



# 2013 | UNCTAD PERSPECTIVE

## COMPETITION AND CONSUMER POLICY



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# **UNCTAD Perspective on Competition Law and Policy 2013**



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## NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to competition policy. UNCTAD seeks to further the understanding of the nature of competition law and policy and its contribution to development and create an enabling environment for an efficient functioning of markets.

UNCTAD's work is carried out through intergovernmental deliberations, capacity-building activities, policy advice, and research and analysis on the interface between competition policy and development.

UNCTAD's work on competition law and policies falls within the framework of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in 1980. The Set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

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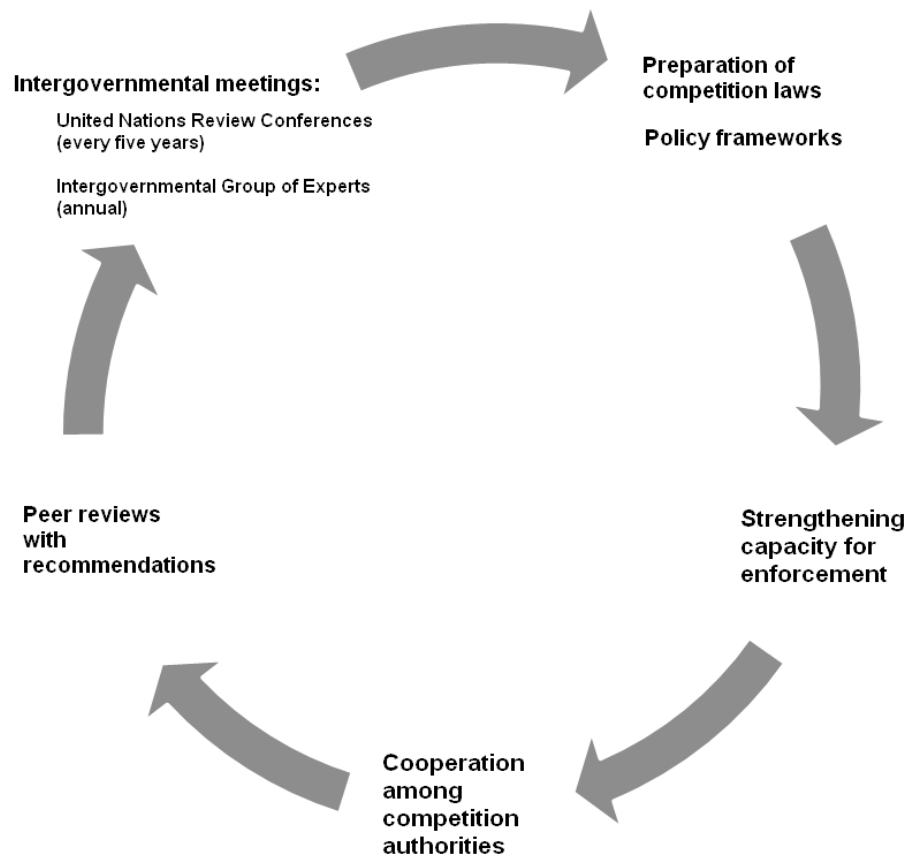
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## Competition Policy for Development

The 2013 UNCTAD Perspective on Competition and Consumer Policy provides an overview of publications and reports of the Competition and Consumer Policies Branch of UNCTAD since 2005. This document allows the reader to discover these works by areas of interest. By providing a summary of each of these works, it enables the reader to become more readily acquainted with the work and output of the Branch. The Perspective further provides opportunities to explore these works in depth, either by directing access to the full publication or by way of web links on the final page. All of the publications listed in this Perspective fall into at least one area of the self-supporting work cycle of the Competition and Consumer Policies Branch of UNCTAD, illustrated below.



The Competition and Consumer Policies Programme services annually the Intergovernmental Group of Experts (IGE) on Competition Law and Policy and when mandated, the Ad Hoc Expert Group meeting on consumer protection policies; undertakes competition policy peer reviews; publishes the UNCTAD model law on competition and the handbook on competition legislation; and implements sector-specific and economy-wide competition and consumer policy reforms that create a level playing field among companies and consumers, increasing the effectiveness of antitrust and consumer protection policies. The highest intergovernmental body directly associated with this work is the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which is held every five years.

The objective of UNCTAD work on competition and consumer policies is to ensure that partner countries enjoy the benefits of increased competition, open and contestable markets, private sector investment in key sectors and ultimately, the improved welfare of consumers.

Competition and consumer protection can play a direct and important role in promoting economic growth and reducing poverty. Competition stimulates innovation, productivity and competitiveness, contributing to an effective business environment. This generates economic growth and employment. It creates possibilities for small and medium-sized enterprises, removes barriers that protect entrenched elites and reduces opportunities for corruption. Competition therefore increases a country's attractiveness as a business location, triggering national and foreign investments. Competition also delivers benefits for consumers through lower prices, improved services and greater choice. In this sense, competition generates total consumer welfare.

Consumer protection benefits all consumers by ensuring that they have the right of access to non-hazardous products, adequate information to enable them to make informed choices according to individual wishes and needs, and effective redress. Consumers who know their rights and enforce them are thus empowered and subject to fewer abuses. This directly

improves their welfare. It also contributes to creating a level playing field for businesses that have to apply a common set of standards, supporting competition.

Despite the benefits of competition, anticompetitive practices are common, with two root causes:

- a) Business conduct that restrains competition. This includes agreements between businesses not to compete (which are typically illegal), through cartels, price fixing and territorial divides, for example. Businesses may also make formal legal groupings such as marketing boards and cooperatives, which can in effect operate as cartels;
- b) Government policies that burden competition. Governments often have restrictive licensing regimes for certain sectors and products, such as for agricultural inputs (e.g. seeds and agrochemicals).

Developing economies are particularly vulnerable to anticompetitive practices – poor business infrastructure and complex regulatory and licensing regimes make it harder for companies to enter these markets; their policies, laws and regulations are often not sufficiently robust, while their enforcement agencies lack the capacity to effectively detect and tackle many instances of anticompetitive behaviour; citizens, and businesses are less aware of the importance of competition and do not exercise their rights or fulfil their responsibilities.

Increasingly, many competition problems have a cross-border component. Companies and supply chains are international, while competition laws and enforcement agencies are primarily national. Individual countries have struggled to address anticompetitive practices at the international level, which requires regional and global collaboration to set and enforce competition rules.

Competition policy aims to overcome this anticompetitive environment by applying a set of market rules that guarantee a level playing field for all businesses. The successful implementation of competition policy results in the elimination of anticompetitive regulation

and unnecessary barriers to competition imposed by government policies. Anticompetitive business practices are also discouraged by effective enforcement of competition rules.

The Perspective is divided into three parts. The first contains publications comprising of specific studies and UNCTAD secretariat background papers for IGEs. The second comprises sectorial index studies carried out under the COMPAL programme for Latin America (available on request) and the third outlines a number of other important publications.

## **Competition Issues in the Tobacco Industry of Malawi**

UNCTAD/DITC/CLP/2011/5

The tobacco industry plays a major role in the Malawi economy. Tobacco is the main cash crop and the main foreign exchange earner in the economy. Tobacco exports account for more than 60 per cent of export earnings. The main objective of this study is to analyse the context, the structure and functioning of the tobacco sector in terms of competition at various stages of the tobacco value chain. Some of the issues highlighted in the study include the structure of the tobacco industry, the nature of the competitive process, the institutional and regulatory framework and capacity issues in the regulatory institutions.

## **Competition Issues in the Transport Sector in Lesotho**

UNCTAD/DITC/CLP/2011/4

The study was carried out within the context of the AFRICOMP programme, which aims to strengthen regional institutions and create synergies between national competition authorities of the region. This is in consideration of the importance of regional integration in Africa. Road transport is the main mode of transportation of passengers and goods in Lesotho, given its topography and the underdeveloped nature of its rail network. To date road construction continues to dominate government programmes and claims significant budget allocations each year. The study involves the analysis of the regulatory environment in the sector, the structure and functioning of the sector as well as the competition aspects of the whole sector. It features interviews with key stakeholders i.e. operators, queue marshals, officials of owners' associations, and Government officials in the Ministry of Public Works and Transport.

## **Status of Competition Policy in Mozambique**

UNCTAD/DITC/CLP/2011/6

In 2006, UNCTAD conducted a study on the competition policy framework analysing the competition environment in Mozambique with a view to developing the draft competition law of Mozambique. Since then, a draft competition law has been prepared and is under consideration by the Government. The economy of Mozambique has undergone significant adjustments during the interim in response to a range of internal and external factors; deregulation and other economic reforms have substantially changed the economy and have had profound effects on competition policy. Consequently, the findings and recommendations of the 2006 study need to be re-examined in the light of the current economic and regulatory environment. This report has two main objectives: to provide background information for the preparation of the chapter on competition in the UNCTAD investment policy review and provide comprehensive knowledge of the market structure and market access with a view to preparing the set-up of the competition authority, updating the 2006 UNCTAD study on competition policy framework in Mozambique.

## **The impact of cartels on the poor**

TD/B/C.I/CLP/24, 2013

Cartels are per se prohibitions under most competition laws. Cartels have an adverse effect on all consumers but the poor disproportionately suffer from the adverse effects of collusion in commerce and public procurement. High prices, particularly in essential goods and services, force the poor to consume less or none of these goods. Moreover, as small entrepreneurs, the poor might be denied access to markets or subject to exploitative conduct by cartels.

This paper reviews a number of cartel cases from various jurisdictions in sectors which are most likely to affect the poor. It identifies the common features of these cartels and the

challenges involved in detecting and prosecuting them by young competition agencies. It then looks into whether and how cartel prosecution benefit the poor and provides an overview of the difficulties faced. The paper confirms that very few young competition agencies have been able to successfully detect and prosecute cartels. Cartels are the hardest challenge for young competition agencies where enforcement is most needed. The paper also identifies key lessons drawn from the experience gained so far in dealing with cartels. These include attribution of sufficient enforcement powers to competition authorities, prioritization of those cases of greater concern to the poor, advocacy measures, distributional equity issues in resolving cases affecting mostly the poor or small businesses, and engaging in international cooperation in anti-cartel enforcement.

### **Prioritization and resource allocation as a tool for agency effectiveness**

TD/B/C.I/CLP/20, 2013

Competition agency performance and effectiveness require priorities to be set and efficient allocation of the agency's scarce resources in order for it to meet its mandate and maximize the impact of its actions. The main objective of this report is to review how priority setting and resource allocation can be used as tools to enhance agency performance and effectiveness. The paper draws on previous works conducted by UNCTAD, the more experienced competition agencies, and other international and non-governmental organizations. The paper is based on responses provided by selected competition agencies to an UNCTAD questionnaire. The paper identifies challenges faced by young competition agencies in applying priority setting and resource allocation as relevant tools for their effectiveness.

## **Modalities and procedures for international cooperation in competition cases involving more than one country**

TD/B/C.I/CLP/21, 2013

Competition authorities are increasingly being faced with the need to enforce competition policy domestically and to deal with cross-border anticompetitive practices. This study identifies the types of cooperating models and the extent to which cooperation arrangements enhance the capabilities of competition agencies to effectively enforce competition law. The study reviews the challenges of enforcing competition law at the regional and international levels and discusses how different countries have approached cooperation in the area of competition policy and its implication for improved bilateral, regional and international cooperation. The study draws attention to the challenges that make it difficult for young competition agencies to cooperate in handling cases and at the same time acknowledges the efforts being made towards better cooperation. The study identifies the gap that exists in the substantive contents of different laws, differences in legal regimes and enforcement capabilities as well as the need to promote better understanding and trust as necessary measures to enhance cooperation. The report concludes with recommended practices for effective cooperation based on the experience gained so far in this area.

## **Competition policy and public procurement**

TD/B/C.I/CLP/14, 2012

There is increased awareness of the power of public procurement to shape supply and thereby influence a whole array of economic factors. Yet for States to get good value for money and hence make good use of scarce public resources, competition is paramount. This background paper emphasizes the role of competition in public procurement. Substantive and institutional aspects of public procurement systems are discussed, including strategies to broaden the circle



of potential bidders, to incentivize competitive behaviours and to fight bid rigging. The paper also aims to initiate and prompt further discussion on applied issues, on bid rigging prevention, detection and enforcement as well as to share lessons learned on policy frameworks and procuring practices that effectively promote competition in procurement markets.

### **Knowledge and human-resource management for effective enforcement of competition law**

TD/B/C.I/CLP/15/Rev.1, 2012

In its report entitled “Foundations of an Effective Competition Agency”, UNCTAD identified knowledge-management and human-resource issues as part of the pillars of an effective competition agency. This paper continues to investigate those issues. The effectiveness of a competition agency depends on the appropriate use of internal resources. Knowledge and human-resource management are important aspects of an efficient competition agency; they enable the acquisition and use of resources to create an environment in which knowledge and resources are efficiently and effectively utilized. The competition agency acquires, shares and uses that knowledge to build human and institutional capacity to implement the competition law effectively. Knowledge management safeguards institutional memory and continuity. The design of the human-resource functions and other capabilities of the agency influence the effectiveness of the agency’s decisions and its ability to fulfil its mandate. The sources of information for this paper are replies by member States to UNCTAD’s request for information, work carried out by the International Competition Network, and writings by academic practitioners, in particular the extensive work carried out by Chris Harman and Sue Brelade in this area.

## **Cross-border anticompetitive practices: The challenges for developing countries and countries with economies in transition**

TD/B/C.I/CLP/16, 2012

While developed countries have been very successful in dealing with international cartels and cross-border mergers, the vast majority of developing countries have been left behind.

Only a handful of developing countries manage to regulate cross-border anticompetitive practices. This paper looks into the experiences of selected countries with a good record of cross-border cartel enforcement and merger control. It identifies specific challenges faced by developing countries in dealing with international cartels and mergers and provides possible measures to overcome these challenges. In international cartel enforcement, the paper suggests some national-level measures, including setting up leniency programmes and increasing enforcement efforts into domestic cartels in the first place. It encourages international cooperation and proposes the establishment of an international intelligence network. In dealing with cross-border mergers, the paper highlights the importance of building capacities and development of skills at the national level. It promotes bilateral, regional and international cooperation by sharing case-specific information and exchanging views on methodologies and remedies, and highlights the need for coordination between the jurisdictions affected by international mergers.

## **Effectiveness of capacity-building and technical assistance extended to young competition agencies**

TD/B/C.I/CLP/11/Rev.1, 2011

An effective competition agency requires certain essential conditions such as independence, adequate financial resources, skilled staff to carry out complex investigations of competition cases, leadership, the ability to advocate compliance with competition law among business

and government agencies to take competition objectives into account and effective cooperation with sector regulators. Most competition agencies in developing countries and countries with economies in transition have 5 to 10 years of existence and continue to face challenges in establishing strong foundations. UNCTAD peer reviews of competition policy of a cross-section of young competition agencies show that, in addition to these challenges, there are conflicting objectives of the competition law with other economic policies, a lack of good governance, a lack of political will on the part of policymakers and a lack of a competition culture. Since the early 1990s, international organizations and more advanced competition agencies have provided capacity-building and technical assistance to young competition agencies to help them overcome these challenges. This note assesses the assistance provided to young competition agencies and shows the progress achieved so far and the challenges that remain in providing effective capacity-building to interested agencies.

### **Review of the experience gained so far in enforcement cooperation, including at the regional level**

TD/B/C.I/CLP/10, 2011

Accelerating globalization over the last few decades has expanded the geographical scope of competition. The activities of large firms can have an impact on multiple markets in foreign jurisdictions, expanding the reach for anticompetitive conduct to have cross-border effects. A purely domestic focus on antitrust policy is therefore no longer sufficient. The international community has tried and tested various approaches to effectively cooperate and tackle antitrust issues with a global dimension. Of late, significant progress has been made, particularly among developed nations in relation to case-specific cooperation in international cartel investigations and cross-border merger reviews. This paper examines the experiences gained so far in competition law enforcement cooperation, highlighting approaches taken to

deepen cooperation in enforcement practice and share information and best practices to effectively investigate market activities involving transnational elements.

### **The importance of coherence between competition policies and government policies**

TD/B/C.I/CLP/9, 2011

This background paper examines the interface between competition policies and other government policies. Coordination between government policies is an important element to the realization of policy goals set by governments in their pursuit to improve the overall welfare of their people. When the coverage and implementation coordination of government policies are not harmonized, the likelihood of achieving desired results is hampered, and the policies may be ineffective. This paper attempts to define what policy coherence is and is not, and explores the need for coordination between competition policy and other government policies. It points out the potential benefits of coherence, as well as strategies for achieving coherence. Finally, it identifies policy issues and areas for further research.

### **Foundations of an effective competition agency**

TD/B/C.I/CLP/8, 2011

Competition policy refers to government policy to preserve or promote competition among market players and promote other government policies and processes that enable a competitive environment to develop. Differing environments imply that the design of the competition regime should differ too. However, there are some features that characterize efficient public regulatory bodies. Among these are independence; transparency; accountability; ensuring due process; being well funded in proportion to the mandate; being staffed by well-educated, well-trained and non-corrupt persons; and having an appellate

process that is well structured and not corrupt. More recent discussion about competition agencies indicates that evaluation is necessary too. Among the internal processes, defining objectives and priorities, appropriately allocating resources and taking effective decisions are necessary for an effective competition agency. This paper first addresses how to define an effective competition agency and the importance of evaluation in that context. The next two sections address different factors that form the foundations of an effective competition agency. Much of the content of the first three sections applies to competition agencies in both developed and developing countries. The last two sections focus respectively on young competition agencies, and on what can be called “barefoot competition offices” – those without significant political or financial support.

### **Assessment of the application and implementation of the set**

TD/RBP/CONF.7/2, 2010

This note, prepared by the UNCTAD secretariat, reviews major developments that have taken place at the national, regional and multilateral levels in the field of competition law and policy, particularly since November 2005, when the Fifth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held. At the multilateral level, mention is made of the cooperation of UNCTAD with international organizations and the International Competition Network, as well as the outcome of UNCTAD XII (April 2008). In chapter I, the note reviews the operation of the Set in the field of competition, looking at its main provisions, drawing attention to their actuality and evaluating the extent to which they have been implemented to date. In chapter II, an evaluation is made of progress in implementation by UNCTAD member States and by the Intergovernmental Group of Experts (IGE) on Competition Law and Policy of the resolution adopted by the Fifth Review Conference, drawing attention to technical cooperation, informal consultations and specific studies

undertaken by IGE. Finally, in chapter III, the note looks at possible activities in the field of competition law and policy which the Sixth Review Conference may wish to launch in the light of the decisions taken by UNCTAD XII.

### **Review of capacity-building and technical assistance on competition law and policy**

TD/RBP/CONF.7/7, 2010

UNCTAD provides capacity-building and technical assistance on competition law and policy to developing and least developed countries as well as countries in transition in accordance with requests received, the needs of the countries concerned and available resources. This includes national and regional assistance in drafting competition laws and policy guidelines, as well as capacity-building in the implementation of competition policy with a long-term perspective in line with the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the requests made by the Fifth United Nations Conference to Review All Aspects of the Set. Accordingly, this document assesses the relevance, impact and effectiveness of the work of UNCTAD on competition and consumer protection policies since the Fifth Review Conference, held in Antalya, Turkey in November 2005. It also contains a progress report on the capacity-building and technical cooperation activities of the UNCTAD secretariat, as well as the activities of donor countries which responded to the Organization's questionnaire.

## **The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy**

TD/RBP/CONF.7/3, 2010

To be effective in supporting the development process, competition law and policy (CLP) should be supported and compatible with other complementary pro-development policies that can bear on economic development. A spectrum of factors – including social, economic and political environment – dictate the choices for competition provisions and enforcement design. Moreover, the priorities adopted by governments in terms of budgetary support, manpower availability and political support are key determinants of agency effectiveness. States would want to exercise their policy space to adapt their competition laws and enforcement institutions to local conditions. The report also discusses the impact of competition policy on economic development. In particular, it addresses the following questions: How effective can CLP be in promoting economic development? What are the factors that can augment or impede such effectiveness? Given that countries are at different stages of their economic development process, should the design and enforcement of their CLP vary and, if so, in what ways?

## **Appropriate sanctions and remedies**

TD/RBP/CONF.7/5, 2010

Competition law and policy will only achieve their objectives and produce the desired effects – in terms of enhancing consumer welfare, stimulating competitiveness and contributing to economic development – if they are effectively enforced. Against this background, the present paper deals with the implementation of competition law and policy, in particular with appropriate sanctions and remedies and judicial review of competition cases. It provides a comparative overview of the respective legislation and enforcement practice in UNCTAD

member States and addresses the challenges encountered by young competition agencies and competition agencies from developing countries. The paper proposes some strategies to overcome these challenges and suggests some issues for discussion at the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

**The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble**

TD/RBP/CONF.7/6, 2010

This paper is a background report discussing the various approaches taken by competition authorities in response to the challenges arising from the global economic crisis to achieve effective enforcement of merger control. The paper suggests that, just as the effects of the recession went beyond the markets in which it originated, so too must the outlook of competition policy enforcers when applying competition policy and merger control. For enforcement to be effective, governments should endeavour to minimize any negative impact on competition arising from their interventions and account for the risk of creating adverse consequences in other States, given the global dimensions of many markets. Therefore, anticompetitive practices require global coordinated responses. In addition to increased coordination, the paper proposes that effective enforcement of competition policy and merger control requires that national laws be enforced consistently and rigorously throughout the economic cycle and not be relaxed in response to a recession. Furthermore, the paper draws attention to the increased importance of the role of competition advocacy during periods of economic troubles, stating that the effective enforcement of competition policy requires that competition advocacy be broadened to wider policy areas without compromising on the independence of competition authorities.



## **The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries**

TD/RBP/CONF.7/4, 2010

Hardcore cartels are considered by many to be the most egregious competition law offence. Leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects. But they are effective only if cartelists not seeking leniency perceive significant punishment to be sufficiently likely. These programmes involve a commitment to a pattern of penalties designed to increase incentives of cartelists to self-report to the competition law enforcer. Leniency programmes in different countries may mutually reinforce these incentives for members of international cartels. A handful of developing countries have anti-cartel leniency programmes. If other developing countries were to adopt leniency programmes, a political commitment to fight cartels would be necessary for such a programme to be effective.

## **Public monopolies, concessions and competition law and policies**

TD/B/C.I/CLP/2, 2009

Infrastructure concessions were promoted as a mean to change inefficient market structures, improve efficiency and relieve the public budget. Concessions were expected to contribute to economic development and consumer welfare. However, developing countries and countries with economies in transition had mixed experiences with concessions. Against this background, this paper analyses concessions from a competition policy perspective. It examines the extent to which this type of contract has the potential to contribute to economic development and what steps need to be taken in order to make this happen. Members' responses to the questionnaire from the UNCTAD secretariat served as a basis for the paper. The paper first sets out the function and rationale for concessions. Next, different options for

the regulatory framework are described. Some effects of concessions on economic development are also described. Ways to stimulate competition are addressed, including in the design, award and performance of a concession. The role of the competition authority is reviewed. The paper concludes by posing questions about how country experiences can improve concession.

### **The relationship between competition and industrial policies in promoting economic development**

TD/B/C.I/CLP/3, 2009

This study examines the relationship between competition and industrial policies in promoting economic development. It introduces competition and industrial policy concepts, practices and their implementation, and evolving roles. It explores the fundamentals of competition law enforcement and industrial policy dynamics. This includes handling of anticompetitive practices, exclusions and exemptions, the role of competition advocacy and the type of industrial policy tools applied. An analysis of the link between competition and industrial policies, synergies and tensions is presented. This study looks at the implications of the current economic crisis on competition and industrial policies and raises issues for policy considerations and the way forward.

### **The use of economic analysis in competition cases**

TD/B/C.I/CLP/4, 2009

Competition law incorporates economic concepts. The co-evolution of industrial organization economics and competition law continues. Today, economic analysis nearly always forms part of the investigation and analysis of non-cartel competition cases by leading competition authorities, and is increasing among other authorities. According to the results of an

UNCTAD survey of competition authorities in developing countries, economics, including econometrics, is most often used in market definition. Further, some of these authorities also apply economics and econometrics in analysing competitive effects of mergers as well as dominance abuse and vertical agreements. Barriers to greater use of economics in developing country competition cases include a resistance among the legal profession, including judges. Part of this resistance may stem from a concern that economics makes competition law more costly or difficult to administer. The reformation of institutional characteristics may also help competition law incorporate economics, such as requiring economists to be among the commissioners, leading authorities or members of tribunals.

## **Review of capacity-building and technical assistance in the area of competition and policy**

TD/B/C.I/CLP/5, 2009

UNCTAD provides capacity-building and technical assistance in competition law and policy to developing countries and countries with economies in transition, in accordance with requests received and available resources. The activities include national and regional assistance in drafting competition laws and application guidelines, as well as in building up institutional capacity for better implementation of competition laws. They also cover competition advocacy for the creation of a dynamic enterprise sector, the promotion of economic growth and development, and the promotion of consumer welfare. This document is a progress report on the activities carried out during 2008 and contains examples of the impact of introducing competition law and policy on the economy of developing countries. It also contains information provided by member States to UNCTAD on technical cooperation activities in the area of competition law and policy.

## **Recent important competition cases involving more than one country**

TD/B/COM.2/CLP/71, 2008

This report reviews recent cases involving restrictive business practices, including mergers and acquisitions and concentrations in developed and developing countries and countries with economies in transition. Some cases are characterized by cross-border aspects to the extent that they involve other countries or foreign firms that have operations in the country in question. From past experiences of case investigations and discussions during intergovernmental meetings, it is possible to show the need for increasing awareness of the benefits of cooperation between competition authorities from both developed and developing countries at the bilateral and regional levels. Cooperation may enhance case-handling capabilities in developing countries. Developing countries also continue to review approaches to competition enforcement, including the introduction of leniency programmes in cartel investigations. Some challenges facing developing countries stem from structural weaknesses of competition legislation, while others stem from policy conflicts between competition and other government policies, for example, concurrent jurisdiction of sector regulators and competition authorities on competition matters. Approximately 30 cases of cross-border anticompetitive practices have been analysed, and this report includes 11 examples of cooperation in case initiation, resolution and investigations between competition authorities, sector-specific regulators and other government agencies.

## **The attribution of competence to community and national competition authorities in the application of competition rules**

TD/B/COM.2/CLP/69, 2008

The report examines a cross-selection of community/regional competition regimes, in both developed and developing countries, arising from economic integration efforts through free

trade agreements, partial scope arrangements and customs unions. The main focus is the state of play in Africa, the Caribbean, Europe and Latin America, insofar as they have competition provisions in their trade agreements. The report compares various systems of regional integration with competition instruments and the outlay of attribution of competences between community/regional authorities and national competition authorities. The European Union has established institutional frameworks with clear definitions of jurisdiction between various institutions. Africa and the Caribbean are in the process of setting up institutions and are at different stages. Latin America has competition provisions in its respective regional arrangements, though implementation has been slow. East and South-East Asia have limited objectives assigned to competition in regional arrangements. This report looks at the various challenges facing each region on competence attribution and comes up with issues for further discussions and future research.

### **Competition policy and the exercise of intellectual property rights**

TD/B/COM.2/CLP/68, 2008

The interplay of competition policy and intellectual property rights is crucial for the economic dynamics of developing and industrialized countries seeking to promote innovation, technology transfer, a fair chance for competitive firms on the markets and affordable good quality products for consumers. With regard to licensing agreements, major challenges are the imposition of abusive terms and the refusal to license or deal. In the field of mergers and acquisitions, competition policy should carefully address the effects of such transactions on the markets for innovation and its impact on economic dynamics. The issue of whether or not a specific constellation of intellectual property rights may raise anticompetitive concerns should thus be carefully analysed on its own merit.

## **Independence and accountability of competition authorities**

TD/B/COM.2/CLP/67, 2008

A review of the concepts and practice of the independence and accountability of competition authorities shows that, even as countries have responded to pressures and learned from the successful experience of others in setting up independent competition authorities, there is a nuanced application of these concepts across countries. Legal, administrative, political and economic factors explain differences in application and most likely make the pursuit of a single standard for independence and accountability undesirable. However, most countries recognize that it is desirable to prevent the implementation of narrow interest group goals when enforcing competition law, and to this end have put in place various checks and balances. Independence is counterbalanced by the desire for stricter standards of accountability; also, accountability is fundamental to development, in particular for developing countries. In this context, the challenge for all countries is to achieve the best balance between autonomy and control.

## **Abuse of dominance**

TD/B/COM.2/CLP/66, 2008

This report considers some of the problems faced by competition authorities, especially in developing countries, when dealing with cases of abuse of dominance. It is based on the responses to a questionnaire prepared by the UNCTAD secretariat and returned by member States in connection with the ninth meeting of the Intergovernmental Group of Experts. The report makes a comparative assessment of abuse of dominance in different jurisdictions by giving an insight of definitions applied to concepts, illustrations of situations deemed to constitute abuse, and the application of the various tests. The report conveys the existing consensus on this topic, suggesting that the provisions on abuse of dominance have continued

to be a formidable weapon for competition authorities in fighting anticompetitive practices in their respective markets. The report reveals that as a result of competition law enforcement, dominant firms are behaving with greater caution, as transgressions of their respective competition laws may have very serious consequences. However, the report also reveals that, due to weak economic and underdeveloped infrastructure found in developing countries, some multinationals may end up as monopolies simply by virtue of their superior efficiency. Given public interest concerns, this may not be welcomed by the competition authorities.

### **Review of capacity-building and technical assistance in the area of competition law and policy**

TD/B/COM.2/CLP/70, 2008

UNCTAD provides capacity-building and technical assistance on competition law and policy to developing countries and countries with economies in transition in accordance with requests received and available resources. The activities include national and regional assistance in drafting competition laws and application guidelines, as well as institutional capacity for better implementation of competition laws. They also cover competition advocacy for the creation of a dynamic enterprise sector, the promotion of economic growth and development, and the promotion of consumer welfare. This document further contains information provided by member States and international organizations to UNCTAD on technical cooperation activities and requests for assistance in the area of competition law and policy.

## **Competition in energy markets**

TD/B/COM.2/CLP/60, 2007

A review of the experience in electricity and natural gas market reforms already undertaken in many countries reveals the persistence of significant market power problems. This is attributed to a number of special features of the electricity and natural gas sector that facilitate market power, weak demand-side response, along with the complexity of economic regulation, an apparent trend towards the reintegration of previously unbundled elements in the supply chain, and challenges in applying conventional methods of market power definition and merger analysis in energy markets. The paper highlights some of the challenges faced by developing countries in reforming their energy markets. These include the political risks of reforming sectors that are strategic and central to development, the absence of a single winning model for reform and the need to interpret and adapt successful experiences to different national contexts, as well as the complexity and costs of economic regulation.

## **Criteria for evaluating the effectiveness of competition authorities**

TD/B/COM.2/CLP/59, 2007

The report considers some of the recent initiatives undertaken by authorities in terms of criteria for the evaluation of competition law enforcement and competition advocacy. It is based on the responses to a questionnaire sent by member States to UNCTAD. The report suggests that effectiveness should be viewed in terms of good outcomes and processes leading to those outcomes. For example, evaluating competition policy activities ex post is important for improving the efficiency of intervention, developing a competition culture and providing an impetus for updating and amending laws, guidelines and procedures. Evaluation activities may be purely internal, or within the government but outside the responsible authority. These activities may be conducted by outside academic experts, consultants, international



organizations or peers. They may focus on examining various measures of the effectiveness of internal agency processes or the outcomes of agency interventions. Surveying changes in stakeholder perceptions can also be an indicator of the progress the authority is making towards the introduction of a competition culture. The evaluation of outcomes can be parsed as inputs to examine the impact of sector studies and sector inquiries, reviews of advocacy initiatives and case selection, merger enforcement reviews – including a review of the effectiveness of remedies – and impact studies of particular case interventions. The largest category of ex post evaluation has been in the area of merger enforcement. It is also important to consider developing country particular priorities for impact evaluation.

**Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling these countries to introduce and enforce competition law and policy consistent with their level of economic development**

TD/B/COM.2/CLP/46/Rev 3, 2007

This note by the UNCTAD secretariat reviews of some international instruments and cases on competition at the international and regional levels. It highlights several issues such as the contributions of binding agreements, informal cooperation and national enforcement efforts, supported by technical assistance, in addressing enforcement difficulties faced by developing countries in cases of restrictive business practices with international elements. It deals with certain types of provisions in international agreements that might enhance enforcement in international cases of restrictive business practices, as well as technical assistance to implement such provisions. It explores incentive maximization for cooperation of advanced countries in this area as well as how disincentives arising from national leniency programmes can be minimized through international collaboration. In making a selection of regional trade agreements, as well as other instruments of the Organization for Cooperation and

Development (OECD), the International Competition Network and the World Trade Organization (WTO), it explores the application of competition laws to restrictive business practices affecting foreign markets. It also highlights preferential or differential treatment for developing countries, as well as means for enhancing cooperation among developing countries. Seeking common approaches, the report delves into the appropriateness of current competition provisions in cooperation agreements and regional trading agreements for the needs and capacities of developing countries. It underlines the interrelationships between competition policy and trade, investment, infant industries, industrial policy and regulation. It angles possibilities for cooperation between competition and trade authorities in international merger cases and enhanced coordination among different international bodies. It recommends further examination of the issues identified within the framework set out by the Fifth Review Conference in working out how possible bilateral, regional, plurilateral or multilateral agreements on competition might apply to developing countries. Such an examination could take into account relevant provisions of the Set of Principles and Rules, the São Paulo Consensus and WTO agreements.

### **Experiences gained so far on international cooperation on competition policy issues and the mechanisms used**

TD/B/COM. 2/CLP/21/Rev, 2007

The report focuses on three of the more formal types of international instruments dealing with competition law and policy cooperation, namely competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. Although no single agreement is exactly like another, the report identifies many common elements among the provisions of these agreements. The report observes that the implementation of such agreements has helped to minimize conflicts among governments and facilitate enforcement in this area, given that countries that are close trading partners and have

comparable competition policy views are the most likely to employ such arrangements. It suggests that to promote the active participation of developing countries in such arrangements, it would be advisable to build up mutual confidence gradually, by evolving from simple and informal arrangements to more complex cooperation agreements. Balanced cooperation among developing countries provides a learning experience and helps ensure that cooperation with more advanced partners can be beneficial. The report concludes that free trade or common market agreements can provide a framework conducive to this purpose, but regional rules, institutions and mechanisms need to be adapted accordingly.

### **Recent important competition cases involving more than one country**

TD/B/COM.2/CLP/62, 2007

This report reviews a number of recent cases involving restrictive business practices including mergers, acquisitions and concentrations in developed and developing countries and countries with economies in transition. Some of the cases have cross-border aspects to the extent that they involve other countries or firms that are foreign and have operations in the country in question. This report illustrates that enforcement of competition law in developing countries has been improving over time through cooperation with other competition authorities. Bilateral and regional cooperation between competition authorities from developed and developing countries has enhanced case-handling capabilities in developing countries. Developing countries have also continued to review approaches to including the introduction of leniency programmes in cartel investigations. Some challenges facing developing countries emanate from structural weaknesses of competition legislations while others stem from policy conflicts between competition and other government policies, for example, concurrent jurisdiction of sector regulators and competition authorities on competition matters. This report offers examples of cooperation in case initiation, resolution and investigations between competition authorities, sector-specific regulators and other government agencies.

**Best practices for defining respective competences and settling of cases, which involve joint action by competition authorities and regulatory bodies**

TD/B/CONF. 6/13/Rev. 1, TD/B/COM.2/CLP/44/Rev, 2006

Despite potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation can be a source of friction. Moreover, the distinction between economic and technical regulation and competition enforcement can often be blurred. By gleaning best practices from various countries' experiences, this report examines the various frameworks under which competition authorities and sector regulators coexist. Although there is no ideal type of division of labour between competition authorities and other regulatory bodies, it is possible to specify guidelines and principles that can be generally applied to most industries and countries.

**Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy**

TD/B/CONF. 6/11/Rev. 1, TD/B/COM.2/CLP/37/Rev, 2006

This study examines methods of preventing or resolving disputes other than binding dispute settlement, including the roles of voluntary peer reviews; consultations on issues or cases relating to the implementation of agreements; and diplomatic methods of dispute settlement such as conciliation, mediation and good offices in the context of international cooperation on competition policy. The study finds that peer reviews are not merely a compliance mechanism but may also be aimed at policy advice, encouraging policy coordination and cooperation, gathering and dissemination of information and best practice models, and providing technical assistance and aid. It also finds that there are a variety of types of consultation provisions, but

they are rarely used in the multilateral context to tackle specific issues. Further, good offices, mediation and conciliation are currently not being used in this area. The report reviews and raises questions as to why some types of consultations have not been fully used within existing multilateral frameworks; it discusses why diplomatic methods of dispute settlement have not been used for competition policy disputes, and how they could be appropriately adapted for this purpose. It opens the discussion on the possible avenues for international cooperation on competition policy and on the development objectives still to be further dealt with in this area.

**A presentation of types of common provisions to be found in international, particularly bilateral and regional, cooperation agreements on competition policy and their application**

TD/RBP/CONF.6/3, 2005

This report gives an analytical description of the main types of competition policy provisions contained in selected agreements on competition law enforcement and regional trading arrangements. Priority has been given in the selection of the instruments reviewed to those that highlight different variations among the types of clauses, feature agreements concluded in different regions to which the parties are developing countries, involve jurisdictions that have concluded a significant number of such agreements, are relatively recent and/or that provide for advanced forms of cooperation. Three broad categories of provisions are dealt with: technical assistance and general information exchange, procedural case-specific cooperation and substantive provisions on the content and application of competition laws for the control of restrictive business practices. An example of one agreement is provided in an annex.

## **A synthesis of recent cartel investigations that are publicly available**

TD/RBP/CONF.6/4, 2005

Cartels are considered by most experts as the most harmful form of anticompetitive practices; therefore they are among the top priorities of competition authorities. Given their secret nature however, cartels are among the most difficult practices to deal with, especially for competition authorities in developing countries that have only recently begun to enforce competition law and policy. This note deals with the common issues, problems and policies that face competition agencies, provides a brief description of a number of recent cartel cases and explores common themes derived from these cases. The note concludes with a list of lessons the study of these cases can provide for use in the future.

## **The relationship between competition, competitiveness and development**

TD/B/COM.2/CLP/30, 2005

The relationship between competition, competitiveness and development is receiving increased attention in the light of globalization and its implications for sustained economic growth and welfare. Policymakers in both developed and developing countries are concerned about national competitiveness and how to achieve it. In this context, the issues note highlights the changing nature of competition and its implications for achieving and sustaining competitiveness, and discusses some of the issues and policy implications facing governments as they wrestle with competitiveness concerns in a globalizing world economy. Among the main policy issues identified by the note is that the competitiveness of developing country firms – and hence developing countries – to integrate into the world economy depends to a large extent on their acquiring the necessary capabilities to apply available technologies and innovate, and on the domestic availability of competitive supporting infrastructure, including human and financial resources and services. This implies policy

measures beyond trade liberalization to address the following factors: supply capacities at the systemic level; concentration of market power, which is both an outcome of global competition and a threat to global competition; and the consequent need for the strengthened application of competition principles.

## **Sectoral Index Studies Carried Out under the COMPAL Programme for Latin America**

### **1. Poultry**

#### **1.1 Nicaragua**

The study aims to examine the competition conditions and barriers to entry in the sector, with a view to identifying possible anticompetitive practices. With this in mind, the methodology focuses on determining the level of concentration and distribution of the market by calculating HHI and ID indices, conducting interviews with specialists and market agents and determining the structural barriers to entry faced by small producers.

Evidence shows that the existence of barriers to entry impeding small producers to compete allows big producers to make use of their market power, establishing a monopoly in the main supermarkets where they fix prices coordinately. The main barriers are the lack of access to funding, leading to the impossibility of meeting sanitary requirements; the lack of access to technology; the difficulty of coping with structural and transportation costs; and the lack of integration in the production chain of processors of a balanced food mix, forcing small producers to buy these inputs from big producers without any quality guarantees and be dependent on their prices.

Among other recommendations, the study concludes that there is a need to ensure a programme that will finance small and medium-sized producers, to strengthen the means to monitor the fulfilment of sanitary conditions and to establish a law of quality controls applicable to the plants of balanced food, guaranteeing better nutritional results for poultry and resulting in higher productivity. As well, it recommends that to a follow-up and price control mechanism be established to detect collusive practices and prices artificially higher than production costs, and provide the Procompetencia Institute with the necessary technical, human and financing resources so that it can meet its objectives.



## **1.2 El Salvador**

The objective of the study is to characterize the competition conditions in the Salvadorian poultry market. To this end, an analysis of the composition, size, economic agents, regulations and performance in the market was carried out. The main weaknesses found were a high dependence on imported aviary genetics, the high costs of basic grains and the difficulties of exporting poultry products to countries in the region because of poor mechanisms for implementing sanitary measures. The study found that consumers lack adequate information because there are no norms relating to product standardization and that small farms cannot sell their products in supermarkets, because they lack distribution logistics. Small farmers only acquire products from producers that can access their establishments.

The study recommended that a study be carried out describing competition conditions at the local level to establish the incidence of small farms and the determinants of price formation at that level, and another, at the regional level, since the leading economic agents operate throughout Central America. Another recommendation was to exchange information with the competition authorities of developed countries about the international situation of aviary genetics and the effects of the high market concentration levels on the sector. Another recommendation was to launch information campaigns for consumers and encourage the Ministry of Agriculture and Livestock to move forward in the development of technical standardization norms in line with international standards that promote competition.

## **1.3 Dominican Republic**

The objective of the study is to conduct a comprehensive analysis of the poultry sector in the Dominican Republic, evaluating the competition conditions throughout the whole production and distribution chain. To this end, the study aims to identify barriers to entry in the market and the presence of market power within the sector as well as structural and behavioural factors that could facilitate anticompetitive agreements or collusion among competitors.

Although the information available was very scarce and no conclusive evidence about anticompetitive practices could be found, the study states that prices are too high for consumers and that there are several barriers to entry for small and medium producers, mainly the lack of farms' compliance with requirements to obtain sanitary and safety certifications, thus preventing them from making domestic or international sales.

Several recommendations were made: first, that the Ministry of Agriculture, in cooperation with the poultry producers associations, develop programmes and projects to improve the biosafety conditions in poultry farms, and in this way, prepare the conditions to obtain their certification; second, that the Ministry work on the design of technical regulations to standardize poultry products in conformance with internationally accepted standards. If international sales of poultry products were made possible, the excess capacity that is causing so many problems and that makes market regulation necessary could be channelled; as a result, prices would become more competitive without requiring regulations on quantities and prices.

## **2. Edible Oils Sector**

### **2.1 Nicaragua**

The objective of the study is to evaluate market concentration and collusion, identify abusive practices and analyse consistent practices causing prejudice to consumers. To do so, interviews with experts, farmers, civil servants and company officers were held. Surveys on production rates and productivity were conducted. Based on the findings, the sector faced three main problems: (a) the installed capacity was underutilized, and oil production had turned into a low value added activity limited to the refinement of imported raw oil; (b) the informal sector had been competing unfairly in the market; (c) the high concentration of the

market led to market power in the form of price-fixing agreements despite competitive prices brought about by competitive imports.

The following recommendations were drawn from the study findings:

- a. To offer incentives, such as access to credit, to produce oil from oilseeds to promote the integration of the agricultural production of soy seed with the industrial production of edible oil and in this way, take advantage of underutilized capacity, generate more employment and fight poverty;
- b. To observe the guarantees of quality and harmlessness of oil more carefully, improving the legal framework for the preparation and packaging of oil;
- c. To implement policies to avoid prejudice caused by the informal sector to consumers and formalized producers alike, such as policies to combat price-fixing and to design a plan to observe good practices in manufactures.

### **3. Basic Grains Sector**

#### **3.1 Nicaragua**

The objective of the study is to carry out a diagnosis of the situation of the different production and commercialization chains of basic grains in Nicaragua (rice, red beans, white corn and sorghum), identify market entry barriers, and detect anticompetitive or unfair competition practices. To do so, qualitative and quantitative analyses of the levels of integration and concentration of the market were performed – meetings with specialists, producers, microproducers and other market agents were held, and integration and concentration indices were calculated. The study found that the level of integration among the different links of the production and distribution chains was low because of the lack of infrastructure. Microproduction units were highly dispersed and heterogeneous, with low

associability among producers, which limited the ability to negotiate and seize market opportunities in buying and selling goods and services and to obtain a better market position.

The study concluded with recommendations to improve public services such as secondary roads, to design a plan involving central and territorial governments to deal with the lack of infrastructures in the country and to promote microproducers associations, in particular to promote the creation of cooperatives to facilitate negotiations and in this way help reduce production costs.

### **3.2 Plurinational State of Bolivia**

The objective of the consultancy was to analyse conditions for competition in the wheat flour, soy and sunflower oil markets at the domestic level, and its commercialization chains. To do so, the SEC methodology, a specific tool that measures parameters such as market entry barriers, property rights, and vertical and horizontal integration to classify competition conditions within the market at expected, precautionary or risk levels, was applied. Competition conditions with regard to wheat were found to be at precautionary levels mainly due to structural barriers to entry and the high concentration in the market of the second link of the production chain (i.e. wheat flour). The soy and sunflower oil markets showed risk levels caused by structural barriers, high market concentration, sunk costs and a high degree of vertical integration.

The study concluded with the recommendation to implement a comprehensive public policy to strengthen different links of the production and commercialization chains.

## **4. Dairy Products Sector**

### **4.1 Nicaragua**

The objective of the study was to identify and measure the impact of possible anticompetitive practices and barriers to entry in the sector. To this end, a revision of different sectorial studies was carried out, interviews with the main actors of the production chain were held, the price structure was analysed and market participation was measured by estimating the HHI concentration index. The study found that the institutions in charge of following up and implementing the norms regarding dairy products were not strong enough. Also, several barriers to entry were identified; the most important being the lack of funding for the acquisition of technology for production and the lack of adequate infrastructures. Although no evidence of anticompetitive practices was found, there were some signs that the participation of informal enterprises in the market created unfair competition between the cost structures of the formal and the informal firms, allowing the latter to charge lower prices than the former. Evidence also pointed to a lack of knowledge of sector norms, especially with regard to competition law and its regulations.

The study concluded that the intervention of the State to control prices would not be appropriate since it would cause market distortion. Yet State intervention focuses on the organization of the sector, basically to implement strategies to formalize a great number of informal enterprises taking part in the different links of the production and commercialization chains. Among others, the following measures were suggested:

- a) To provide basic infrastructure and set up investment funds aimed at improving the production of technology for dairy enterprises;

- b) To implement policies to incorporate dairy enterprises into formal production, conducting a national census about the number of informal enterprises in the dairy sector and a diagnosis of the current situation of informal enterprises in the sector;
- c) To establish a permanent information policy on market behaviour in dairy products, training technical staff and training dairy enterprises in existing norms and their application;
- d) To carry out a policy for securing the implementation of national norms ruling the dairy sector.

## **5. Health Services Sector**

### **5.1 Peru**

Because of the high concentration of the health services market in Peru, which is indeed a duopoly, the objective of the study is to find evidence of the existence of collusive practices. Because of missing accident data, it was not possible to use the Bajari and Ye methodology, which uses a regression model whereby the price bids are regressed on the costs caused by the accidents of an injured person. Instead an alternative model was used in which the relationship between the variability of prices and market shares is analysed. If collusive practices exist, alternatively, the two enterprises would be presenting courtesy offers with significantly higher prices than the competitors' to ensure that the other company wins the bid and gains a certain market share. Therefore, should collusion exist, there will be a high variability of prices and a high correlation between variability and market shares.

The analysis found auctions with low variability on prices and others with high variability. Although the latter could lead one to suspect collusive practices, no relationship was found between price variability and market share. Therefore, no evidence of collusive practices was found. An alternative explanation for these two different patterns was hypothesized: the high

variability of some bids could be explained by the differences in the risks of the insured firms that could be known if previously insured in the system. Low variability would then be indicative of newly insured firms. As there was no historic data about their accident risk, the prices were calculated according to a generic formula that produces a lower variability of prices.

Since no evidence of collusive practices was found, no recommendations were made in this study.

## **6. Freight Sector**

### **6.1 El Salvador**

The aims of the study are twofold: to look for anticompetitive practices in the sector, in particular, agreements among competitors and dominant abusive positions, and to test whether the existing regulatory framework facilitate such practices. The research entailed interviews with the main economic agents in the sector to identify possible monopolistic practices, and an analysis of the market shares and the relevant markets in the industry.

Although information was limited, and the conclusions of the study were therefore preliminary, the results showed that there was no evidence of anticompetitive practices in the markets. No significant barriers to entry were found; neither could it be concluded that the regulatory framework could facilitate such practices.

Nonetheless, some recommendations were made to improve the competition conditions of the sector and improve its efficiency: (a) first, to facilitate access to credit for transport enterprises so as to have a more flexible supply, facilitating the development of substitute services and increasing consumers' options, for example boosting the development of the rail

industry; (b) second, to create a joint ventures register to prevent hidden price agreements among competitors. Such a register would include the objectives of joint ventures, their operating rules, conditions of access for partners and the main efficiency advantages stemming from the joint ventures.

## **7. Financial Services Sector**

### **7.1 Peru**

The objective of the study was to determine why interest rates in Peru were so scattered and high in spite of the increasing growth of microfinance entities and the expansion of multibanking services that should be boosting competition in the market, and therefore pushing interest rates down. To do so, the relationships between concentration indices in the corporate and microfinance sectors and interest rates and between concentration and profitability indices (i.e. ROE) were analysed. Also, an analysis of the barriers to entry and transactional costs for customers was carried out, with special emphasis on whether barriers to the transfer of customers were caused by information asymmetries in the market.

Although there were some methodological difficulties in the analysis that did not make it possible to reach a definite conclusion about the anticompetitive practices in the Peruvian financial services market, the findings suggested that the scattered interest rates in the Peruvian financial sector were not due to anticompetitive practices but to the information asymmetries existing in the market and the resulting difficulties in the transfer of customers.

To combat such asymmetries, it was recommended that financial institutions be urged to present the information contained in contracts in a more transparent manner, create more historical credit information sources and improve the financial culture that all financial instrument users must have, informing them about the different techniques for calculating



interest rates and establishing credit conditions, therefore enabling them to compare the different alternatives existing in the market.

## **7.2 Nicaragua**

The main objective of the study is to analyse current Nicaraguan consumer protection rights with respect to the services rendered by financial institutions. It seeks to assess the capacity and requirements of the Nicaraguan Consumer Protection Agency, known by its Spanish acronym, DDC, to give an accurate response to the users of financial services. The study also seeks to identify and examine the problems experienced by consumers of financial services using data from Nicaraguan consumer protection associations. For this purpose, interviews with specialists and officers of these associations were held. Study findings revealed several cases concerning infringement of the rights of consumers using the services of financial institutions, that almost every microfinance institution infringed the maximum interest rate permitted by the law on loans to natural persons and that consumers were often not aware of their rights or of the effective cost that the service rendered represented. Based on the evaluation of the Nicaraguan Consumer Protection Agency, it can be concluded that it does not have the logistical and technical capacities enabling it to respond quickly and effectively to consumer claims.

Based on those findings, the following recommendations were put forward:

- a. To pass a new law for financial services users, that among others, should clarify the extent of the authority of the Consumer Protection Agency and some important elements to manage the claiming process. The draft consumer rights protection bill, which has already passed the preliminary hoops, could be a solution. However, some key aspects require modification, since the current wording contains some contradictions that could lead to misinterpretation;

- b. To design a national consumer protection policy, in particular, a financial services user protection policy that should define the role of the State with regard to consumer protection rights;
- c. To strengthen the Consumer Protection Agency by creating a new unit devoted to the users of financial services, re-instituting the National Counsel for the Protection of Consumer Rights to coordinate the different institutions dealing with claims from financial services user, and launching a policy to strengthen the knowledge of consumer protection associations about financial and legal issues.

## **8. Construction Sector**

### **8.1 Plurinational State of Bolivia**

This sectoral study focused on the behaviour and the degree of concentration and existence of anticompetitive practices in two important construction subsectors: steel and cement. A census of market players was carried out and several factors determinant of competitive conditions were highlighted: barriers to entry were identified, the concentration level and the degree of market power were calculated, the purchasing power of producers of steel and cement was assessed, and prices were compared to those in the international market. From this analysis, it could be concluded that there was no evidence of abuses of a dominant position or anticompetitive behaviour in the steel sector. However, with regard to the cement sector, some evidence led to the presumption of collusion.

Based on the evidence found, recommendations focused on the need to design policies to fight collusion and draft a law for the defence and enforcement of competition. Some of the recommendations are listed below:

- a. To design policies targeting mergers control to prevent the concentration that facilitates collusion among enterprises and study the possibility of implementing leniency programmes;
- b. To design and implement a competition protection law that guarantees the independence of the competition authorities and their empowerment to investigate, gather information, impose sanctions and carry out corrective measures; to avoid ambiguity and the squandering of resources, it is necessary to clearly set out the purpose of the law;
- c. To promote competition advocacy by enhancing the influence of the competition authorities on government policies so as to avoid collusion and corruption;
- d. To spread knowledge among competition agencies and civil society through the exchange of experiences

## **8.2 Dominican Republic**

Given the limitations regarding access to information, the objective of the study was merely to elaborate a preliminary approach about the competition conditions in the market in order to determine the necessity of conducting further investigations to identify possible anticompetitive practices in the productive and commercialization chains of three important inputs for construction: wood, cement and steel. To do that, the SEC methodology was applied, measuring several parameters such as barriers to entry, property rights, and vertical and horizontal integration to classify competition conditions within the market at an expected, precaution or risk level. Due to the existence of barriers to entry and sunk costs in the different markets, competition conditions at the steel and the wood sectors were classified at precaution level, whereas they were classified at the risk level for the cement market.

The study concluded with several recommendations to improve market and competition conditions and information channels. One recommendation concerned the implementation of a comprehensive public policy to support the different links of the construction chain from a competition advocacy perspective. This would help strengthen the institutional framework for competition protection in the construction sector, including the development of a normative framework, the strengthening of institutions and the development of sectoral services.

### **8.3 Iron for construction – El Salvador**

The objective of the study was to identify possible barriers to entry and anticompetitive practices in the Salvadorian steel sector. The standard methodology for sectoral studies was used, with special emphasis on the degree of concentration in each market. To complete the analysis, Salvadorian market price trends were compared with those of the Central American region and the world market. There was no evidence of competition problems, since the high substitutability of national and imported products proved to guarantee competitive prices for the steel market, and only a few structural barriers were identified. An issue of concern was the existing restrictions to scrap exports, causing the prices of scrap to be artificially lower than competitive ones, since it is the only input from which steel is produced in El Salvador, and the demand for scrap in the market is weak (i.e. oligopsonistic), due to the small number of steel producers in the Salvadorian market.

The following recommendations were made with a view to preventing anticompetitive practices:

- a. To maintain the largest possible degree of openness to competitive imports and control competition conditions in the regional market, which is the main source of competitive imports, by working closely with the competition authorities of the countries in the region;

- b. To discourage vertical integration practices that involve local producers and major regional players in the retail distribution segment to keep the market open to competitive imports;
- c. To use an approach that takes into account the link between the steel and construction sectors so as to assess the intersectoral impacts of anticompetitive practices;
- d. To ensure that excessive competition does not have an adverse effect on the quality and safety of the products, and that according-to-norm products and out-of-norm products are easily distinguishable;
- e. To consider alternative policies to ensure decent domestic prices if restrictions on exports of steel scrap cannot be removed.

## **9. Other Issues**

### **9.1 Used clothes – Plurinational State of Bolivia**

The aim of the study is to examine competition in the Bolivian clothes market. An analysis of factors such as product differentiation, speed of market entry, intensity of research and development activities, economies of scale, cost advantages, and transportation and distribution costs revealed no evidence of barriers to entry, abuse of dominance or monopoly. The study also explored market distortions generated by the excessively low prices of used clothes imports (both legal and illegal) on small and medium-sized apparel manufacturers. A specially designed econometric model showed that an increase of 1 per cent of imported clothes caused a decline of 0.28 per cent in the revenues of micro and small enterprises.

The study concluded that it was important to draw up an inventory of the formal and informal sectors in the Bolivian economy to identify the sectors in which a competition law could be applicable. It was necessary to design complementary laws on consumer protection and unfair competition. Another recommendation pointed to the need to clamp down on the illegal

smuggling of used clothes. Since the informal sector was so vast, regulations were likely to be ineffective; banning imports would only lead to increased smuggling. Therefore, it was essential to provide more sector transparency by promoting a culture of competition, increasing awareness of consumer rights and the advantages of formalizing imports.

## **9.2. Hydrocarbons – Peru**

The objective of the study was to analyse the causes of possible restrictive behaviours to competition in the commercialization of fuels derived from petroleum in Peru regarding the flaws and limitations of the design of the current regulatory framework and its enforcement. Evidence was found that the Peruvian competition law had some loopholes and deficiencies leading to artificially high prices and the constitution of monopolies and processes of vertical integration and concentration. Further, the activities of INDECOPI, the Competition Protection agency in Peru, were few and the doctrine adopted, lax and permissive.

In accordance with the evidence found, the study concluded with the following recommendations to target the problems found:

1. To adopt a specific regulation regarding PETROPERU's price policy, accompanied with the establishment of higher autonomy and transparency, and accountability standards;
2. To approve a draft bill on merger control drawn up recently by INDECOPI;
3. To restore a law from 1996 which defined as an abuse of market power price discrimination against local consumers by fixing prices in the domestic market above export parity prices;
4. To adopt more energetic and active competition policies in the hydrocarbons market prioritizing continuing investigations of anticompetitive practices in the liquefied petroleum gas (LPG) market;

5. To adopt measures aimed at strengthening INDECOPI, including more autonomy and budgetary resources, and procedures that guarantee the transparency and accountability of its operations.

### **9.3. Liquefied petroleum gas – El Salvador**

The objectives of the study were twofold: to identify the main barriers to entry in the LPG market and analyse the effects of subsidies and price regulation in the Salvadorian LPG market. Concentration indices such as the HHI were calculated, and competitors in the market were ranked. Barriers to entry included legal conflicts relating to the exchange of containers owing to the lack of mechanisms and transparent rules for the interchange of containers among companies and concentration and vertical integration in storage capacity. With regard to the effects of subsidies and price regulations, the subsidies on consumption led to a larger-than-recommended consumption of scarce goods, causing shortages and creating an inefficient allocation of resources, since all consumers, not only the poorest, benefit from this subsidy.

Based on the above, the following recommendations were made:

1. The creation of exchange centres, a transitory deposit of containers for common use and a compulsory container register, in order to facilitate a rapid recovery of containers by each company and to regulate the exchange of containers.
2. To reduce barriers to entry for competitors who do not have their own import facilities (i.e. that are not vertically integrated) and to evaluate the possibility of free access to import and storage facilities in seaports;
3. Initiate investigations regarding the behaviours of firms in order to evaluate if they adjust to the current competition regulations;
4. In order to avoid the problems of insufficiency derived from subsidies, study alternatives that permit increasing the efficiency of market mechanisms and, at the same time, fulfilling the social and distributive objectives of public policies.

#### **9.4. Medicines – El Salvador**

The objective of the study was to analyse the characteristics of the market and the competitive environment; in particular, the existence of barriers to entry for new competitors. To this end, the concentration and market power in the market were analysed using the HHI and ID indices, respectively, the evolution of prices was observed and an analysis of the legal framework to compete in the market was carried out. It could be concluded that the level of concentration was low and that there was no evidence that any firm could have enough market power. However, it was observed that the prices of medicines in El Salvador were comparatively higher than in Nicaragua, due to the absence of price regulation and the weak development of the generics market. The large investment required to set up a pharmacy and the exclusivity agreements between foreign and domestic laboratories and drugstores were major barriers to entry in the Salvadorian medicines market.

The study concluded that the market needed to be more regulated to facilitate entrance. It was also recommended that the distribution of medicines should be made more efficient by introducing new technology, boosting the use of generics and new medicines, thus allowing citizens to have access to medicines, to use them properly and to enjoy competitive prices.

#### **9.5. Medicines for the treatment of cardiovascular, respiratory and gastrointestinal diseases – El Salvador**

Based on findings of the previous study on the competition conditions in the medicines sector in El Salvador, it was concluded that it would be necessary to carry out a more targeted study to evaluate the competition conditions in the cardiovascular, respiratory and gastrointestinal medicines market. Concentration and rivalry indices were calculated, the conditions of collusive agreements and differences in prices were examined and a quantitative and qualitative analysis was conducted to identify possible dominant positions in the market. Findings showed that the problem in these markets was not a competition problem but a



regulatory one. The evidence showed that the markets were competitive, that all firms had enough market power and that market characteristics did not favour the establishment of anticompetitive agreements. However, huge price differences were found among the different products. Although these differences proved to reflect the competitive behaviour in the market, since they reflected the differences in the quality of products perceived by consumers, the latter appeared to be willing to pay higher prices for well-known, leading brands rather than risk purchases of goods lacking certain guarantees.

A global strategic policy was defined to improve the regulation of the sector and develop a code of conduct. Special emphasis was put on the elimination of administrative barriers to imports, the establishment of reference prices linked to import flexibility and the analysis of the profitability regarding the register of products. In addition, there was a need to make container content more uniform so as to facilitate price comparison, to create a list of substitutable medicines and those that are not, to develop a quality guarantee stamp based on the voluntary adhesion to a certification process and to draw up a code of trading good practices covering all the markets in the medicines value chain.

## **9.6. Medicines – Nicaragua**

The objectives of the study were to analyse the impact of the current price regulatory framework of the medicine sector on competition conditions and to identify possible anticompetitive practices in the market. For that purpose, an analysis of the medicines market was carried out at the global, regional and domestic levels. The behaviour of the main economic agents in the sector was analysed, and the current pricing policy was subject to review. It was concluded that there were some limitations to competition caused by the high discounts that big pharmacies apply because of the bonuses that wholesalers apply to them when buying large volumes, and that constitutes discriminatory behaviour towards small and medium-sized pharmacies that often have a limited purchase power. As well, it was observed that the consumption of generics was comparatively smaller than the consumption of well-

known brand products since pharmacies usually sell the latter, as they have higher sale prices and give them more benefits. Although it was possible for the patient to change the prescription of a well-known brand for the generic product, information asymmetries impeded the consumer to have accurate information to do so.

In order to target these problems, the following recommendations were made:

1. To pursue a policy of price regulation so as to prevent the standard of living of the poorest from worsening. At the same time, to improve the control mechanisms, especially those related to monopolist products in order to guarantee their adjustment to the authorized price;
2. To promote the consumption of generic products through a variety of policies, for example, by establishing a maximum margin for generics higher than the maximum margin for innovative products (i.e. 35 per cent compared with 25 per cent); formulating a law regarding the consumption of generic products that among others, must contain an obligation to include the name of the generic product when writing a prescription for a brand product; making it compulsory to prescribe generics; making it obligatory for pharmacies to publish lists of generics and their corresponding well-known brands and implementing an information policy to overcome information asymmetries in the market towards the citizenry but also towards opinion leaders, consumer protection associations, and especially doctors and pharmaceutical companies;
3. To promote competition and transparency in the market by monitoring its behaviour more closely and establishing warning mechanisms to identify anticompetitive practices.

## **Other Documents**

### **The United Nations set of principles and rules on competition**

(TD/RBP/CONF/10/Rev.2)

The United Nations Conference on Restrictive Business Practices was convened by the General Assembly in its resolution 33/153 of 20 December 1978 under the auspices of UNCTAD. Pursuant to resolution 103 (V) of 30 May 1979 of the United Nations Conference on Trade and Development, the Conference on Restrictive Business Practices met at the United Nations Office at Geneva from 19 November to 8 December 1979. At the conclusion of that period, the Conference requested a resumed session to complete its work. In accordance with General Assembly decision 34/447 of 19 December 1979, the Conference reconvened from 8 to 22 April 1980. In concluding its work, the Conference adopted a resolution in which it approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and transmitted this Set of Principles and Rules to the General Assembly at its thirty-fifth session for adoption as a resolution. Accordingly, the General Assembly, at its thirty-fifth session in its resolution 35/63 of 5 December 1980, adopted the Set approved by the Conference. Since the adoption of the Set in 1980, four United Nations Conferences to Review All Aspects of the Set have taken place under the auspices of UNCTAD, in 1985, 1990, 1995 and 2000 respectively. The Fourth Review Conference (25–29 September 2000) adopted a resolution (TD/RBP/CONF.5/15 of 4 October 2000) in which it “*Reaffirms* the validity of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, *recommends* to the General Assembly to subtitle the Set for reference as “UN Set of Principles and Rules on Competition”, and *calls upon* all member States to implement the provisions of the Set”.

## **United Nations Guidelines for Consumer Protection (as expanded in 1999)**

[http://unctad.org/en/PublicationsLibrary/UN-DESA\\_GCP1999\\_en.pdf](http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf)

The Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in Geneva on 25–29 September 2000, decided in its resolution that UNCTAD should, inter alia “consider convening an Expert Meeting on Consumer Policy as a distinct body from the Intergovernmental Group of Experts on Competition Law and Policy”. To build on the work already accomplished by the United Nations in the area of consumer protection, it was decided that the expert meeting should be guided in its deliberations and recommendations by the Expansion of the United Nations guidelines on consumer protection to include sustainable consumption (A/C.2/54/L.24). It was also agreed that the expert meeting should focus on identifying measures that could lead to more effective implementation of the provisions contained in these guidelines. The Guidelines are reproduced in this UNCTAD series on issues relating to competition law and policy.

## **Implementation report on the United Nations Guidelines on Consumer Protection (1985–2013)**

(TD/B/C.I/CLP/23)

Beginning October 2012, UNCTAD is undertaking the revision of the United Nations Guidelines on Consumer Protection. This task was mandated by the first Ad Hoc Expert Meeting on Consumer Protection, held in Geneva on 10 and 11 July 2012. The Guidelines were originally drafted by the Economic and Social Council and adopted by the General Assembly in 1985 and then expanded by the Economic and Social Council in 1999. From the beginning of the current Guidelines, due consideration was given to the existing work on

consumer protection issues, produced by organizations such as the OECD, OAS, UNIDO and UNCITRAL, and prevailing norms and best practices were incorporated into the original document. As this assessment reflects, the Guidelines remain a valid and relevant document for consumer protection policy and have inspired a significant number of national consumer protection laws. In order for these Guidelines to continue providing a relevant framework, a number of areas have been identified for improvement. UNCTAD asked member States, international organizations and other relevant stakeholders to participate in this important project by informing on the legislative processes of member States and on contemporary guidelines produced by organizations such as the International Consumer Protection and Enforcement Network, OECD, OAS, the United Nations Commission on International Trade Law and Consumers International. The 58 responses to the calls for contributions and comments on an initial draft of this document form the basis of the present report.

### **Voluntary Peer Reviews of Competition Law and Policy**

**<http://unctad.org/en/Pages/DITC/CompetitionLaw/Voluntary-Peer-Review-of-Competition-Law-and-Policy.aspx>**

The peer review process provides a unique opportunity to examine and draw lessons from experiences of, and challenges faced by, countries in the implementation of competition policies. The reports produced during the process regarding the state of competition law and enforcement in reviewed countries are impartial and rigorous, and are undertaken by competition policy experts from developed and developing countries with practical experience in implementing competition law. The peer review process is interactive and combines the exchange of experiences with recommendations for possible improvements either in the formulation of the competition law or in its enforcement. Further, it provides interested developing countries with technical assistance, should they be willing to implement the peer review recommendations. UNCTAD has carried out peer reviews for the following

member States: Nicaragua, Pakistan and Ukraine (2013); Mongolia (2012); the United Republic of Tanzania, Zambia and Zimbabwe (Tripartite Report, 2012); Serbia (2011); Armenia (2010); Indonesia (2009); Costa Rica (2008); the West African Economic and Monetary Union, Benin and Senegal (2007); Tunisia (2006); Jamaica and Kenya (2005).

### **Model Law on Competition**

<http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx>

The tenth Intergovernmental Group of Experts on Competition Law and Policy requested the UNCTAD secretariat to prepare a further revised and updated version of the Model Law on Competition to be considered by the Sixth Review Conference and posted on its website. In addition, the secretariat was asked to redesign the format of the presentation and its updates. As directed by the tenth session, the present publication has been prepared on the basis of the written comments on the Model Law received from member States in 2010, which were complemented by research carried out by the UNCTAD secretariat with support from academics and practitioners.

The redesigned format of the presentation of the Model Law on Competition and its updates consists of a copy of the 2007 version of the Model Law (TD/B/RBP/CONF.5/7/Rev.3), combined with a loose-leaf-collection that presents chapter-by-chapter commentaries on respective provisions of the Model Law. The design of Model Law 2010 has been made more reader friendly in that recent developments in legislation, case law and commentaries are contained in comparative tables indicating the types of laws or solutions adopted by countries for different aspects of the competition issues. Before providing an overview of alternative approaches in existing legislation in the form of a country overview table, an introduction to each chapter of the Model Law summarizes in a systematic way the main findings that can be drawn from the various country examples and, where appropriate, makes reference to recent

work of the International Competition Network and the Organization for Economic Cooperation and Development.

## **Handbook on Competition Legislation: Consolidated Report 2001–2012**

UNCTAD/DITC/CLP/2012/HANDBOOK

The United Nations provides for the compilation of the Handbook on Restrictive Business Practices Legislation and for the continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices to assist developing countries in devising appropriate legislation. The Set also envisages that, in this connection, States should provide necessary information and experience to UNCTAD. The Fifth United Nations Conference to Review All Aspects of the Set requested the UNCTAD secretariat to publish further issues of the *Handbook on Competition Legislation*. Despite the general trend towards the adoption, reformulation or better implementation of competition laws and policies in developing countries and countries with economies in transition, many of these countries still need to improve their competition legislation or strengthen their institutions for effective enforcement, and therefore rely, to a large extent, on UNCTAD capacity-building for this work.

This Handbook, prepared by the secretariat, is based on the premise that commentaries contributed by States and texts of their national competition legislation can be used by countries for preparation and/or further revision and updating of national competition legislation, in particular as complementary material to the UNCTAD Model Law on Competition. Moreover, the Handbook and the Model Law can be used in the provision of UNCTAD technical assistance activities to countries introducing or revising their legislation. The Handbook contains commentaries on competition legislation provided by States and published by the secretariat from 2001–2008, as well as commentaries not included in or provided after the publication of the 2008 edition of the Handbook. It is planned that the

Handbook will be updated yearly on the basis of contributions submitted. UNCTAD encourages member States to provide commentaries on recent developments in national competition legislation and jurisprudence, as well as revised competition laws.



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