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Competition protection

Erjola Xhuvani

PhD, Lecturer, College University of Business, Albania

* Corresponding Author: **Erjola Xhuvani**

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Abstract

Competition advocacy can help drive pro-competitive reforms as well as encourage voluntary by enterprises in the market. This explains why the advocacy of competition is becoming increasingly important for competition authorities around the world, both in developed and developing countries. Competition advocacy includes all actions taken by a Competition Authority regarding the promotion of a competitive environment for economic activities "by means of mechanisms non-coercive, mainly through strengthening the institution's relations with other institutions state and through increasing public awareness on the benefits of competition". Advocacy of competition is therefore a primary function of the Competition Authority and is done quite often complementary to the mandatory application of the competition law. Advocacy of the competition of together with the mandatory implementation of the law can ensure that citizens benefit from markets lively, competitive, and price-seeking interiors.

Keywords: competition protection, governments intervention, competition authority, competition law, law enforcement

1. Introduction

Governments intervene in markets in a variety of ways that affect directly or indirectly their functioning, and these interventions can reinforce or reduce competition. In cases where the government intervenes in the market in a way that is unnecessarily restrictive or unfair competition, the Competition Authority can advocate to change the approach of to the government. In this case, advocacy efforts should be directed at the government itself. In some cases, it can it would be useful for these advocacy initiatives to be addressed to the public as well, so that the latter can exercise indirectly pressure to the government. Conversely, when the government undertakes pro-competitive reforms and faces opposition from unilateral interests in society, the Competition Authority must intervene to advocate in defense of government policy, to help build support for that policy from other supporters in society, from opinion-makers or from the general public themselves, towards whom they should advocacy efforts are directed. According to Goodwin and Martinez Licetti (2016), advocacy for a change in how governments intervene in the market may include:

- promoting changes in regulations and economic policies (proposed or existing), when they strengthen dominant positions or limit market entry, they lead to collusion secret, increase the costs to compete in the market, or discriminate and / or protect the interests of unilateral;
 - counseling against the effects of market distortion, caused by industrial policy, incentives for investments and selective public aid and the recommendation of other alternative solutions;
 - supporting decision-making when the conditions of competition require an increase or decrease rules;
 - providing proposals on mechanisms to build a level playing field between private enterprises and public enterprises competing with them;
 - recommending competitive conditions for auctions and for public-private partnerships and/or for privatizations;
 - clarifying and defining the scope of mutual legal mandates of the authorities of competition and sector regulators, as well as other agencies regarding promoting the principles of competition, and cooperation through these institutions for it make competition policies effectively applicable in the regulated sectors;
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- Work to convince policy-makers to include the principles of competition among the most important policies economic matters (such as trade, business environment and regulatory reforms, social policies, incentives and investment policies, etc.)

When advocating for a change in government policy, it can be helpful to win supporting those who will benefit from the change. If it creates a coalition in support of change, consisting of entities / or individuals who may or may not benefit from it, there is more the likelihood that the Competition Authority will succeed in influencing the government.

The main objective of a Competition Authority is to punish the illegal behavior of enterprises in the market, and more broadly their prevention through prohibition or compliance with the law. While interdiction is achieved through law enforcement activities, compliance with Competition law can be promoted through advocacy. According to Goodwin and Martinez Licetti (2016), advocacy for a change in the behavior of enterprises private market and their compliance with the law may include:

- clarification of the applicability of competition law in the conduct of the enterprise, or self-regulation through associations of chambers of business and merchants;
- Promoting compliance with the law and/or voluntary cessation of anti-practices competitive through special programs such as the Leniency Program.

Providing guidance on competition law can help to achieve greater big compliance. By clarifying the scope of the law, companies will be able to judge better if their behavior is compatible with applicable laws and will reduce the likelihood of violations that are due to misunderstanding of the prohibitions imposed by the competition law. Law enforcement and compliance advocacy are two sides of the same coin. Both aim to make competition law efficient. The first by punishing violations of the law ex-post and the second by persuading enterprises to refrain from ex-ante violations of the law. In some circumstances, the growth of raising the awareness of enterprises on the usefulness of the law, and therefore encouraging compliance, may be the most efficient way to prevent illegal practices.

Moreover, in some cases, even in the face of a possible violation of the law, an Authority Competition may decide to use advocacy instead of starting an investigation. Indeed, the investigation is costly both for the Competition Authority and for the parties being investigated, as it absorbs resources and usually ends with the imposition of fines, which in some cases can be damaging sustainability of the enterprise (especially small and medium-sized enterprises). So that the Competition Authority may decide to use the softer instrument of advocacy, by making companies aware that their behavior in the market may represent a violation of the law competition and encouraging them to change such behavior. However, this approach should be used sparingly, as, over time, it may undermine the credibility of the Authority Competition. For example, this approach can be limited to those cases where, due to any change of possible of the laws in force, the companies are not aware that their behavior is anti-competitive.

2. Advocacy to raise a culture of competition in the country

According to Goodwin and Martinez Licetti (2016), activities that increase the awareness of key stakeholders (eg civil society, media, judges and policy makers) on the logic and benefits of competition include:

- increasing awareness of the ways in which the principles of competition are included in the policies economic issues can promote and protect the benefits that consumers receive from an environment healthy competition;
- providing technical expertise related to industries or markets for policy-makers and judges;
- Increasing awareness on the impact of competition on citizens and enterprises.

In a survey conducted by the CBCPI Working Group⁶, which included¹ Competition Authorities, most of them indicated that building consensus on the principles of competition is at the heart of advocacy activities aimed at creating a culture of competition in the country. They evaluated the importance to give to the citizens' knowledge about the benefits of competitive markets and, at the same time, about the role of the Authority of Competition, in order to generate more public support for pro-competitive economic reforms, advertising or information campaigns and training programs that can be used directly to the citizens.

Building public consensus on the positive effects of free and effective competition between enterprises in their efficiency, innovation and economic growth, will increase the reputational damage (or social stigma) for enterprises with anti-competitive behavior, resulting in the improvement of the implementation of the competition law, through voluntary compliance with the law. Public understanding of the benefits of competition and obtaining of grassroots support as broad as possible for a strong competition policy give the Competition Authority the opportunity to perform its role more effectively. In transition economies, often the general public has not adequately faced competition and competitive markets. Advocacy initiatives that appreciate the virtues of competition and consumer welfare help to reinforce the culture of competition. According to a study conducted by ICN (2002), in developed countries consumers tend to be more familiar with the benefits of competition than those in developing countries².

Fortunately, there is sufficient evidence that competition officials in countries in development understand the importance of competition advocacy for this purpose, and are undertaking initiatives aimed at raising a culture of competition. The spread of the culture of competition should be carried out not only at the level of the general public, but also at the institutional level. Frequent and competent interactions with the government and sector entities, in a special way with the regulators, will facilitate the implementation of reforms which are not limit, but on the contrary strengthen the competition, improving the position of the Authority Competition within the institutional framework. Furthermore, the spread of knowledge on the principles and the rules of competition and on the instruments that the law of competition provides for judges – as EG through training courses - can be useful to increase the

¹https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/CPI_AdvocacyCaseStudiesRegulatedSectors2004.pdf

² Report of ICN (2002), page 79

efficiency of decisions and coercive actions undertaken by a Competition Authority, so that these decisions not unnecessarily be delayed or failed in Court (eg by making judges more open to the economic principles of competition and to the arguments of its policy).

The possibilities for implementing competition advocacy initiatives are many. Based on international best practices, the Competition Authority can focus its efforts on one of the following areas of advocacy:

- economic policy reforms, including all interactions with the government and parliament, such as the Competition Authority's interventions in the legislative process when it comes for direct state interventions in the economy, privatizations, public aid, policies of public investment, commercial policy and legal framework in the field of public procurement;
- regulation, which includes all interactions with regulatory entities in the regulated sectors, to change the regulations in force, or to monitor the implementation of the existing ones;
- compliance, which includes all interactions with the business community, to achieve a better understanding and compliance with competition laws;
- the culture of competition, which includes all interactions with the general public, or with categories of special professionals of this public, such as companies and competition lawyers, judges, government agencies, public officials, universities and academics, press professionals and participants in the public debate, in order to obtain a wider understanding of the good and the benefits of competition.

3. Advocacy for a change in the way governments intervene in markets

Governments intervene in a variety of ways in markets and affect directly or indirectly their functioning. These interventions can reinforce or reduce competition. In cases where the government intervenes in the market in a way that is unnecessarily restrictive or unfair competition, the Competition Authority can advocate to change the approach of to the government. In this case, advocacy efforts should be directed at the government itself. In some cases, it would be useful that these advocacy initiatives be addressed to the public as well, so that the latter can exercise indirectly pressure to the government³.

Conversely, when the government undertakes pro-competitive reforms and faces opposition from unilateral interests in society, the Competition Authority must intervene to advocate in defense of government policy, to help build support for that policy from other supporters in society, from opinion-makers or from the general public themselves.

According to Goodwin and Martinez Licetti (2016), advocacy in order to change the way how governments intervene in the market may:

- promote changes in regulations and economic policies (proposed or existing), when they strengthen dominant positions or limit market entry, lead to collusion secret, increase the costs to compete in the market, or discriminate and / or protect the interests of unilateral;
- counsel against the effects of market distortion, caused by industrial policy, incentives for investments and

selective public aid and the recommendation of other alternative solutions;

- support decision-making when competition conditions require an increase or decrease rules;
- provide proposals on mechanisms to build a level playing field between private enterprises and public enterprises competing with them;
- recommend competitive conditions for auctions and for public-private partnerships and/or for privatizations;
- Give clarification and definition of the scope of the mutual legal mandates of the authorities of competition and sector regulators, as well as other agencies regarding promoting the principles of competition, and cooperate through these institutions to make competition policies effectively applicable in the regulated sectors.

When advocating for a change in government policy, it can be helpful to win supporting those who will benefit from the change. If it creates a coalition to support the change, consisting of entities / or individuals who may or may not benefit from it, there is more the likelihood that the Competition Authority will succeed in influencing the government.

The main objective of a Competition Authority is to punish the illegal behavior of enterprises in the market, and more broadly their prevention through prohibition or compliance with the law. While interdiction is achieved through law enforcement activities, compliance with Competition law can be promoted through advocacy⁴.

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- clarification of the applicability of competition law in the conduct of the enterprise, or self-regulation through associations of chambers of commerce and merchants;
- promoting compliance with the law and/or voluntary cessation of anti-practices competitive through special programs such as the Leniency Program

Providing guidance on competition law can help to achieve greater compliance. By clarifying the scope of the law, companies will be able to judge better if their behavior is compatible with applicable laws and will reduce the likelihood of violations that are due to misunderstanding of the prohibitions imposed by the competition law.

Law enforcement and compliance advocacy are two sides of the same coin. Both aim to make competition law efficient. The first by punishing violations of the law ex-post. The second by persuading enterprises to refrain from ex-ante violations of the law. In some circumstances, the growth of raising the awareness of enterprises on the usefulness of the law, and therefore encouraging compliance, may be the most efficient way to prevent illegal practices.

Moreover, in some cases, even in the case of a possible violation of the law, the Competition Authority may decide to use advocacy instead of starting an investigation. Indeed, the investigation is costly both for the Competition Authority and for the parties being investigated, as it absorbs resources and usually ends with the imposition of fines, which in some cases can be damaging sustainability of the enterprise (especially small and medium-sized enterprises). So that the

³ M. Kirzner Israel, *Competition and Entrepreneurship*, University of Chicago Press, 1978, pg 17

⁴ B. Baker Jonathan, *The Antitrust Paradigm: Restoring a Competitive Economy*, Harvard University Press, 2019, pg. 14

Competition Authority may decide to use the milder instrument of advocacy, by making companies aware that their behavior in the market may represent a violation of the law competition and encouraging them to change such behavior. However, this approach should use sparingly, as, over time, may undermine the credibility of the Authority Competition as enforcers of the law, resulting in the reduction of the applicability of the law through prohibition. For example, this approach can be limited to those cases where, due to any change of possible of the laws in force, the companies are not aware that their behavior is anti-competitive⁵.

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- providing technical expertise related to industries or markets for policy-makers and judges;
- Increasing awareness on the impact of competition on citizens and enterprises.

In a survey conducted by the CBCPI Working Group⁶, which included 33 Competition Authorities, most of them indicated that building consensus on the principles of competition is at the heart of advocacy activities aimed at creating a culture of competition in the country. To give citizens knowledge on the benefits of competitive markets and, at the same time, on the role of the Authority of Competition, in order to generate more public support for pro-competitive economic reforms, advertising or information campaigns and training programs will help directly to increase the role of competition. Building public consensus on the positive effects of free and effective competition between enterprises in their efficiency, innovation and economic growth, will increase the reputational damage (or social stigma) for enterprises with anti-competitive behavior, by result in the improvement of the implementation of the competition law, through voluntary compliance with the law. Public understanding of the benefits of competition and obtaining grassroots support as broad as possible for a strong competition policy to the Competition Authority perform its role more effectively.

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Fortunately, there is sufficient evidence that competition officials in developed countries understand the importance of competition advocacy for this purpose, and are undertaking initiatives aimed at raising a culture of competition⁷.

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not only at the level of the general public, but also at the institutional level. Frequent and competent interactions with the government and sector entities, in a special way with the regulators, will facilitate the implementation of reforms which are not limit, but on the contrary strengthen the competition, improving the position of the Authority Competition within the institutional framework⁸.

The possibilities for implementing competition advocacy initiatives are many. Based on in international best practices, the Competition Authority can focus its efforts on one of the following areas of advocacy:

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- compliance, which includes all interactions with the business community, to achieve a better understanding and compliance with competition laws;
- the culture of competition, which includes all interactions with the general public, or with categories special professionals of this public, such as companies and competition lawyers, judges, government agencies, public officials, universities and academics, press professionals and participants in the public debate, in order to obtain a wider understanding of the good and the benefits of competition.

Economic policy reforms constitute a broad category that includes all initiatives of advocacy that the Competition Authority can undertake to influence decisions and strategies of the legislative and executive institutions of the central and local governments.

Economic policy reforms can be justified by market malfunctions and failures, or they may be dictated solely by the political agenda. Competition authorities should ensure in particular that, respecting the principles and rules of competition, laws and regulations limit and eliminate distortions in the field of competition. If there is any other way, less restrictive to achieve the policy objective in question, the Competition Authority must grant technical advice on this method. When it is not possible to avoid a restriction of competition, The Competition Authority can advocate for a careful and transparent assessment of benefits and losses between the achievement of the policy objective pursued and the negative consequences that result from reduced competition⁹.

One of the main goals of competition advocacy action is to try to reverse or to review anti-competitive legislation before it comes into force. Many countries require that the proposed legislation in some areas or in some sectors be reviewed in advance by the Authority of Competition, or allow the

⁵ Hovenkamp Herbert, *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, 2008, pg 24

⁶ Chapter 6 of World Bank, OECD 1998

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https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2018.pdf

⁸ https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/CPI_AdvocacyCaseStudiesRegulatedSectors2004.pdf 7 ICN Report (2002), page 79

⁹ L. Carson Jamie, and Matthew Roberts Jason, *Ambition, Competition, and Electoral Reform: The Politics of Congressional Elections Across Time*, University of Michigan Press, 2013, pg.74

authority to review on its own initiative (ie ex officio) the laws and regulations that may affect competition.

Intervention in the process of law making can be carried out through recommendations and opinions that try to shed light on the expected impact that the proposed law would have on competition. The Competition Authority may address legislators and/or the general public, adapting depth and degree of technicality as appropriate. Choosing the appropriate form of intervention should take into account the importance of the issue in the political calendar and the timeline of the legislation process that is happening.

International trade policies can be a source of significant constraints for competition, especially in newly opened markets. Local producers and sellers, who can enjoy a dominant position in the market, and who are well connected politically, will resist to the opening of markets to foreign competitors. A similar challenge concerns the removal of support finance for powerful domestic enterprises - such as investment incentives and state aid¹⁰.

Opening markets to foreign producers could encourage domestic enterprises to become more efficient, as this increases competition. In the short term, this process can reduce the profits of domestic enterprises and may have consequences in other areas of the economy, perhaps entering into conflict with social economic objectives. The Competition Authority cannot ignore the analysis of cost/benefits between social objectives and market efficiency, but must persist that the financial supports and other sources of competitive advantages, which are given to local enterprises be temporary, closely related to restructuring programs, and for policy-makers to consider other, more direct social protection measures in place to interfere with the efficient functioning of the markets.

State aid for enterprises can create unequal conditions for enterprises participating in a certain market as well as costly competition for financial aid; and cause a distortion in the distribution of resources across sectors. Therefore, it is very important for Competition Authorities to monitor the distribution of state aid. In Europe, The European Commission asks the Member States to provide an expenditure report on the distribution of state aid, and then these institutions publish every year a summary of State aid, called "Table of state aid accounts".¹⁰ Another example is the Competition Council of Moldova, which has created an online State Aid Register for reporting and monitoring all state aid given by all agencies of the country, making it complete transparent and enabling the detection, investigation and elimination of anti-competitive forms of aid state.

The economies of many developing countries are characterized by a high degree of state participation in the economy, directly or through State/Public Enterprises. Depending on the structure of the market in which these Enterprises (or the State itself) operate, when the need for it is felt to encourage more competition, the Competition Authority can advocate for various reforms:

- if private enterprises operate in the same market alongside a State Enterprise, The Competition Authority can advocate for competitive impartiality;
- if the market is a natural monopoly (eg network industries), the Competition Authority can advocate to

improve field-regulation to enable competition in the market downstream;

- If the market is a legal monopoly (eg State monopolies), the Competition Authority can advocate for de-regulation (liberalization) or privatization.

Some sectors, including e.g. financial services are characterized by a high governmental participation degree and control. In many countries, before the reforms opened the markets for competition and allow private operators to enter the competition, these markets were ruled by State Enterprises. The fact that they have operated in the market without rivals for a long time, often gives to the State Enterprises a competitive advantage¹¹.

One such advantage is market ownership, one of the privileges enjoyed by State Enterprises. In most cases, these Enterprises also enjoy other privileges and immunities, which are not available to co-contestants their private, such as direct financial support, financing and guarantees, rigidity of capital (captive equity), advantages from obtaining information, exceptions from the application of special regulatory regimes and bankruptcy rules. These strategic advantages over their rivals are not necessarily based on better performance, higher efficiency, better technology, or higher driving skills.

4. Conclusion

Fostering a culture of competition is vital to create an open and welcoming environment and social pressure in favor of competition-friendly reforms. Stakeholder education with the principles of competition can counterbalance the strength of pressure groups that exert influence and create initiatives where politicians embrace socially desirable policies whose benefits usually seen over long periods. Strengthening the culture of competition also serves to enforce the competition laws, as it leads to a more widespread focus on competition rules.

It is of particular importance that initiatives on the culture of competition are planned to ensure continuity and stability in time in order to achieve selected audiences, rather than allocating resources to reach more groups in short and infrequent times. The culture of competition is one of those areas where usually the work of Advocacy bears fruit in long periods of time, as a result of persistent and uninterrupted efforts. When they are not carried out regularly, the activities aimed at a public target group outside the institution offer fewer opportunities to bring the desired changes.

For these reasons, it is recommended that the Competition Authority plans continued and coordinated efforts for the implementation of the activities listed below, in order to be effective and improve the general level of the culture of competition in the country. The Competition Authority should plan initiatives specifically aimed at student's bachelor's / master's / PhD in order to increase step by step and create demand for knowledge in the field of competition. The first step is the organization of open days and group presentations (workshops), which will address competition issues from a practical perspective. Such activities could indicate, for example, what anti-competitive practices look like and how they cause harm, giving examples practice and showing in detail the loss of economic benefits brought about by the absence of competition. Along with round tables and

¹⁰ <http://ec.europa.eu/comm/competition/mergers/studies/reports/lear.pdf>

¹¹ Benjamin Gomes-Casseres, *The Alliance Revolution: The New Shape of Business Rivalry*, Harvard University Press, 1996, pg.77

courses, the Competition Authority should invest in longer-term activity. Indeed, the second step would be to include well-targeted courses among the existing graduate programs, especially in the Faculties of Economics and Law. Finally, it is recommended that the Competition Authority cooperate with universities for the opening and the organization of master's degrees and intensive courses dedicated to competition law and economics, which can be addressed to both students and professionals who wish to improve competitive knowledge and technical competence.

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