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Competition Policy

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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.<sup>1</sup>

Persuading legislators and regulators of these competition benefits can be easier said than done. Consumer interests are diffuse, and legislative or regulatory proposals<sup>2</sup> 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.<sup>3</sup>

The United States antitrust agencies, the Federal Trade Commission (“FTC”) and the





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-



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

#### **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.<sup>8</sup> 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

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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).

<sup>8</sup> 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).





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 serv

International Competition Network's Recommended Practice on Competition Assessment<sup>14</sup> 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.<sup>15</sup> While challenges exist, success can be achieved when a carefully crafted and thoughtful strategy is employed.

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

<sup>15</sup> See International Competition Network (2011), *supra* note 2.