

BETTER REGULATION:

**A GUIDE TO COMPETITION
SCREENING**

HOW TO APPROACH COMPETITION SCREENING

1. The Commission on 15 June 2005 has endorsed the **Revised Impact Assessment Guidelines** which apply to EC legislative and policy proposals¹ and explicitly require the assessment of **competition impacts**².
2. The purpose of this guidance document is to provide some suggestions on how **competition impacts** could be identified and addressed when drafting legislation.
3. The legislative and policy proposals (hereinafter the “proposals”) most likely to have an impact on competition in the internal market are³:
 - a) Rules on **liberalisation**⁴, **industrial policy** and **internal market** measures;
 - b) Rules introducing certain **exclusive commercial rights** or exempting certain activities from the application of the competition rules;
 - c) **Sectoral rules** pursuing environmental, industrial or regional policy goals having an effect on economic activities;
 - d) **General Rules** (e. g. corporate law) having a **commercial impact**.
4. When carrying out the **competition test** the following basic questions should be considered:
 - i. What restrictions of competition may result from the proposal (e.g. does it place restrictions on market entry, does it affect business conduct, etc.)?
 - ii. Are less restrictive means available to achieve the same policy objective?
5. **Competition screening** may result in the choice of **less restrictive** regulatory or market-based **methods** to achieve certain policy objectives in order to **avoid unnecessary or disproportionate restrictions** of competition. This is in the interest of both consumers and industry.
6. The following **sections A-C** contain **examples** for the most frequent types of adverse effects on competition generated by regulation and some suggestions how unnecessary restrictions could be avoided. The examples given in this document are by no means exhaustive. For more detailed advice please contact DG COMP at http://europa.eu.int/comm/competition/index_en.html

¹ Available at http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines-main.pdf

² See in particular the Economic Impacts Table on page 29 of the Guidelines: “Competition in the Internal Market” and Annex XI to the Guidelines (“Assessing Impact on Growth, Competitiveness and Jobs”), pages 29, 30 section 9.2 “Impacts on competition in the internal market”; available at http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines-anx.pdf

³ In the order of likelihood that they might affect competition.

⁴ Formerly monopolised network utilities such as electricity, telecoms, postal sector, public transport, etc.

A) PROPOSALS EXEMPTING CERTAIN MARKETS OR SECTORS FROM COMPETITION

➤ Content (examples):

- 1) Rule exempting the production and sale of agricultural products from the application of the competition rules;
- 2) Rule on waste management (obliging companies to collect and recycle their waste) excluding competition between different waste management systems;
- 3) Rule excluding competition for accreditation services⁵.

➤ Potential negative impacts on competition:

- Anti-competitive behaviour or emergence of monopolies;
- Distortion of the competitive process and its outcome: it may not be the most efficient suppliers, who will succeed;
- Less innovation, changing consumer preferences are only met with a delay if at all;
- Little or no customer choice between suppliers;
- Lower quality and higher prices in the long run.

➤ Less restrictive options:

- Opt for temporary exemptions (e.g. allowing monopolies in the agricultural sector for a limited period of time) which are regularly reviewed to verify whether still necessary;
- Introduce mandatory tender procedures for temporary monopolies;
- Limit exceptions to certain products or services;
- *For accreditation and waste management:* Allow competition while setting objective and transparent criteria to be met by all suppliers.

⁵ The accreditation of certain product qualities is required for Member States to recognise certificates issued in other Member States of the EU (mutual recognition).

B) PROPOSALS WHICH DIRECTLY INTERFERE WITH THE COMMERCIAL CONDUCT OF COMPANIES

- Proposals limiting the ways how companies compete and differentiate themselves from rivals

➤ Content (examples):

- 1) Legislation on product characteristics (e.g. ingredients for food, performance of technical products, etc.);
- 2) Rules determining maximum prices/minimum quality standards;
- 3) Rule prohibiting/restricting advertising for certain products or services;
- 4) Rules limiting the distribution of certain products or services or reserving distribution to certain channels or intermediaries.

➤ Potential negative impacts on competition:

- May exclude from the market certain types of goods or services;
- May reduce the degree of differentiation of products or distribution methods;
- May create/increase entry barriers for new products;
- May decrease market participants' incentives to compete vigorously (e.g. as they align towards the minimum quality or maximum price levels);
- Consumers may have less choice between different products/services offered at potentially higher prices.

➤ Less restrictive options:

- Performance based standards instead of prescriptive standards for goods and services;
- Quality control mechanisms instead of an advertising ban;
- Information and training of consumers (demand side instead of supply-side approach);
- Transparency obligations (e.g. hospitals to publish statistics on success rates for certain treatments);
- Obligation for suppliers to provide adequate information to customers;
- Enhanced liability provisions: facilitate consumer claims for damages in case of failing products or lack of diligence of the provider;
- Economic instruments as an alternative to administrative standards to achieve environmental policy goals (e.g. tradable emission or noise rights, tax incentive systems).

- Proposals reducing companies' incentives to engage in vigorous competition

➤ Content (examples):

- 1) Public procurement rules determining the (public) contracting entities' behaviour in the bidding process (e.g. participation and selection criteria, award procedures & modalities of purchasing process);
- 2) Common Market organisations for agricultural products inviting companies to discuss market conditions;
- 3) Rules (e.g. waste management) which induce companies to coordinate their behaviour.

➤ Potential negative impacts on competition:

- May increase market transparency and facilitate bid-rigging and customer sharing;
- May lead to coordination on price (in particular if price is the most important distinguishing factor to determine quality in the market at stake);
- May create barriers for newcomers and result in a decrease in innovative activity.

➤ Less restrictive options:

- Avoid rules which invite companies to agree on their competitive behaviour;
- Provide public entities with the right to take action against bid rigging and other anti-competitive practices (e.g. exclusion from the bidding process if proven infringement of the competition rules; rights of contracting entities to investigate unduly low bids).

C) PROPOSALS WHICH INDIRECTLY INTERFERE WITH THE COMMERCIAL CONDUCT OF COMPANIES

- Proposals raising entry barriers

➤ Content (examples):

- 1) Rules providing for marketing or testing requirements or licensing for the provision of new products or services in concentrated markets;
- 2) Rules restricting access to important resources in concentrated markets (e.g. access to raw materials, land, IPRs, know-how or technology concerning production methods).

➤ Potential negative impacts on competition:

- May raise entry costs for newcomers since more time is necessary to generate sufficient business to obtain a return on investment;
- Market entry of alternative products may be delayed or become more costly.

➤ Less restrictive options:

- Avoid unnecessary restrictions of access to important resources;
- Address possible abuses when drafting the proposal (e.g. the artificial prolongation of the duration of patents or the foreclosure of other competitors from know-how related to the production process; refusal by dominant companies to supply on a cost oriented basis, etc.)⁶;
- Make sure the proposal provides appropriate access to know-how and information needed to offer improved or innovative versions of already existing products (“follow”-on innovations).

⁶ Addressing these problems up-front, especially in concentrated markets, is more efficient than having to rely exclusively on ex post enforcement action.

- Proposals which (*de facto*) favour incumbents at the expense of new entrants

➤ Content (examples):

- 1) Rule setting conditions for tax reductions or other benefits (e.g. the fulfilment of certain environmental performance targets in the energy field) which *de facto* can only be met by the incumbent;
- 2) Rule linking the authorisation to provide a particular service (e.g. offer of direct mailing services) to the provision of other services (e.g. universal service obligation);
- 3) Rule limiting access to cash payment services to banks or institutions with a banking license;
- 4) Rule reserving the exploitation of public sector information (such as educational, social, tourist or patent information) to the subsidiaries of public (state owned) undertakings.

➤ Potential negative impacts on competition:

- May raise entry barriers, reduce number of potential players and lead to a limitation of offerings and higher prices;
- May run counter the efforts of liberalisation (see in particular in the newly liberalised sectors such as the postal, energy or telecom sector);
- May have adverse effects on entry into and performance in downstream markets (e.g. infrastructure services);
- Incumbents will be subsidised at the expense of other players (having the same effect as distorting staid aid).

➤ Less restrictive options:

- Avoid regulation which will *de facto* favour incumbents at the expense of new entrants;
- For (necessary) obligations which raise entry barriers choose the least restrictive alternative;
- Especially in the liberalised sectors such as telecoms, postal services, public transport, energy, etc. regulation should provide that suppliers are selected on the basis of transparent, non-discriminatory and objective procedures (“competition for the market”).