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## ON International Investment

## POLICY FRAMEWORK FOR INVESTMENT: USER'S TOOLKIT – DRAFT USER GUIDANCE ON THE PFI COMPETITION POLICY CHAPTER

### Session 1.3.: Competition policy

The PFI User's Toolkit project is in response to a need for specific and practical implementation guidance revealed from the experience of the countries that have undertaken projects using the PFI. Development of the Toolkit entails a process involving government users, co-operation with other organisations, OECD Committees with specialised expertise in the policy areas covered by the PFI and interested stakeholders. This document is a preliminary draft of the Toolkit's guidance on the PFI competition policy chapter, prepared by Vivek Ghosal, an external consultant to the Secretariat. It is distributed as part of the conference documentation for the relevant session in the programme at the Global Forum on International Investment. The views expressed in this paper do not necessarily represent those of the OECD or its member governments.

**POLICY FRAMEWORK FOR INVESTMENT: USER’S TOOLKIT**  
**– DRAFT USER GUIDANCE ON THE PFI COMPETITION POLICY CHAPTER**

Competition policy and law enforcement aim to improve conditions for competition by controlling or prohibiting practices and transactions that could restrict competition. More competitive markets lead to lower prices for consumers, more entry and new investment, enhanced product variety and quality, and higher innovation. Overall, greater competition is expected to deliver higher levels of welfare and economic growth. Below we note how the principal objects of competition laws – mergers, abuse of dominant positions and cartels – are linked to the PFI initiative.

**A. Merger enforcement**

The primary objective of merger enforcement is to limit or prevent the creation of significant market power due to their adverse effects on prices and production.<sup>1</sup> As part of merger enforcement, national competition authorities may carefully scrutinise certain mergers for market power concerns before approving them. This process may sometimes involve burdensome requests by the competition authority for data and other information about the merger. In this context, it is important that the merger review process be:

- Transparent to all firms, domestic and foreign
- Reasonably consistent across firms and across time

Ideally, firms would want to be informed about the time involved and costs incurred during the evaluation process. They would want to be informed about what types of M&As the competition authority might challenge or block. They would want to be informed about past actions by the competition authority to form a clear picture of the enforcement stance. Lack of transparency and information in these dimensions could result in greater uncertainty in the decision-making process of firms and investors and potentially higher costs, leading to reduced entry and investment.

**B. Abuse of dominance (or monopolization)**

This category encompasses different forms of potentially anti-competitive behavior by firms. These include some incumbent firms’ actions that may erect barriers-to-entry into markets or raise the costs of the firm’s rivals which may adversely affect the likelihood of new entry and investment in those markets. Some examples include:

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<sup>1</sup> Broadly speaking, market power is defined as the ability of firms to charge prices above competitive levels and consequently earn significant profits (or above-normal economic profits). In 2000 the European Commission blocked the merger between Volvo and Scania on the grounds that it would likely create significant market power in the heavy trucks market in the Nordic countries and possibly Ireland. In 1996, The US Federal Trade Commission blocked a merger between Staples and Office Depot in the office supplies market arguing that the merged firm would attain (near) monopoly status in many local markets and result in substantial price increases.

- Dominant incumbent firms in industries such as telecommunications and electricity offer “deals” where the customer is locked-in to the contract for a period of time and there are costs to changing suppliers. Since these raise the costs to the customers of switching suppliers, they are less likely to do so. This may discourage new entry and investment.
- The competition authorities of several countries have accused Microsoft of abusing its dominant position in the (Windows) operating system market to bundle complementary software such as the internet browser, media player, among others, to disadvantage rivals and erect barriers-to-entry by new firms.<sup>2</sup>
- Formerly regulated monopolies in industries such as electricity, railroads, postal, natural gas, among others, may make it difficult for new entrants to enter their markets due to their control over the transmission network, rail lines and gas pipelines. Without access to these, new firms would have a very difficult time entering and competing.

Lack of action by the competition authority, when legitimate concerns arise, could have a detrimental effect on entry and investment. It is important that the process for filing abuse of dominance cases be transparent to all firms, domestic and foreign. The competition authority should also make past decisions public in order to provide transparency about the types of violations that the authority might consider to be illegitimate anti-competitive behavior by incumbents.

### **C. Cartels**

Collusive behavior (formation of cartels) by firms can result in many undesirable consequences. The more commonly discussed aspects relate to the fact that the quantity of the product or service provided can decrease and prices are likely to increase, sometimes by significant amounts. Other aspects of cartel behavior relate to issues such as the cartel members collectively agreeing to erect barriers-to-entry, and agreeing not to engage in product or process innovation. If left unchecked, these types of behavior by cartels could result in lower new entry and investment. Vigorous law enforcement against cartels is necessary to maintain a free and competitive market.

### **D. Laws, Institutions and Enforcement**

The body of competition laws needs to be comprehensive to cover the potentially wide range of anti-competitive practices that firms might engage in, and the laws need to be transparent for both domestic and foreign firms and investors. At this point in time, a large number of countries have fairly comprehensive competition laws in the books and, among those who don't, many countries are moving forward to address this shortcoming. Comprehensive and well meaning laws are, of course, only as effective as the institutions that are designed to implement them. The institutions need to be properly structured such that they are bestowed with independence in decision-making, free of political interference and provided adequate monetary and staff resources to meet the demands of the workload.<sup>3</sup> In this dimension, there is greater variation across countries.

Finally, the competition laws need to be enforced. In the context of PFI, the actual outcomes from competition law enforcement can be viewed as crucial. For example, a potential foreign firm or investor would of course carefully examine the competition laws and institutions they might have to deal with, but, in the final analysis, it is the observed past outcomes – decisions taken by the relevant competition

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<sup>2</sup> See Microsoft Decisions in the reference.

<sup>3</sup> The article by Kovacic and Eversley (2007) provides a nice summary of some of these issues and references to developments in various countries.

authority – that might matter the most. If a jurisdiction has virtually no enforcement, firms may view the environment as being relatively certain and low cost in terms of their entry and investment decisions. In contrast, if the past history of enforcement is idiosyncratic and lacking in transparency and consistency, firms may view this jurisdiction as being highly uncertain and costly, and this may result in them postponing their investment decisions or even ignoring the market altogether.<sup>4</sup> In the ensuing framework, we focus on institutions as well as actual competition law enforcement as the latter, in many ways, can be thought of as crucial information for potential firms and investors making decisions to enter new markets.

#### **Question 4.1**

- (a) *Are the competition laws and their application clear, transparent, and non-discriminatory?*
- (b) *What measures do the competition authorities use (e.g. publishing decisions and explanations on the approach used to enforce the laws) to help investors understand and comply with the competition laws and to communicate changes in the laws and regulations?*

#### **Rationale for the question**

For competition laws and enforcement to be effective, businesses and other stakeholders need to understand the “rules of the game.” This requires that competition laws be transparent and their enforcement predictable. It also requires that rulings on competition cases be made based on non-discriminatory criteria and be consistent. In other words, while no two situations are the same, the decisions ought to be consistent with each other under reasonably similar circumstances. Transparency can be promoted by, for instance, ensuring that businesses and other interested parties have access to all necessary information, by offering guidance on the interpretation of the competition laws and by publishing reasons for judiciary and regulatory agency decisions. Transparency and predictability help to improve the investment environment, because they reduce the risk of inconsistent application of laws and regulations and lower uncertainty faced by investors and others. (Also, see the chapter on Investment Policy.) In addition, transparency reduces firms’ costs of compliance and promotes confidence by reassuring investors that they are being treated fairly and that government is exercising its powers responsibly.

As discussed in the introduction to this section, mergers, abuse of dominance and cartels present somewhat different scenarios in terms of their effects on entry of new firms and investment. Domestic firms often expand into new markets within the country via M&As as opposed to *de novo* entry. This may require approval of the competition authority. Cross-border M&As have increased significantly and foreign investors and firms wanting to enter new markets via M&A may have to seek approval from the destination country’s competition authority. Given this, it is vital that potential investors and businesses are able to relatively easily obtain information on the process for obtaining merger approval. Lack of transparency about the procedures, inconsistent application of merger review policies and potential biases against foreign investors can have a significant negative effect on the short and long-run flows of investment and entry of new firms.

For competition law cases related to abuse of dominance (monopolization) and cartels, an important point to note is that, unlike merger reviews, these cases are not automatic; they are generated when there is a complaint filed with the competition authority or when the authority pro-actively decides to investigate.

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<sup>4</sup> Theory shows that uncertainty has a dampening effect on firms’ investment and entry decisions (Dixit and Pindyck, 1994). In our case, the uncertainty would arise from the competition law enforcement dimension.

For these types of cases, important aspects of transparency relate to the procedures and costs for filing complaints as well as firms defending themselves when an allegation is made.<sup>5</sup>

### **Criteria and indicators to examine in responding to the question**

*(a) Are the competition laws and their application clear, transparent, and nondiscriminatory?*

1. Is information about the procedures for obtaining approval for the M&A and dealing with abuse of dominance and cartel cases easily available?<sup>6</sup>
2. Are investors and businesses able to gauge the time and procedural costs of obtaining approval for the M&A and dealing with abuse of dominance and cartel cases?
3. Provide a list of sources – such as websites, competition authority information portals or other governmental sources – by which firms and investors can easily gain the above information.
4. Are there any rules or restrictions that place foreign investors and firms at a disadvantage compared to the domestic firms with regard to approval for mergers and acquisitions or dealing with abuse of dominance and cartel cases?
5. If yes to Qs. 5, then:
  - a. List the rules and restrictions.
  - b. What are the justifications for these rules and restrictions?
  - c. Are there any initiatives to relax these restrictions in the near future?
6. Are there instances where foreign firms have complained about asymmetric treatment? If yes, cite the instances.

*(b) What measures do the competition authorities use (e.g. publishing decisions and explanations on the approach used to enforce the laws) to help investors understand and comply with the competition laws and to communicate changes in the laws and regulations?*

1. Does the competition authority publish information on merger, abuse of dominance and cartel investigations:<sup>7</sup>
  - a. Total number of investigations under each category?
  - b. Total number of investigations cleared without any competition concern?
  - c. Total number of investigations where some remedy was applied to alleviate competition concerns?

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<sup>5</sup> The UK Office of Fair Trading (2004) document is an example of how the competition authority could provide information about aspects of competition law investigations and various procedures. The Office of Fair Trading's (2006) annual report, for example, provides information on how their stakeholders rate their work on various criteria such as: Independence; Fair and objective; Professionalism; Transparency; Clear analysis; Consistent Accountability; Proportionate/considered judgment; and Diversity.

<sup>6</sup> For example, the websites (see the references) of the European Commission's DG Competition, the US Federal Trade Commission and the UK Office of Fair Trading provide extensive amounts of information on the procedures. Also see the SEAE Technical Team (2002) report on the criteria used for the assessment of mergers in Brazil.

<sup>7</sup> For example, the websites (see the references) of the European Commission's DG Competition, the US Federal Trade Commission and the UK Office of Fair Trading provide extensive amounts of information on the mergers and other cases.

- d. If remedy was applied, is information about the remedy, including the agency's decisions to either take or not take action, available to firms and investors? Cite the sources..
2. Are detailed merger, abuse of dominance and cartel decision reports published and easily available? Cite the sources.<sup>8</sup>
3. If there are any changes in the competition laws related to mergers, abuse of dominance or cartels, are they widely publicised for all firms and investors to see? How is this information disseminated?
4. If there are any changes in the magnitude of penalties for abuse of dominance, cartel and other types of cases, are they widely publicised for all firms and investors to see? How is this information disseminated?

#### **Question 4.2**

*Do the competition authorities have adequate resources, political support and independence to implement effectively competition laws effectively?*

#### **Rationale for the question**

The distinction between adopting a new law or policy and effectively implementing it can represent the difference between success and failure. Effective competition law enforcement requires that the competition authority have the resources, political support and independence to do the job properly. Competition authorities must often challenge vested interests, such as private firms with monopolistic positions in the market or state-owned firms that fall under the regulatory authority of other parts of government. In the absence of a strong political commitment, efforts to promote competition, and hence investment, are in such cases likely to fail. Furthermore, a strong commitment to policy implementation and oversight at the political level can help to protect competition authorities themselves from regulatory capture. Therefore, it is critical that the competition authority be able to engage in independent decision-making based on the merits of the case. While it is probably inevitable that the political processes in many countries will result in the key officials being chosen by the incumbent administration, a more bi-partisan approach may provide greater confidence to the key officials and foster a climate of independent decision-making on the merits of the cases. It is likely to be important that the competition authority reports to and receives feedback on its activities from bi-partisan oversight committees. This would create a climate of broad support, independence in decision-making as well as oversight. Evidence of political intervention in competition cases is likely to fundamentally erode the authority and confidence of the competition authority.

Political support for competition policy, which includes supplying sufficient resources for effective enforcement, is an important determinant of the potential contribution of competition policy to an attractive investment environment. Modern competition law enforcement requires significant resources. The competition authority needs to be well funded to ensure an adequate staff of lawyers, economists and support staff.<sup>9</sup> Mergers that are challenged by the competition authority often require a significant effort in

<sup>8</sup> As an example, consider the Volvo Scania (2000) merger decision that is posted on the European Commission website. This document presents potential firms with a lot of information on how the EC viewed the concerns about market power and what information the EC used to make their case.

<sup>9</sup> The South African and Hungarian competition authorities' annual reports are useful examples of the presentation of information on resources.

gathering data, information about the markets under consideration, sophisticated econometric analysis and as well as hiring of legal and economic experts. The same is true of abuse of dominance (monopolization) investigations. Cartel investigations can take on a very different tone as, in some countries, cartels are illegal *per se* and the formation of cartels is punishable by significant penalties. The competition authority may have to expend considerable resources in discovering and prosecuting cartels.

Institutional settings vary widely, complicating the assessment of the degree of political support for competition policy, or of its vulnerability to special-interest intervention. Criteria that might be considered could include the status of the competition authority within the government structure and the institutional arrangements for insulating enforcement decision makers from political direction or influence. For example, does the competition commission sit relatively high or low in the hierarchy of governmental units? If it is relegated to a minor role in a ministry, then the effectiveness and decision-making capabilities could be weak. The mandate and ability to engage in a wide range of investigations and prosecutions (where needed) would be key signals of political support.

### **Criteria and indicators to examine in responding to the question**

Regarding the adequacy of **resources**:

1. What is the annual budget of the competition authority?
  - a. As a percentage of the country's GDP, how does this compare to other countries?
2. What are the sources of revenues for the competition authority?
  - a. From the government?
  - b. From merger filing fees, case-handling charges for abuse of dominance cases, and penalties imposed for cartels and abuse of dominance cases?
3. Are additional monetary resources available to hire economic and legal experts when merger, abuse of dominance or cartel cases are being investigated or prosecuted?
4. What are the total number of full-time lawyers working at the competition authority? How does this compare to other countries?
5. What are the total number of full-time economists working at the competition authority? How does this compare to other countries?
6. What are the total number of support staff – research assistants, paralegals and secretarial staff – working at the competition authority?
7. Given the size of the economy, are the resources (monetary and staff) provided by the government sufficient to undertake vigorous investigations and enforcement when needed?
8. Are there any instances where the lack of resources prevented the competition authority from effectively undertaking its tasks? Cite the evidence.

To assess the extent of **political support**:

1. Is the competition authority part of a government agency or a stand-alone unit?

2. Where does the competition authority sit in the hierarchy of institutions? For example, how does it compare in its relative importance to sector regulators such as in banking, financial markets, telecommunications, electricity and natural gas?
3. Who does the head of the competition authority report to?
  - a. A minister?
  - b. Senior elected representatives?
  - c. A bi-partisan committee of elected representatives?
4. What are the powers and reach of the competition authority?

To gauge the degree of independence:

1. Are the officials in key decision-making positions appointed in a bi-partisan manner or are they appointed by the incumbent administration/ruling party?
2. Are there bi-partisan oversight committees that evaluate the work of the competition authority on a regular basis?
3. Is there evidence of political interference in decisions made by the competition authority? Cite the evidence.
4. Are there instances where decisions made by the competition authority have been over-ruled by other governmental agencies or due to political pressures? Cite the evidence.

### **Question 4.3**

*To what extent, and how, have the competition authorities addressed anticompetitive practices by incumbent enterprises, including state-owned enterprises, that inhibit investment?*

### **Rationale for the question**

Incumbent enterprises can sometimes discourage investment by abusing their market power. For example, if an incumbent maintains exclusive distribution arrangements with its retailers or wholesalers, and the cost of establishing an alternative network is prohibitive, new entry and new investment may be impeded. Likewise, if a producer sells a product below cost (appropriately defined) with a view to recouping losses incurred after rivals have exited the industry, or would-be new entrants have been deterred. A credible threat of predatory pricing behaviour discourages prospective investors and can discourage investment in upstream and downstream industries. Overall, as noted in the introduction, abuse of dominant market positions by incumbent firms encompasses myriad forms of potentially anti-competitive behavior. Some of this comes to the attention of the competition authority via complaints filed by other firms in the market while other investigations are initiated by the competition authority. The competition authority may then take action depending on the merits of the case. The demonstrated willingness of competition authorities to prevent, correct and sanction anticompetitive practices can thus have a significant positive bearing on the investment climate.<sup>10</sup>

<sup>10</sup> The European Commission's DG Competition website (see references) has a separate section devoted to state aids which contains information on the competition issues and the enforcement actions.

## Criteria and indicators to examine in responding to the question

1. How many abuse of dominance investigations have been pursued by the competition authority in recent years?
  - a. How many of these investigations involved domestic firms? Foreign firms?
  - b. How many investigations involved enterprises in which the State has an interest?
2. What types of abuse of dominance cases have been pursued by the competition authority? For example, is information available on cases that involved:
  - a. Predatory pricing?
  - b. Raising rivals' costs?
  - c. Erecting barriers-to-entry?
  - d. State owned enterprises using state aids to disadvantage private firms?<sup>11</sup>
  - e. Any other categories?
3. What is the investigative and enforcement stance taken by the competition authority towards anti-competitive activities by current and formerly state-owned or regulated firms? Would this be best characterised as vigorous or lax? Cite the evidence.
4. Has the competition authority carefully scrutinised abuse of dominance by current and formerly state-owned or regulated firms?
  - a. What types of behavior were investigated?
  - b. What were the decisions in these cases?
  - c. What were the proposed remedies for the anti-competitive behavior?
  - d. What were the justifications for the decisions and remedies in these cases?
5. Is information easily available to businesses and investors on the details of these decisions made by the competition authority and the central reasons for challenging the cases? Cite the sources of information.

### **Question 4.4**

- (a) Do the competition authorities have the capacity to evaluate the impact of other economic policies on the ability of investors to enter the market?*
- (b) What channels of communication and co-operation have been established between competition authorities and other relevant government agencies?*

### **Rationale for the question**

Some government policies and regulations directly discourage investment, for example, through prohibitions or restrictions on investment in certain sectors. Other policies and regulations are less direct, but can also discourage investment. Trade restrictions, for instance, can make a national market too small for those investments where economies of scale need to be reaped to be viable. The recent OECD initiative contained in the "Competition Assessments Toolkit" (2007) examines several different types of rules and restrictions. For example:

1. Explicit regulations on entry

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<sup>11</sup> For example, in 2002 the European Commission ordered Deutsche Post AG to repay over €500 million in illegal state aid that it had used over several years to undercut rivals in its unprofitable package-delivery business. (See Deutsche Post State Aids case, 2002.)

2. Granting or extending exclusive rights including intellectual property rights
3. Rules and regulations on the flow of goods, services, capital and labor
4. Regulations on advertising and marketing
5. Rules on content and setting of standards
6. Grandfather clauses
7. Regulations that influence prices
8. Promoting self-regulation
9. Regulations that partially or completely exempt activities from national competition laws

Since the Competition Assessments Toolkit presents extensive details on these and the potential harm they may cause to competition and new entry, we do not revisit them here. Included in the above are issues related to patents and “extensions” of patents. The rules and restrictions noted above can have profound impact on markets and the modernization and injection of new technologies and can affect entry by new firms and investments in building new capacity.

One of the key challenges to establishing a sound investment environment is to identify and remove the unnecessary impediments to new investment. In this context, and without prejudice to the authority of government to regulate and the authority of other agencies in the conduct of their responsibilities, it is desirable to involve the competition policy authorities. This would help when laws and regulations are being developed to better appreciate competition policy perspectives, which through inter linkages bear on the investment environment. More generally, ensuring coherence across policy areas is a principle of the Policy Framework for Investment. But it can present difficult trade-offs, notably in the domain of competition policy. For example, intellectual property rights (IPR) reward investments in creative and innovative activities with exclusive rights, limiting direct competition for a period. In the absence of IPR, such investment would be smaller. The difficulty for policy lies in balancing the considerations of competition policy and ensuring an optimal incentive to create and innovate through, for instance, investments in research and development. There are also cross border considerations, including issues associated with the impact of licensing in home countries on competition in host countries, an area which has been identified as requiring further consideration.

Finally, due to the complex nature of the rules and regulations and their potential impact on new entry and investment, it is important that there be well defined channels of collaboration and communication between the relevant governmental units to facilitate proper evaluation of the impact of economic policy decisions.<sup>12</sup> Also, there has to be an active advocacy of competition issues and concerns by the competition authority to increase awareness of the competition concerns.<sup>13</sup>

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<sup>12</sup> See, for example, the report by the Competition Commission of Zambia (2006) regarding the relationship between the competition authority and sector regulators.

<sup>13</sup> Consider, for example, the South African Competition Commission’s (2006) report on the agricultural industry or the market study sanctioned by the Competition Commission of India (Sriraman et al., 2006) on the road transport industry in India or the Hungarian Competition Authority’s (2000) report on large scale retail trade and competition. These studies provide a wealth of information about the markets and dwell on issues related to competitiveness and efficiency. They also serve a useful purpose in terms of advocacy. In terms of advocacy in general, the websites (see the references) of the European Commission’s DG Competition, the US Federal Trade Commission and the UK Office of Fair Trading provide information on advocacy. Also see Competition Commission of India (2004) and Kim (2002, 2006).

## Criteria and indicators to examine in responding to the question

*(a) Do the competition authorities have the capacity to evaluate the impact of other economic policies on the ability of investors to enter the market?*

1. Does the government request the competition authority to evaluate the impact of various rules and restrictions on the extent of competition, and new entry and investment, in the markets?
2. In the last few years, how many times has the competition authority provided input in such cases? Provide examples of instances and the issues.<sup>14</sup>
3. Does the competition authority have adequate monetary and specialised staff (e.g., economists and lawyers) resources to evaluate the impact of the economic policy decisions on new entry and investments?
4. In instances where the competition authority was consulted, are their reports easily available to the public and business community? Describe the specific sources via which the information can be obtained?
5. In instances where the competition authority was asked to provide input, what evidence is there that the recommendations were implemented? Provide examples of recommendations that were implemented.

*(b) What channels of communication and co-operation have been established between competition authorities and other relevant government agencies?*

1. Are there formal meetings between the officials of the competition authority and other governmental units and sector regulators?<sup>15</sup> If yes, provide examples.
2. Does the competition authority host workshops or conferences to disseminate information about its mission and activities to inform and educate the public and the business community? If yes, provide examples.
3. Do governmental units and sector regulators invite the competition authority to comment on new policy initiatives? If yes, provide examples.
4. Are the deliberations between the competition authority and other governmental units available to the public and the business community in a timely manner? Are interested non-governmental parties allowed to provide input into the deliberations or comment on these reports.

### **Question 4.5**

*Does the competition authority periodically evaluate the industrial policies towards national champions and their impact on the investment environment?*

### **Rationale for the question**

<sup>14</sup> See, for example, Hungarian Competition Authority (2005) report on notarial services.

<sup>15</sup> These could include line ministries, the cabinet, and sectoral regulators such as electricity, banking, telecommunications, natural gas, financial markets, among others.

Some governments promote particular firms, often referred to as “national champions”, as part of an industrial development strategy. This often includes significant state involvement, in terms of direct or indirect financial assistance (also see the chapter on Tax Policy) and the granting of special treatment, for instance, through restrictions on foreign direct investment, trade barriers and exemption from competition laws. The arguments for national champions have been contentious primarily due to the fact that the longer-run benefits of such a policy are questionable. Domestic consumers and the economy may lose due to the higher prices and lower product and process innovation that results from lack of competition. Given the potentially damaging consequences for domestic consumers and new firms who may want to enter these markets, it is important that governments carefully evaluate their positions regarding promoting firms as national champions.<sup>16</sup> Evaluations on the effectiveness of such schemes, in terms of attracting investment, ought to be broad-based, taking into consideration their impact on the investment decisions of other investors and more broadly on the investment environment. The competition authorities are often well placed to conduct such an exercise, at least in terms of assessing the impact on markets from granting exemptions from competition laws.

### **Criteria and indicators to examine in responding to the question**

1. Are there any implicit or explicit exemptions from competition laws enjoyed by national champions or dominant firms? If yes:
  - a. List the industries and firms.
  - b. Provide details about the specific exemptions?
  - c. Are there any governmental initiatives to remove these?
  - d. Has the competition authority been asked to evaluate these exemptions? If yes:
    - i. What were the outcomes?
    - ii. Are details about the competition authority’s input and recommendations available to the public? Cite the sources.
2. In instances where a national champion was acquiring a domestic firm, did the government favor the national champion and overrule objections from the competition authority? If yes, cite the instances.
3. In instances where foreign investors attempted to acquire the national champion, did the government impede or block the transaction? If yes:
  - a. Cite the instances
  - b. What were the specific arguments used by the government to block the transaction?
  - c. Was the competition authority asked to provide input into the transaction? If yes, what was their view.
  - d. Did the government overrule any objections by the competition authority?
4. Are there instances where an abuse of dominance complaint was filed by a domestic or foreign competitor and the government overruled the objections and favored the national champion? If yes:
  - a. Cite the instances.
  - b. What were the main arguments provided by the government?

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<sup>16</sup> See Geroski (2005) and Majoras (2007), and the report by the German *Monopolkommission* (2003).

### **Question 4.6**

- (a) *What is the role of the competition authorities in case of privatizations?*  
(b) *Have competition considerations having a bearing on investment opportunities, such as not permitting market exclusivity clauses, been adequately addressed?*

### **Rationale for the question**

Competition authorities have sometimes found themselves at the margins of policy formulation in areas not directly associated with competition law or policy, per se. This has been the case, for example, with respect to the wave of privatizations that swept through many regulated sectors during the 1990s, which was a major driver of increased flows of foreign direct investment. With privatisation comes a change in ownership structure, and the new owner(s) can be domestic or foreign.<sup>17</sup> A concern of governments and competition authorities has been to avoid replacing public monopolies with private ones. A critical issue in these situations relates to the potential exceptions and exclusions that may be granted to the new (private) firm, exclusivity contracts, and the behavior of the formerly state-owned enterprises. Given that these firms were often national or regional monopolies, they may enjoy political clout with the government, and may exert considerable influence on markets and create impediments to new investments by competitors. As noted by Kovacic and Eversley (2007), the success of formerly state-owned enterprises “may seek to use mergers, holding companies or other institutional arrangements to reestablish the monopoly structure.” Some of the classic examples can be found in industries such as electricity, natural gas, railroads, telecommunications, banking and insurance, and postal services, where the dominant incumbents have tried to make it difficult for new entrants to gain access to their transmission, pipeline, railroad and landline telecommunications networks. This challenge has sometimes been exacerbated by the pursuit of conflicting objectives. More specifically, the desire to create more efficient industry structures, on the one hand, and the desire to sell state owned assets at the highest possible prices, on the other. This latter aspect has sometimes led governments to grant market exclusivity to foreign investors, a non-transparent incentive to FDI and a restraint on the degree of competition.

Given the potential pitfalls, it is desirable for competition authorities to play an active role during privatisations. Governments need to focus on competition considerations, including the potential benefits that private investment, both domestic and foreign, can bring to an economy, in addition to the possible short-term budgetary windfalls. Competition authorities should also be able to evaluate of the costs associated with arrangements that lead, either tangentially or by design, to monopolies. While merger control powers could be applied to prevent or correct anti-competitive dispositions of privatised assets, it would be more efficient for the competition policy authorities to be involved in decisions about privatisation well before transactions reach that stage.

### **Criteria and indicators to examine in responding to the question**

1. In instances where key sectors were privatised, was the government concerned about the extent of competition in the new market? If yes, what evidence can be provided from government reports and documents?
2. In the privatisation agreements, were the new firm(s) granted exclusivity contracts? If yes:

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<sup>17</sup> The Reserve Bank of Australia’s (1997) report provides a useful look at the various methods of sale, financial and organisational issues that come with privatisation. For an interesting look at the role played by competition authorities in the market liberalisation process, see the Hungarian Competition Authority’s (1999) report on the electricity market liberalisation. For a review of issues related to UK’s privatisation experiences, see Parker (2004).

- a. Cite the instances and provide details about the salient features of the contract including the time period of the exclusivity.
  - b. Was there analysis of the likely harm to competition in the new market?
  - c. Were these studies available to firms and investors? Cite the sources.
3. In the privatisation agreements, were the new firm(s) granted partial or complete exemptions from competition laws? If yes:
  - a. Cite the instances and provide details about the salient features of the contract including the time period of the exemption.
  - b. Was there analysis of the likely harm to competition in the new market that might result from the exemption?
  - c. Were the reports with the findings available to firms and investors? Cite the sources.
4. Was the competition authority asked to provide input regarding competition issues in the new privatised market? If yes:
  - a. Cite the instances.
  - b. Were the competition authority's recommendations available publicly? Cite the sources.
  - c. Were the competition authority's recommendations accepted partially or entirely? Provide examples.

#### ***Question 4.7***

*To what extent are competition authorities working with their counterparts in other countries to co-operate on international competition issues, such as cross-border mergers and acquisitions, bearing on the investment environment?*

#### **Rationale for the question**

With the rapid increase in cross-border investment, competition authorities are increasingly dealing with competition issues that span borders, such as international mergers and acquisitions and international cartels. Invariably, investigation of competition cases with an international dimension requires cooperation with the competition authorities in other countries. Some of the key issues in international collaboration relate to sharing and confidentiality of information and data, and possible harmonization of administrative and evaluation procedures.<sup>18</sup> Establishing formal working relationships and channels of communications can speed up the investigation of such cases, reducing the period of uncertainty, benefiting the investment environment.

#### **Criteria and indicators to examine in responding to the questions**

1. Is there an established mechanism by which the competition authority exchanges information and collaborates with authorities from other nations? If yes:
  - a. What are some examples of collaboration in recent years?
  - b. Are there regular meetings and at what intervals?
  - c. What specific areas does the collaboration cover and how are the cross border issues dealt with regarding the different types of investigations?

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<sup>18</sup> On the broader issues of international collaboration and advocacy, see, for example, Cassidy (2001), Correa and Aguiar (2002), de Araujo (2002) and Mavroidis and Neven (2000). The websites (see the references) of the European Commission's DG Competition, the US Federal Trade Commission, the UK Office of Fair Trading, and other competition authorities, present information on their international advocacy activities.

2. Is there a formal mechanism by which the competition authority has collaborated with authorities of other nations in trying to harmonize administrative, application and evaluation procedures? If yes:
  - a. What were the economic criteria – such as benchmarks for market power or the specific theories of competitive harm – where harmonization was sought? Describe the outcomes and agreements?
  - b. What were the administrative and application procedures – such as merger approval filing requirements, fees, sharing of information, among others – where harmonization was sought? What were the outcomes and agreements?
  - c. What agreements were reached on the confidentiality of information for merger, abuse of dominance and cartel investigations?
  - d. Has all of this information been widely disseminated and easily available to businesses and investors? Cite the sources from where investors and firms can obtain this information.

## **OECD Policy Resources**

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OECD Roundtable on Ensuring Access to Key Capacity for New Entrants,” Presentation by Hungary at the OECD Workshop, 2006.

OECD (2005), Council Recommendation on Merger Review.

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Microsoft decisions. [http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm)  
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European Commission, DG Competition [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html)

United Kingdom, Office of Fair Trading <http://www.offt.gov.uk/>

U.S. Department of Justice, Antitrust Division <http://www.usdoj.gov/atr/>

U.S. Federal Trade Commission, Bureau of Competition <http://www.ftc.gov/bc/index.shtml>