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LATIN AMERICAN COMPETITION FORUM

Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- Contribution from United States --

23-24 September 2015, Montego Bay, Jamaica

The attached document from United States (FTC) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica.

Contact: Mario Umaña, Senior Trade and Competition Specialist, Inter-American Development Bank
Tel: +1 (202) 623-3256; Email: mariou@iadb.org.

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Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- CONTRIBUTION FROM UNITED STATES (FTC)* --

1. Introduction

1. Competition advocacy is an important means by which the United States antitrust agencies, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“Division”) (collectively “the Agencies”), carry out our competition mission. The Agencies engage regulators and legislators in carefully tailored ways to support legislative, regulatory, and judicial outcomes that satisfy legitimate policy goals without placing unnecessary burdens on competition and consumer welfare. In particular, we seek to identify potential anticompetitive restraints before they are finalized and implemented, or to seek modifications to mitigate potential competitive harm. As described in the United States submission to this Forum in 2014,¹ while the Agencies often provide written comments and similar formal interventions, the Agencies also rely heavily on “soft” advocacy to other public institutions, including long-term relationship building with sector regulators, to create an alignment of interests and a culture of shared problem solving, the value of which cannot be overestimated.

2. Because resources are not finite, an understanding of the costs and benefits of competition advocacy is useful as a tool for allocating agency resources, just as it is important to understand the costs and benefits of enforcement. To this end, it is important that the agencies aim to: define what constitutes advocacy “success”; evaluate and measure the impact of advocacy in ways we can convey meaningfully to others; and share the results, no matter how imperfect.

* Contribution from the United States Federal Trade Commission.

¹ Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean --- Contribution from United States, DAF/COMP/LACF(2014)17 (August 27, 2014), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2014\)17&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2014)17&docLanguage=En) (“2014 Submission”). Among other things, the topics raised by item four of the Call for Country Contributions, “On the Audience of Competition Advocacy and Delivery Options,” were addressed in that submission.

3. With respect to external stakeholders, the Agencies' goal is to evaluate and explain their advocacy outcomes in order to foster public accountability and maintain the Agencies' credibility. It is equally important, however, to measure the impact of competition advocacy for internal purposes, both in terms of effectively managing agency resources and in order to further refine our tools.

4. Staff who manage the Agencies' competition advocacy portfolios must be prepared to answer certain basic questions: Why are we pursuing this advocacy opportunity? How do we know if the investment of time and effort is justified? What has worked well, such that we are confident it is worth trying again? And what has not worked as well, such that we might need to consider alternative approaches?

5. Assessing the impact of competition advocacy has not proven susceptible to precise measurement. This submission provides several observations regarding the unique characteristics of advocacy that make it difficult to define and measure success. It then describes the main approaches the Agencies currently use to assess success, and highlights some questions the Agencies continue to consider.

2. Why Is the Impact of Advocacy Difficult to Measure?

6. Three main characteristics of competition advocacy pose unique challenges for the evaluation and measurement of outcomes.

7. The first relates to the level of formality of the advocacy. When the Agencies submit official written comments to other federal agencies, respond to requests by state legislators, or file *amicus curiae* briefs in judicial proceedings, the number can be counted and tracked over time. Similarly, when an intervention addresses a specific regulatory or legislative proposal, expresses a particular point of view, or requests a certain outcome, it is usually possible for Agency staff to identify and measure whether the desired outcome has occurred. In contrast, the impact of soft advocacy, especially relationship building with sectoral regulators and other stakeholders, is nearly impossible to measure and quantify in a systematic way. At best, the Agencies can make a qualitative judgment regarding the level of influence over time.

8. Second, the inherently incremental nature of most competition advocacy can complicate measurement. Sometimes, the Agencies file a comment followed shortly by the desired outcome. More often, however, success or failure is apparent only over the long-term. The agencies may gradually seek to change the viewpoints of others, often by providing them with a useable framework to incorporate competition principles into their future decision-making, and by encouraging them to seek less restrictive alternatives where feasible.² Because other factors inevitably influence the outcome, it can be difficult to draw a causal link between Agency advocacy intervention and the outcome, especially with respect to soft advocacy that may take place over many months or years. The Agencies take the same long-range view when utilizing workshops, studies, and reports as part of their competition advocacy strategy. Often those tools are chosen precisely because of the need to explore novel issues, to lay a foundation for continued discussion, and to sensitize external stakeholders to our competition-focused perspective.³ The information

² See 2014 Submission, *supra* footnote 1.

³ For example, in the last twenty years, the Agencies have increased their focus on competition issues at the intersection of antitrust and intellectual property. *See, e.g.*, U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995) (hereinafter 1995 GUIDELINES); FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) (hereinafter 2003 REPORT); U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007); FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011). The U.S. Congress and the U.S. Supreme Court have adopted policies of even the older reports within the last ten years. The Court joined

gathered through workshops, studies, and reports frequently inform our competition advocacy initiatives, but they are not a prerequisite to them.

9. Another complication resulting from the incremental nature of competition advocacy arises when the Agencies attack a problem through a combination of advocacy and enforcement tools. One key example is the FTC's longstanding effort to combat "pay-for-delay" agreements between branded and generic pharmaceutical firms to suppress price competition by keeping generic entrants out of the market. For many years, FTC staff conducted studies and issued reports⁴ and pursued other policy interventions⁵ that have enhanced understanding of the issue and fostered a climate favorable for change. The FTC also supported a legislative proposal, ultimately enacted, that created a reporting mechanism for these types of agreements,⁶ which likely influenced some firms to pursue arrangements that are less likely to have anticompetitive consequences. Meanwhile, a core part of the FTC's strategy was, and still is, vigorous enforcement against anticompetitive pay-for-delay deals. Litigation wins – notably, a significant U.S. Supreme Court ruling⁷ and a landmark settlement⁸ – were necessary to effect meaningful changes. The

the Agencies in rejecting the presumption that patents convey market power. *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 45-46 (2006); *see also* 1995 GUIDELINES at § 2.2. Congress incorporated the FTC's recommendation for a more streamlined post-grant review process in the America Invents Act. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011); *see also* 2003 REPORT at 7. Echoing the FTC's policy recommendations, the Court expanded the standard for invalidating patents on obviousness grounds, creating new opportunities to improve patent quality. *KSR v. Teleflex*, 550 U.S. 398, 415 (2007); *see also* 2003 REPORT at 22-24; 1995 GUIDELINES. By taking a long-range approach, the Agencies are prepared to influence major policy shifts when the right case or proposed law arises.

⁴ *See, e.g.*, FED. TRADE COMM'N, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION* (2002), available at https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf; FED. TRADE COMM'N, *AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT* (2011), available at <https://www.ftc.gov/sites/default/files/documents/reports/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission/authorized-generic-drugs-short-term-effects-and-long-term-impact-report-federal-trade-commission.pdf>.

⁵ *See, e.g.*, Brief for Fed. Trade Comm'n as Amici Curiae Supporting Plaintiffs-Appellants, In re Lamictal Direct Purchaser Antitrust Litigation, No. 14-1243 (3rd Cir.) (2014), https://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf; Brief for Fed. Trade Comm'n as Amici Curiae, In re Effexor XR Antitrust Litigation, No. 3:11-cv-05479 (D.N.J.) (2013), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/re-effexor-xr-antitrust-litigation/130816effexoramicusbrief.pdf; Brief for Fed. Trade Comm'n as Amici Curiae, In re Wellbutrin XL Antitrust Litigation, Nos. 2:08-cv-2431 and 2:08-cv-2433 (E.D. Pa.) (2013), https://www.ftc.gov/system/files/documents/amicus_briefs/wellbutrin-xl-antitrust-litigation-re/130926wellbutrinbrief.pdf.

⁶ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, Title XI, Subtitle B, § 1112, 117 Stat. 2461 (2003); *see also* <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care/pharmaceutical-agreement-filings>.

⁷ *FTC v. Actavis*, 133 S. Ct. 2223 (2013) (holding that reverse payment agreements between brand and generic drug companies are subject to antitrust scrutiny).

⁸ FTC News Release, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics* (May 28, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill> (includes link to all related materials); *FTC v. Cephalon, Inc., Stipulated Order for Permanent Injunction and Equitable Monetary Relief* (E.D. Pa. June 17, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150617cephalonstip.pdf>.

incremental approach ultimately proved successful, but it is difficult to measure the influence of advocacy compared to other tactics.

10. The third relevant aspect of advocacy relates to the audience for an intervention. Even when a formal written comment is filed with a specific person or body, the document likely has broader influence. Indeed, sometimes that extended reach can provide an important strategic reason for filing the comment. The Agencies make advocacy documents public, they promote them through news releases and blog posts, and they may discuss them in speeches, the press, and elsewhere. Thus, an advocacy can send an important signal and influence the thinking of many stakeholders beyond the specific recipient. However, given its diffuse impact, agency staff may not always know the true scope of the impact. For example, if an Agency advocates against a certain type of potentially anticompetitive legislation in one state and thirty other states decline to pursue similar legislation, it is hard to accurately measure whether the advocacy efforts played a role.

3. How Is the Impact of Advocacy Measured?

11. This section describes the FTC's approach to measuring the impact of some of our advocacy interventions. As explained below, this process yields both internal and external reports as well as more subjective evaluations.

12. FTC staff compiles a list of all formal advocacy interventions for each fiscal year, including comments to other federal agencies regarding regulatory proposals, responses to requests by state legislators regarding pending legislative proposals, responses to public comment opportunities regarding proposed state regulations, and third-party *amicus* briefs in private judicial proceedings.⁹ Except in the case of *amicus* briefs, which are directed to the judiciary, the FTC sends a short survey to the recipient, aiming to identify the person who would be best situated to evaluate the advocacy's impact. The survey asks the recipient to respond to the following questions on a scale from one to five, along with an opportunity for narrative responses:

- How useful were the comments?
- To what extent were the comments considered during deliberations?
- Were the comments given more consideration because they came from the FTC?
- Would the comments be useful to decision-makers considering other matters in the future?
- Did the comments present new information or perspectives?
- Did the comments present a sound analysis and clear reasoning?
- Did the comments influence the ultimate outcome?
- Were the FTC's recommendations adopted in whole or part?
- Was the outcome consistent with the FTC's recommendation?
- Did the matter, including the FTC's position, receive press coverage?
- Were the FTC's comments influential due to press coverage or other publicity?

⁹ These are available at <https://www.ftc.gov/policy/advocacy/advocacy-filings>.

13. While the response rate varies from year to year, the FTC typically receives answers from between one quarter to one third of recipients.¹⁰

14. In addition to the external reporting, within the agency, FTC staff most familiar with each advocacy intervention are asked to compile and report information regarding specific outcomes, such as the final results of a rulemaking, whether the proposed legislation was enacted, or how a court case was decided and on what grounds. Staff is also asked to grade each advocacy as: successful; partially successful; initially successful; initially unsuccessful; unsuccessful; pending; or moot. Given the causation issues described above and the multiple factors at play, the grades are somewhat subjective. For example, if a comment opposed proposed legislation that nevertheless passed, but our influence resulted in more favorable language, the advocacy may have been partially successful despite an overall unfavorable outcome. The grades reflect our best attempt to distill the impact of each intervention.

15. It can be difficult to know how long to wait before assessing the success of an advocacy initiative, because it may take some time before an outcome is clear. Causation becomes more attenuated as time passes. Therefore, for most issues that remain unresolved by the end of a fiscal year, the staff reports an initial grade but continues to reevaluate the outcome for two subsequent fiscal years. After three years, especially with respect to state legislative proposals, a final grade is usually assigned based on the matter's status at that time. Following that three year period, the FTC's practice is not to claim credit for a success or change the grade to .unsuccessful if a favorable outcome is later reversed (*e.g.*, a law that had been opposed fails for three years but passes in year four). This approach may both overestimate and underestimate the long-term impact of our interventions, but our experience demonstrates that the effects roughly balance out. With respect to rulemakings and judicial proceedings that have a finite outcome, such cutoffs may not be necessary and the matter may be carried over as pending until final resolution.

16. Once FTC staff has compiled all of this information regarding outcomes, it is used in two ways. Internally, advocacy staff generates an advocacy "report card" that it disseminates to the Commissioners and within the agency. The report card includes both quantitative metrics (*i.e.*, percentages of advocacy comments for each grade or category) and qualitative analysis (*i.e.*, narrative analyses of the outcomes). This document creates an important institutional record, ensuring that information is shared while still current, documented in a systematic way, and available for later review.

17. Externally, the metrics are synthesized and disseminated as part of the FTC's annual performance report.¹¹ As part of a federal government-wide performance evaluation process, the FTC is required to identify meaningful metrics and targets, and to report annual results. The FTC has recently set a goal that at least fifty-five percent of its formal advocacy comments succeed in whole or in part.¹² The FTC also reports the percentage of advocacy survey respondents who find our formal advocacy interventions to be "useful."

18. In addition, the performance report includes metrics for certain types of informal advocacy, including the number of workshops, conferences, and similar public events involving significant competition-related issues, and the number of reports and studies issued on key competition-related topics. Given the difficulty of assessing outcomes from such informal efforts, the FTC has does not formally define or measure the impact of these advocacy tools or of our myriad other informal advocacy efforts. The FTC does, however, strive to evaluate their effectiveness, even if those evaluations are more holistic and

¹⁰ FTC staff are contemplating ways to streamline the survey, in an effort to improve the response rate.

¹¹ The FTC's performance reports are available at <https://www.ftc.gov/about-ftc/performance>.

¹² Prior to FY2014, the FTC publicly stated a goal for the number of advocacy comments filed, and reported that number each year, but did not publicly state a goal regarding outcomes. Results under the new goal are not yet available.

directional. We incorporate these impressions into our ongoing decisions regarding which advocacy opportunities to pursue and how to allocate advocacy resources.

19. Especially with respect to soft advocacy before other federal agencies, one of the best measures of success is the inclusion of favorable language (or the deletion of less favorable language) in reports and other documents issued by other agencies. When the Agencies see publicly disclosed language that recognizes the value of competition and the importance of market-based incentives, we can be reasonably confident that our advocacy has had a positive impact, especially when that language appears in subsequent drafts, following iterative conversations and/or opportunities for informal review and comment by the Agencies.

4. What Questions Will We Continue To Ask?

20. The Agencies continue to reflect on how to improve our analysis of the impact of our advocacy. One issue is whether we could or should attempt more quantitative analysis, including through the application of economic tools. Most competition advocacy involves both economists and attorneys, all of whom contribute different perspectives and analytic techniques. Ultimately, due in large part to the causation issues described above, we have not yet identified a systematic way to apply economic tools to our advocacy impact evaluations, although the Agencies are continually alert to specific situations where this may be possible.

21. The Agencies also continue to consider whether, and to what extent, to incorporate the views of outside stakeholders in our impact evaluations. Typically, stakeholders do not receive advocacy surveys because they are not the official targets of the advocacy. Agency staff do, however, hear frequently from stakeholders regarding their impressions of the impact of our prior submissions, and FTC staff capture and incorporate such feedback in their internal report card. Ultimately, the best measure of impact may be that stakeholders whose views align with competition principles constantly ask the Agencies to engage in *more* competition advocacy. They firmly believe Agency advocacy interventions make a difference – which is precisely why they seek our involvement.