

COMPETITION ASSESSMENT TOOLKIT

1 principles



COMPETITION ASSESSMENT CHECKLIST



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

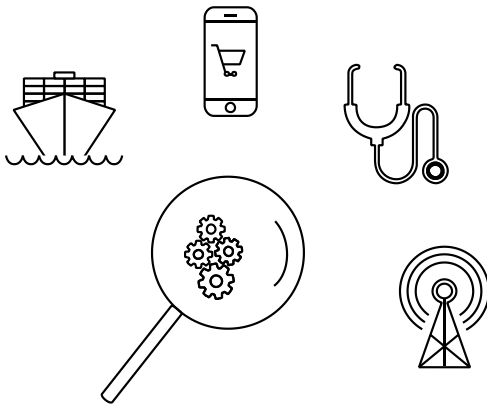
Limits the choices and information available to customers

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

Competition Assessment Toolkit

Volume 1
Principles



Please cite this publication as:
OECD (2019), *Competition Assessment Toolkit: Volume 1. Principles*,
www.oecd.org/competition/toolkit

Version 4.0.

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD or of the governments of its member countries or those of the European Union.

This document and any map included herein are without prejudice to the status or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city, or area.

© OECD 2019



Foreword

Increased competition improves a country's economic performance, opens business opportunities for its citizens and reduces the cost of goods and services throughout the economy. However, numerous laws and regulations may unduly restrict competition in the marketplace. Governments can reduce unnecessary restrictions by applying the methods described in the OECD's "Competition Assessment Toolkit". The Toolkit provides a general methodology for identifying unnecessary restraints and developing alternative, less restrictive policies that still achieve government objectives. A key element of the Toolkit is the "Competition Checklist" that asks a series of simple questions to screen for laws and regulations that could unnecessarily restrain competition. This screening focuses limited government resources on areas where competition assessment is most needed.

Governments can use the Toolkit in three ways:

- To evaluate draft new laws and regulations (for example, through regulatory impact assessment programmes)
- To evaluate existing laws and regulations (either in the economy as a whole, or specific sectors)
- To evaluate the competitive impacts of regulation (either by the government bodies that develop and review policies -or the competition authority).

It is designed for use in a decentralised fashion across government, at both national and sub-national levels. The Toolkit materials were designed with this flexibility because restrictions on competition can be implemented at different levels of government, and competition assessment is useful at all levels. One of the most successful examples of pro-competitive reform occurred in a federal system when Australia implemented broad, pro-competitive reforms at both national and state level in the mid-1990s. Since that time, Australia has experienced strong economic performance, with high and steady growth that has raised Australia's economy from a mid-level performer to one of the top

performing OECD economies. In a 2013 large competition assessment project, economic benefits from implementing recommended changes amounted to around EUR 5.2 billion (OECD, 2014a). In another project, benefits were estimated at around 2.5% or more of GDP (Sims, R., 2013 and Productivity Commission, 2005). While not all projects will have such large impacts, benefits from competition assessment can often be substantial.

The Toolkit can be used by officials without specialised economic or competition policy training. Potential users include: ministries, legislatures, government leaders' offices, state governments and external policy evaluators.

The Competition Assessment Toolkit is available in many languages to encourage its broad use and adoption. It contains three volumes: Volume 1 - *Competition Assessment Principles* - gives examples of the benefits of competition, provides an introduction to the Competition Checklist and shows ways that governments assess the competitive effects of their policies; Volume 2 - *Competition Assessment Guidance* - provides detailed technical guidance on key issues to consider when performing competition assessment; and, Volume 3 - *Operational Manual for Competition Assessment* - is a step-by-step guide for performing competition assessment. All related materials can be found on the OECD's website at www.oecd.org/competition/toolkit.

Acknowledgements

The Competition Assessment Toolkit was developed by Working Party No. 2 of the Competition Committee, with the input of many OECD delegations, both from Member and non-Member economies, and other OECD bodies with an interest in these areas, including the Regulatory Policy Committee and the Consumer Policy Committee.

At the OECD Secretariat, the materials were drafted by Rex Deighton-Smith, Sean F. Ennis, Vivek Ghosal, Marta Troya-Martinez, Mark Ronayne, Cristiana Vitale and Sabine Zigelski, under the leadership of Sean F. Ennis of the Competition Division. Substantial comments were made by Peter Avery, John Davies, António Gomes, Stéphane Jacobzone, Federica Maiorano, Ania Thiemann and many OECD committee delegates.

Chapter 1 was prepared by Sean F. Ennis, in conjunction with Rex Deighton-Smith and Vivek Ghosal. The examples provided in Chapter 2 were prepared by John Davies, Vivek Ghosal, and Cristiana Vitale.



Table of contents

Chapter 1

Competition Assessment and the Competition Checklist..... 7

Chapter 2

How competition benefits consumers and positively affects productivity, growth, innovation and employment..... 23

Chapter 3

Fitting Competition Assessment into government operations 33

References..... 43

Appendix

Recommendation of the OECD Council on Competition Assessment 47



Chapter 1

Competition Assessment and the Competition Checklist

This chapter describes the Competition Checklist and its role in the competition assessment process. Readers with prior knowledge of this topic may wish to proceed directly to the technical companion volume, *Competition Assessment Guidance*.

Introduction

Government action is designed to promote and protect important public policy goals and there are usually multiple ways to achieve these goals. When considering options, it is beneficial to assess the effects on competition because consumers are typically better off when there is more, rather than less, competition.¹ Such assessments are best performed early in the process of developing policies.

The Toolkit shows regulators and legislators how to make that assessment. It provides a practical method to identify important competitive restrictions and, if possible, how to avoid them. In 2009, the OECD Council adopted a Recommendation on Competition Assessment (see Appendix A for the full text of the recommendation).

As a first step, the method employs a “Competition Checklist”, a set of threshold questions which indicate when a proposed law or regulation may have significant potential to harm competition. The Checklist helps policymakers focus on potential competition issues at an early stage in the policy development process.

¹ Examples of the benefits of competition are provided in Chapter 2.

While the majority of regulations do not present a risk of significant harm to competition, the competition assessment process, of which the checklist is the initial stage, provides an analytical framework for regulators and legislators to mitigate, or avoid, potential competition problems. It does so by helping to identify possible alternatives that may reduce, or eliminate, potential harm to competition while continuing to achieve the desired policy objectives.

The rest of this chapter describes the four categories of questions in the Competition Checklist and the first step policymakers should take if the answer to any of these questions is “yes.” It also gives some initial ideas for potential policy alternatives.

COMPETITION ASSESSMENT CHECKLIST

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 goods or services
- 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

Checklist A Are there limits on the number or range of suppliers?

Limiting the number of suppliers leads to the risk that market power² will be created and competitive rivalry will be reduced. When the number of suppliers declines, the possibility of diminished competition (or collusion) among remaining suppliers increases, and the ability of individual suppliers to raise prices can be increased. The resulting decline in rivalry can reduce incentives to meet consumer demands effectively and can reduce innovation and long-term economic efficiency. While there may be sound reasons for policy makers to limit the number or range of suppliers the benefits of entry limits need to be carefully balanced against the fact that ease of entry by new suppliers can help prevent existing suppliers from exercising market power or colluding.

A1 *Grants of exclusive rights*

Granting an exclusive right to produce a certain good, or provide a certain service, represents the establishment of a private monopoly. Historically, the grant of an exclusive right occurred frequently in the context of a “natural monopoly”.³ Exclusive rights, particularly if granted for a long duration, have frequently been considered as a means of encouraging substantial investment in infrastructure that might not occur without the incentive of a guaranteed market that an exclusive right provides. But exclusive rights are sometimes used in situations where the natural monopoly justification for them does not apply.

Exclusive rights are, in many respects, the ultimate entry barrier and are likely to yield monopoly pricing and other problems associated with the exercise of market power. Regulation does not always prevent these outcomes because regulators often fail (or have limited success) in the restriction of market power and protection of consumers. Therefore, such rights should be limited and only established after careful consideration of prices to be charged, duration of rights, and alternative ways to achieve the same objectives.

² Market power of suppliers is the ability to profitably increase price, decrease quality, or decrease innovation relative to the levels that would prevail in a competitive market.

³ A monopoly exists when a good or service can reasonably be purchased from only one supplier. In a “natural monopoly”, one supplier can produce the desired output more efficiently and at a lower total cost than two or more suppliers.

Alternative policy options

If there are no alternatives, regulators may wish to consider auctioning the exclusive right. Advice should be sought from the government, or other economists, as to the most appropriate type of auction for the proposed sale of rights. Where such a right is granted, particular attention needs to be paid to regulatory design. For example, issues need to be addressed, such as the relative appropriateness of “cost-plus” pricing regulation versus “rate-of-return regulation” versus “price-cap” regulation. Moreover, in many cases, splitting the exclusive right between two or three parties can conserve competitive dynamics to some degree while still reaping the desired benefits.

A2

License or permit requirements

Licenses or permits required for operation necessarily restrict entry. Qualification requirements can take the form of minimum standards for formal education and/or experience and may include good character requirements. For example, in the finance industry, before participation in an official capacity at company and board level is permitted, so-called “fit-and-proper” tests are often required. In other industries, potential entrants are sometimes required to take a “public interest” test to demonstrate the “need” for an additional service to be provided and, in some cases, to show that their entry would not have a negative impact on existing industry businesses. In extreme cases, there may be a fixed numbers of licensees.

License or permit requirements are often stricter than needed for consumer protection and can reduce consumer choice unnecessarily or create artificial scarcity that raises prices. While licensing schemes often have well-founded consumer protection objectives, such barriers frequently have the effect of protecting incumbent producers from competition. Care needs to be taken that license and permit requirements do not become more onerous than necessary to achieve the desired regulatory objectives.

Alternative policy options

Product quality standards that ensure consumer safety should not be set higher than necessary. Likewise, restrictions on supplier size (e.g. only one storefront per professional) should not be set at levels that create substantial anti-competitive impacts or inefficiencies. Similarly, when compulsory insurance, performance bonds and comparable requirements are being considered, the nature and extent of consumer harm that can potentially result from poor practice, or from the failure of a service provider,

should be taken into account. To ensure consumers are protected from any potential harm, they must be able to make well-informed decisions when selecting a provider. Alternative approaches to enhancing consumer knowledge should be envisaged.

A3***Limits the ability of some suppliers to provide goods or services***

Governments can limit the ability of certain suppliers to participate in a business activity. For example, some governments require all real estate brokers to provide a government-mandated set of services, which limits or prohibits low-cost minimum-service brokers, or fee-for-service brokers, from providing services. Such restrictions are often excessive because they unduly restrict the number of suppliers, reduce competition between suppliers and result in higher prices or less desirable contract terms for customers.

Alternative policy options

When regional or small business policy objectives are under consideration, alternative options that are less restrictive to competition may include: a range of direct subsidies and/or tax benefits, more favourable regulatory provisions for the small or regional provider, or the use of publicity/educational campaigns.

A4***Significantly raises the costs of entry or exit***

Regulations that raise the cost of entry to, or exit from, a market will tend to discourage potential entrants thus reducing the number of participants in the market over time. Examples of this type of regulation include: rigorous product testing requirements, and unnecessarily high educational or technical qualifications to be met. In the case of the digital economy, physical presence, minimum scale and inspection rules can unduly obstruct entry.

Alternative policy options

Governments sometimes act to minimise the negative competitive impacts of such provisions by providing targeted exemptions. For example, low-volume car manufacturers are often exempt from aspects of vehicle testing regulations, or subject to less onerous testing protocols. To enable better informed consumer choices, alternatives such as providing more information or product disclosure requirements could be considered. In some cases, regulation may be required, even though it could raise entry costs. The focus should be on minimising anti-competitive potential by ensuring that

requirements to achieve an adequate degree of consumer protection are set at the minimum mandatory level.

A5

Restricts the geographic flow of goods, services, capital and labour

Regulations sometimes limit the flow of goods, services, capital and/or labour across jurisdictional boundaries, often as an instrument of regional policy. Such limitations, however, artificially reduce the geographic area of competition for provision of a good or service. This may reduce the number of suppliers and potentially allow suppliers to exercise market power and increase prices.

Potential restrictions should be assessed on the following questions:

- Is there a clear link between the restrictions and achievement of specific policy goals?;
- Are restrictions the minimum necessary for achievement of the goal?;
- Does a reasoned analysis suggest that the policy goal will be achieved by means of the restriction?; and
- Are restrictions limited to a finite time span through explicit regulatory provisions?.

There is a substantial risk of “temporary” protection developing into a quasi-permanent arrangement as a result of substantial lobbying by suppliers benefitting from the restrictions.

Alternative policy options

There are often better alternatives available to achieve regulatory objectives, including direct subsidies and favourable regulatory treatment. In general, there are relatively few contexts in which such restrictions are likely to pass a benefit/cost test. Therefore, policymakers should adopt a generally sceptical view of proposed regulation that includes such restrictions.

Checklist B **Are there limits on suppliers' ability to compete?**

Regulation can affect a supplier's ability to compete in a variety of ways, including: advertising and marketing restrictions; standard setting for products or service quality; and price control of goods or services. These limits can reduce the intensity and dimensions of rivalry, yielding higher prices for consumers and less product variety.

B1 *Controls the prices at which goods or services are sold*

Governments often regulate prices in traditional monopoly sectors, such as utilities. These types of price control are probably helpful to consumers and serve as a counterweight to a lack of consumer alternatives. However, price controls are also sometimes applied in situations where there are many potential suppliers for the same consumer. When minimum prices are set, low-cost suppliers who provide better value to consumers are prevented from winning market share. Similarly, when maximum prices are set, supplier incentives to innovate by providing new and/or high-quality products can be substantially reduced, and suppliers may effectively co-ordinate their prices around the maximum price.

Minimum price regulation is sometimes a response to extremely vigorous price competition. In these cases, minimum price regulation is generally seen as a means of protecting small suppliers from "unfair" competition. The impacts of such price regulation merit careful evaluation because the result is likely to be higher prices for consumers or unmet demand. Maximum price regulations are frequently introduced as a necessary corollary to entry restrictions. An alternative is to permit freer entry to the market.

Alternative policy options

Price regulation rarely constitutes the most effective or efficient means of achieving intended objectives. For example, in the taxi market, a better means of protecting consumers is to address restrictions on supply with the introduction of ride-hailing services. In the case of "predatory pricing" concerns, use of the general competition law is likely to be a better alternative. Thus, regulation proposing to control prices should be subject to especially rigorous scrutiny.

B2 *Restricts advertising and marketing*

Regulations that restrict suppliers' ability to advertise or market goods and services often exist to limit false or misleading advertising. Sometimes restrictions are intended to reduce advertising for products or services that are deemed to have a socially negative value or that are subject to excess consumption. At other times, advertising to certain "vulnerable" groups, such as children, may be restricted. Restrictions of this nature, when circumscribed to ensure they are not overly broad, can have significant social benefits.

In many cases, however, advertising and marketing restrictions are too broad and unduly restrict competition. Restrictions on advertising and marketing are likely to be particularly onerous for potential entrants, as they restrict an entrant's ability to inform potential customers of their presence in the market and of the nature and quality of the goods and services that they are able to offer.

Alternative policy options

General consumer protection laws almost invariably contain prohibitions on misleading and deceptive advertising practices. These promote efficient markets and are effectively pro-competitive and usually obviate the need for any further, product- or service-specific, advertising restrictions. Where there is a need to discourage over-consumption, alternative approaches to advertising restrictions include information campaigns and consumption taxes. These constitute more direct, effective, means of addressing the identified policy issue.

B3 *Sets standards for product quality that provide an undue advantage to some suppliers over others, or are above the level that some well-informed customers choose*

Regulations setting standards often provide benefits to consumers and can help to promote new types of products by ensuring that new products from different suppliers are compatible. But standard setting can also provide undue advantages to some suppliers over others. One common example is environmental regulations that limit the allowable emissions of a mildly toxic substance. While limiting emissions is often appropriate to protect public health, regulations can be designed in ways that unfairly advantage a small number of suppliers, for instance, by requiring a particular technology or by

setting unduly strict standards that are difficult, or impossible, for less well-resourced producers to meet. Another example where standard-setting can have a significant anti-competitive impact is when minimum quality standards are set for particular product types. There are often sound objectives underlying such standard-setting, such as consumer protection from risks associated with the use of the product. However, when some consumers prefer lower cost over increased safety, the need for the standard is less clear. Consumer welfare can be reduced by such standards as consumers are prevented from buying cheaper, lower quality goods that they might prefer, even when fully informed of all associated risks.

Alternative policy options

Alternatives to stricter product standards regulations often exist. For example, when minimum standards are pursued for consumer protection reasons, it may be possible to require disclosure of certain product characteristics instead. When major changes in emissions standards are contemplated, governments can seek to minimise anti-competitive impact by permitting emission rights trading or providing temporary assistance to smaller suppliers in order to help them meet the new requirements.

B4

Raises the costs for some suppliers relative to others

At times, regulations have the effect of raising costs for some suppliers relative to others. One source of cost asymmetry is due to regulations that unnecessarily require the use of one technology of production over another. Another source is the “grandfather clause” which exempts current suppliers from a regulation but applies it to new entrants. Subsidies or preferential financing for state-owned or preferred enterprises are also a source. Imposition of regulations which were designed for traditional suppliers on digital technology powered businesses may increase their costs. Such arrangements have substantial potential to distort competitive relations within the industry by influencing costs to some suppliers to a greater extent than to others. This can create inefficiency, impede entry, reduce corporate-led innovation and lower the intensity of competitive pressure in the market. While creating cost differentials can be harmful, this does not mean that regulations should always seek uniform supplier costs.

Regulations that require registration to practice a particular profession can include grandfather clauses to allow those who have extensive experience within the profession to be registered even if they do not have the training or qualifications necessary for new applications to register. In relation

to productive technologies, grandfather clauses are often implemented to ensure adequate time exists to amortise the sunk costs of previous investments.

Alternative policy options

The anti-competitive impact of grandfather clauses can be minimised by ensuring that they are time-limited rather than permanent. The duration of the exemption should be strictly proportionate to the underlying rationale for the clause being granted in the first place. More generally, however, a sceptical approach to arguments in favour of the need for grandfather clauses should be taken, as they are frequently a reflection of attempts to defend vested interests from potential competition.

Subsidies can provide benefits in many circumstances, but when they fundamentally alter terms of competition by providing advantages to firms that are inefficient, they may move business to less efficient providers. Alternatives to subsidies can include restructuring to eliminate uneconomic activities and to make businesses run with higher productivity, though at times special subsidies may be required to support such restructuring. In some jurisdictions, subsidies are limited to ensure they are not ongoing, that they are genuinely aimed at improving the performance of viable companies and to address market failures, and that their negative effects on competition remain limited.

Checklist C

Are there reductions in the incentives for suppliers to compete?

Regulations can affect supplier behaviour by not only changing their ability to compete, but also by changing their incentive to act as vigorous rivals. The main reasons suppliers may compete less vigorously are due to regulations that: may facilitate co-ordination between them or reduce the willingness, ability or incentive of customers to switch between different suppliers.

Other reasons include profit or market share limits, that restrict potential rewards from competing. Cartel-like behaviour⁴ may be more readily

⁴ A cartel exists when competitors make an agreement to restrict competition, for example by setting a price, limiting supply, sharing profits or rigging bids, thus increasing their collective profits.

generated under self-regulatory or co-regulatory regimes, by increasing the share of supplier output and price information, or by excluding an industry or sector from the reach of competition law.

Cartels are harmful because they restrict output and raise prices, making consumers worse off. The risks of cartel activity must be balanced against potential benefits of self-regulation, such as quicker certification of new technologies.

C1***Self-regulation and co-regulation***

When an industry or professional association takes full responsibility for regulating the conduct of its members, without government legislative backing (often at the urging of government), the term “self-regulation” is used. However, when a government provides legislative backing to rules that are developed, at least partly, by the industry/professional association, the term “co-regulation” is used. Self-regulatory and co-regulatory structures can yield substantial benefits by ensuring that technical standards are appropriate and that standards advance with technology.

However, these structures can have significant anti-competitive impacts. In particular, industry/professional associations often adopt rules that reduce incentives or opportunities for vigorous competition between suppliers of goods or services, such as advertising restrictions and rules that prevent discounting. In addition, unduly strict qualification requirements may reduce market entry.

Alternative policy options

Governments should retain powers to prevent attempts by the industry/professional association to use regulatory powers in an anti-competitive manner. This may include either ensuring that self-regulation or co-regulation clearly remains subject to competition law enforcement, or that relevant governmental authorities have the right to approve or refuse association rules and, to substitute their own rules, as necessary, should the association continue to propose unacceptable rules.

C2***Requirements to publish information on supplier prices, outputs or sales***

Regulations that require market participants to publish information on their prices or output levels can significantly contribute to the formation of

cartels, as a key requirement for cartel operation is that participants can effectively monitor their competitors' (or co-conspirators') market behaviour. Cartels and tacit co-ordination are more likely to arise when: there are fewer participants in the market; entry barriers are high; suppliers' products are relatively homogeneous; and, information is available before, or soon after, price or output changes occur.

Regulations may be adopted that require publication of information, such as price and output levels, to improve consumer information and, sometimes this can improve the efficiency of markets. However, when cartel formation is likely, such requirements are more likely to have a net negative impact. Other options exist that do not require publishing all collected data.

Alternative policy options

When information is gathered primarily for government policy making, there may be no need to publish it at all. When the purpose is to aid consumers or provide general statistics, aggregate statistics are less supportive of cartels than company-specific statistics, and historical statistics are less supportive than current information. Aggregated statistics across companies will deter cartel members from identifying suppliers that are violating the cartel agreement, whereas company-specific statistics can clearly identify a company that has deviated from a cartel agreement over pricing or quantity. As cartels need to share current information in order to allocate output and set price targets, historical statistics and information are less useful to them.

C3

Exemptions from general competition laws

In many countries, particular suppliers or economic sectors benefit from exemptions from general competition law but some are subject to their own, sector-specific competition laws. In other cases, no restrictions on anti-competitive conduct exist at all. Where a substantial derogation from the general application of competition law exists, there is a clear risk of cartels, pricing abuse and anti-competitive mergers.⁵

⁵ A merger is a combination of two (or more) previously independent firms to form one larger firm.

Alternative policy options

When there is a specific rationale for the continued existence of an exemption, consideration should be given to how its effect can be minimised. For example, a legislated monopoly requiring all producers of a particular commodity to sell to a licensed wholesaler may be more restrictive than allowing producers to engage in co-operative selling arrangements.

Checklist D **Are there limits on choices and information available to customers?**

D1 ***Limits the ability of consumers to decide from whom they purchase goods or services***

Regulations sometimes limit choices available to consumers. For example, a regulation may restrict customers to utilising medical services locally. Such a regulation could limit quality of care and prevent consumers who would prefer to go further afield (for example, to a clinic with shorter waiting lists or a better reputation) from doing so.

Placing limits on consumer choice can be harmful, because designated suppliers will have less incentive to deliver products of desired quality and price.

Alternative policy options

The most likely alternative is better information. But sometimes information is simply not enough. For example, in the case of contact lenses, the rules for prescriptions were modified to oblige prescribers, who had issued a prescription for private label and exclusively supplied contact lenses, to provide sufficient information so that close alternatives on the market could be identified and legally substituted by contact lens sellers. (For more details, see Chapter 4, Section 4.1 of the Competition Assessment Guidance, volume 2 of the Competition Assessment Toolkit).

D2 ***Reduces the mobility of customers by increasing the costs of changing suppliers***

Regulations can make consumers more or less willing to switch suppliers by affecting “switching costs” – the explicit and implicit costs borne by a consumer in changing from one supplier to another. Switching costs may arise for various reasons, including long contract terms or tying of assets to

suppliers in a way that makes switching inconvenient, as with tying a phone number to a given service provider. When consumers face high switching costs, suppliers can charge higher prices for their goods or services and will sometimes promote policies to ensure high switching costs.

Alternative policy options

The pro-competitive impact of reducing or eliminating switching costs can be large, and policymakers should avoid policies that raise switching costs for consumers. Where there is a clear risk of switching costs being imposed, provisions should be included in the regulatory structure to limit or prohibit their use. Due care should be taken to ensure that legitimate costs of consumer switching are considered. Even when the supplier will incur substantial costs as a consequence of the switching process, if the pro-competitive impact of reducing or eliminating costs is sufficiently large, the regulator may wish to prevent suppliers from explicitly recovering those costs from consumers. Competition between businesses prior to a customer purchase decision may help to lower negative impacts from switching costs.

D3

Fundamentally changes information required by buyers to shop effectively

When governments deregulate and introduce markets that did not previously exist, consumers will be asked to choose between products that they may never have purchased before. One example where this may occur is the consumer purchase of electricity. When consumers are able to select a supplier in new markets, it can be difficult for them to evaluate offers and distinguish good companies from bad ones. When information is lacking on the “new” product, reforms risk being rolled back due to consumer complaints about companies taking advantage of them.

Alternative policy options

To ensure deregulation survives and is considered a success, it may be better to accompany the creation of new choices with an information requirement that provides consumers with a reference point for comparing offers.

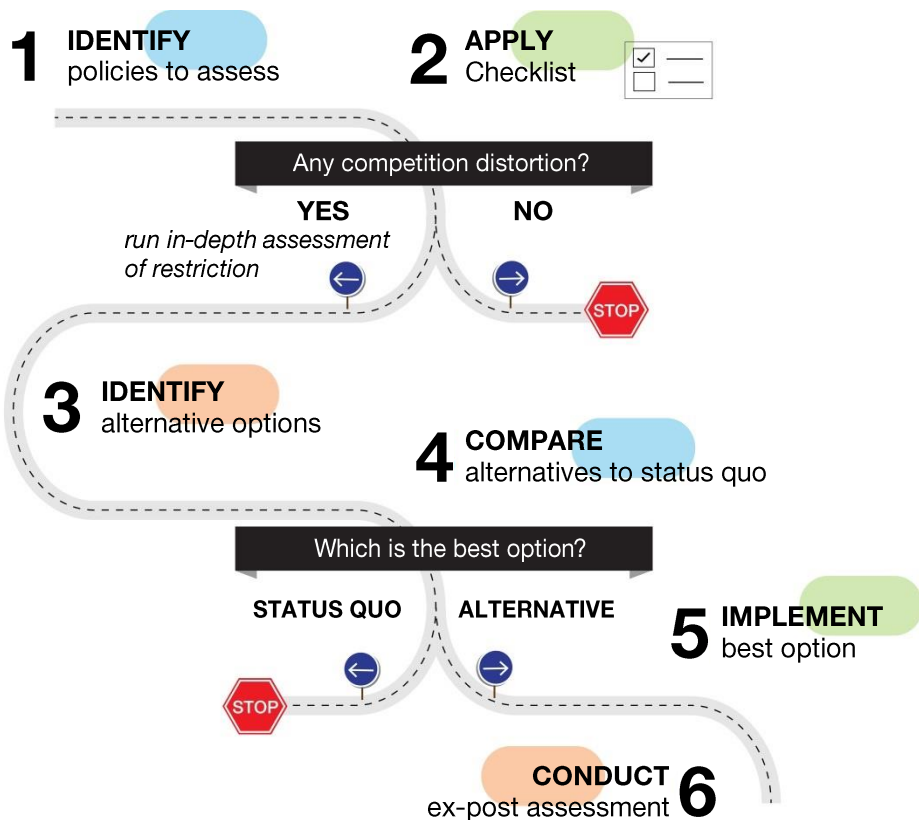
Options for such information requirements may include government-run information and educational programmes which may distribute leaflets, or air public service television commercials to help educate consumers about the choices they will have after deregulation.

When the answer is < yes >

Identifying regulations that may unduly restrict competition is the important first step for improving regulatory quality. The Competition Checklist questions provide an initial basis for identifying regulations that may give rise to an anti-competitive impact. Sub-points under questions indicate the main, but not exclusive, ways in which regulations may unduly restrict market rivalry.

Checklist users will most likely find that only a minority of regulations have the potential to unduly constrain market activity. But when the Checklist suggests that there is a potentially excessive constraint on market activity, a more comprehensive competition assessment merits consideration. Chapter 3 discusses how to fit competition assessment into governmental operations and the *Operational Manual* describes how to carry out the assessment.

Figure 1. Steps in Competition Assessment





Chapter 2

How competition benefits consumers and positively affects productivity, growth, innovation and employment

This chapter, based on OECD (2014b), provides examples of how competition delivers substantial benefits to consumers. It also summarises the main beneficial effects on macro-economic outcomes such as productivity, growth, innovation, employment and inequality.

1. Consumer benefits

An important reason for market reforms is that governments are clearly recognising the benefits of competition.¹ The Competition Assessment Toolkit provides practical tools for governments to limit excessive restrictions on competition. Before using these tools, it is worth considering why increased competition between businesses is a goal worth pursuing.

Competition among businesses can deliver improvements in production efficiency and bring newer and better products to consumers through innovation, leading to gains in economic growth and consumer welfare. In general, competition between suppliers usually leads to lower prices and greater choice. To understand how these benefits go directly to consumers,

¹ In many of de-regulated industries such as telecommunications, electricity and airlines, one of the touted benefits of competition was that excess capacity built under regulation would eventually be reduced, leading to greater efficiency in production and lower prices for consumers. Muris (2002) points out that since many industries are being privatised or liberalised across the world, governments are clearly recognising the benefits of competition.

some examples illustrating the overall benefits of competition, without necessarily focusing on regulatory restrictions, are presented below.

1.1. Examples of benefits to consumers from competition



Shipping Ports

Argentina started privatising some seaport services in the 1970s. This phase of privatisation was not very successful in terms of productivity. Public investments in infrastructure remained low, the system was over-regulated and port institutions were inadequate. In the 1990s, private firms were allowed to operate public ports and build new ports, or invest in their infrastructure. In the case of the Port of Buenos Aires, its six terminals were given in concessions to five different private firms, while the Port Authority retained ownership of the infrastructure (landlord port model). As a result of the reforms, cargo handling increased by 50% between 1990 and 1995, labour productivity surged by 275% and Argentinean ports became the cheapest in Latin America. In 1997, Puerto Nuevo's cargo handling surpassed that of Santos (Brazil), the biggest port in South America. Foreign firms participated in the construction of new ports, as in the case of a terminal in Zarate.

Sources: Serebrisky, T. and L. Trujillo (2004), "An assessment of port reform in Argentina: Outcomes and challenges ahead," <http://dx.doi.org/10.1080/03088830500136659>; WTO(2004) "Infrastructure in trade and economic development".



Book Publishing

Before 1997, the Net Book Agreement (NBA) prevented UK and Irish booksellers from selling below the publisher's chosen price. Soon after the NBA was abolished, a basket of best-selling books was, on average, discounted by 28% and 41% of books were discounted, rising to 52% by 2006. Other benefits included, for example: (a) increased growth of new book titles published, from an average of 3% per year to over 4%; (b) expanded selection in stores and improved customer service.

Source: Davies, S. et al (2004), "The benefits from competition: Some illustrative UK cases."



Retail Stores

The effects of increased competition in grocery and other retail stores have been observed in several studies. For US markets, Hausman and Liebtag noted that when Wal-Mart originally enters a market, its prices are between 10% and 25% lower for the same products compared with large retail chains such as Kroger, Publix, Target, and others. After Wal-Mart opened a store near a Kroger supermarket in Houston, sales at Kroger dropped 10%, even though Kroger's prices declined after the arrival of new competition. This effect indicates that consumers benefited from Wal-Mart's entry. Other benefits of competition associated with the appearance of grocery superstores include: (a) new products and greater variety in the stores; (b) store renovation with wider aisles, better lighting and product display; (c) increased number of check-out counters. Preventing such stores from opening through regulation would thwart achievement of price and quality benefits to consumers.

Sources: Hausman, J. and E. Leibtag (2005), "Consumer benefits from increased competition in shopping outlets: Measuring the effect of Wal-Mart", <http://econ-www.mit.edu/files/1765>; Yan Q. Mui (2005), "Wal-Mart throws an undercut at Target", <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/15/AR2005121502096.html>



Railways

Lalive and Schmutzler (2007) studied the effects of introducing competition for local passenger railway markets in the German state of Baden-Württemberg (one of Germany's largest states) over the period 1994-2004. They found that, while DB Regio was still the dominant operator ten years after reforms were introduced, its competitors, NE-operators, expanded their market share from about 3% at the beginning of the reform to 13.2% in 2004. They found that service frequency in Baden-Württemberg increased substantially from 1994-2004 and service frequency on the lines that were procured competitively developed more favourably than those that were not. They found: (a) a 29% increase in total transportation; (b) a much stronger increase in the competitive group (45% vs. 22% in the control group); and (c) an increase from 19 to 39 lines operated, at least partly, by competitors of DB Regio. Overall, it was concluded that introducing more competition resulted in a greater frequency of service as well as increased convenience for consumers due to the higher frequency of trains.

Source: Lalive, R. and A. Schmutzler (2007), "Exploring the effects of competition for railway markets", <http://ideas.repec.org/p/soz/wpaper/0511.html>.



Road Transport

In France, a study was made on the effects on employment following changes to road freight transport regulations. The government, at the time eliminated the requirement for a government-issued license for transporting merchandise more than 150 km. After the reform, road transport prices fell along with margins, suggesting that there had been high rents in the sector. Employment in the sector had been growing at a rate of 1-1.5% per year prior to the reform. Immediately after the reform, employment grew at 5% and subsequently grew around 4% per year. Strikes were carried out in 1992 and 1995 due to the reform and how it was implemented. But, according to Cahuc and Kamarz (2005), the net effect was the creation of jobs.

Sources: OECD (2007b), “Summary of the discussion of the roundtable on competitive restrictions in legal professions”, www.oecd.org/regreform/sectors/40080343.pdf (see comments of Francis Kamarz, p. 379); Cahuc, P. and F. Kamarz (2005) “De la précarité à la mobilité: Vers une sécurité sociale professionnelle”, <https://www.vie-publique.fr/rapport/27046-de-la-precarite-la-mobilite-vers-une-securite-sociale-professionnelle>



Automotive Parts

Warren-Boulton and Haar (2007) estimated the amount of economic benefit from competition to consumers in the market for automotive collision parts. They showed that consumers benefit in two ways when Keystone (or another competitive parts seller) enters the market with a competitive alternative to an Original Equipment Manufacturer (OEM) part. They considered two effects: (a) Keystone’s price will typically be lower than the OEM’s price; and (b) Keystone’s entry and competition typically results in the OEM reducing its price. Their calculations showed that, on average: (a) Keystone’s automotive part prices are about 26% lower than the prices of the OEM parts they compete against; and (b) prices of OEM parts were reduced by about 8% due to the competition. They concluded that regulations requiring the use of OEM parts can be detrimental to consumers.

Source: Warren-Boulton, F.R. and D.E. Haar (2007), “Estimation of Benefits to Consumers from Competition in the Market for Automotive Parts.”



Housing

Atterhög (2005) used data to explore the effects on rents and quality of housing services when Swedish municipal housing companies privatised apartments located outside metropolitan areas. He found that: (a) in several markets, more competition led to lower rents, with decreases in the range of 2%-5%; and (b) on average, there was no significant change in the quality of housing services due to privatisation. The resulting quality of apartments varied depending on the owner.

Source: Atterhög, M. (2005) "Increased competition in the Swedish housing market and its effect on rents and quality of housing services for households", www.ingentaconnect.com/content/routledg/shou/2005/00000022/00000001/art00003



Stock Exchange

The Australian Securities Exchange, a monopoly stock market operator, started offering stockbrokers fee discounts under the threat of competition from two overseas rivals – Liquidnet and AXE – which planned to set up operations in Australia. Liquidnet was, and still is, US-listed and AXE ECN was backed by the New Zealand Exchange and major brokerage houses: Citigroup, CommSec, Goldman Sachs JBWere, Macquarie and Merrill Lynch. AXE and Liquidnet were promoting alternative trading systems for market crossings, or off-market trades between fund managers, which accounted for about 30% of all equity trades.

Source: "Exchange cuts fees as competitors lurk", *The West Australian*, 25 August 2007.



Telecommunications

The French Consumer organisation, UFC Que Choisir, stated that the least expensive SIM-only offers in the French market, offered by low-cost internet brands of incumbent operators, before Free Mobile entered the market, were between USD 46.6 and USD 54.7 per month (EUR 34 and EUR 39.90), with either 2 hours of unlimited calls and 1-2 GB of data. Following its entry into the market, Free Mobile offered unlimited calls and 3 GB of data for US 27.4 (EUR 19.99) per month. It should also be noted that these low-cost brands had started in anticipation of Free's arrival.

Source: OECD (2014 d), "Wireless market structures and network sharing", <http://dx.doi.org/10.1787/5jxt46dzt9r2-en>



Airlines

Prior to the 1990s, the EU aviation market was heavily regulated in terms of airlines' access to routes and prices. Agreements between member states restricted access to markets and often allowed only one airline to operate a service on a limited number of specified routes. During the 1990s, domestic markets were opened up and eventually became free to competition from all EU-licensed carriers. Low-cost airlines emerged as a result of greater opportunities for competition. Some results of the increased competition were: (a) traditional carriers began to offer services, such as online booking and pricing simplicity, to compete with the low-cost carriers. The simplified fare structure gave lower fares, greater flexibility, and more choice to customers. For example, advance purchase and Saturday night stay restrictions were removed; (b) price decreases were considerable. EU carriers' average lowest non-sale fares had fallen by 75% in nominal terms; (c) European flight frequency increased by 78%; and (d) there was an increase in service variety. The average number of airlines operating on sample routes increased from 3 to 4 between 1992 and 1997, and increased further by 2003.

Source: Davies, S. et al (2004), "The benefits from competition: some illustrative UK cases".



Private Vehicle for Hire Services

Taxi services are heavily regulated in many countries. Their stable market structure has not experienced many challenges until the emergence of ride-sourcing and ride-sharing services. The Spanish Competition Authority (CNMC) conducted a study to evaluate the impact of regulations which restrict competition in the private vehicle for hire (PVH) market. The loss in consumer welfare due to regulatory restrictions on the PVH services was estimated at a minimum of 324 million euros per year. Restrictive regulations include a quantitative limit in the segment of PVH services, obligation to render service on pre-booking basis, prohibition on cruising or parking to be hailed on the street by the passenger, requirement to rent the entire vehicle, geographical restrictions, minimum scale requirements and requirements regarding the characteristics of the vehicles.

Source: CNMC (2016), "Informe económico sobre las restricciones a la competencia incluidas en el real decreto 1057/2015 y en la orden fom/2799/2015, en materia de vehículos de alquiler con conductor – um/085/15 y acumulados" <https://www.cnmc.es/file/107176/download>

2. Positive effects on macro-economic outcomes

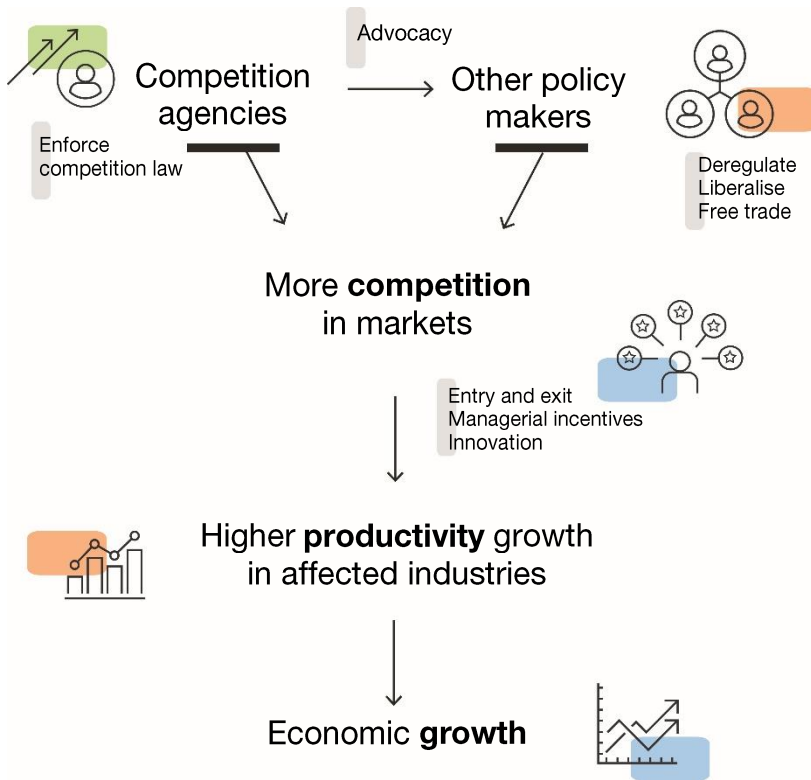
Customers benefit when they can choose between different providers, and so does the economy as a whole. Their ability to choose forces firms to compete with one another. Customer choice is a good thing in itself, but competition between firms also leads to increased productivity² and economic growth.

It can be difficult to measure the direct effect of – for example – competition law on economic growth. But there is solid evidence in support of each of the relationships shown below. See OECD (2014b) for a detailed overview of literature and studies proving this point.

Most importantly, it is clear that industries experience faster productivity growth with greater competition. This has been confirmed by a wide variety of empirical studies, on an industry-by-industry basis, and even firm-by-firm. This finding is not only confined to “Western” economies, but emerges from studies of Japanese and South Korean experiences, as well as from developing countries.

² Unless specified, the term productivity refers to total factor productivity.

Figure 2. Competition benefits



Source: OECD (2014b).

The effects of stronger competition can often touch sectors adjacent to those in which the competition occurs. In particular, vigorous competition in upstream sectors can ‘cascade’ to improve productivity and employment in downstream sectors and through the economy more widely.

This is mainly due to competition improving allocative efficiency by allowing more efficient firms to enter and gain market share, at the expense of less efficient firms. Therefore, regulations, or anti-competitive behaviour preventing entry and expansion, may be particularly damaging for economic growth. Competition also improves the productive efficiency of firms, as firms facing competition seem to be better managed. This can even apply in sectors with important social, as well as economic, outcomes: for example, there is increasing evidence that competition in healthcare provision can improve quality outcomes.

There is also evidence that intervention to promote competition will increase innovation; firms facing competitive rivals innovate more than monopolies. The relationship is not simple: it is possible that moderately competitive markets innovate the most, with both monopoly and highly competitive markets showing weaker innovation. However, as competition policy focuses on introducing or strengthening competition in markets that are not working well, and not on making moderately competitive markets hyper-competitive, this would still imply that most competition policies serve to promote innovation.

Because more competitive markets result in higher productivity growth, policies that lead to markets operating more competitively, such as enforcement of competition law and removal of regulations that hinder competition, will result in faster economic growth.

The evidence base regarding product market deregulation is stronger still, because there have been many deregulation events, allowing comparison between industries, between countries and over time. Furthermore, regulatory policies specifically designed to introduce and promote competition – especially in network industries – have resulted in productivity gains.

Of course, there are policy objectives other than GDP growth, and the OECD has been a vigorous champion of measuring and considering such objectives more rigorously when formulating policy. The effect of competition on inequality has been less studied, and is often assumed to be malign as competition creates winners and losers. However, restricting competition causes harm to the majority, while profits generally go to a minority. The poorest in society are often the worst affected by higher prices, or lower quality and choice, resulting from restrictions on competition.

Similarly, when concerns are raised about employment loss due to productivity gains generated through competition, it should be noted that layoffs are often a consequence of other forms of technical progress too. Furthermore, restrictions on competition have been shown to reduce output and employment. Therefore, it is essential to ensure investment in new and alternative means of productive employment.

Introducing more competition and opening markets up to competition through a thorough competition assessment of new or existing laws and regulations will thus contribute to economic growth, increased productivity and higher overall welfare.



Chapter 3

Fitting competition assessment into government operations

This chapter discusses how competition assessment can be effectively incorporated into government activities.

1. Introduction

As we have seen, competition assessment is the process of evaluating government regulations, rules and/or laws to (1) identify those that may unnecessarily impede competition and (2) redesign identified regulations so that competition is not unduly inhibited. Fitting this process effectively into government operations and institutions requires consideration of the following five questions:

- Which policies merit a competition assessment?
- When should a competition assessment be performed in the policy development process?
- Who should be responsible for drafting and reviewing a competition assessment?
- How can policymakers, without responsibility for regulatory quality or competition, be given incentives to prepare an appropriate assessment?
- What resources are required for competition assessment?

It will become clear from the following sections, that there is not a simple formula for institutional implementation of competition assessment. Feasible

solutions are likely to vary substantially, given the difference between jurisdictions with regard to, for example, whether there is a federal system, staffing strengths, and the political environment. While the Toolkit draws on existing experience to identify potential options, these should not be considered exhaustive. As can be seen in the 2014 Report on the Implementation of the 2009 Recommendation on Competition Assessment, the Toolkit implementation was considered to be highly useful in a number of very different review exercises – impact assessment integrated into Regulatory Impact Assessment, discretionary assessments that might also be placed under the heading of competition advocacy, and market and sector inquiries as well.

2. Which policies merit a competition assessment?

The depth of a competition assessment should be proportional to the potential negative competitive effects of a policy. The Competition Checklist permits a quick screening of policies to identify those with potential to unduly impact competition for further assessment. The majority of individual laws or regulations do not have that potential and consequently do not require a detailed competition assessment.

Laws, regulations and rules. Policies that include laws, regulations and rules to implement laws or regulations, may be subject to competition assessment. Some governments and independent public bodies (such as national competition authorities, courts of auditors, etc.) have chosen to review the competitive impacts of subsidies or of preferential treatment given to state-owned enterprises. Not all jurisdictions subject their laws to competition assessment, but those that have had the greatest success with competition assessment are the ones that have done so. (See Chapter 2 Section 1.1)

New and existing policies. Some governments have approached competition assessment by looking at both new and existing policies. This is the most effective way to broadly improve the competitive environment, but requires substantial political will. Other governments have implemented a form of competition assessment focused exclusively on new policies.

National, regional, local. There is a strong economic case for performing competition assessment at the national, regional, and local levels. Assessment is relevant to all government policies that may unduly restrict competition. Policies that create such limits are sometimes imposed at the national level, but can also originate at the regional or local level. For example,

policies hostile to competition in the provision of taxi services are often imposed at the local level while consumer-harmful regulation of professionals often occurs at the regional level.

Sectoral and horizontal. In order to address a variety of restrictions that may be present in different laws, it is essential to ensure that the breadth of regulations reviewed is sufficiently comprehensive. Rather than reviewing sectoral regulation on its own, a full competition assessment would be sure to include all relevant regulations for delivering a service, whether these are sector specific or horizontal laws and regulations that have an impact on product requirements. This is particularly important for reviews in the light of digitalisation. For example, the internet sale of secondhand furniture by households may depend very much on the general consumer protection rules that apply to any retailer and on required retailer guarantees.

Box 1. National Competition Policy Reforms in Australia

After completion of the Hilmer Committee's report in 1993, which urged greater microeconomic openness with a focus on pro-competitive reforms, Australian governments agreed in 1995 to a programme of reviewing and revising legislation that limited competition and was not in the public interest. This reform programme identified 1700 laws that needed review. Legislation was reviewed at a national and state or territorial level, with most reviews being completed by 2001. The national government offered funding to aid state and territorial governments with any adjustment costs that might arise from revisions of legislation. The programme was notable because it systematically identified existing laws and regulations that merited review and because, during the programme's implementation, Australia's GDP growth improved, relative to other OECD countries.

3. When should a competition assessment be performed in the policy development process?

New policies. Competition assessments can contribute positively to the design of new policies and, ideally, should be performed **early** in the policy development process, before a decision has been made about how to approach a given policy challenge. When a proposed policy has the potential to restrict competition, government competition experts should be consulted to ascertain whether alternatives can be developed that will achieve the regulatory objectives with less harm to competition.

Existing policies. Most existing policies have not been subject to a competition assessment. It is critical to prioritise which policies should be reviewed first, as some policies are more likely to adversely impact competition

than others. For example, in Australia at the time of its National Competition Reviews, hundreds of existing government policies were identified that limited competition. Australia prioritised these policies for review and where problems were found, revision occurred in almost all cases.

4. Who should be involved with drafting and reviewing a competition assessment?

To ensure that competitive effects are properly considered, the governmental body developing the policy in question should perform the competition assessment. This way, the policymakers concerned can ask the necessary pertinent questions at the appropriate time to promptly and efficiently develop policies that take due account of competitive effects.

“Frontline” policymakers, however, may not take the competition assessment process seriously unless an external party reviews their work. Regulatory gatekeepers, officials with competition expertise such as those located in competition authorities, or some combination of the two can perform the reviews.

In the United Kingdom, the regulatory gatekeeper, the Better Regulation Executive (BRE), has responsibility for reviewing the impact of new regulatory proposals. Under guidelines published by the Department of Business in March 2015, regulations estimated to have a positive effect on competition can be counted as having net zero cost and are thus fast tracked through the impact assessment process. Policy makers also have discretion to assess whether or not their proposal will have a negative impact on competition. Departments can seek the advice of the Competition and Markets Authority (CMA), if their proposals raise competition concerns that may require further analysis. The CMA also has the power to make recommendations to ministers if it is concerned about the potential impact on competition of proposals for legislation.

To perform an assessment that is wider-ranging and more comprehensive than the Competition Checklist would typically require market definition and competition analysis competencies. For this reason, some countries require their competition authorities to review any new laws or regulations that are expected to have an economic impact before the provisions in question are enacted.

For example, in Mexico, the competition authority must review any new secondary legislation with potential effects on competition. In Korea, the competition authority has responsibility for reviewing selected new

regulations. In Hungary, the competition authority is required to submit its comments on new regulations.

Many other countries hold horizontal consultations prior to the adoption of new regulations. Such consultations work better when competition reviewers can enter the process early on, are not required to submit their comments on all policies, and can intervene when they believe there may be a significant potential problem.

The reviewing body's degree of independence is also important. In Australia, for example, a new body was created in 1995 to oversee the National Competition Policy reviews of national and state or territory laws and regulations. The National Competition Council, was created as a distinct and independent body from both the regulatory oversight office for reviewing new regulations and from the competition authority. Australia's success from its National Competition Policy described in Box 1 amply demonstrates the value of independent bodies reviewing laws and regulations.

Some national competition authorities, such as the former Spanish Comisión Nacional de la Competencia, have carried out reviews of subsidy schemes and published annual reports on subsidies.

A number of competition assessment have been or are being carried out by the OECD in conjunction with the reviewed countries. When completed, the relevant reports have been made available publicly; these may be useful to those considering assessments in comparable sectors. Examples of sectors reviewed have included: construction, food processing, gas and LPG, meat, professions, pharmaceuticals, tourism and transport and logistics.

The involvement of a competition authority or other government body in the competition assessment process should not bar any subsequent government legal action under that jurisdiction's competition laws. Competition assessments, by definition, are based upon predictions, and in real life, predictions can turn out to understate or overstate competitive harms.

5. How can policymakers without responsibility for regulatory quality or competition be given incentives to prepare an appropriate assessment?

Policymakers who develop new regulations may be inclined to under-report potential competition problems associated with a proposed regulation. They may perceive that identifying a potential competition problem or consulting with an outside agency, such as a regulatory gatekeeper or competition authority, will simply create more work for them without

substantial benefit. Therefore, it is important to emphasise to policymakers that competition assessment will improve their policy.

A number of options are available to encourage policymakers to embrace and properly execute competition assessments, and to improve their assessment skills, as follows:

- Including competition assessment in Regulatory Impact Analysis (RIA);
- Financial rewards; and
- Best-practice training.

5.1. Including competition assessment in RIA

RIA is a formalised process for reviewing regulations to ensure they achieve their intended policy objectives. In general, the goal of RIA is to ascertain that the benefits of a regulation exceed its costs. When competition assessment is included, the RIA is more effective because the dynamic, market-oriented considerations inherent in competition assessment provide important insights for a policymaker seeking to determine if the benefits of a particular regulation outweigh its costs. By 2009, over 30 OECD jurisdictions had RIA processes in place, and the competition element of the assessment was formally called Competition Assessment. Including competition assessment within RIA is an ongoing trend. In the United Kingdom, assessment of competition impact was introduced into RIA in 2002 and, in the European Commission, competition assessment has been part of the RIA process since 2005. In the United States, RIA guidance documents explicitly require consideration of market impacts (see US Office of Management and Budget, 2003). In 2007, Korea introduced competition assessment in its government review process for new regulation. In 2008, Indonesia introduced competition assessment. In 2013, Mexico included competition assessment as part of its RIA review process by its review body COFEMER. In 2017, China introduced its Fair Competition Review System, and Japan and India introduced guidelines on competition assessment. Giving the competition authority a role in this area also reduces the need for regulatory agencies or gatekeepers to retrain their staff.¹

¹ For more details on how to include competition assessment in RIA, see OECD (2007a).

The focus on dynamic market efficiency² makes competition assessment useful as an element of overall regulatory assessment. This element can help identify regulations that unduly restrict market activity. Competition assessment also has an additional, incidental benefit as it helps to identify all parties likely to be affected by a regulatory proposal, especially those who will be affected indirectly. This can assist officials in ensuring that RIA-based consultation is sufficiently inclusive and, thus, more effective.

When conducting a full competition assessment within the RIA, the first step should ascertain the underlying objective of the new regulation from within the broader RIA process. Secondly, existing restrictions on competition should be identified and analysed followed by an examination of the proposal's potential adverse competitive effects. In some cases, it may be helpful to consider the current extent of competitive pressure by, for example, defining the relevant market - although this need not be a formal or elaborate process. Market definition can be helpful in some cases, but is not always obligatory. The main objective is to evaluate and assess existing, and future possibilities of, competition. Finally, the competitive effects of alternative policy options should be assessed and compared.

Most proposals will not significantly harm competition. But, when an assessment does identify significant potential for weakening competition in an industry (or related industries), key elements of the proposal's design should be reconsidered and alternative means of achieving the regulatory objective be identified and assessed.

If alternatives cannot be identified, a rigorous, disciplined comparison of the proposal's benefits should be made. The proposal should only be adopted if the comparison shows that its enactment will yield a net benefit, taking into account the anti-competitive impact costs identified by the assessment.³

² Dynamic efficiency focuses on efficiency over time, with changes in efficiency potentially resulting from innovation, technological developments, the ability of firms to respond flexibly to new market conditions and growth of successful suppliers.

³ This approach is already explicitly in use in Australia. The "Guiding Legislative Principle", adopted under the former National Competition Policy agreement, states that legislation restricting competition should not be adopted unless it can be shown that both the benefits of the restriction to the community as a whole outweigh the costs and that the of the regulation's objectives cannot be achieved by any other means that are less restrictive of competition. See Competition Principles Agreement, clause 5 (1).

5.2. Financial rewards

Because Australia is a federal system, implementing the National Competition Policy (NCP) at state or territory level required the states' agreement. The commonwealth government made significant payments to states and territories, consisting of per capita payments based on the extent to which reviews and revisions of legislation were completed. "The NCP payments are the means by which gains from reform are distributed throughout the community. The payments recognise that, although the states and territories are responsible for significant elements of NCP, much of the direct financial return accrues to the Australian Government via increases in taxation revenue that flows from greater economic activity."⁴

During the core period of the NCP, payments to states and territories were significant, as shown in Table 1.

Table 1. Australian national competition policy payments received by jurisdictions annually (AUD million)

Jurisdiction	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
	(a)	(a)	(a)	(a)	(a)	(a)	(a) (b)	(a) (b)	(b) (c)
New South Wales	126.5	138.7	148.6	155.9	242.5	251.8	203.5	233.6	292.5
Victoria	92.8	102	109.2	114.7	179.6	182.4	178.7	201.6	197.9
Queensland	74.2	81.6	81.5	73	147.9	138.9	87.9	143.3	178.7
Western Australia	38.4	42.4	43.2	45.5	71.1	72	33.6	53.5	71
South Australia	34.3	38.4	34.5	35.9	55.7	57.1	40.7	50.4	54.3
Tasmania	12.6	13.9	10.8	11.2	17.4	17.7	17.2	19.8	19
ACT	6.2	7	7.2	7.5	11.6	12.4	11	13.6	12.7
Northern Territory	11.2	13	4.5	4.5	7.6	7.5	5.9	8.4	8
Total	396.2	436.9	439.5	448	733.3	739.9	578.5	724.2	834.1

Source: National Competition Council

Notes: (a) From Final Budget Outcome documents, (b) Each jurisdiction's payments reflect the application of permanent deductions and suspensions, (c) Costello, the Hon. P (Treasurer) 2005, 'National Competition Payments to States and Territories for 2005', Media release, 15 December 2005. Totals may not add due to rounding. Figures up to, and including 1999-2000, include Financial Assistance Grants.

⁴

See <http://ncp.ncc.gov.au/pages/about>.

While payments are significant, the Australian government has estimated annual benefits to the economy to be 2.5% of GDP, or AUD 20 billion, from productivity improvements and price rebalancing in many different sectors where NCP and related reforms have occurred.⁵

5.3. Best practice

To ensure the success of a competition assessment, training on best practices is critical for the policymaking officials carrying out the work. Many policymakers are specialised in domains that do not relate to competitive effects or economics and cannot be expected to assess competition issues appropriately without specific training. Competition authorities, regulatory gatekeepers, or the OECD can help with this effort.

6. What resources are required for competition assessment?

The resources required for an effective competition assessment programme can be relatively small. For example, when the United Kingdom first implemented its competition assessment programme, two staff members from the Office of Fair Trading (OFT) played a very active role, and only a small percentage of the roughly 400 regulations reviewed each year received detailed scrutiny. The remainder were assessed by means of a competition filter, similar to the Competition Checklist (described in Chapter 1) allowing officials to quickly diagnose any potential competition problems arising from a policy.

Of course, a competition assessment programme can also benefit from a high level of resource commitment. As described in Box 1 and Table 1, the Australian approach illustrates a far-reaching and resource intensive method coinciding with a strong economic performance.

Regardless of commitment level, resource requirements will be highest at the initial implementation stage. For example, a detailed best practice training programme, will often require a substantial initial outlay although expenditure will be less substantial in later years as the system should be functioning efficiently and working relationships between relevant policy officials will already have been established. However, due to staff turnover, ongoing training will almost certainly be needed after the initial implementation.

⁵ See Productivity Commission (2005). The review notes that direct causal links are difficult to establish empirically. Moreover, measuring net impacts in this area is particularly complex.

7. Conclusion

Incorporating competition assessment into government regulatory decision-making can potentially yield strong economic benefits. It enables identification of markets where activity is unduly restricted and can propose policy alternatives that will continue to meet policy goals while promoting competition to the extent possible. The best way to fit competition assessment into government operations will vary, given the substantial difference in institutional, legal and federal environments of jurisdictions. Nevertheless, the following points are evident: first, regulatory gatekeepers are well-suited to perform competition assessments, particularly when they are part of a RIA; second, competition authorities are ideally suited to advise on, and even selectively perform, competition assessments and provide training on the process; finally, the benefits accrued from fitting an effective competition assessment programme into government regulatory operations definitely outweigh the costs.



References

Atterhög, M. (2005), “Increased Competition in the Swedish Housing Market and its Effect on Rents and Quality of Housing Services for Households”, *Housing, Theory and Society* 22, No. 1, 32–49, 2005, <https://www.ingentaconnect.com/content/routledg/shou/2005/00000022/000001/art00003>

Hausman, J. and E. Leibtag (2005), “Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart”, 2005. <http://econ-www.mit.edu/files/1765>

Cahuc, P., and F. Kramarz (2005), “De la précarité à la mobilité: Vers une sécurité sociale professionnelle,” Report to the Minister of Economics and the Minister of Labour, La Documentation Française, Paris, <https://www.vie-publique.fr/rapport/27046-de-la-precarite-la-mobilite-vers-une-securite-sociale-professionnelle>

Davies, S. et al (2004), “The Benefits from Competition: some Illustrative UK cases”, in *DTI Economics paper No. 9*, Centre for competition policy, University of East Anglia, <http://webarchive.nationalarchives.gov.uk/20090609011503/http://www.berr.gov.uk/files/file13299.pdf>

Serebrisky, T. and L. Trujillo (2004), “An Assessment of Port Reform in Argentina: Outcomes and Challenges Ahead,” <http://dx.doi.org/10.1080/03088830500136659>

Lalive R. and A. Schmutzler (2007), “Exploring the Effects of Competition for Railway Markets”, in *International Journal of Industrial Organisation* No. 26, University of Zürich, <http://ideas.repec.org/p/soz/wpaper/0511.html>

Muris, T. J. (2002), “Creating a Culture of Competition: The Essential Role of Competition Advocacy,” International Competition Network Panel on Competition Advocacy and Antitrust Authorities, Naples, Italy.

OECD (2019), OECD Recommendation on Competition Assessment, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0455>

OECD (2014a), OECD Competition Assessment Reviews: Greece. OECD, Paris, <http://dx.doi.org/10.1787/9789264206090-en>

OECD (2014b), OECD Factsheet on How Competition Policy Affects Macro-Economic Outcomes. OECD, Paris, <http://oe.cd/comp-factsheet-macroeconomics>

OECD (2014c), Experiences with Competition Assessment, OECD 2014. <http://www.oecd.org/daf/competition/Comp-Assessment-ImplementationReport2014.pdf>

OECD (2014d), “Wireless Market Structures and Network Sharing”, OECD Digital Economy Papers, No. 243, OECD Publishing, <http://dx.doi.org/10.1787/5jxt46dzt9r2-en>

OECD (2007a), Integrating Competition Assessment into Regulatory Impact Analysis, OECD, Paris, [https://one.oecd.org/document/DAF/COMP\(2007\)8/en/pdf](https://one.oecd.org/document/DAF/COMP(2007)8/en/pdf).

OECD (2007b), “Summary of the Discussion of the Roundtable on Competitive Restrictions in Legal Professions”, Working Party No. 2 on Competition and Regulation, October 2007, p. 379, www.oecd.org/regreform/sectors/40080343.pdf

Sims, R. (2013), "Driving Prosperity Through Effective Competition, Speech www.accc.gov.au/speech/driving-prosperity-through-effective-competition

Productivity Commission (2005), Review of National Competition Policy Reforms, Inquiry Report No33, Commonwealth of Australia, Canberra, www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf

The West Australian (2007), “Exchange Cuts Fees as Competitors Lurk”, The West Australian, 25 August 2007.

US Office of Management and Budget (2003), Circular A-4, Sept. 17, 2003, www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf

Warren-Boulton, F. R. and D. E. Haar. (2007), “Estimation of Benefits to Consumers from Competition in the Market for Automotive Parts.” Microeconomic Consulting & Research Associates, Inc.

WTO (2004), “Infrastructure in Trade and Economic Development”, World Trade Report, World Trade Organization,
www.wto.org/English/res_e/booksp_e/anrep_e/wtr04_2b_e.pdf

Ylan Q. Mui (2005), “Wal-Mart Throws an Undercut at Target.” *The Washington Post*, 16 December 2005 edition, www.washingtonpost.com/wp-dyn/content/article/2005/12/15/AR2005121502096.html



Appendix

Recommendation of the OECD Council on Competition Assessment

On 11 December 2019, the OECD Council adopted a Recommendation on Competition Assessment. It replaces a first version of the Recommendation which was originally adopted in 2009. The following text of the Recommendation was extracted from the OECD database of legal instruments, where additional information and any future update can be found: <http://acts.oecd.org/Default.aspx>.

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 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 Recommendations of the Council on Competition Policy and Exempted or Regulated Sectors [OECD/LEGAL/0181] and on Competition Assessment [OECD/LEGAL/0376], which this Recommendation replaces;

HAVING REGARD to the Recommendation of the Council on Regulatory Policy and Governance [C(2012)37], 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.AGREES that for the purposes of this Recommendation, the following definitions are used:

- **“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.
- **“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. RECOMMENDS as follows to Members and non-Members having adhered to the Recommendation (hereafter the “Adherents”):

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. Governments should ensure that exceptions from competition law are no broader than necessary to achieve their public interest objectives and that these exceptions are interpreted narrowly. Exceptions should only apply to those business activities that are required to achieve the stated policy objective. This principle also implies that any new exception should be defined for a limited period of time, typically by including a sunset date, so that no exception would persist when it is no longer necessary to achieve the identified policy objective.

4. 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);
- v) Provide an exception from competition law for any specified objective (e.g., the assessment could make sure that any exception is absolutely necessary to achieve the stated policy objectives).

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.

III.INVITES the Secretary-General and Adherents to disseminate this Recommendation, in particular within the competition community and other relevant policy communities.

IV.INVITES non-Adherents to take due account of, and adhere to, this Recommendation.

V.INSTRUCTS the Competition Committee to:

- a) serve as a forum for sharing experience under this Recommendation;
- b) report to Council no later than five years following its adoption and at least every ten years thereafter.

About the OECD Competition Assessment Toolkit

The OECD Competition Assessment Toolkit helps governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives. It consists of 3 volumes: Principles, Guidance and Operational Manual. Read more about the toolkit at oe.cd/cat.



Toolkit Principles

Volume 1 sets down the toolkit principles, describing benefits of competition, the checklist and examples of government processes.



Technical guidance

Volume 2 provides detailed technical guidance on key issues to consider when performing a competition assessment.



Operational manual

Volume 3 is an operational manual which provides a step-by-step process for performing competition assessment.

The OECD Competition Assessment toolkit helps governments eliminate barriers to competition. It consists of three volumes.

Volume 1 sets down the toolkit principles, describing benefits of competition, the checklist and examples of government processes.

The Toolkit is available for download in over 15 different languages at www.oecd.org/competition/toolkit.

