

## **Competition Enforcement Capacity Building and Competition Advocacy**

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### **Introduction**

First of all, I would like to thank the organisers for the opportunity to participate in this conference and contribute to this session. Meetings such as this bring to the forefront the interconnectedness of competition law and policy around the world – while competition regimes take many different forms, we can all benefit from sharing our experiences in addressing the challenges associated with the design and/or implementation of an effective competition policy.

My personal experience is a case in point. I have led competition authorities in Ireland and the UK, under two different systems – one prosecutorial before the courts (Ireland), one administrative with judicial oversight (UK) – but the aim has remained the same, making markets work well for consumers and the economy.

Similarly, when policymakers and competition authorities seek to build capacity for competition enforcement and advocacy, independently of the system under which they operate, the overall goal is to maximise the ability of competition authorities to secure vibrant, competitive markets,

in the interests of consumers and to promote productivity, innovation and economic growth.<sup>1</sup>

My contribution today will highlight the role of competition authorities in driving economic growth. It will follow on by outlining the characteristics of an institutional framework that can, by ensuring optimal enforcement capacity and advocacy, facilitate such a role. I will argue that an effective competition policy system needs to be able to address both public and private restrictions on competition, and that, in order to be effective, competition agencies need to operate within an appropriate institutional framework that needs to take into consideration not only the design and work of the competition agency, but also that of other relevant institutions, most notably the courts.

### **Competition drives economic efficiency and growth**

Competition is a crucial factor in driving economic growth. First, it places pressure on firms to increase their internal efficiency. Second, it ensures that more productive firms increase their market share at the expense of the less productive. These low productivity firms may then exit the market, to be replaced by higher productivity firms. Third, in the presence of competition, firms will aim to innovate to gain a cost advantage, to differentiate their products, or to bring new products to the market place.

Competition also contributes to growth through other channels. There is evidence that it reduces inflation rates, both at the sectoral and aggregate level.<sup>2</sup> And it is a defence against the entrenchment of vested interests and protectionism, opening up markets to new entrants and increasing the attractiveness of a country as a recipient of foreign direct investment.

The role of competition in driving economic growth at minimal or no cost is especially important in the current economic climate. With

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<sup>1</sup> See, for example, the recent consultation document issued by the UK Department for Business Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011, available at: [www.bis.gov.uk/Consultations](http://www.bis.gov.uk/Consultations).

<sup>2</sup> European Central Bank (2005), *Does Product Market Competition Reduce Inflation?* shows a robust and significant negative link between competition and inflation, both at the aggregate and sectoral levels.

macroeconomic tools likely to prove insufficient and their use restricted by the need for fiscal consolidation, microeconomic instruments (such as the removal of unnecessary regulatory burdens and the protection and promotion of competition) become all the more important. This is a message echoed by many commentators, including those not necessarily within the competition regime.<sup>3</sup>

At a macro level, there is strong evidence that policies to increase competition can stimulate economic growth and competitiveness.

- Overall, there is a wide range of empirical studies examining the links between competition, innovation and productivity that, on the whole, set out a positive relationship between the three.<sup>4</sup>
- Reforms introduced by the UK government throughout the 1990s aimed at reducing entry barriers, such as market liberalisation and interventions by competition authorities, increased innovation and productivity in the UK.<sup>5</sup> Entry or the threat of entry increased the incentive on existing firms to innovate or adopt new techniques in order to avoid the loss of market share. It also caused those firms that were less inefficient to exit, raising economy wide productivity levels.

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<sup>3</sup> See, for instance, McKinsey Global Institute (2010) *From Austerity to Prosperity: seven priorities for the long-term in the United Kingdom*.

<sup>4</sup> For instance, Geroski (1990), *Innovation, Technology and Market Structure*, finds evidence against the hypothesis that increases in competitive rivalry decrease innovativeness. Blundell, Griffith and Van Reenen (1995), *Dynamic count data models of technological innovation*, reveal a complex relationship between competition and innovation: at the firm level, dominant firms tend to innovate more, while at the industry level, concentration dampens innovation; to the extent that growing dominance increases concentration, the level of aggregate innovation will tend to fall. Griffiths, Harrison and Simpson (2006), *The link between product market reform, innovation and EU macroeconomic performance*, who highlight that, within an industry, the effect of increasing competition on innovation is larger the closer to the global technological frontier (a scenario likely to relate to the situation in the UK).

<sup>5</sup> Aghion, P. Blundell, P., Griffith, R., Howitt, P and Prantl, S. (2008), *The Effect of Entry on Incumbent Innovation and Productivity*.

- It has been estimated that between 20 to 40 per cent of total factor productivity differences between eight OECD countries could be explained by firm entry and exit.<sup>6</sup>
- Increased competition in the UK has been considered a major factor in explaining the narrowing in the productivity gap between British and German manufacturing.<sup>7</sup>
- Increased competition in the UK associated with better productivity performance, with these effects working at least partly through greater pressure on management to perform and through firm-worker bargains which raised effort and improved working practices.<sup>8</sup>

There are also many market-level examples of the beneficial impact of increased competition. For example:

- Following the OFT investigation in 2002 into price fixing by manufacturers and retailers of replica football kits, the choice of outlets was increased and prices fell by some 15 per cent.<sup>9</sup>
- The OFT intervention against Napp Pharmaceuticals for its abuse of dominance in the market for sustained release morphine resulted in savings for the national health authorities in excess of £1.5 million per year.<sup>10</sup>

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<sup>6</sup> Nickell, S. (1996). *Competition and Corporate Performance*.

<sup>7</sup> See Crafts, N. & Mills, T. (2003), *TFP Growth in British and German Manufacturing, 1950-1996*, Centre for Economic Policy Research, Discussion Paper No.3078.

<sup>8</sup> See Crafts, N. (2011), *British Relative Decline Revisited*, University of Warwick, Centre for Competitive Advantage in the World Economy, Working Paper No. 42. At a more general level, the link between competition and managerial practices is explored in depth by John van Reenen's work on managerial practices (see, for instance, his presentation on 'Restoring Growth', available at: [http://cep.lse.ac.uk/\\_new/events/event.asp?id=127#slides](http://cep.lse.ac.uk/_new/events/event.asp?id=127#slides)).

<sup>9</sup> Davies et al. *The Benefits from Competition: some illustrative UK cases*, DTI Economics Paper, no. 14.

<sup>10</sup> OFT 1332, *Evaluating the impact of the OFT's 2001 abuse of dominance case against Napp Pharmaceuticals*, available at: [www.offt.gov.uk/shared\\_offt/ca-and-cartels/OFT1332.pdf](http://www.offt.gov.uk/shared_offt/ca-and-cartels/OFT1332.pdf).

- A market study by the OFT recommending the elimination of administrative restrictions on entry in the retail pharmacy sector resulted, even with only partial implementation, in shortened travel and waiting times, and improved access to lower-priced over-the-counter medicines, with overall quantified net benefits conservatively estimated at £12-20 million per year. In addition, the market study also resulted in other (non-quantified) benefits including extended opening hours, and greater choice for consumers.<sup>11</sup>
  
- The liberalisation of European air routes by the European Commission facilitated the entry of a number of new low cost carriers. These carriers introduced new business models (including new booking methods and extensive use of outsourcing). In addition to increased consumer choice, the price of an economy class ticket provided by traditional carriers fell by over 66 per cent between 1992 and 2002.<sup>12</sup>
  
- The prohibition in the UK of the Net Book Agreement, an agreement between publishers not to supply books to retailers that priced below the publisher's net price, in 1997 led to a dramatic reduction in the price of popular paperback fiction, with discounts on bestsellers and 'multi-buy' offers such as two-for-one now regularly being seen. In addition, it has helped to promote and grow new efficient distribution models such as the internet.<sup>13</sup>
  
- The deregulation of international telephone calls in the UK has provided consumers with greater choice of providers and led to significant decreases in the price of UK international calls, down 90 per cent over the decade to 2002.<sup>14</sup>

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<sup>11</sup> OFT 1219, *Evaluating the impact of the 2003 OFT study on the Control of Entry regulations in the retail pharmacies market*, available at: [www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/OFT1219.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/OFT1219.pdf).

<sup>12</sup> DTI (2004), *The Benefits from Competition: some illustrative UK cases*.

<sup>13</sup> DTI (2004), *ibid.*

<sup>14</sup> DTI (2004), *ibid.*

**To fulfil its potential to contribute to economic growth, an effective competition policy system needs to address both public and private restrictions on competition**

We are all familiar with the restrictions on competition that can result from the actions of private agents and the impact that they can have on efficiency and innovation. But it is also essential to recognise that governments can also have an adverse impact on competition, either through (more) overt actions, such as exempting certain sectors from the application of competition laws or granting subsidies to industries or individual industry players, or through more subtle forms of market intervention (for instance, by introducing regulations that, while aiming to achieve public policy objectives, provide an advantage to incumbents). That is not to say that governments do not have a role to play in markets – in many cases, the role of government is a most legitimate, indeed necessary one – markets cannot exist without a framework of rules. And we know that markets, left to their own devices, can fail because of market power, information asymmetries or externalities.

However, government interventions can have unforeseen, yet significant and multifaceted, consequences. As such, the full cost of intervention needs to be carefully assessed before deciding whether, how much, and how to intervene, especially as we usually risk over-intervention, not under-intervention.

In this respect, competition agencies have an important role to play in the not necessarily easy task of helping policymakers consider all of the costs and benefits of a market intervention. This is essential for a number of reasons. First, there might be a bias in evidence. The benefits of government interventions might be easier to see than the cost of lost competition, especially as much of the evidence is likely to come from interest groups (who have the most to lose) and might itself be weighed in a certain direction. Consumers are diffuse, less personally affected, less well informed and less collectively organised, facing more challenges when providing the counter-balancing arguments in favour of competition.

Second, governments need to factor in (but frequently overlook) the benefits of dynamic efficiency, and the risks derived from preserving business models that are unsustainable, while blocking innovation and new entrants to the market. These benefits, while potentially very large,

can be difficult to assess or rely on in advance and may take years to materialise. As a result, they may easily be under-appreciated.

Third, and crucially, the restriction on competition resulting from government intervention can result in a slippery slope – once 'rents' have been established in one sector, others may lobby government for similar treatment.

Competition enforcement and advocacy are complementary. Successful advocacy is needed to open regulated sectors to the full application of competition rules and their enforcement. But industries which have previously been insulated from competition and now find themselves facing increasing competition will frequently resort to anti-competitive practices to attempt to limit that new competition, giving rise to a greater need for enforcement. Conversely, where enforcement increases competition, the industry in question may resort to lobbying to have the sector protected from competition.

Moreover, enforcement adds leverage to the advocacy work. A competition authority that has established its credibility and profile by bringing high-impact enforcement cases will have the credibility and public stature to engage in competition advocacy more effectively.

A competition authority that both enforces and advocates will come across as more balanced – an authority with enforcement powers only would focus entirely on private restrictions and might be seen as anti-business or narrowly focussed. An authority with both functions can be seen as being consistently pro-competition, with broader legitimacy.

Hence, effective advocacy and effective enforcement complement and reinforce each other. Because of that, it is essential that the design and capability building of any competition authority reflects the need to tackle both private and public restrictions on competition, with enforcement and advocacy as two sides of the same coin.

I will now turn my attention to the factors that facilitate an agency's capability to engage in successful advocacy and enforcement work.

**The capability of an agency to effectively engage in enforcement and advocacy work will depend not only on the characteristics of the agency, but also on the framework within which it operates**

Competition agencies operate within a competition policy framework, defined by the roles and functions of other institutions, including the Courts, but also government at large. As such, the capability of an agency to effectively engage in enforcement and advocacy work will depend not only on the characteristics of the agency, but also on the characteristics of those institutions and the framework defined by them.

At the **agency level**, different studies on the effectiveness of competition authorities have emphasised a range of characteristics that contribute to ensuring that the benefits from competition materialise.<sup>15</sup> There are, however, some **recurrent themes** that I would like to bring to your attention:

- **Resources: level and type of resources, and how they are allocated and managed.** The most common pitfall of competition agencies is not to have the right resources and/or not to allocate them effectively. In this respect, we are referring not only to the adequate level of financing (an increasing challenge given public finances constraints), but also to the ability to recruit and retain high quality staff (something intrinsically linked to the challenges and quality of the work undertaken), and to the existence of a sufficiently broad-based leadership (that makes the performance of the competition authority less dependent on specific individuals).

In this respect, it is also crucial that agencies can maximise the impact (direct and indirect, and both in the short and long-term) of their work. In our experience, this is greatly facilitated by the ability

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<sup>15</sup> For instance, the Global Competition Review (GCR) Rating Enforcement survey looks at a number of criteria, including management, caseload, resources and media profile and reputation within the competition community, to produce a ranking of competition authorities. While the 2004 UK Government-sponsored KPMG Peer Review of Competition Policy (available at [www.bis.gov.uk/files/file32813.pdf](http://www.bis.gov.uk/files/file32813.pdf)) refers to a number of criteria such as technical competence, clarity of procedures, speed of decision-making, minimal burden on businesses, political independence, ability of investigation, case officers to make independent, impartial recommendations to superiors, and resources available for caseload.

to prioritise in a manner that is clear yet flexible enough to reflect the changing circumstances of governments and markets.<sup>16</sup> The ability to prioritise is, in turn, reinforced by adopting an effect-driven approach, that focuses on outcomes (rather than outputs), and bases decisions on sound economic analysis and consideration of the impact of specific interventions on consumers.

An agency's impact can be further maximised by putting in place effective project and knowledge management processes. Effective project and knowledge management help ensure, first, that work is well focussed, planned and managed (thereby ensuring resources are utilised effectively). Second, they ensure that the agency and its staff benefit from prior learning, which saves time and resources by avoiding 'reinventing the wheel' and contributes to consistency. Third, they ensure that accountability for delivery of the work is clear and understood by staff. Also, the reputation of the authority is enhanced as a result of carrying out its work professionally.<sup>17</sup>

- **Independence, both formal and actual.** That is, independence not only in terms of decision-making, but also in terms of providing independent input into policy decisions. In this respect, it is essential that competition agencies have formal powers to study restrictions on competition and make recommendations to government, ideally complemented by a formal requirement for the government to respond to such recommendations. When coupled with the ability to prioritise and the flexibility which results from it, this independence allows competition agencies to reflect matters of strategic significance, and to be informed by the changing environment in which they operate. It also allows them to focus their resources on those issues where the impact on consumers and the economy at large can be most significant (or, to put it in

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<sup>16</sup> See, for instance, *OFT prioritisation principles* (OFT 953), outlining a prioritisation framework based on four criteria: impact, strategic significance, resources and risks.

<sup>17</sup> The ICN is engaged in experience-sharing projects in this area: see [www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx](http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx). See also the ICN Market Studies Good Practice Handbook, available at: [www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx](http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx).

other terms, allows competition authorities to spend their political capital where it matters the most).

This independence is also reflected in the ability of competition agencies to explore ways in which we can improve how we operate and develop new tools. In this respect, it is important that competition agencies continually explore how to improve and streamline their processes and to harness the capabilities and resources of the private sector (for instance, by giving businesses the information needed to enable them to self-assess).

- **Flexibility** in the use of different tools, remedies and sanctions. In this respect, 'hard tools' are crucial, with financial penalties, sanctions against individuals, private damage actions and the reputation damage associated with enforcement interventions acting as crucial drivers of deterrence and, therefore, of the success of a competition authority.

But, to maximise its effectiveness, a competition agency should consider not only the direct impact of its interventions, but also how its activities can change business behaviour. In this respect, it is important to note that, in addition to punishing transgressors, enforcement has an important deterrence effect<sup>18,19</sup>, preventing infringements from taking place and driving compliance. While enforcement provides clear signals for businesses as to the implications of infringing the law, it is important also to ensure that businesses understand what they can and cannot do. The importance of providing guidance is often overlooked when governments and agencies seek to enhance the capacity and

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<sup>18</sup> '[...] deterrence is perhaps the single most important ultimate outcome of the [Antitrust] Division's work. We are just as sure that it presents the most significant measurement challenges...' (DoJ, Congressional Submission for Fiscal Year 2001). OFT 962, *The Deterrent Effect of Competition Enforcement by the OFT*, November 2007, estimates the ratio of potential infringements abandoned or modified to the number of decisions during the period 2001- 2006, with values ranging from 4:1 for abuse of dominance, to 7:1 for (anti-competitive) commercial agreements.

<sup>19</sup> See, for instance, OFT 962, *ibid*. Recent qualitative research further highlights the relevance of these factors (see, for instance, OFT 1227, *Drivers of compliance and non-compliance with competition law*, March 2010).

effectiveness of a competition agency. At OFT, we provide advice and information about the law so that businesses know more clearly what they can and cannot do. This helps to facilitate compliance with competition law, but also helps ensure that businesses do not refrain from engaging in innovative and potentially beneficial, pro-competitive conduct due to uncertainty as to whether that conduct is compliant. The increased certainty that derives from guidance and consistency fosters investment and lowers costs to business, with an ensuing positive impact on growth.

- **Transparency.** While independence and flexibility are unquestionably crucial characteristics of competition agencies, they need to be balanced by transparency and consistency. By opening themselves to scrutiny (both in terms of terms of procedures and of the application of principles) competition authorities are more accountable, gaining the political capital required for an agency to operate in an independent manner – an issue of particular relevance when dealing with controversial decisions, including those that relate to (perceived) trade-offs between competition policy and other policy objectives. Transparency also contributes to consistency, hence creating a stable business environment for businesses to operate, with a positive impact on investment and growth.

In order to have the required impact on the economy, **competition agencies need to operate as part of an effective institutional framework, both at the level of the courts but also across the economy.**<sup>20</sup>

### *The role of courts in the competition system*

The relevance of the role of the courts should not come as a surprise, given the inherent complementarities between the role of competition authorities and that of the judicial system (as the enforcement of the

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<sup>20</sup> See, for instance, Buccirossi, P., Ciari, L., Duso, T., Spagnolo, G. and Vitale, C., *Competition Policy and Productivity Growth: An Empirical Assessment* (September 2009), CEPR Discussion Paper No. DP7470, for an assessment of the impact of the characteristics of the competition authorities and the economic framework at large on productivity.

policy is often done by the courts directly or in appeal). For these reasons, the courts (and the legal system in general), may play an important role in determining the deterrence properties of a competition regime.<sup>21</sup> A common pitfall of competition regimes relates to the relevant courts not providing effective oversight. The scrutiny of the courts provides important checks and balances on the work of a competition agency. A study conducted by the ICN<sup>22</sup> revealed that the independent and effective review of competition agencies' decisions by courts is a necessary and important aspect of many well-functioning competition regimes. However, competition agencies raised a number of concerns in relation to the lack of specialised knowledge on competition issues by the judiciary. The ICN report confirmed that a judiciary familiar with competition law, including its economic aspects, is an important element of a country's competition policy system and noted the urgency to bring judges closer to the technical analysis made by competition authorities, especially in transition and developing countries.

*The wider legal and economic framework impacts on the effectiveness of the competition system*

At a wider level, it is important to recall that competition law forms part of an overarching framework designed by government to enable fair and open competitive markets to exist. The effectiveness of the other parts of the framework – including government's role in establishing the 'rule of law', creating property rights, and ensuring contracts are upheld – also impacts the effective functioning of the competition regime.

I will focus on two aspects of this wider framework which have yielded positive results in terms of promoting fair, competitive markets in the UK: first, protecting consumers from malfunctioning markets, including by giving them a stronger voice; and, second, promoting the embedding of competition principles in the design of policies.

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<sup>21</sup> Buccirosi et al, *ibid*, confirm the relevance of a quality judiciary as a complement to enforcement activities.

<sup>22</sup> International Competition Network, *Report on Competition and the Judiciary* (2006), available at: [www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf), and *Competition and the Judiciary 2nd Phase Report – Case Studies* (2007), available at: [www.internationalcompetitionnetwork.org/uploads/library/doc372.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc372.pdf).

### *The importance of a strong consumer voice*

I have already referred to the fact that strong competition is good for the economy, but it is also good for consumers, with tangible benefits at the individual level in the form of lower prices, higher quality and wider choice. But this positive impact of competition can be furthered by consumer protection as there are clear synergies between the two policies.

We often refer to a virtuous circle of competition and consumer protection. When consumers trust firms and markets (because of effective consumer protection laws) and when consumers choose the products and services that are best for them, then firms to compete vigorously to gain business from each other. Competition provides huge benefits to consumers, but strong competition does not address all possible sources of consumer detriment. Indeed, intense competition that results in a 'race-to-the-bottom' can make strong consumer protection law all the more important.

Having active consumers with the confidence to engage in markets will, in turn, act as a driver for economic growth. Firms can only gain from innovation if they can get their products to market, and consumers are active and willing to adopt these new products.

In this respect, consumer protection can ensure that competition results in the 'right' kind of innovation, aimed at addressing consumer demand and improving processes, not at obfuscating consumers. This can be especially important in new or changing industries and in emerging or developing countries, where a dynamic of 'wrong' innovation can lead to a 'race-to-the-bottom' in standards, with low standards becoming the norm.

Consumer policy has a role in the protection of vulnerable people, which can be hugely important, especially in times of economic uncertainty when consumer confidence can dampen demand.

In order for these benefits to be realised fully, it is important that consumers, in addition to protection under the law, have a strong voice in the process, to balance against that of business. Consumer bodies have an important role to play in harnessing the diverse interests of consumers and ensuring that their interests are taken into account.

### *The UK experience*

The UK experience provides evidence of the benefits of considering competition and consumer policy in conjunction, and of a formalised process for providing a voice to consumer concerns about the workings of markets.

In the UK, we have benefited from having competition enforcement and consumer protection integrated within a single agency. Consumer law and enforcement help ensure that competition results in innovation that benefits consumers, addressing demand and improving processes. Our competition work has taken valuable lessons from consumer policy in understanding better how consumers actually behave, rather than making economic assumptions about 'rational consumers', which has promoted more effective remedies. Conversely, we have found that competition policy helps ensure that consumer protection legislation is enforced in a way that does not chill pro-competitive business conduct or economic growth. The OFT's dual role has enabled us to analyse consumer detriment with improved economic rigour, and to devise more sophisticated remedies by looking at the market origins of consumer problems.

In addition, we have formalised systems for designated consumer bodies to raise issues regarding concerns about features of markets that are or appear to be harming consumers. 'Super-complaints' have enabled the regime to realise some important benefits. They have helped to provide consumers with an enhanced voice, recognising that the voice of business is generally stronger and more organised, whereas the voice of the consumer, which may be more aligned with the consumer welfare objective, is generally more diffuse and weak.

### *Competition assessment in policymaking*

I referred earlier to the importance of addressing public, as well as private, restrictions on competition. A competition agency clearly cannot address public restrictions on its own, but must work together with policymakers in other branches of government. The goal should be for government to recognise competition as one of the drivers of economic growth and, as such, incorporate competition assessment as part of the cost-benefit analysis for new legislation or market interventions. In the UK, the impact assessment to be undertaken at the time of introduction of any policy or

piece of regulation requires the consideration of the impact on competition, with the OFT monitoring and informing the process as required. This provision is complemented by the OFT's power, following a market study, to make recommendations to government on any existing regulations that might hinder or distort competition, with government required to respond within 90 days. This level of formal interaction provides a stable platform for the competition agency and other parts of government to work together.

### **Conclusion**

To sum up, initiatives aimed at building competition enforcement capacity and competition advocacy are most likely to be effective when addressed in a holistic manner, both in terms of the range of tools available to competition agencies and of how the competition system fits into the wider policy and economic framework.

So what would an ideal competition system look like? I propose that it would include a well-resourced, independent, accountable, transparent, outcome-focussed competition agency with a broad and flexible range of tools available to address both public and private restrictions on competition. The agency would operate as part of an overarching policy framework which recognises the importance of competition for economic growth, with consumers having a strong voice in the process, and with a judiciary that is well-versed in competition law, including its economic aspects.

Thank you for your attention.