 (2013).

¹⁶ According to the Advocacy Working Group Workplan for 2012-2013, "The Benefits Project seeks to provide ICN members with knowledge, strategies and arguments for explain the benefits of competition to support their competition advocacy efforts with government and non-government stakeholders."

¹⁷ Particularly when competition laws are being re-written, legislators or ministers and their staff may be interested to know international best practices, which can be provided by many routes, including through international organization such as the OECD and UNCTAD.

competition-related research, and its faculty promote their ideas in national debates of relevance to competition.

In the United Kingdom, the Centre for Competition Policy at the University of East Anglia, partially funded by a grant from the U.K.'s Economic and Social Research Council, provides extensive research and advice on competition that is grounded in public policy questions and needs.

F. Law Schools

One of the greatest challenges for enforcing competition law in countries with a new law is the lack of legal professionals with a specialization in competition law. Law schools can play an important role in helping to train the legal professionals of the future, ensuring a long-run supply of legal professionals with the appropriate expertise.

The offering of at least one competition law course can yield substantial benefits over the long run. Given the absence of domestic experience with competition law, such a course may potentially focus on international experiences with competition law. Of course, offering such courses requires that law schools have professors with the expertise to teach such a course. One technique for achieving this is to send a law professor overseas for a six-month or one-year fellowship during which they would take competition law courses and prepare research in that area while interacting with established legal experts in this area of the law.

G. Competition Bar

National lawyer associations can spread experience and training in competition law to practicing professionals. This can occur, for example, by organizing workshops or seminars, ideally as part of on-going professional training requirements. The American Bar Association has been a leader in developing expert materials and running topic-specific and general meetings for its members, due to the work of the Antitrust Section.

While the Antitrust Section may do excellent work, many countries do not have the core size of practitioners needed to make such a specialist bar successful. Nonetheless, the general lawyer association can still play a useful role in promulgating awareness of competition law as a practice area.

A particular challenge in small countries may be to convince successful practicing lawyers to add a new specialty of competition law, or to convince new lawyers to specialize in an area where they cannot practice full time and do not know whether they would have any clients. One tool to overcome a reluctance by practicing lawyers to invest in competition law is for the lawyer association to organize workshops that provide continuing legal education credits, a particularly strong incentive in those countries that have a requirement for such on-going professional training.

H. Judiciary

The judiciary clearly plays a key role in determining competition law enforcement outcomes. Unlike lawyers dealing with competition law cases, judges are unlikely to be experts in competition law, unless specialist courts have been created. The purpose of activating competition culture among judges is not to make judges decide cases in favor of competition

authorities, but rather for them to engage with the concepts that would be used in competition law cases in advance of dealing with their own first competition law case.

A useful tool for engaging with judges is workshops, often under the aegis of a judicial network. Law schools, law professors, and judicial organizations are in a strong position to advocate or propose relevant workshops. For example, Mauritius started a training center for judges and barristers known as the Institute for Judicial and Legal Studies, headed by a judge for the Supreme Court. The Institute sponsors workshops for judges as well as for barristers. Also, a number of workshops on European competition law for national judges have been held at the OECD-GVH Regional Centre for Competition.

I. Business

The crux of market competition is to ensure that businesses effectively compete with each other. The transformation that may be necessary as a business community adapts to a new legal framework can be difficult and slow. Sudden changes in policy such as the application of competition law need time to seep through to business. However, competition authorities can help the process along.

For example, in Australia, when the competition authority began considering actions in the health sector, brochures explaining how competition law could apply to health practitioners were prepared and distributed. Speeches were given along with workshops for the affected medical practitioners and managers. These actions laid down a clear set of signals to indicate which business behaviors were appropriate, and which were not. Placing these signals in advance ensured that business would have time to adjust to a new legal environment, and adjust their dealings accordingly, prior to any competition enforcement.

J. Business Associations

Business associations such as national Chambers of Commerce and specific trade associations can be important for spreading information about competition law to businesses in a form that is understood and respected by business people. One example of recent work that can be valuable to companies is the compliance toolkit prepared by the International Chamber of Commerce Commission on Competition.¹⁸ The design of this toolkit benefited from the experience of large companies, but it is designed to provide help and guidance on competition law compliance to medium-sized companies as well.

Business associations can serve as valuable conduits for educating the business community and answering questions of business operators in a cost-effective manner. Another example of recent work is the book on competition law in Mauritius published by the Mauritius Chamber of Commerce and Industry, providing competition law guidance to business operators in ordinary language, with practical, illustrative examples from countries with a longer experience of competition law enforcement.

¹⁸ The ICC Antitrust Compliance Toolkit “seeks to complement materials produced by antitrust agencies and other sources of guidance, by focusing on practical steps companies can take internally to embed a successful compliance culture.” See <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/>.

K. Consumer Associations

Consumer associations may represent a diverse set of interests and, at times, receive their funding from governments, making the interest group they represent particularly disembodied. Consumer associations typically claim to represent the interests of consumers as purchasers. Some associations validate these claims by preparing journals with buying advice (to name just a few—*Which?* (United Kingdom), *Que Choisir* (France), *Consumer Reports* (United States)) as well as by delivering reports and testimony to government or appearing in the media.

Consumer associations can be powerful promoters of a pro-competition agenda, particularly by shining the light on anticompetitive behaviors in a vocal, attention-getting way that would be unseemly and inappropriate for a competition authority. Consumer associations can also serve as an excellent source of complaints and leads. Particularly when complainants are reluctant to come directly to the competition authority, consumer associations can play a particularly important role as an intermediary. One tool for activating consumer associations is illustrated by the U.K. process whereby a consumer association can call for an investigation via a legislatively defined “super complaint.”¹⁹

III. KEYS TO SUCCESS

Competition agencies are by no means the only motors for enhancing competition culture within particular constituencies, but they can be one of the most important. Another key motor can be the ministry responsible for competition policy. A third motor is people from within the constituencies themselves who are interested in competition policy. Whatever the motor, communication and quantitative estimates can play a critical role when competition agencies seek to reach key constituencies to promote stronger competition culture.

Creativity is a valuable element of communication. The Competition Commission of Mauritius, for example, held a “Competition Week” in 2011 in which three events were held, each one targeting a different constituency and with different content. One event was for university students to raise law students’ and economics students’ awareness of competition law and policy; one was primarily for business people; and the last one was for professionals, notably those with expertise in legal and economic analysis. While the three events were all targeted at relatively narrow audiences, news about the events, including from a press conference held the week before, ensured that the competition authority was in the news repeatedly over a two-week period.²⁰ The competition week raised awareness of the value of competition among the general public.

Quantitative estimates can be particularly important for showing politicians, government officials, and the general public that competition matters and for explaining the mechanisms that ensure it matters. The Competition Commission of Mauritius estimated that, after entry of new

¹⁹ The super-complaint power was first used by the U.K.’s *Which?* to call for an investigation of private dentistry in 2001.

²⁰ One rule of thumb from the advertising business is that in order to have lasting impact on an individual, an advertising campaign should reach that individual multiple times within a month. One impact of the Competition Week was that many individuals did have three or more impressions of the competition authority over a period of two weeks, either from watching the evening television news, reading the daily newspaper, or listening to the radio news.

brands following a Competition Commission decision that eased entry of new block-processed cheese brands, prices for incumbents fell by 4.5 percent. Further, given that new brands adopted lower price strategies, the lowest price available fell by 14 percent, yielding projected consumer benefits of U.S. \$4.6 million to \$21 million.²¹

IV. CONCLUSION

In order to create a competition culture, many different constituencies need to understand those aspects of competition law and policy most appropriate for them. It is unrealistic to expect that all members of society would be in favor of competition. For example, officials from self-interested companies that benefit from regulations that restrict entry by other companies will likely advocate against competition, at least in their domain. Professional groups may likewise seek to create professional rules that enhance scarcity of professional services and enhance professional incomes, at the expense of their clients. Companies involved with cartels could be expected to advocate against effective cartel laws and against effective enforcement.

The fundamental challenge of the political economy of reform is often stated as the fact that benefits from reform are diffuse while costs of reform are concentrated. Achieving a stronger competition culture can help to give more strength to the diffuse interests by creating recognition of the bias of certain lobbies and the harm they may cause.

The level of competition awareness among the general public, media, and politicians may be important for winning overall support for competition policy and competition law. In any given constituency, universal awareness and understanding of how competition works and how market power can be abused are not essential. Pragmatically, there are people in each constituency who will be more important than others. For example, among the judiciary, judges who decide on competition law case outcomes will be more important to reach than judges who might never decide on outcomes, such as judges who are specialized in family law. Among journalists, those reporting on business affairs can be important, while those reporting exclusively on politics or sports will not be important.

This paper has sought to provide a framework for developing strategies that promote competition culture. In order to enhance the monitoring of effectiveness of such strategies, it would be valuable to measure different facets of competition culture to measure success in achieving a competition culture among the relevant people in each constituency. Even countries with long histories of market economy operation may come out with weaknesses in some respects. Identifying weaknesses and strengths in competition culture can then be a first step to developing a strategy to achieve and enhance competition culture.

²¹ See, *Evaluation of CCM Case: IBL Consumer Goods Sales Contracts with Retail Stores*, CCM Report, (November 18, 2011).