

RECOMMENDATION OF THE OECD COUNCIL ON COMPETITION ASSESSMENT

2009



Increased competition contributes to higher economic productivity and growth. In many jurisdictions, however, laws, regulations or other government-imposed barriers unduly restrain market activities. One important step to eliminate these restraints is “competition assessment”, that is, the evaluation of policies to find those unnecessarily restricting competition in order to develop alternative policies that achieve the same objectives, with lesser harm to competition.

On 22 October 2009, the OECD Council adopted a Recommendation that calls for governments to identify existing or proposed public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives. It also proposes governments to establish institutional mechanisms for undertaking such reviews.

A number of approaches to competition assessment are possible and the OECD has developed a Competition Assessment Toolkit which is one of them. More about the toolkit at www.oecd.org/competition/toolkit.

The OECD is also committed to supporting the implementation of the Recommendation by both OECD and non-OECD countries. Non-OECD governments who would like support with implementation can contact Mr Sean Ennis from the OECD Competition Division [+33 1 45 24 89 78 ; +33 1 45 24 97 35 ; DAFCOMPContact@oecd.org].

About the OECD Competition Committee

The OECD Competition Committee is at the forefront of debate on competition policy and enforcement. Bringing together the leaders of competition authorities, it promotes the regular exchange of views, analysis and best practices on key competition policy issues. The Committee’s work is supported by the Competition Division within the OECD Directorate for Financial and Enterprise Affairs. www.oecd.org/daf/competition

About the OECD

The OECD is a forum in which governments compare and exchange policy experiences, identify good practices in light of emerging challenges, and promote decisions and recommendation to produce better policies for better lives. The OECD’s mission is to promote policies that improve economic and social well-being of people around the world. www.oecd.org

Recommendation of the OECD Council on Competition Assessment

As approved by Council on 22 October 2009
C(2009)130 - C/M(2009)21/PROV

The Council,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the agreement reached at the 1997 Meeting of the Council at Ministerial level that restrictions on competition are often costly and ineffective in promoting public interests and should be avoided [C/MIN(97)10]);

Having regard to the OECD Guiding Principles on Regulatory Quality and Performance [C(2005)52], which call for governments to review proposals for new regulations, as well as existing regulations, with reference to competition;

Recognising that competition promotes efficiency, helping to ensure that goods and services offered to consumers more closely match consumer preferences, producing benefits such as lower prices, improved quality, increased innovation and higher productivity;

Recognising that higher productivity is essential to economic growth and increased employment;

Recognising that public policies serve a variety of commercial, social, health, safety, security environmental and other objectives;

Recognising that, at times, public policies unduly restrict competition;

Recognising that such undue restrictions can occur unintentionally even when the public policies in question are not focused on economic regulation and not intended to affect competition in any way;

Recognising that public policies that unduly restrict competition often may be reformed in a way that promotes market competition while achieving the public policy objectives;

Recognising that regulation and reform of regulated industries usually require detailed competition assessment of likely effects;

Recognising that, other things being equal, public policies with lesser harm to competition should be preferred over those with greater harm to competition, provided they achieve the identified public policy objectives;

Noting that a number of countries already perform competition assessment; and

Noting that the OECD and a number of OECD Member countries have developed competition assessment toolkits;

I. RECOMMENDS as follows to governments of Member countries:

A. Identification of existing or proposed public policies that unduly restrict competition

1. Governments should introduce an appropriate process to identify existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for performing competition assessment, including the preparation of screening devices.
2. In performing competition assessment, governments should give particular attention to policies that limit:
 - i) The number or range of market participants;
 - ii) The actions that market participants can take;
 - iii) The incentives of market participants to behave in a competitive manner;
 - iv) The choices and information available to consumers.
3. Public policies should be subject to competition assessment even when they pursue the objective of promoting competitive outcomes and especially when they:
 - i) Set up or revise a regulatory body or regime (e.g., the assessment could make sure that, among other things, the regulator is appropriately separated from the regulated industry);
 - ii) Introduce a price or entry regulation scheme (e.g., the assessment could make sure that there are no reasonable, less anticompetitive ways to intervene);
 - iii) Restructure incumbent monopolies (e.g., the assessment could make sure that the restructuring measures actually achieve their pro-competitive objectives);
 - iv) Introduce competition-for-the-market processes (e.g., the assessment could make sure that the bidding process provides incentives to operate efficiently to the benefit of consumers).

B. Revision of public policies that unduly restrict competition

1. Governments should introduce an appropriate process for revision of existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for evaluating suitable alternatives.
2. Governments should adopt the more pro-competitive alternative consistent with the public interest objectives pursued and taking into account the benefits and costs of implementation.

C. Institutional Setting

1. Competition assessment should be incorporated in the review of public policies in the most efficient and effective manner consistent with institutional and resource constraints.

2. Competition bodies or officials with expertise in competition should be associated with the process of competition assessment.
3. Competition assessment of proposed public policies should be integrated in the policy making process at an early stage.

D. Definitions

For the purposes of this Recommendation:

“Public policies” means regulations, rules or legislation.

“Unduly restricts competition” means that restrictions on competition needed for achieving public interest objectives are greater than is necessary, when taking into account feasible alternatives and their cost.

“Market participants” means businesses, individuals or government enterprises engaged in supplying or purchasing goods or services.

“Competition bodies” means public institutions, including a national competition authority, charged with advocating, promoting and enhancing market competition and not limited in these roles to a specific sector.

“Competition-for-the-market processes” refers to the bidding processes organised by government for allocating the right to supply a given market or for using a scarce government resource for a distinct period of time.

“Competition assessment” means a review of the competitive effects of public policies including consideration of alternative and less anti-competitive policies. The principles of competition assessment are relevant to all levels of government.

II. INVITES non-Member economies to associate themselves with this Recommendation and to implement it.

III. INSTRUCTS the Competition Committee:

To serve as a forum for sharing experience under this Recommendation for Member countries and non-Member economies that have associated themselves with this Recommendation;

To promote this Recommendation with other relevant Committees and Bodies of the OECD;

To report to Council in three years on experience with this Recommendation.

Notes

The full text of the Recommendation is also available on the OECD database of legal instruments where additional information and any future update can be found: <http://acts.oecd.org/Default.aspx>

Statement by the United States: “The U.S. Delegation affirms the support of the United States for this Recommendation, noting that its implementation in the United States may depend on the work of independent branches of government, particularly the U.S. Congress.”

Statement by the European Commission: "The European Commission welcomes and supports the adoption of the Recommendation on Competition Assessment. It underlines the importance which the European Commission attaches to competition principles being taken into account in different policy areas. We note however that the scope of the Recommendation is relatively narrow as the definition of public policy excludes certain areas of public rule making. However, as the Recommendation does not prevent any party from going beyond the standard laid down in the Recommendation, the European Commission can fully support the adoption of this document".

OECD COMPETITION ASSESSMENT TOOLKIT CHECKLIST

This checklist is part of the OECD Competition Assessment Toolkit, developed to help governments eliminate barriers to competition based on the recommendation. It notes that competition assessment should be conducted if a legal provision has any of the following effects:



A

Limits the number or range of suppliers

This is likely to be the case if the provision:

- A1** Grants exclusive rights for a supplier to provide goods or services
- A2** Establishes a license, permit or authorisation process as a requirement of operation
- A3** Limits the ability of some suppliers to provide a good or service
- A4** Significantly raises cost of entry or exit by a supplier
- A5** Creates a geographical barrier for companies to supply goods, services or labour, or invest capital

B

Limits the ability of suppliers to compete

This is likely to be the case if the provision:

- B1** Limits sellers' ability to set prices for goods or services
- B2** Limits freedom of suppliers to advertise or market their goods or services
- B3** Sets standards for product quality that provide an advantage to some suppliers over others, or are above the level that some well-informed customers would choose
- B4** Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

C

Reduces the incentive of suppliers to compete

This may be the case if the provision:

- C1** Creates a self-regulatory or co-regulatory regime
- C2** Requires or encourages information on supplier outputs, prices, sales or costs to be published
- C3** Exempts the activity of a particular industry, or group of suppliers, from the operation of general competition law

D

Limits the choices and information available to customers

This may be the case if the provision:

- D1** Limits the ability of consumers to decide from whom they purchase
- D2** Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
- D3** Fundamentally changes information required by buyers to shop effectively

Access the full text of the toolkit, available for download in several languages, at www.oecd.org/competition/toolkit



oe.cd/competition-recommendations

