

Update of the Policy Framework for Investment

Draft chapter: Competition



Context

Since the PFI was developed in 2006, new forces have reshaped the global investment landscape, including the global economic and financial crisis, which started in 2008 and from which many economies have still not recovered, and the emergence of new major outward investors within the G20, the spread of global value chains. Numerous lessons have also been learnt through the use of the PFI, particularly in developing and emerging economies. To reflect new global economic fundamentals, an update of the PFI was launched in 2013 and is due for completion in 2015.

Invitation to contribute

Experts, business and civil society representatives, international organisations, and the general public are invited to contribute comments on this draft chapter. Comments should be sent to investment@oecd.org by 31 December 2014.

A compilation of comments received will be published online at the end of the consultation period.

Contact

If you have any questions regarding the consultation, please email investment@oecd.org.

Find out more about the update of the PFI: www.oecd.org/investment/pfi-update.htm

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COMPETITION

1. Effective competition is essential for a dynamic business environment in which firms are willing to take risks and invest.
2. A competitive environment encourages risk-taking and, thus, investment. There is extensive empirical evidence that industries facing greater competition experience faster productivity growth, because competition allows more efficient firms to enter and gain market share at the expense of less efficient ones. In competitive markets firms succeed when they better satisfy their consumers. Furthermore, without competition there is little incentive to innovate. Newer products and processes allow firms to get ahead of the game.
3. Creation and maintaining a competitive environment requires a sound and well-structured competition law, an effective competition authority that enforces this law, and, more widely, economic policies that respect the principles of competition and avoid unnecessarily restricting it.
4. A sound competition law guarantees that firms know “the rules of the game” and respect them. Such a law should prohibit anticompetitive vertical and horizontal agreements, as well as exclusionary practices by dominant companies, and it should provide for the review of mergers and acquisitions to prevent the creation of conditions that can lead to a reduction in competition. The rules should apply equally to all firms – whether private or state-owned, foreign or domestic – in all sectors and exemptions should exist only when absolutely necessary and well-justified.
5. Even a well-designed competition law can be effective only if it is properly enforced. A well-resourced, skilled and independent competition authority is needed, which fulfils its mandate free from any political interference. The agency should have the necessary power and tools to uncover illegal practices and to impose sanctions for infringements so as to ensure a reasonable level of deterrence, while being proportionate. It should also provide confidence in a fair and transparent application of the law, by guaranteeing the right to a fair process, clarity about the rules, and certainty about the length of the enforcement procedures. Complex and hard to interpret rules and non-transparent proceedings of unpredictable duration do not foster a climate of trust and certainty, and discourage firms from investing.
6. Deterring and stopping anticompetitive behaviour and mergers is a necessary, but not sufficient condition for ensuring a competitive environment. All economic policies have to contribute to achieve this aim.
7. Sometimes competition can be weakened by other government interventions pursuing different objectives. To avoid this outcome, government and public bodies should systematically assess the impact on competition of proposed policies, laws and regulations, and should eliminate any unnecessary obstacles and distortions to competition these may create, unless essential to the achievement of other policy goals. The expertise and knowledge of competition agencies should be exploited to provide advice and support. Competition agencies can contribute by identifying on their own initiative any distortions to competition introduced by government interventions.

8. Similarly the principles of fair and effective competition should inform how the public sector procures its goods and services and awards concessions for the provision of services using public resources. Competitive tendering based on clear transparent and non-discriminatory rules should be used to select the best providers and any form of bid-rigging should be detected and punished.

9. Privatisation and liberalisation policies should be designed so as to create the conditions not just for the entry of new players, but to guarantee sustainable and effective competition. This includes ensuring that accounting, functional or structural separation is put in place when necessary to separate the competitive and non-competitive elements of the industry and to avoid discrimination and cross-subsidisation. Appropriate sectoral regulation has to be introduced, which has to reach a delicate balance between the need to avoid the incumbent exploiting its advantages to foreclose entry and expansion, and the need to provide new entrants with the proper incentives to invest. Liberalisation, when properly implemented, is considered to have an unambiguously positive effect on investments.

10. The questions listed in the rest of this chapter are meant as a guide for policy makers to determine if, and to what extent, these pillars are in place in a given country, and how laws, policies and institutions can be improved to create the appropriate environment to foster competition and hence favour investment

Key questions

- 1. Do you have an independent and well-resourced competition authority with the necessary powers to effectively enforce competition law?*
- 2. Are any exemptions to the application of competition law limited and justified?*
- 3. Do you have a competition law that prohibits anticompetitive agreements, and anticompetitive behaviours by dominant companies, and that provides the necessary tools to uncover such illegal practices, as well as adequate sanctions to deter them?*
- 4. Does your competition law provide for the review of mergers and acquisitions between companies that can harm competition?*
- 5. Does your competition law provide for a fair and transparent process to the parties involved in competition investigations and proceedings, and for effective judicial review?*
- 6. Are the effects on competition of policies, laws and regulations considered and any unnecessary impediment to competition removed?*
- 7. Has sectoral economic regulation been imposed only when necessary and is proportionate?*
- 8. Does the public procurement regime ensure a level playing field among companies competing for contracts and guarantee that the best value offer is selected?*

SUPPLEMENTAL QUESTIONS

<p>Do you have an independent and well-resourced competition authority with the necessary powers to effectively enforce competition law?</p>	<ul style="list-style-type: none"> • Is the competition authority an independent agency or attached to a ministry? To whom does the authority report? How is it financed? • If there are other authorities, e.g. sectoral regulators, which have the powers to protect or foster competition, are their respective roles and areas of interest well-defined to avoid conflicting interventions?
<p>Are any exemptions to the application of competition law limited and justified?</p>	<ul style="list-style-type: none"> • Are there sectors or economic actors (e.g. state-owned enterprises or small and medium enterprises) that are partially or fully exempt from the application of competition law? • Is there an economic rationale or a public interest rationale for these exemptions?
<p>Do you have a competition law that prohibits anticompetitive agreements, and anticompetitive behaviours by dominant companies, and that provides the necessary tools to uncover such illegal practices, as well as adequate sanctions to deter them?</p>	<ul style="list-style-type: none"> • Does your competition law prohibit hard core cartel agreements and other anticompetitive horizontal or vertical agreements? • Does your competition law prohibit abuses of dominant position/monopolisation? • When the competition authority assesses whether an agreement or a unilateral behaviour is anticompetitive does it only consider the impact these may have on competition or also other factors (e.g. impact on employment)? • Is the determination of whether a firm holds a dominant position in a market based on solid economic criteria? • Does the competition agency have the necessary power and tools to uncover such illegal practices (e.g. inspection powers)? • Does the competition law permit the imposition of sanctions for infringements of the competition law that are adequate to ensure a reasonable level of deterrence, while being proportionate? • Is there a leniency program to help uncover cartels?
<p>Does your competition law provide for the review of mergers and acquisitions between companies that can harm competition?</p>	<ul style="list-style-type: none"> • Does your competition law require the review of mergers and acquisition by the competition agency before they are completed? • Is there a threshold for notification that limits the scrutiny of the competition authority to the more economically relevant mergers and acquisitions? • Are there statutory timetables that provide certainty about the duration of merger and acquisition reviews? • Can the companies propose remedies to address any competition concern raised by a merger or acquisition they are involved in? • Are there special, more restrictive criteria for assessing mergers and acquisitions that involve foreign companies? • Can an anti-competitive merger or acquisition be allowed on other grounds (e.g. public interest)?

<p>Does your competition law provide for a fair and transparent process to the parties involved in competition investigations and proceedings, and for effective judicial review?</p>	<ul style="list-style-type: none"> • Are the competition rules and practices that regulate competition enforcement made public and accessible to all interested parties? • Does your legislation provide companies investigated by the competition authority with the right to a due process (e.g. have a right to be informed about the reasons for the investigation, to have a right to defend themselves, to have a right to access the case files, to have a right to ask for clarifications)? • Are there protections for ensuring that confidential or privileged business information provided by companies during investigations, merger reviews and market studies is not disclosed to third parties? • Are there statutory timetables that provide certainty about the duration of investigation? • Does your legislation allow for competition authority decisions to be effectively reviewed by an independent appellate body? • Does your legal system allow for compensation of the victims of competition law infringements (e.g. accessible procedures to seek damages for the losses they have incurred)?
<p>Are the effects on competition of policies, laws and regulations considered and any unnecessary impediment to competition removed?</p>	<ul style="list-style-type: none"> • Does the competition authority have the power to undertake market studies in markets where competition does not appear to be effective and propose recommendations to address any impediment to competition it may identify? • Do the government/ministries regularly assess the impact on competition of proposed policies, laws and regulations that may have implications for competition (e.g. those that restrict entry, access, exit, pricing, output, normal commercial practices, and forms of business organisation) and ensure that no alternative arrangements can meet the same objectives with less distortive effect on competition? • Is the competition authority involved in this process (e.g. performs the assessments, provides advice)? • Has the competition authority been involved in the design of the privatisations processes that have taken place in the last few years?
<p>Has sectoral economic regulation been imposed only when necessary and is proportionate?</p>	<ul style="list-style-type: none"> • Are natural monopolies, whether state-owned or private, regulated to ensure that prices are not excessive and the owners have incentives to reduce costs? • When a legal monopoly has been opened to competition (liberalisation) has appropriate regulation been imposed on the incumbent to ensure that competition can develop? • Are there measures to ensure co-ordination and consistency between competition law enforcement and economic sectoral regulation?
<p>Does the public procurement regime ensure a level playing field among companies competing for contracts and guarantee that the best value offer is selected?</p>	<ul style="list-style-type: none"> • Are public authorities required to guarantee transparency, equal treatment and non-discrimination when procuring goods and services or awarding concessions? • Are tenders designed to ensure that only value for money bids are selected? • Is there a preference (e.g. a minimum quota) for domestic suppliers over foreign ones or for state-owned or managed enterprises vs privately-owned ones? • Can sanctions be imposed for engaging in bid rigging activities that ensure an adequate level of deterrence?

ADDITIONAL RESOURCES

Websites

www.oecd.org/daf/competition

www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm

www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm

www.oecd.org/daf/competition/assessment-toolkit.htm

www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm

www.oecd.org/daf/competition/reforms

www.oecd.org/daf/competition/recommendationconcerningstructuralseparationinregulatedindustries.htm

www.oecd.org/daf/competition/recommendationconcerningstructuralseparationinregulatedindustries.htm