

ASIA PACIFIC: OPPORTUNITIES & CHALLENGES – A GLOBAL CALL FOR COMPETITION POLICY



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ASIA PACIFIC: OPPORTUNITIES & CHALLENGES – A GLOBAL CALL FOR COMPETITION POLICY ADVOCACY

By Pradeep S. Mehta



BIG DATA MARKETS AND COMPETITION LAW IN ASIA

By Vivek Ghosal



THE COVID-19 TAKE-OFF OF COMPETITION ADVOCACY IN ASIA PACIFIC

By Ruben Maximiano, Wouter Meester & Leni
Papa



AUSTRALIA'S MERGER CONTROL REGIME: EX POST MERGER REVIEWS, CONTINUED PUSH FOR RADICAL CHANGES TO MERGER CLEARANCE PROCESS, PROPOSED SECTOR SPECIFIC RULES

By Kirsten Webb



REGULATORY HUMILITY: SHOULD LEGISLATORS RETHINK PLANS TO OVERHAUL ONLINE MARKETPLACES?

By Bruce Gustafson



RECENT DEVELOPMENTS IN COMPETITION POLICY IN JAPAN

By Toshio Dokei, Hideo Nakajima & Takako Onoki



MOBILE ECOSYSTEMS: COMPETITION AND TRANSPARENCY

By Yusuke Zenny



COMPETITION POLICY AND START-UPS IN INDIA

By Dhanendra Kumar & Abir Roy



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Recognizing the economic opportunity and potential Asia-Pacific countries offer, the present article seeks to leverage competition advocacy tools for building and strengthening competition culture in particular and overall socio-economic improvement, as a whole. The second section of the paper highlights a few Asia-Pacific region-specific illustrations of such competition advocacy tools, before segueing into the fundamental role a competition policy can play. Lastly, the challenges faced by developing countries which have to be considered before incorporating the advocacy tools are highlighted. The article is a global call for the incorporation of active competition advocacy in Asia-Pacific regions.

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The Asia-Pacific region presents multiple opportunities as global supply chains are heavily dependent on it and in fact, now forms the center of gravity of the global economy.²

In economic terms, this region accounts for almost 37 percent of the world's Gross Domestic Product ("GDP"), at purchasing power parity³ and being the largest regional economy, it is estimated to account for more than half the world's GDP.⁴ Moreover, with the recent Regional Comprehensive Economic Partnership ("RCEP") of the Asia-Pacific, the trade effects are estimated to spiral by approximately two percent, i.e. to the tune of nearly USD 42bn.⁵

Since the region comprises diverse dynamic, transiting and developing economies which have been the frontrunners of global growth, an understanding of the competition landscape and economy at large of the Asia-Pacific region provides a strategic assessment of the roadmap for global growth and development.

I. BRINGING IN A COMPETITION ADVOCACY LENS

Competition in a nation's economy is of great importance in the functioning of the market economy.⁶ The agility of the competition landscape is in fact an important determinant, which effectively gauges the growth potential of a nation, more so, in times such as these.

Especially in the aftermath of COVID-19, advocacy by competition authorities came handy for crisis management.⁷ Even otherwise, amidst the dynamism in the market behavior and new-defined goals of business communities, it has been recognized that competition advocacy is required since it strengthens the competitive environment without enforcement measures⁸ and seeks to create and develop active cooperation among stakeholders in the economy while focusing on increased cooperation on a macro level.

Furthermore, for transition economies, this necessity for competition advocacy increases multi-fold since a competition culture needs to be nurtured in them. In such economies, the propensity of a sense of biasness towards the government enterprises or state-owned enterprises ("SOEs") is higher since the boost of private participation is only a recent phenomenon. Additionally, there is a possibility that the law of the land may not be able to effectively cover the ever-changing needs of the regulatory landscape under its ambit. Not only this, the advocacy function of competition regulators also serves as a check on the enforceable competition regime of a country.

As has been highlighted by Timothy Muris, "[p]rotecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel. A system that sends private price-fixers to jail, but legalizes government regulations to fix prices, has not completely addressed the competitive problem. It has simply dictated the form that the problem will take."⁹

Commenting on the role of the competition regulator to this end, a World Bank-OECD report states that:

"The competition office, therefore must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace."¹⁰

2 The growing importance of the Asia-Pacific region, Speech by Jean-Claude Trichet, available at <https://www.ecb.europa.eu/press/key/date/2008/html/sp080225.en.html>.

3 The growing importance of the Asia-Pacific region, Speech by Jean-Claude Trichet, available at <https://www.ecb.europa.eu/press/key/date/2008/html/sp080225.en.html>.

4 The future of Asia: Asian flows and networks are defining the next phase of globalization, McKinsey Global Institute, available at <https://www.mckinsey.com/featured-insights/asia-pacific/the-future-of-asia-asian-flows-and-networks-are-defining-the-next-phase-of-globalization>.

5 Asia-Pacific partnership creates new "centre of gravity" for global trade, UNCTAD, available at <https://unctad.org/news/asia-pacific-partnership-creates-new-centre-gravity-global-trade>.

6 Competition and Economic Growth: An Empirical Analysis with Special Reference to MENA Countries, available at <https://meea.sites.luc.edu/volume16/pdfs/Gomaa.pdf>.

7 UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

8 Competition Advocacy: Soft Power in Competitive Policy, available at <https://www.sciencedirect.com/science/article/pii/S221256711300141X>.

9 Competition Advocacy as a Tool for Promoting Competition Culture and Combating Public Restraint: The Case of Pakistan, Joseph Wilson, Competition Commission of Pakistan, CPI Antitrust Chronicle, Competition Policy International Aug 2014(1).

10 The World Bank, OECD: A Framework for the Design and Implementation of Competition Law and Policy, Chapter 6, at 93, 1998.

Therefore, while it is important to have advocacy and awareness on competition, it is equally imperative to have robust competition policy advocacy in place, which includes opinions and recommendations of regulators, rule-makers and the public at large as shown in the figure below. While these terms may seem to be similar, in terms of scope, they differ significantly.

Graph 7 Competition Policy: Enforcement and Advocacy.



Figure 1: The Interplay of Advocacy

Source: International Competition Network, Advocacy Working Group¹¹

In fact, competition advocacy is regarded as one of the most useful tools for the spread of a competition culture.¹² A note by the UNCTAD secretariat highlights that competition advocacy entails:

“(a) promoting a competitive environment, (b) advising Governments and public bodies on legislative and regulatory frameworks and (c) raising awareness of the private sector and civil society on the benefits of competition for consumer welfare, economic growth and sustainable development.”¹³

Therefore, the scope and contours of competition advocacy are much broader than enforcement of competition law or merely raising awareness regarding the need for competitiveness in an economy. Granular and specific activities for each of the aforementioned sub-parts must be carried out to meet the objective of competitive advocacy effectively.

This article seeks to investigate the good practices of jurisdictions in the Asia-Pacific region, thereby drawing comparatives and highlighting success stories in the domain of competition advocacy.

II. PEEKING INTO JURISDICTIONS

There is no set and concrete method of carrying out competition policy advocacy. On a global scale, all jurisdictions follow differing principles and forms of advocacy. While some jurisdictions have set out objectives and clearly defined provisions to this effect, there are many jurisdictions which fail to recognize the concept altogether and have not incorporated any explicit competition advocacy provisions.

Countries such as Afghanistan and India make specific references to competition advocacy in their respective competition regimes. In Section 16 of the Draft Afghanistan Competition Act, 2011¹⁴ and Section 49 of the Indian Competition Act, 2002¹⁵ it is explicitly mentioned that

¹¹ Advocacy and Competition Policy, International Competition Network, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

¹² UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

¹³ UNCTAD, Competition Advocacy during and in the aftermath of the COVID-19 Crisis available at https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

¹⁴ Available at <https://cupdf.com/document/afghanistan-competition-act.html>.

¹⁵ Available at https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

the competition regulator shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training on competition issues. In the Report of the Working Group on Competition Policy in India, it was recognized that there is need for competition advocacy, influence, and government intervention outside the ambit of competition law since even non-competition developments have a profound impact on the state of competition in an economy.¹⁶

Another trend widely followed by countries is conducting sectoral competition assessments in the form of formal market studies. Market studies can assess whether competition in a market is working effectively by taking a deep dive into sectoral issues and assist in determining the way forward to address such issues identified.¹⁷ Many countries have adopted this practice, including Australia, India, Hong Kong, New Zealand, Singapore, and Philippines.

The impact of such market studies is tremendous. To cite an example, the Australian Competition and Consumer Commission (“ACCC”) undertakes in-depth market, sector or industry reviews with the aim of improving the sectoral understanding of industry practices and dynamics.¹⁸ Among several focus areas, ACCC conducted inquiries in the digital space, including on digital platforms¹⁹ and advertising.²⁰ As a result of these market studies, it was found that the market study on digital platforms was particularly referred to by the Australian government while reviewing their Privacy Act of 1988. Further, a blunt statement on Google’s dominant status as a service provider across the ad tech supply chain, served as a public clarification of ACCC’s understanding of digital advertising and the digital platform sector and gave stakeholders a chance to analyze the evidentiary value of the statement.²¹

India, of late, is also showing some vibrancy with respect to competition advocacy. In 2011-12 several sector studies were undertaken by the Ministry of Corporate Affairs (the administrative ministry for Competition Commission in India) in order to inform drafting of National Competition Policy.²² These studies were carried out by CUTS International in association with several institutions and experts.

Of the positive outcomes of the sector studies done in 2011-12, the one on civil aviation led to the Ministry of Civil Aviation asking for a more in-depth study from the same consultancy which had done for Ministry of Corporate Affairs. This was done and led to radical pro-competitive changes in the country’s Civil Aviation Policy. For example, the condition of having at least 20 aircraft and five years’ experience for an airline to get an approval to be able to fly abroad was dropped. This was a ridiculous barrier because any foreign airline operating flights to India did not need such a qualification. Apparently, such a provision was engineered by other incumbent private airlines who did not want an extra competitor.

Since 2017-18, the Advocacy Division of the Competition Commission of India has been coordinating competition assessments of several laws, bills, policies, regulations etc. applicable in priority sectors. But their implementation is not made public.

One particular form of advocacy carried out by this author along with the Competition Commission of India in the period of 2002-07 was to oppose a proposed amendment in the Post Office Act was that any letter or package below the weight of 100 grams could only be sent through the post office channels thus barring private couriers from this lucrative business. After much hue and cry made in the media and workshops, the government dropped the proposed amendment.

Other tools that are used for competition advocacy include policy notes, which are condensed versions of opinionated discussion papers. A comparative outlook on the policy notes, particularly for the sugar industry in Philippines and Pakistan, showcase differences in the concept.

16 Report of the Working Group on Competition Policy, Planning Commission, Government of India, available at https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf.

17 Using Market Studies to Tackle Emerging Competition Issues, OECD, <https://www.oecd.org/daf/competition/using-market-studies-to-tackle-emerging-competition-issues-2020.pdf>.

18 Market Studies Australian Competition and Consumer Commission, available at <https://www.accc.gov.au/focus-areas/market-studies>.

19 Digital Platforms Inquiry, Final Report, ACCC, available at <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

20 Digital Advertising Inquiry, Final Report, ACCC, available at <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

21 Market Studies: Making All the Difference?, available at <https://www.competitionpolicyinternational.com/market-studies-making-all-the-difference/>.

22 <https://circ.in/circ-iica-sector-studies-project>.

While in Philippines, policy notes provide an overview of the sector, highlight the value chain, and outline concise recommendatory measures, covering various sectors,²³ Pakistan's Competition Commission publishes more nuanced and specific policy notes.²⁴ For the sugar industry, the Philippines Competition Commission publishes a policy note with the disclaimer that these policy notes do not reflect the views of the Commission but rather the author.²⁵ Thus its gravity is lost.

In Pakistan however, for the sugar industry itself there are two documents available including a policy note on the fixing of price of sugar²⁶ and a policy note on the price-fixing agreement between All Pakistan Sugar Mills Association and Ministry of Industries and Production.²⁷ Further, Competition Commission of Pakistan also published their detailed opinion on the competition concerns in the sugar sector of Pakistan.²⁸

In 2018, the Indian competition authority published a policy note entitled "Making Markets Work for Affordable Healthcare."²⁹ The policy note identified four key issues in the healthcare and pharmaceutical sectors, and made some valuable policy recommendations to deal with such issues. This did not result in any immediate changes but laid the foundation of a narrative to reform the health care market.

There is also a widespread practice of competition regulators of providing advice and/or opinions to the government or public authorities on competition matters in countries such as Singapore, Papua New Guinea, South Korea, Vietnam, Thailand, and Hong Kong.

Apart from these measures, there may be a plethora of activities that can be undertaken by competition regulators in order to further their advocacy agenda. This will include publishing regular newsletters such as "MyCompetition" as done by the Malaysian Competition Commission³⁰ or Hong Kong's "Competition Matters" newsletter. It would also include the entire bouquet of measures undertaken by Pakistan including international conferences, consultative groups, press releases, brochures, seminars, training sessions, advertisements, sessions with Ministries, celebration of World Competition Day, compliance through persuasion, policy notes and opinions,³¹ among other things.

Therefore, from a bare perusal of the above, it becomes apparent that there is no specific way of operationalizing and ensuring an active advocacy function. However, considering the encompassing role that they have to play in shaping economies, all countries in the Asia-Pacific region must particularly operationalize an active competition advocacy toolkit.

With the abovementioned advocacy tools, it becomes apparent that advocacy tools other than spreading awareness about the need for a competition culture, have been recognized and must be implemented across all countries. Each of the tools has a specific way of informing regulatory action through active consultation and informed debate. By propelling these debates, the competition landscape will become more active, representative and be better equipped to serve the particular needs of the growing economies in a nuanced manner.

III. INCORPORATING COMPETITION POLICY

While separate tools of competition advocacy may be incorporated in competition regimes either explicitly as legal provisions or as a matter of conduct by competition regulators, the formalization of competition policy can also play a fundamental role.

23 Policy Notes, Philippine Competition Commission, available at <https://www.phcc.gov.ph/category/resources/publications/policy-notes/>.

24 Policy Notes & Opinions, Competition Commission of Pakistan, available at https://www.cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42&lang=en#.

25 Competition Issues in the Sugar Industry in the Philippines, Roehlando M. Briones, Philippine Competition Commission, available at <https://www.phcc.gov.ph/wp-content/uploads/2020/09/Policy-Note-2020-03-Competition-Issues-in-the-Sugar-Industry-in-the-Philippines.pdf>.

26 Policy Note, Fixing of Maximum Retail Price of Sugar by Government of Punjab, Competition Commission of Pakistan https://www.cc.gov.pk/images/Downloads/policy_notes/sugar_policy_note_2021.pdf.

27 Policy Note, Price Fixing Agreement, Competition Commission of Pakistan, available at https://www.cc.gov.pk/images/Downloads/policy_notes/ActionsPolicy_Notes_Policy_Note_on_Sugar-Price_Fixing.pdf.

28 Opinion, Competition Concerns in the Sugar Sector of Pakistan, Competition Commission of Pakistan, available at https://www.cc.gov.pk/images/Downloads/policy_notes/25_April_2018_sugar_opinion.pdf.

29 <https://www.cci.gov.in/node/4184>.

30 Newsletter, Ministry of Domestic Trade and Consumer Affairs, available at <https://www.myc.gov.my/newsletter>.

31 Competition Advocacy as a Tool for Promoting Competition Culture and Combating Public Restraint: The Case of Pakistan, Joseph Wilson, Competition Commission of Pakistan, CPI Antitrust Chronicle, Competition Policy International Aug 2014(1).

A competition policy enables the outlining of broad governance principles for building a competition culture and simultaneously provides opportunity for infusing and dealing with flexible circumstances of the economy. By being applicable across different sectors, regulatory action is informed by such competition policy.

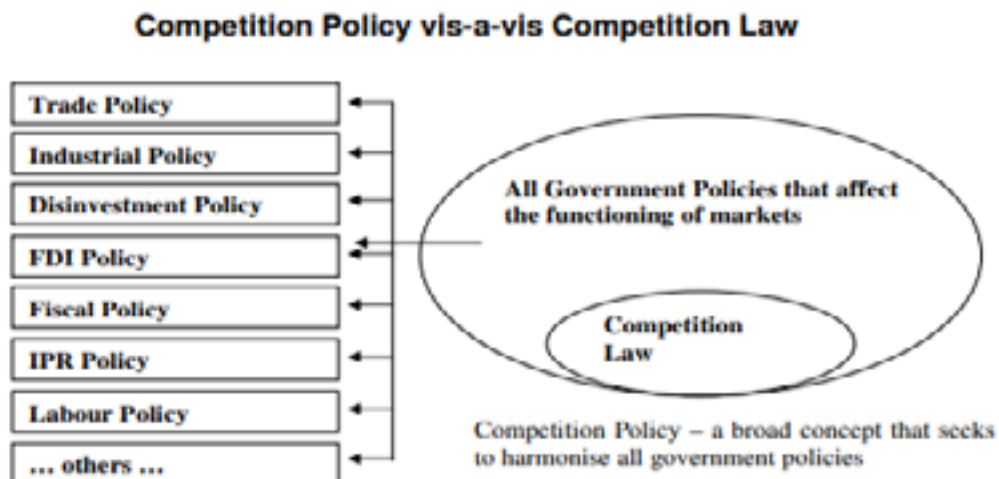


Figure 2: Competition Policy vis-à-vis Competition Law
Source: Time for a Functional Competition Policy and Law in India³²

The set of these multilaterally agreed equitable principles and rules assist in controlling restrictive business practices and facilitate adoption and strengthening of laws and policies at both national and regional levels, while advocating for a unified competition culture.

Additionally, there is a direct linkage between competition policy and Sustainable Development Goals (“SDGs”).³³ Accordingly, a fair and competitive market is necessary for overall development of the economy and the world at large. Economists such as Joseph Stiglitz assert that *“a strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.”*³⁴

In countries like Australia, the most instrumental part of the competition advocacy initiative has been the implementation of a National Competition Policy (“NCP”). Australia’s NCP was formulated to provide a comprehensive approach to reform across all levels of the government in the year 1995.³⁵ By conducting constant reviews of the NCP, it was found that the Australian NCP had delivered multi-faceted benefits to the economy by boosting the GDP by 2.5 percent and had significantly contributed to an improvement in the standard of living of Australians.³⁶ The NCP was administered by an exclusive body, the National Competition Council and not the ACCC. Currently, the NCC has been downsized as competition principles have sunk into governments at the federal and provincial levels.

While a few countries like Philippines have already followed suit and operationalized a NCP, which has reportedly been seen to improve market efficiency³⁷, in other developing economies like India and Bangladesh, competition law advocates opine that it is time for a comprehensive competition policy. In India, there has been advocacy for effective implementation of a competition policy³⁸ with a whole-of-government

32 Time for a Functional Competition Policy and Law in India: Mainstreaming competition principles into policy and legal framework is pro-development, Pradeep S Mehta and Manish Agarwal, CUTS International, available at <http://www.cuts-international.org/pdf/compol.pdf>.

33 The role of Competition Policy in the Attainment of SDGs, CUTS International, Ghana, available at <https://cuts-accra.org/the-role-of-competition-policy-in-the-attainment-of-sustainable-development-goals-sdg-2/>.

34 Competing over Competition Policy, Joseph E. Stiglitz, available at <https://www.project-syndicate.org/commentary/competing-over-competition-policy>.

35 Australia’s National Competition Policy, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief.

36 Review of National Competition Policy Reforms, Productivity Commission Inquiry Report, Australian Government, available at <http://ncp.ncc.gov.au/docs/PC%20report%202005.pdf>.

37 National Competition Policy seen to improve market efficiency, available at [https://www.bworldonline.com/national-competition-policy-seen-to-improve-market-efficiency/#:~:text=THE%20implementation%20of%20the%20National,Philippine%20Competition%20Commission%20\(PCC\)](https://www.bworldonline.com/national-competition-policy-seen-to-improve-market-efficiency/#:~:text=THE%20implementation%20of%20the%20National,Philippine%20Competition%20Commission%20(PCC)).

38 National Competition Policy: An idea whose time has come?, available at <https://cuts-ccier.org/national-competition-policy-an-idea-whose-time-has-come/>.

approach.³⁹ In addition to this, in Bangladesh there has been advocacy for an effective competition policy targeting inclusive sustainable development and innovation.

For developing countries this economic recovery phase, serves as an opportune time for implementing competition advocacy tools and advocacy for a competition policy.

IV. THE WOES OF DEVELOPING COUNTRIES

In order to have a functional competition policy in place which has consumer and social welfare as its front-running goals, there are various challenges which must be overcome.

Firstly, there must be availability of adequate resources for ensuring independence of the competition policy. Secondly, the principles of transparency must be enshrined in the doctrine. Thirdly, there must be due consideration given to the ease of doing business in general and the business and investment climate in particular. Fourthly, proper competition advocacy tools must be employed to have a nuanced and active understanding of different sectors of the economy.

In the words of Dr. Mukhisa Kituyi, former Secretary General of the United Nations Conference on Trade and Development (“UNCTAD”):

“It is widely acknowledged that sustainable and inclusive economic growth requires higher levels of economic productivity through diversification, technology upgrading and innovation. Appropriate industrial and trade policies are necessary but not sufficient to achieve this. There remains a need for complementary and coherent policies that ensure countries benefits from free trade. Competition policy is one of these policies, which governments need to develop and implement in order to achieve the goals of the 2030 Agenda.”⁴⁰

V. CONCLUSION

Asia-Pacific nations must collectively utilize the learnings from the dynamism witnessed due to their developing business landscape which was further bolstered by COVID-19 to adopt competition advocacy tools and a comprehensive competition policy.

While countries do not have uniform competition advocacy tools or a homogenous competition policy, it is widely accepted that the same is necessary for building a competition culture, in addition to the competition law regime. Even if specific provisions to this effect are not enshrined in the law, several countries, thought leaders, civil society and academicians opine that holistic competition advocacy automatically falls under the mandate of the competition regime.

Arguably, transition economies such as those in the Asia-Pacific should give all the more priority to advocacy over enforcement activities.⁴¹ The reasons for the same are, firstly, since these countries do not have mature competition regulators with adequate experience and secondly, since the rule-making process is fairly fluid on account of the continuously changing industry segment. Resultantly, the need to have a broad competition governance structure in place, with adequate wiggle room to accommodate businesses’ ever-changing trends, demands and conduct, is greatly felt.

The soft law opportunity that is provided by competition advocacy tools and competition advocacy must not be ignored. If such tools are incorporated in the formative years of a market economy, this shall prepare and pave the way for a robust economy for the years to come.

A holistic and comprehensive competition policy is the need of the hour. This policy should incorporate an array of competition advocacy tools as well. It is imperative that open dialogue with the public through competition advocacy tools such as seminars, informed policy notes, opinions, guidelines, articles is strived for and continued for a participative consultative competition culture.

39 Opinion| The relevance of a good competition policy to our aims, Pradeep S Mehta, available at <https://www.livemint.com/opinion/columns/opinion-the-relevance-of-a-good-competition-policy-to-our-aims-11577377302114.html>.

40 “Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals,” CUTS International, Jaipur (2015).

41 Advocacy and Competition Policy, International Competition Network, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

Countries may seek guidance from advocacy toolkits such as that of the International Competition Network (“ICN”), which employs tools such as identifying competition advocacy issues, identification of and engagement with stakeholders, implementation and monitoring advocacy and assessment of the effectiveness of the initiative.⁴² The OECD also has a comprehensive toolkit, and has supported many competition authorities in their endeavors with respect to competition advocacy. CUTS International has also developed toolkits to suit the needs of developing countries.⁴³ Such toolkits may also be developed region-wise, keeping the importance of regional integration.

Along with this, competition regulators must ensure that the competition law enforcement responsibilities are up to speed with global developments.⁴⁴

42 Advocacy Toolkit: Advocacy process and tools, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_Toolkit1.pdf.

43 http://www.cuts-ccier.org/CoMPEG/pdf/CUTS-Competition_Impact_Assessment_Toolkit.pdf and http://www.cuts-ccier.org/CREW/pdf/FCR_Practitioners_Guidebook.pdf.

44 <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf>.



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