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***Ways and Means to Strengthen Competition Law
Enforcement and Advocacy***

Contribution

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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD

I. Introduction

This submission seeks to expand on the Secretariat's paper with respect to its discussion of the challenges facing the implementation of competition advocacy policies. A common challenge is how a competition agency can create a practical link between competition advocacy and implementation of competition principles by other domestic government agencies. Competition agencies, economists, and many officials responsible for developing public policy understand the benefits of competition policy for consumer welfare. To help advance that understanding with regulators and legislators seeking to advance other policy objectives, many competition agencies have developed a practice of advocating for the incorporation of competition principles in the work of other public institutions.¹

Persuading legislators and regulators of these competition benefits can be easier said than done. Consumer interests are diffuse, and legislative or regulatory proposals² can impede competition in ways that may not be obvious. Financially self-interested industry participants are usually well organized, well resourced, and generally have a keen appreciation of the stakes at hand for their business, and may even have better access to regulators and political leaders. In such an environment, proponents of competition and broad-based consumer welfare often face strong challenges.³

The United States antitrust agencies, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“Division”), collectively “the Agencies”, have learned that success is more likely when regulators and legislators can identify fundamental values in common. All are likely to recognize the benefits of lower consumer prices, and share an interest in promoting regulatory schemes that minimize harm to competition and consumers. The Agencies’ strategy has been to promote an alignment of those interests in favor of a regulatory policy that protects consumers against harm by

¹ This paper was originally developed as a submission to the OECD Latin America Competition Forum for its 2014 meeting in Montevideo, Uruguay.

² In the interest of brevity, the rest of this paper will refer only to regulatory proposals, although the issues discussed are applicable to both legislative and regulatory proposals.

³ The importance of competition advocacy has been highlighted in numerous speeches and the work of multilateral organizations. *See, e.g.*, Chairwoman Edith Ramirez, The Relationship Between Competition Policy, Productivity, and Economic Crisis: The Case of the United States, Latin America Competition Forum, Lima, Peru (2013), available at <http://www.ftc.gov/about-ftc/biographies/edith-ramirez#speeches>; Commissioner Maureen Ohlhausen, An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification, before Chilean Competition Day (2013), available at http://www.ftc.gov/system/files/documents/public_statements/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-competition-advocacy-premerger/131105mkochilepeech.pdf at 19; Renata Hesse, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property, Seattle 2013, available at <http://www.justice.gov/atr/public/speeches/301596.pdf>; International Competition Network, Advocacy and Competition Policy (2002), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>; International Competition Network, Advocacy Toolkit Part I: Advocacy processes and tools (2011), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc745.pdf>; OECD, Competition Assessment Toolkit (2010), available in English and Spanish at <http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

ensuring that legitimate regulatory goals are met in ways that are least restrictive of competition. The Agencies have identified several factors that, in their experience, can be particularly helpful in facilitating successful advocacy:

- First, identifying issues that are most likely to matter to consumers.
- Second, establishing relationships with regulators with the goal of helping them understand how competition policy can be closely aligned with both regulatory and consumer interests.
- Third, where possible, encouraging regulators and legislators to consider the impact on consumers of different policy options, and to select an option that imposes the fewest restrictions on competition while achieving other legitimate policy goals.

II. Identification of Issues of Importance to Consumers

As a tactical matter, an important consideration for an agency engaging in advocacy is to identify issues that will resonate for ordinary consumers. While cases that appeal to consumers are not necessarily those that have the greatest impact on consumer welfare, successful competition advocacy requires building support among policy makers who may not be well-versed in competition policy, and cases with consumer appeal are likely to garner such support. The following are recent examples of such cases. This submission will go on to show how each of these steps were applied in these cases.

- *Dental services.* Traditionally, dental services have been the preserve of dentists who are licensed by individual states. Dental therapists are a relatively new type of “mid-level” provider that offers some of the same basic dental services offered by dentists, and expansion of their services is likely to increase the output of basic dental services, enhance competition, reduce costs, and expand access to dental care. This could especially be true for underserved populations. The Commission on Dental Accreditation (CODA), a non-government organization that establishes standards for dental professionals that are widely accepted and adopted by state dental regulators, is considering standards that are likely to shape the scope of what these new providers will be able to do. CODA proposed to adopt standards for educating dental therapists that would have assumed direct supervision by dentists, likely compromising the ability of these professionals to eventually offer basic dental care independently and thus reducing their beneficial effects for competition and access to care. In effect, the approach placed the work of dental therapists under the control of dentists. Dentists, some of whom believe that dental therapists could offer a new source of lower-cost competition, would thus have been in a position to suppress competition by preventing dental therapists from practicing independently.

- *Advanced practice nursing services.* In the United States, many geographic areas face shortages of primary health care providers. Physicians may be few and far between, and some patients may have trouble obtaining an appointment with a doctor or paying for a doctor's services. Traditionally, nurses and doctors have worked together to coordinate patient care in many different ways, and nurses have been especially important in delivering health care to remote or underserved populations. About a third of the states have allowed advance practice nurse practitioners – nurses with advanced training – to provide some basic health care services independently, without mandatory physician supervision. Physician groups, however, typically have often opposed this type of independent practice. As a result, many states limit the ability of these nursing professionals to practice to the full extent of their training and licensure without physician supervision. For example, in Louisiana, state law prohibited such nurses from practicing unless they had first obtained a written “collaborative practice” agreement with a doctor. Mandatory physician supervision requirements give doctors the power to block market entry by nurses whom they may view as competitors, or to add costs to nurses' services by demanding high fees for such agreements (which presumably would be passed along to consumers in the form of higher prices).
- *New forms of urban transportation services.* Consumers who need urban transportation services traditionally have relied on taxi services, the prices and services of which typically are regulated at the local level. As noted by Chairwoman Ramirez in this Forum last year,⁴ incumbent taxi firms and new entrepreneurs have introduced new smartphone applications, sometimes also called digital dispatch services, which have enabled consumers to arrange and pay for transportation in new ways. While these options have proved quite popular with consumers, they have been less popular with many traditional taxi operators who, in many cases, had previously faced little competition. Some traditional operators asked local government regulators to impede or possibly preclude the use of some new smartphone applications, to limit the types of vehicles that could be arranged using smartphone applications, or to restrict the ability of drivers to work with smartphone applications.
- *Services related to real estate transactions.* Buying or selling a home is the largest financial transaction most U.S. residents will ever undertake. The median priced home cost \$184,000 in 2009, and the median commission paid to real estate brokers came close to \$10,000. Overall, Americans paid nearly \$60 billion for brokerage services in 2009. In 2007, the Division launched a new website to educate consumers of real estate brokerage services on the potential benefits that competition can bring.⁵ Features of the website include maps identifying states with real estate laws that can inhibit competition and a calculator to help consumers tally their potential savings when brokers pursuing new business models compete for their business. New real estate brokerage models have the potential to reduce the

⁴ See Ramirez, *supra* note 3.

⁵ See http://www.usdoj.gov/atr/public/real_estate/index.htm.

estimated median commission paid by home sellers by thousands of dollars; however, a number of states have passed laws making it illegal for brokers to offer rebates and limited-service packages that can benefit customers. Data presented on the website show how the elimination of these types of barriers can save consumers thousands of dollars in real estate commissions when selling or buying a home. The website also explains how consumers are harmed when states forbid competition between lawyers and non-lawyers to conduct real estate closings, and when brokers tailor the rules governing local multiple listing services to exclude lower-cost rivals.

The common theme in each of these examples is that the underlying competition issues have direct and easily understandable implications for ordinary consumers: reduced access to medical services in remote areas; higher dental costs; reduced access to an increasingly popular type of transportation service; and more expensive services for the sale and purchase of real estate.

We do not mean to suggest that regulations that do not have an obvious impact on consumers should be beyond the scope of a competition advocacy strategy. Rather, this discussion suggests that the first competition advocacy interventions of a competition agency might well involve products and services well understood by consumers. Once regulators and legislators come to understand how competition benefits consumers, they may be more readily inclined to apply the same analysis in industries in which the effects on consumers may be less obvious, but are nevertheless of great economic impact.

III. Alignment of Interests Between Regulators and Competition Authorities

Successful advocacy requires building relationships between the competition agency and the regulator. The foundation of a successful relationship is developing a mutual understanding that the regulator and the competition agency both share the goal of protecting consumers, each relying on its own statutory mandate and expertise. In principle, both competition authorities and regulators share an interest in ensuring consumer access to products and services that meet appropriately formulated minimum standards for health and safety at the lowest price. Those responsible for regulating health care practitioners – such as doctors, dentists, nurses, and dental therapists - are properly charged with, for example, ensuring that treatment is performed only by individuals with sufficient training and competence to meet standards of hygiene and patient care. Municipal regulators of taxi services have legitimate interests, including vehicle safety, insurance, and prevention of deceptive practices. None of these goals conflict with the goals of competition policy.

For their part, competition authorities are charged with ensuring that competition can reduce prices and spur new and innovative ways to deliver services to consumers. These goals should align with regulators' goals. For example, permitting new entry by qualified health care providers is likely to reduce costs and create new health care options to

consumers. This should align well with health care regulators' goals, as it should facilitate consumers' access to appropriate health care services when needed, instead of deferring care when such options are not available. Similarly, permitting entry by firms that offer more flexible and affordable urban transportation options should be consistent with taxi regulators' goals. The challenge, therefore, is to build alliances with regulators to develop a shared view that competition not only is consistent with regulators' own goals, but also can help further their goals.

Often, this is a slow process. The initial reaction of regulators may be that competition regulators do not understand the regulated sector as well as the regulator. While the regulator may indeed have superior knowledge of the sector, it may not have the same expertise in competition principles. (In many cases, the competition agency will in fact also have developed considerable sectoral expertise.) The competition agency must persuade the regulator that its competition expertise can complement the regulator's sectoral expertise, and ultimately help the regulator to do its job better. The Agencies do this by building working relationships at the staff level. Building this relationship may call as much on interpersonal relations skills as it does on substantive competition expertise. This may be done by attending conferences, establishing liaison arrangements, and most importantly, offering its expertise and analysis to the regulator in a constructive fashion. An approach that puts the regulator on the defensive is unlikely to foster a solid relationship. The goal of such relationship building is that the competition agency and the regulator build a culture of shared problem-solving, whereby both the regulator and the competition experts bring their unique tools and expertise to bear in pursuit of a common goal.

Care must be taken to manage the relationship. While formal intervention receives more publicity, informal intervention, in the form of a telephone call or a private meeting, can help the regulator to understand the issues, and may lead to a better result in many instances as it does not raise concerns about the competition agency making uninvited public statements that could be considered critical of the other agency. The Agencies generally intervene formally when they have been specifically invited to do so or in response to a call for public comments, understanding that an unsolicited opinion is less likely to be seriously considered than one that has been requested.⁶ Sensitivity to the needs of the regulator is important. The goal is not to publicly embarrass or undermine support for the regulators, nor to endorse a particular outcome, but to support and persuade them to integrate competition values into their analysis.

Building mutually beneficial relationships may proceed differently with state and federal regulators. In the case of federal regulators, we have continuing common interests that give us a greater opportunity to build long-term partnerships. In the case of state, territorial, and local government bodies, those relationships may be more difficult to build on a sustained basis. Nonetheless, we continually interact with interested parties, such as trade associations and others, who have an interest in the actions of regulators, and the Agencies have good working relationships with state Attorney-General offices responsible for state

⁶ In some cases, regulatory processes include a formal request for public comment. In those cases, a specific invitation is not necessary.

antitrust enforcement. In some cases, as in the case of advanced practice registered nurses, we gain introductions to state regulators through these entities.

By nurturing these relationships over time, we demonstrate our interest in and receptivity to learning about prospective regulatory changes that may restrict competition. These relations become an early warning system and, coupled with our monitoring, keep us apprised of new developments, so that we can be proactive in pursuing advocacy opportunities.

With regard to promoting relationships with other federal agencies, the Agencies have found the use of “details” to be an effective approach. Agency staff have spent time at other agencies learning more about their substantive work, and staff from selected regulatory agencies have spent time at the Agencies sharpening their understanding of competition policy and principles. Recently, for example, a detailee from a federal agency that works on health care technology issues helped to plan an FTC workshop. This collaboration led to continuing engagement between the two agencies on issues of common interest and provided FTC staff with greater visibility to advocate competition within that agency and with its stakeholders. The relationship has led to frequent behind-the-scenes engagement and consultation on areas of mutual interest. We are helping the health care agency think about ways to promote competition through their policies and programs. They are helping us to better understand how health information technology markets work. They are also assisting us in evaluating problematic conduct that might be worthy of FTC investigation.

Similarly, a Division lawyer recently spent a year working at the Department of Health and Human Services, helping that agency to prepare for implementation of health care restructuring in the US market, and drawing attention to the importance of competition principles in that effort. The Division has also had detailee exchanges, in both directions, with the Federal Communications Commission. Of particular importance to mainstreaming competition policy, in many recent years the Division has seconded a senior economist to spend a year working with the President’s Council of Economic Advisors, thereby helping to ensure that competition principles are considered in overall government economic policy.

To be sure, there are times when this approach may not work. There are situations where the regulator’s views become so closely aligned with the interests of the regulated sector that the regulator places the industry’s interests over those of consumers. This relationship is often referred to as regulatory capture. This can be especially problematic when the regulatory system places regulation directly in the hands of members of the regulated group. The United States Supreme Court recently upheld Agency law enforcement action against regulators when the interests of the regulated have become indistinguishable from the interests of the regulators.⁷

⁷ N.C. State Board of Dental Examiners v. FTC, 574 U.S. --- (2015), *available at* http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf. In that case, the North Carolina state board regulating dentists was comprised of practicing dentists. The board took action to prevent non-dentists from offering teeth whitening services in the state. The dentists contended that they were regulating in the way that the state had envisioned, rendering them immune from antitrust scrutiny under the state action doctrine, which allows politically-accountable state governments to displace competition with regulation under certain

IV. Illustrating Approaches to Balancing Competition with Regulatory Goals

Once suitable topics for intervention have been identified and alliances have been established, what remains is to assist regulators in developing a framework for understanding the costs that anticompetitive regulation may impose and to allow them to identify options that impose the fewest restrictions on competition while achieving other legitimate policy goals. This can be especially useful when the alleged consumer benefits of a regulation are trivial or nonexistent.

On occasion, the FTC has conducted studies that have quantified the cost of regulation. Some years ago, for example, the FTC's Bureau of Economics studied the effects of restrictions on the commercial practice of optometry by taking advantage of a natural experiment – some states imposed such restrictions, while others did not – and measured the differences in price and quality. The price of optometric services proved to be much higher in restrictive jurisdictions, but quality was determined not to have been affected in these jurisdictions.⁸ However, studies of this sort can be very expensive, and even if resources are available, such studies can be difficult to conduct in the timeframe necessary to contribute to the regulatory debate. Even if it does not conduct a formal study, the FTC seeks to provide the regulator with an analytical framework that explains how restrictions on competition are likely to affect price and quality, in order to allow the regulator to make its own judgment.

In some cases, Agency competition advocacy might take the form of pointing out the experience of other jurisdictions, citing existing statistical evidence, and demonstrating how competition policy analysis can be performed. For example, in the case of dental therapy, the FTC pointed out that in Australia, where dental therapists have been providing dental care for many years, “dental therapists have practiced autonomously, including diagnosis, treatment planning, care provision, and referrals to dentists as appropriate.” FTC staff also identified international studies that spoke to “the safety and quality of care . . . provided by dental therapists as compared to dentists and about their acceptance by the populations served,” and noted that in the United States, evaluations of a dental therapy program in Alaska “show that [dental therapists] are performing within their scope of practice, patients are satisfied with their care, and there is no significant difference between the quality of the

circumstances. The case ultimately went to the United States Supreme Court, which upheld the FTC's position and ruled that even when an association of market participants has been given some regulatory powers by the state, its members may not collude to exclude new entrants, or engage in other anticompetitive actions, without active supervision by neutral parties. *See also U.S. v. National Association of Realtors*, documents available at <http://www.justice.gov/atr/cases/nar.htm>, *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

⁸ Federal Trade Commission, Bureau of Economics, STAFF REPORT ON EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980).

treatment provided by the [dental therapists] as compared with dentists.”⁹

In the case of transportation services, the FTC identified the types of consumer harm that might be expected to follow from particular aspects of proposed regulation. The FTC pointed out, for example, that:

- Requiring vehicles to weigh at least 3,200 pounds could exclude certain lighter, more fuel efficient, and more environmentally friendly vehicles from being used, which might prevent firms from competing on the basis of fuel efficiency;
- Requiring levels of insurance exceeding those required for incumbent service providers adds costs but does not serve any actual public safety concern;
- Requiring vehicles to be blue or black could restrict both the availability of vehicles and the ways that sedan services might compete using distinctive branding based on color; and
- Prohibiting a digital dispatch service from making a “substantial change” to its dispatch or payment solution for taxicabs or digital payment system without regulatory approval could restrict the ability of digital dispatch services to update their software in a regular, timely manner.

This kind of analysis could be helpful to a regulator that did not have an opportunity to evaluate, or experience in evaluating the competitive effects of regulation.¹⁰

In the case of an advance practice nursing advocacy to the State of West Virginia, the FTC began with statistics illustrating the extent of the problem of lack of access to health care services and went on to identify some of the potentially hidden costs that the proposed restrictions might impose. It cited evidence that requiring advance practice nurses to sign affiliation agreements with doctors effectively required nurses to pay for such agreements. “Unless these arrangements involve true and beneficial supervision,” the FTC pointed out, “they raise the possibility that [advanced practice nurses] are not compensating physicians for their time, but rather for the potential loss of income some physicians believe may occur as a result of [advanced practice nurses’] entry into the primary care marketplace. Such payments raise the costs of practice, likely resulting in fewer independently practicing [advanced practice nurses] and higher prices (without any improvement in the quality of care provided).” The FTC also identified that advance practice nurses in some areas were unable to find any physician who would sign an affiliation agreement, thus making it impossible for the nurse to practice.¹¹

⁹ Letter from FTC Staff to Commission on Dental Accreditation (2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-commission-dental-accreditation-concerning-proposed-accreditation-standards-dental/131204codacomment.pdf.

¹⁰ Letter from FTC Staff to Cite District of Columbia Taxicab Commission (2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

¹¹ Prepared Statement of FTC Staff Before Subcommittee A of the Joint Committee on Health of the State of West Virginia Legislature on the Review of West Virginia Laws Governing the Scope of Practice for Advance Practice Registered Nurses and Consideration of Possible Revisions to Remove Practice Restrictions (2012), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-testimony-subcommittee-wv-legislature-laws-governing-scope-practice-advanced-practice/120907wvatestimony.pdf.

In the case of real estate transaction services, the Agencies over the years have filed comments with a large number of entities, at the state or municipal level, responsible for regulating these services. In 2008, for example, the Division wrote to the Montana Board of Realty Regulation, urging the Board to include in proposed regulations on real estate brokerage services an option for consumers to waive minimum service requirements. The DOJ letter noted that the vast majority of states allow consumers to select and purchase only those real estate brokerage services they want, thereby allowing consumers to save thousands of dollars when selling their homes, and forcing traditional full-service brokers to compete harder, putting downward pressure on the price of their services. The letter described developments in the industry as traditional brokers faced increasing competition from fee-for-service brokers who charge only for those services the consumer chooses to buy. These fee-for-service brokers “unbundle” the package of real estate services offered by traditional real estate brokers and charge a fixed or hourly fee for specific services, such as listing the home in the Multiple Listing Service, negotiating or closing contracts, or providing advice on matters such as pricing the home. Consumers who are willing to do some of the work themselves can negotiate a customized package of services from a fee-for-service broker. These new brokerage models enable consumers to save thousands of dollars by allowing them to purchase only those services they want. Those savings are similar to the savings some consumers realize when they choose to purchase cars that have fewer options; if every consumer had to buy every option the manufacturer offers, most would pay more.

V. Effectiveness of Advocacy Intervention

The FTC has analyzed the effectiveness of its advocacy efforts, and has identified several conditions that make the success of this approach more likely. In surveys of advocacy recipients, the FTC found that in most cases, its recommendations received consideration and often achieved the desired result. Respondents agreed that the quality of the arguments was important.¹² The FTC also learned that, apart from cases in which the regulator had formally requested public comment, it was useful to have an invitation before intervening. When the FTC’s recommendations were specifically solicited, at least some degree of success was more likely.

VI. Conclusion

Bringing competition policy into the mainstream of public policy is a necessary tool for competition agencies. Fortunately, in addition to experience gained at the national level, a significant body of work has gone into creating such tools. The OECD Competition Assessment Toolkit, for example, contains tools to assist governments in evaluating new and existing draft laws and regulations at the national and subnational level.¹³ The

¹² See Ohlhausen, *supra* note 3, at 19.

¹³ See OECD, *supra* note 2.

International Competition Network's Recommended Practice on Competition Assessment¹⁴ can be a helpful tool, and its Advocacy Working Group has produced the first portion of a toolkit designed for use by competition agencies for similar purposes.¹⁵ While challenges exist, success can be achieved when a carefully crafted and thoughtful strategy is employed.

¹⁴ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc978.pdf>.

¹⁵ See International Competition Network (2011), *supra* note 2.