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The impact of cartels on the poor

Note by the UNCTAD secretariat

Executive summary

Cartels are per se prohibitions under most competition laws. They have an adverse effect on all consumers but the poor suffer disproportionately from the 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 note 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. The note then examines whether and how cartel prosecution benefits the poor and provides an overview of the difficulties faced. The note confirms that very few young competition agencies have been able to successfully detect and prosecute cartels. They are the hardest challenge faced by these agencies in an area in which, nevertheless, enforcement is most needed. The note 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 the importance of international cooperation in anti-cartel enforcement.

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Introduction

1. The objective of most competition laws is to protect competition as a process, thus enhancing efficiency in economic activity and promoting consumer welfare. However, competition law is usually not concerned with wider economic and social objectives such as poverty reduction. Nevertheless, competition law enforcement might alleviate the economic burden on the poor thereby complementing other policies targeting poverty reduction.

2. This background note for the thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy examines the impact of cartels on the poor. It examines the challenges faced by competition authorities in cartel investigations and whether and how the poor benefit from cartel prosecution. The note is based on cases handled by relatively young competition authorities; it contains some lessons learnt from their experiences and raises some questions for the round-table discussion on the topic.

I. The conceptual framework

3. Poverty is a very complex problem. It is not simply a lack of adequate income, but a mix of human deprivation in various social and economic dimensions. Despite national and global efforts to address it, human poverty still remains widespread around the world. Given its multifaceted nature, many governments take a broad and comprehensive approach to poverty reduction covering a wide range of policy areas. Competition law and policy would surely contribute to this collective effort.

4. Anticompetitive practices, especially hard-core cartels that fix prices, limit output or allocate markets or consumers, which are practices that lead to a rise in prices, could have a harmful effect on consumers in general and on the poor in particular. When cartels involve so-called essential goods or services that meet the basic needs of everyday life, the effect on the poor is most harmful. Essential goods and services typically include, among others, basic food, medicine, fuel, transport, drinking water and electricity.

5. Cartels could harm the poor both as consumers and small entrepreneurs. As consumers, the poor suffer from higher prices of essential goods or services fixed by cartels. While cartels harm the consumer in general, the poor are disproportionately affected. Poor consumers may be forced to reduce their consumption of a cartelized product or forgo expenditure on other goods to afford essential goods.

6. Cartels also have an impact on the poor by preventing small and medium-sized enterprises (SMEs) from entering cartelized markets and developing their businesses. Cartels could hurt SMEs in several ways. SMEs may want to start a business in a market where cartelists may collude to prevent them from entering the market. When SMEs employ cartelized products as input, cartels may increase the production cost of SMEs by charging higher prices for these inputs. The enterprises may then not be in a position to reflect such cost increases in their prices, therefore having no choice but to accept lower revenues or exit the business. Such enterprises could also be indirectly affected by a cartel if they sell inputs to cartelists. Cartels increase prices and reduce output, and therefore SMEs are likely to see their sales to cartel members declining as a result of this anticompetitive conduct. Given that SMEs generate jobs for the poor, any adverse effect caused by cartels to SMEs means fewer jobs, aggravating poverty even further.

7. In addition to seller cartels, buyer cartels could also have a detrimental effect, especially on poor farmers. Buyer cartels are observed in major commodity products, such as coffee, cotton, tea, tobacco and milk on which a number of small farmers and many developing countries heavily depend as a major source of revenue.¹ In the cocoa market, nearly 90 per cent of the global cocoa production in the late 1990s came from smallholder farmers.² These commodity markets are exposed to cartelization by buyers due to insufficient negotiating power of smallholder farmers vis-à-vis the small number of buyers, normally large transnational corporations. Considering that 70 per cent of the developing world's 1.4 billion extremely poor people live in rural areas,³ buyer cartels or abuse of market power by large transnational agribusinesses in these commodity sectors would have a direct impoverishing impact on the rural poor as well as the producer countries.

8. Cartels could produce more detrimental effects on the poor at times of economic recession or crisis. During economic crisis, the poor are hit hardest and SMEs are more vulnerable to economic downturn and less likely to survive the economic crises. Low-income households tend to be the first ones to lose jobs. Higher prices caused by cartels add to the drastic fall in income, thereby forcing the poor to hardship. As an example, the Mexico tortilla crisis, initially caused by external factors, not only hit the poorest but also drew poor tortilla makers out of the market. The situation deteriorated when large tortilla producers benefited from the crisis and engaged in hoarding to push prices up even further.⁴ Even at times of economic boom, cartels in fuel or basic food markets could trigger crisis for the poor. Amartya Sen argues that famine might occur not only from lack of food but from inequalities built into food distribution mechanisms. He has used the example of the Bengal famine of 1943, which, he argued, was caused by an urban economic boom that increased food prices, thereby causing the death of millions of rural workers from starvation when their wages did not keep up.⁵

9. From this perspective, vigorous competition law enforcement can be a powerful policy tool to ensure that markets not only lead to efficiency in resource allocation but also work for the poor. Available evidence indicates that young competition agencies give priority to those anticompetitive practices that affect essential goods and services sectors. As case examples in the following section suggest, interventions by national competition authorities contribute to the alleviation of the burden on the poor. However, as stated in paragraph 1, poverty reduction is not the main objective of national competition authorities' enforcement activities. It is rather a by-product of the antitrust intervention. The objective of most competition laws is to promote competition, thereby increasing economic efficiency and maximizing consumer welfare. Strong enforcement efforts observed in this area are mainly driven by discretionary selection by national competition authorities of target sectors based on criteria that include the size or level of income of the population affected. Nevertheless, there is nothing to prevent developing countries from designing and developing competition laws that take into consideration the needs of their people and other policy objectives. Some jurisdictions explicitly consider other policy objectives in their

¹ Fox EM (2008). Antitrust, economic development and poverty: the other path. In: Qaqaya H and Lipimile G, eds., *The Effects of Anti-competitive Business Practices on Developing Countries and Their Development Prospects*. United Nations publication. UNCTAD/DITC/CLP/2008/2. New York and Geneva.

² International Cocoa Organization. Available at <http://www.icco.org/faq/57-cocoa-production/123-how-many-smallholders-are-there-worldwide-producing-cocoa-what-proportion-of-cocoa-worldwide-is-produced-by-smallholders.html> (accessed on 14 January 2013).

³ United Nations International Fund for Agricultural Development (2011). *Rural Poverty Report 2011*.

⁴ Fox EM (see reference 1).

⁵ Sen A (1981). *Poverty and Famines: An Essay on Entitlement and Deprivation*. Oxford University Press. Oxford.

competition laws. For instance, South Africa uses the competition legislation and its implementation as a means to contribute to wider economic and social goals, such as employment creation and retention, equitable participation in the economy by SMEs, and a broader and more racially diverse spread of ownership.⁶ Other jurisdictions such as that of Kenya articulate the importance of promoting and enhancing competition as a means of eliminating poverty in their policy guidelines.

II. Case examples

10. According to a study by Lande and Davis,⁷ in the United States of America victims of cartels received over US\$9 billion in cash, excluding other forms of compensation such as products or discounts, through private enforcement since 1990 in only 25 private cases.⁸ The European Commission's estimate on the annual cost of hard-core cartels operating in the European Union or in a single European Union member State is between €25 billion and €69 billion.⁹ Considering that the detection rate for hard-core cartels is assumed to be between 10 per cent and 20 per cent,¹⁰ the real damage by cartels is likely to be much bigger. These figures give an idea about the dimension of damages caused by cartels and it can be imagined that the effect will be experienced disproportionately by poorer consumers. This section provides some examples of cartel operation from various developing countries and emerging economies in sectors that are most likely to affect the poor.

A. Brazil

1. Industrial and medicinal gas (2010)¹¹

11. The Brazilian competition authority fined five companies and six of their executive officers R\$2.9 billion (US\$1.8 billion) in 2010 for cartelization in the industrial gases market. It is one of the highest antitrust fines ever imposed in Brazil. The collusive practices, which started in 1998, consist of customer allocation, bid rigging and price fixing. The investigation was initiated in 2003 following an anonymous complaint. The cartel was detected by telephone wiretaps and dawn raids. A major company in the sector, White Martin, was fined R\$2.2 billion, the highest fine of its kind in Brazil, which corresponded to 50 per cent of the company's turnover. White Martin had already been condemned for cartel activity in 1997. Recidivism was an important factor in the

⁶ Contribution from South Africa to the Organization for Economic Cooperation and Development (OECD) Global Forum on Competition. Paris, 28 February–1 March 2013.

⁷ Lande RH and Davis JP (2008). Benefits from private enforcement: an analysis of forty cases. *University of San Francisco Law Review*. 42:879–913. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661 (accessed 16 April 2013).

⁸ As cited in Li K (2011). On optimizing the deterrence of cartels. The American Antitrust Institute working paper No. 11–10. 5 December.

⁹ Commission of the European Communities (2008). Commission staff working document. Accompanying document to the White Paper on Damages Actions for Breach of the European Commission Antitrust Rules – Impact Assessment, p. 14–15. COM(2008) 165 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0405:FIN:EN:DOC> (accessed 16 April 2013).

¹⁰ See reference 9, p. 15.

¹¹ Contribution from Brazil to the UNCTAD round table on the “Impact of cartels on the poor”, thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013. Also see <http://lalibrecompetencia.com/2010/09/09/brazilian-antitrust-agency-fines-gas-cartel-in-us-1-8-billion/> (accessed 16 April 2013).

determination of the fine. The cartelized products are mostly used in the health sector. Therefore, the cartel had a direct impact on the costs of patients and hospitals, as well as public sewerage and water companies.

2. Gasoline (2007)¹²

12. A gasoline cartel was detected following a dawn raid in 2007. Fuel prices decreased by more than 10 per cent after the detection of the cartel. This fall in fuel prices brought about a general saving of over €1 million. Retail fuel is an essential product; particularly in countries which are highly dependent on highways for cargo and people transportation. In Brazil, highways represent 62 per cent of total cargo transportation. Fuel prices affect the final prices of basic goods and bus tickets, which have a direct impact on the poor.

B. Chile¹³

1. Pharmacies (2012)

13. In December 2008, the Fiscalía Nacional Económica (FNE) filed a complaint against three retail pharmacies accusing them of concerted action resulting in increases in the prices of 206 drugs between December 2007 and March 2008. In April 2009, a settlement agreement was reached between FNE and Farmacias Ahumada, which agreed to pay US\$1 million. This case had a high impact on public opinion. In January 2012, the Tribunal for the Defense of Free Competition (TDLC) imposed a fine of approximately US\$20 million on each of the two remaining retail pharmacy chains. These correspond to the maximum fines applicable under the Competition Act and are based on the seriousness of the conduct displayed and the extent of the harm caused, affecting a significant number of consumers in the country. The overall amount of fines imposed by this ruling is higher than the sum of all fines applied by the TDLC since its establishment in 2004. In September 2012 the Supreme Court upheld TDLC's decision. In the ruling, TDLC judges held that "the companies involved in the case committed an extremely grave infraction, considering its nature, its actual consequences in the retail pharmacies market, and the extent of the affected geographical market...Economic interest was placed before human dignity, life and individuals' health".¹⁴

2. Poultry meat (ongoing)

14. The FNE initiated an investigation against an output-restricting cartel involving three poultry companies implemented and monitored by a trade association for the last ten years. Taking into account the seriousness of their actions, the duration of the conduct, the market power that the agreement conferred to the companies involved and the essential nature of the product affected, the FNE requested the imposition of the maximum fines established in the Act and dissolution of the trade association. For the first time, FNE submitted evidence gathered through dawn raids thanks to its seizure powers provided by the 2009 reform of the Competition Act.

¹² Contribution from Brazil to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

¹³ Contribution from Chile to the UNCTAD round table on the "Impact of cartels on the poor", thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

¹⁴ See <http://www.fne.gob.cl/english/2012/09/11/supreme-court-upholds-tdlcs-ruling-against-cruz-verde-and-salcobrand-pharmacies-imposing-the-highest-ever-fines-for-collusion/#more-1216> (accessed 10 April 2013).

3. Bus transport (ongoing)

15. In June 2011, FNE initiated ex officio a case in the passenger ground transportation services offered by private companies. It accused two companies and one individual for engaging in a coordinated manner in acts aimed at fixing public tariffs and determining the distribution of bus frequencies on specific routes to and from Santiago. The FNE requested the imposition of fines of approximately US\$7 million for one of the companies and the individual under investigation. The other company was exempted from any fine thanks to its leniency application.

C. Indonesia

Cooking palm oil (2009)¹⁵

16. The Indonesian Competition Authority (KPPU) found a price-fixing cartel between 20 manufacturers of cooking palm oil, leading it to seek to impose a total fine of US\$31 million. According to KPPU's estimate, consumer losses in the cartel period amounted to US\$178 million. The price of cooking oil dropped following the public statement made by KPPU during the investigation. The supreme court overruled the decision of the KPPU, stating that the indirect evidence on which the KPPU relied was not sufficient to prove the infringement.

D. Kenya

Transport¹⁶

17. Competition Authority of Kenya investigated the cartels disguised as trade and welfare associations in the Matatu transport sector and found price fixing and imposition of "route entry charges" to market participants. The latter had a deterring impact on potential market access of poor small-scale entrepreneurs. These associations recommended commuter fares to be charged by their members. The Competition Authority issued a cease and desist order to the associations, which then stopped these anticompetitive practices. Consequently, fares stabilized. The cartelized practices in the Matatu sector would have had a significant impact on low income families whose expenditure in Matatu fares is 7 per cent of their income compared to 0.2 per cent for high income households.

E. Peru

Oxygen for medical use (2008)¹⁷

18. The Peruvian Competition Authority found that suppliers of oxygen for medical use to Peru's public health system had distributed the procurement bids for this product geographically between 1999 and 2004. The companies involved were sanctioned. This product is indispensable for the life and health of persons who do not have access to private

¹⁵ Contribution from Indonesia to the UNCTAD round table on the "Impact of cartels on the poor", thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

¹⁶ Contribution from Kenya to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

¹⁷ Contribution from Peru to the OECD Latin American Competition Forum. Santo Domingo, 18–19 September 2012.

health institutions. Therefore, the conduct would have affected low income population the most.

F. Republic of Korea

1. Liquefied petroleum gas (2009)¹⁸

19. The Republic of Korea Fair Trade Commission (KFTC) observed that the domestic liquefied petroleum gas (LPG) prices remained high even after January 2008 when international prices stabilized and initiated an investigation in April 2008. It was found that high domestic LPG prices were primarily due to price hikes by LPG suppliers. KFTC imposed a record fine of about US\$600 million on seven LPG suppliers for having fixed LPG wholesale prices between 2003 and 2008. In its press release, KFTC emphasized the fact that LPG is a critical input or daily necessity for taxi and disabled drivers, and families in poor areas where liquefied natural gas, a more convenient fuel source, is not accessible.

2. Sugar (2007)

20. KFTC detected and imposed fines on a sugar cartel involving three producers engaged in fixing both prices and quantities of supply between 1991 and 2005.

G. Russian Federation

Chlorine (2011)¹⁹

21. The Federal Antimonopoly Service prosecuted a cartel active in the chlorine market for more than three years. Chlorine is used in the production of a variety of industrial and consumer products, such as pharmaceuticals, textiles and in water sanitation. Based on the evidence obtained during dawn raids and the information received from chlorine consumers, the Antimonopoly Service established that nine companies entered into a cartel agreement to fix prices and quantities supplied, and to allocate markets by customers.

H. South Africa

1. Bread and milling (2007-2010)²⁰

22. The country's Competition Commission found out that major firms dominant in the milling of wheat and maize and the production of bread and maize meal had colluded to fix prices through regular meetings and contact between 1994 and 2007. Maize and wheat are essential inputs in staple foodstuffs such as maize meal and bread, especially important for

¹⁸ Contribution from the Republic of Korea to the UNCTAD round table on the "Impact of cartels on the poor", thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

¹⁹ Contribution from the Russian Federation to the UNCTAD round table on the "Impact of cartels on the poor", thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

²⁰ Rakhudu M and Kalicharan A (2008). Bread and milling cartel. *Competition News*. Edition 28. June. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/June-08-Newsletter-28.pdf> (accessed 15 April 2013); and Competition Commission of South Africa (2010). Competition Commission settles with Pioneer Foods. Media release, 2 November. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-settles-with-Pioneer-Foods2.pdf> (accessed 15 April 2013).

the poor. The Commission initiated an investigation into the bread and milling companies and at the early stages of the investigation one company applied for leniency. Based on the information received from the applicant, the Commission learned that four bakeries agreed to fix the selling price of bread and also engaged in a milling cartel to fix prices and allocate customers. The Competition Tribunal imposed fines on three companies for their involvement in the bread and/or milling cartel between December 2007 and 2012. In November 2010, the Commission reached a settlement agreement with a leading member of the cartel. The settlement package went beyond conventional sanctions and remedies and included innovative measures such as price reduction commitment and other measures to address distributional concerns.

2. Pharmaceuticals (2008)

23. After a three-year investigation, the Competition Commission prosecuted three pharmaceutical companies involved in collusive tendering and market allocation to avoid competition and manipulate prices for pharmaceutical and hospital products supplied to public hospitals. One of the cartel members applied for leniency and cooperated with the Commission. The Commission considered that this was an important case in the light of growing public concern about escalating health-care costs and highlighted the fact that collusive behaviour would undoubtedly be one of the contributing factors to higher prices in health-care markets.²¹

I. Turkey

Poultry meat (2008)²²

24. The Turkish Competition Authority investigated the allegations in the media of the existence of a price-fixing and output-restricting agreement between undertakings in the poultry meat market. The investigation involved 27 undertakings and the Poultry Meat Producers and Breeders Association. Based on the evidence found during the on-the-spot inspections, the Authority concluded that nine undertakings had participated in a cartel and jointly limited supply and raised prices between 2003 and 2008. The Authority imposed an administrative fine on each undertaking.

J. Zambia

Fertilizer (2012)²³

25. Fertilizer is an essential input and the most expensive raw material in the agricultural sector. The Zambian Government partially subsidizes the fertilizer cost of poor small-scale farmers. It procures fertilizer from two companies that have been winning the tender for the last ten years. The Zambia Competition and Consumer Protection Commission suspected a cartel, carried out a dawn raid on these firms and collected implicating evidence. However,

²¹ Competition Commission of South Africa (2008). Pharmaceutical product cartel referred for prosecution. Media release. 11 February. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/MR012008.doc> (accessed 15 April 2013).

²² Contribution from Turkey to the UNCTAD round table on the “Impact of cartels on the poor”, thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

²³ Contribution from Zambia to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

during the investigation the Government expressed its concerns to the Commission about the case and particularly its possible implications for the disruption of fertilizer supply which could lead to food shortages and insecurity. Investigations were therefore suspended.

III. Common features of cartel cases

26. The essential goods industries are observed to have typical structural characteristics which make them susceptible to cartelization. These industries are highly concentrated. In many cases, the product is homogenous and it has few or no substitutes. Hence the price elasticity of demand is very low. There is a lack of countervailing buyer power. Therefore, cartels are rampant in these industries. Since the market structure is similar across many countries or markets are dominated by the same group of multinationals, it is not rare to see similar cartels that operate in different countries.

A. Types of cartels and affected sectors

27. In most of the cartel cases described in section II, price fixing is the most common form. There are also cases of output restriction, customer or market allocation or bid rigging, although these are not as common. In many cases of price fixing and output restriction, industry associations were involved in the coordination and maintenance of the cartel. In almost all cases in section II, poor consumers are affected through higher prices. The sectors that are affected by cartels and are most likely to affect poor households are those of essential goods and services, such as food, medicine, fuel and transport. In some sectors, such as bus transport, entry of small businesses is impeded by the cartel dominating the market.

28. Bid-rigging cartels are also a common practice. In many developing countries, the poor rely on goods and services provided by central and local governments. For example, poverty reduction projects funded by foreign aid or public resources require governments to procure goods and services to build public schools, hospitals, roads, or purchase medicine, school uniforms, and the like. Given resource constraints, the State has a strong interest to procure the required goods and services of adequate quality at the lowest possible price. With this aim, the appropriate design of public procurement procedures, strong enforcement of completion law against bid rigging and corruption prevention are the best ways to ensure the best value for money and benefit the poor. In countries where the government has a social housing programme for low income families, such as Brazil,²⁴ and therefore procures cement, price fixing and bid rigging within cement cartels might impose a huge burden on government expenditure, thereby decreasing resources that may otherwise be used for programmes benefiting the poor.

B. Challenges in anti-cartel enforcement

29. Effective anti-cartel enforcement requires competition authorities with sufficient enforcement powers and effective investigative tools at their disposal to facilitate evidence collection and to be able to impose effective sanctions. Some jurisdictions have been successful in prosecuting cartels, while others face challenges. This section looks into some of these challenges.

²⁴ Contribution from Brazil to the OECD Latin American Competition Forum. Santo Domingo, 18–19 September 2012.

1. Evidence gathering

30. One of the challenges in dealing with cartels is to find evidence of an agreement or proof of communication, such as meetings, phone calls or e-mail exchanges between cartel members. In many jurisdictions, courts look for direct evidence of an agreement and indirect evidence is deemed insufficient to prove the infringement, as in the cooking palm oil case in Indonesia. However, finding evidence of a cartel agreement is very difficult and is one of the biggest challenges. This challenge, however, may be dealt with by giving sufficient powers and resources to the competition authority to carry out dawn raids, search and seize evidence, and build human and technical capacities of the agency to investigate and successfully prosecute cartels.

2. Investigation tools

31. In most of the cases described in section II, competition agencies in Brazil, Chile, the Republic of Korea, the Russian Federation, South Africa and Turkey used dawn raids and leniency programmes in detecting cartels. Both dawn raids and leniency programmes have proved to be the most effective tool in evidence gathering. Therefore, it is crucial for competition agencies to have the power to undertake such raids or unannounced visits to suspected cartel members' premises, as well as have the authority to access physical and virtual places of information, such as filing cabinets and computers, regardless of the authorization of company employees or managers.

32. As for leniency programmes, it is observed that many developing countries with a good record of competition law enforcement, such as Brazil, Chile, the Republic of Korea, South Africa and Turkey have put in place leniency programmes after having successfully prosecuted some cartels. Such experience earns competition authorities certain credibility which is essential for the effective functioning of leniency programmes. Another influential factor for the effectiveness of leniency programmes is the severity of sanctions. Only if severe sanctions are imposed and collected will cartel members be encouraged to come forward and cooperate with competition authorities. KFTC submits that some long-term and undetected cartels were discovered thanks to increased transparency and incentives, and clear predictability of penalties.²⁵

3. Lengthy investigations

33. Cartel investigations often take several years to be concluded. It is a long and resource-consuming process. Competition authorities need well-trained staff to carry out dawn raids and successfully implement leniency programmes. They would also need the support of other government institutions such as the judiciary and the police. Notwithstanding the time and resources invested in a cartel case, the result might be frustrating in cases where necessary evidence cannot be obtained and circumstantial evidence is found insufficient and therefore rejected by the courts.

4. Sanctions

34. The severity of sanctions is important in deterring cartels and encouraging leniency applications.²⁶ As for the determination of the amount of fines, jurisdictions use several criteria such as the size of the market, the affected population and the recidivism of

²⁵ Contribution from the Republic of Korea to the UNCTAD round table on the "Impact of cartels on the poor", thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

²⁶ UNCTAD (2010). Appropriate sanctions and remedies. TD/RBP/CONF.7/5. Geneva. 30 August. Available at http://unctad.org/en/Docs/tdrbpconf7d5_en.pdf (accessed 15 April 2013).

cartelists. The Republic of Korea took into account the market and population size in the LPG cartel investigation. Likewise, Brazil imposed a record high fine in the industrial and medicinal gas cartel based on the use of products, the effect of the cartel and recidivism. Chile imposed maximum fines applicable under the competition law in the pharmacies case based on the seriousness of the conduct and the number of consumers affected. Box 1 provides some examples of successes in competition advocacy.

Box 1. Success stories in competition advocacy

Opening markets to competition or enhancing conditions for competition could bring better results to alleviate the impact of anticompetitive practices on the poor rather than taking ex post measures through time- and resource-intensive investigations.

Croatia

The Croatian Competition Agency issued an opinion in 2010 addressing competition concerns in taxi services. The Agency proposed replacing the existing rules limiting the number of competitors and allowing price fixing by the relevant association with flexible and easier market access conditions. Consequently, the number of competitors increased, prices fell by 45–50 per cent compared to the monopoly price of the incumbent, the number of drives rose by 100 per cent, the service was diversified and innovation and environmental protection were promoted.²⁷

Kenya

Kenya opened up the maize milling sector to competition. However, the cost of maize flour was still high, mainly due to the concentration of milling businesses and the minimum prices imposed by the Cereal Millers Association on its members. The Competition Authority of Kenya requested a review of the association's internal regulations. Consequently, these regulations were removed and competition was enhanced leading to lower prices. This measure benefited the poor consumers since maize and its derivatives are essential goods for poor families.²⁸

Republic of Korea

In 2010, the KFTC allowed the participation of more enterprises including city gas companies in the liquefied natural gas station business which had been monopolized by the Korean Gas Corporation. Competition is expected to improve in the liquefied natural gas retailing market leading to lower prices and higher service quality.²⁹

Russian Federation

The Federal Antimonopoly Service of Russia successfully advocated for opening up a highly concentrated national concrete market to foreign competition. This measure resulted in reduced prices for this material widely used for housing construction, including

²⁷ Contribution from Croatia to the UNCTAD round table on the “Impact of cartels on the poor”, thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

²⁸ Contribution from Kenya to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

²⁹ Contribution from the Republic of Korea to the UNCTAD round table on the “Impact of cartels on the poor”, thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

social dwellings.³⁰

Zambia

The Competition Commission of Zambia successfully advocated for the liberalization of international entry into the telecommunications sector, which was administered by the State-owned incumbent company. Consequently, the cost of international calls declined by 70 per cent, benefiting poor consumers who did not have access to this service previously.³¹

IV. Benefits of cartel investigations for the poor

35. In many of the above cases, cartels were detected through dawn raids and leniency programmes. In the gasoline cartel case in Brazil, the dawn raids were influential in immediately leading to a 10 per cent decrease in prices. However, this is not the case in many investigations. In the bread cartel case in South Africa, bread prices increased following the detection of the cartel and the imposition of fines on one of the cartelists. Effective enforcement does not necessarily bring about immediate price falls. Moreover, competition authorities do not usually evaluate the impact of cartel prosecution on prices in the years following their decision. Nor do they look into trends in market access by new firms, especially SMEs. Therefore, one cannot assume that anti-cartel enforcement entirely removes the negative impact of cartels on the poor. Nevertheless, eliminating cartels would contribute to increased efficiency and improved consumer welfare in the economy. Cartel investigations and fines would also have a deterring effect on potential cartels.

A. Post-cartel prices

36. Imposition of large fines on cartel members would not directly benefit the poor or SMEs. Collected fines are not distributed among those that have suffered but usually go to the government budget. Hence, it is when they pay lower prices that consumers can see the real benefit of anti-cartel enforcement. In basic food sectors, a lower price would be the successful result of a cartel investigation from the perspective of the poor.

37. The challenge is that the prosecution of a cartel does not guarantee a fall in prices. Theoretically, the breakdown of a cartel should be followed by a price decline. However, in practice price decline is often not observed. In many cases where cartels are successfully prosecuted, prices tend to persist at the higher level. Although it is hard to prove the benefits of prosecuting cartels for the poor, Brazil provides a success story. In the gasoline cartel case (see section II) in the city of Joao Pessoa, dawn raids brought about an immediate impact and gasoline prices fell by more than 10 per cent afterwards. This is an outcome which every competition authority would hope to obtain in a cartel investigation. Based on the average consumption level of gasoline multiplied by the price decline, the investigation is said to save over €1 million per month for the whole city.

38. The bread cartel case in South Africa points to the opposite scenario. Despite the detection and sanctioning of the cartel, bread prices remained high. Confronted with this

³⁰ Contribution from the Russian Federation to the UNCTAD round table on the “Impact of cartels on the poor”, thirteenth session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 8–12 July 2013.

³¹ Contribution from Zambia to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

frustrating result, the Competition Commission took a bold approach to make a settlement package with a leading member of the cartel, which included a pricing reduction commitment that set minimum levels of gross profit reduction for each category of bread. This requires a role of quasi price regulator for the Competition Commission. This intervention brought down both wholesale and retail bread prices.

B. Damage suits

39. The possibility of seeking compensation through a damage suit is another way to benefit the poor or SMEs. Many jurisdictions provide a legal basis for affected parties to privately seek compensation for the loss they suffer from a cartel. However, private actions for damages are not widely used except in well-established legal regimes such as that of the United States of America. Many practical obstacles may explain the infrequent use of private actions: It is very difficult to bring consumers together and organize a collective action. Even if this is achieved, the next challenge is to prove the damage, which is not an easy task for the poor and SMEs, and might involve high costs.

40. Nonetheless, there is a growing recognition of private actions as a follow-on action to cartel prosecution. An example is the LPG cartel in the Republic of Korea. Following the decision by the KFTC, taxi drivers associations and an association for disabled persons filed a damage suit against the members of the cartel. The law suit involved more than thirty thousand taxi drivers and disabled people, making it one of the largest damage suits.

C. Evaluating the impact of cartels on consumers

41. As mentioned in paragraph 10 above, a body of empirical evidence has emerged on the impact of cartels on consumers. Some jurisdictions calculate the damages incurred by a cartel during the investigation. Indonesia is a good example. In their efforts to raise public awareness of the harmful effect of cartels, the KPPU attempted to calculate damages in major cartel cases, including the cooking palm oil case. This practice could help gain the support of other government bodies and the general public, thereby strengthening the position of competition authorities.

42. Other jurisdictions often evaluate the impact of their cartel investigation. This is aimed at assessing the success of a particular intervention. The outcome of post-evaluation could be useful in raising public awareness on the harm caused by cartels. However, ex post evaluation on the impact of anti-cartel enforcement is not very common. This is partly because competition authorities tend to focus their resources on proving the infringement. Where basic goods and services are involved, post-cartel prices are a key concern for the poor. In this respect, ex post price monitoring could be a good starting point for competition authorities, as demonstrated by Brazil in the gasoline cartel case.

V. Other regulatory measures to alleviate the impact of cartels on the poor

43. Many developing countries, such as Kenya, Malaysia, the Philippines and Zimbabwe, amongst others, have price-control legislation. Price-control schemes are aimed at maintaining the affordability of staple foodstuffs and basic goods for consumers, especially the poor, by regulating hoarding, excessive prices or profiteering, and sometimes even cartels during times of shortages. They typically cover a range of essential goods, such as bread, flour and fuel, the majority of which coincide with the products in the case examples in section II.

44. Many developing countries often resort to this instrument to control the prices of basic food and goods. The Philippines provides a recent example. Following a complaint from bakers, the Department of Trade and Industry (DTI), which is responsible for the enforcement of the Price Act, found profiteering by flour milling companies. The DTI ordered them to refrain from selling flour at the current prices and to reduce these prices by more than 10 per cent. To ensure that flour prices remain within the reasonable range, DTI set up a continuous price monitoring and controlling scheme whereby it notifies millers to review and lower their prices when DTI deems it necessary.³² In some cases, government agencies may collaborate with competition authorities to monitor the price fluctuations in basic goods sectors and to take necessary measures.

45. Where competition laws are enforced, there is a possibility that active enforcement of price-control legislation collides with antitrust review. In comparison with antitrust enforcement, the price-control scheme could appear to be more effective in ensuring lower prices of basic goods for the poor. However, it is well known that direct price controls replace the market process, thereby creating a number of adverse effects that have been witnessed in many countries. It may lead to shortage of the price-controlled product by artificially lowering its prices, and postpone the process whereby the market reaches equilibrium. Government intervention may have unintended consequences including facilitating the emergence of cartels. Several UNCTAD Voluntary Peer Reviews of Competition Law and Policy have found that when policymakers were confronted with rising prices of basic commodities, they often met with businesses and encouraged them to agree collectively on “reasonable” prices. Therefore, it is strongly recommended that countries use direct price control carefully and sparingly. In this respect, the role of competition advocacy is very important. The Competition Authority of Kenya pre-empted in a timely manner the introduction of price controls by the Kenyan Legislature during the commodity price volatility in 2010 on some essential commodities, such as wheat flour, rice, cooking oil, sugar and petrol, through advocacy activities.³³

VI. Lessons gained from the experience so far

A. Sufficient enforcement powers

46. It is important that competition authorities have sufficient powers given to them by law to be able to carry out cartel investigations effectively. Dawn raids and leniency programmes are the most influential tools in cartel detection and prosecution. To be able to collect evidence, competition authorities should have the power to carry out dawn raids or unannounced visits to premises of cartel members, and search and seize necessary documents.

47. Successful developing and emerging country jurisdictions, such as Brazil, Chile, the Republic of Korea, South Africa and Turkey use these tools effectively in prosecuting cartels. These jurisdictions have developed their enforcement practice step by step eventually reaching the standard of more advanced jurisdictions in cartel prosecution, with an increasing number of cases over the years.

³² Contribution from the Philippines to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

³³ Contribution from Kenya to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

B. Prioritization

48. For competition law and policy to yield benefits to the poor, a competition authority could play a bigger role by strategically allocating its resources or setting its priorities to dealing with anticompetitive conduct, particularly cartels in sectors most likely to affect the poor. A number of jurisdictions already have a prioritization framework in one way or another. These frameworks prioritize sectors or products which affect the poor. South Africa provides a good example. In 2008, the Competition Commission identified three criteria for prioritization as part of its strategic planning process. One of these criteria is the impact on poor consumers. Cartels were targeted as a cross-cutting priority. The Commission also identified four priority sectors based on these criteria, which are food and agroprocessing, infrastructure and construction, banking and intermediate industrial products.³⁴ Likewise, the Competition Authority of Kenya aims at ensuring the access for poor people to basic goods and services at affordable prices.³⁵

49. In response to threatening inflation in the aftermath of the global economic crisis, in the Republic of Korea, KFTC set up a programme to monitor price fixing of key items, price hikes in which can severely impact households. Substantial resources were allocated to this programme, allowing a close track to be kept of price changes of goods that were identified as being closely related to people's basic needs, such as fuel and food. With this initiative, a number of cartels in instant noodles, eggs and gasoline markets were detected.

50. Regardless of whether a formal prioritization framework is in place, many authorities, such as those in Indonesia and Mauritius, focus their enforcement activities on sectors that provide the basic needs of people. However, very few young competition agencies have been able to successfully detect and prosecute major cartels. Cartels remain the hardest challenge where enforcement is most needed.

51. Considering the challenges of anti-cartel enforcement and the resource constraints faced by many agencies in developing countries, competition authorities could focus their efforts on sectors where cartels would have a severe impact on a relatively larger sector of the population, particularly the poor. They could also look into public procurement and examine, in cooperation with the procurement agency, the bidding behaviour in situations where bid rigging is suspected. Such studies might reveal patterns suggesting market allocation or bid rotation.³⁶

C. Distributional equity

52. The conventional thought in antitrust is that it is not the right tool to address equity issues. It is said that antitrust is designed to enhance efficiency, and not the policy instrument to deal with distributional aspects. One may argue that at times of economic crisis and recession, competition law and policy should play a more proactive role in addressing equity issues, especially when anticompetitive practices concern the poor and SMEs.

³⁴ Ramburuth S (2008). The Commission's approach to prioritization. *Competition News*. Edition 28. June. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/June-08-Newsletter-28.pdf>.

³⁵ Contribution from Kenya to the OECD Global Forum on Competition. Paris, 28 February–1 March 2013.

³⁶ UNCTAD (2005). A Synthesis of recent cartel investigations that are publicly available. TD/RBP/CONF.6/4. Geneva. 5 September. Available at http://unctad.org/en/docs/trbpcconf6d4_en.pdf (accessed 16 April 2013).

53. In line with this argument, some jurisdictions take a more aggressive approach, especially in devising remedies and settlements in cartel cases. South Africa provides an interesting example. In its famous bread and milling cartel case, the Competition Commission reached a settlement with a leading cartel member that went beyond conventional sanctions and directly addressed equity issues. The settlement included an exigence that, first, the company adjusted its pricing of flour and bread by reducing its gross profit; second, a payment be made of R 250 million to create the Agroprocessing Competitiveness Fund, which will promote competitiveness, employment and growth in food value chains and provide finance to SMEs; third, that the company increase its capital expenditure to increase output and create jobs.³⁷

D. Competition advocacy measures

54. Advocacy is important in ensuring coherence between different government policies and measures towards enhanced competition in markets. Nevertheless, competition agencies face challenges in compromising between broader economic or social policy objectives and strict application of competition law. The fertilizer case in Zambia is a good example showing such difficulty. Competition authorities alone cannot always fulfil the function of promoting competition. They need the support of other government bodies and the judiciary. To ensure such support, other institutions should also understand the importance and benefits of competition. Competition advocacy is therefore crucial in disseminating a competition culture amongst government institutions and other stakeholders and in effective competition law enforcement. Sometimes, the lack of political will might impede effective anti-cartel enforcement by a competition authority. Even worse is the fact that such deficiency could reinforce cartelistic behaviour by setting a precedent for other companies signalling them that competition law infringements could go unpunished. Box 1, above, provides some examples for successful advocacy measures in various jurisdictions.

E. International cooperation in anti-cartel enforcement

55. International organizations such as the OECD, UNCTAD and the International Competition Network provide forums to exchange information and experiences on anti-cartel enforcement amongst competition authorities and undertake studies in this area.

56. Cooperation between competition agencies in cross-border cartel cases is crucial. Both formal agreements and informal cooperation between competition authorities have proven to be effective in many cartel cases involving several jurisdictions.³⁸ Where developing countries have no leniency programme or formal cooperation agreement with other countries, informal cooperation may be a valuable asset in their investigations into international cartels. Although confidential information cannot be shared with foreign agencies without the consent of concerned parties, experience has shown that informal cooperation between agencies facilitate information exchange on the status of an investigation, theoretical approaches, investigative methods and design of remedies.

³⁷ Competition Commission of South Africa (2010). Competition Commission settles with Pioneer Foods. Media release. 2 November. Available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-settles-with-Pioneer-Foods2.pdf> (accessed 16 April 2010).

³⁸ UNCTAD (2012). Cross-border anticompetitive practices: the challenges for developing countries and economies in transition. TD/B/C.I/CLP/16. Geneva. 19 April. Available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd16_en.pdf (accessed 16 April 2013).

Nevertheless, formal agreements similar to the cooperation agreement negotiated between the European Union and Switzerland are worth exploring since they open avenues to exchange confidential information gathered in the course of an investigation. Such information exchange is subject to certain conditions, including respecting confidentiality and data protection rules. This requires jurisdictions to prepare the necessary legal framework to satisfy such conditions and build trust in their legal and institutional systems.

57. Regional or global efforts for further cooperation can be built on existing frameworks. Facilitating the exchange of publicly available information through an intelligence network would be beneficial to all participants, especially authorities in developing countries. The intelligence network may set up an alert system to inform competition authorities about successfully prosecuted cartels, detection techniques and evidence gathering. UNCTAD is currently working on the creation of an online databank, the Collaborative Information Platform. The Platform will provide a virtual forum where competition agencies can share non-confidential information on past and ongoing cases of competition law violations, particularly of a cross-border nature. It aims at promoting a communicative attitude between jurisdictions by facilitating the identification of similar violations investigated by other jurisdictions as well as examples of similar challenges faced.³⁹

VII. Questions for further discussion

58. The following questions are relevant to the continued discussion of the subject:

- (a) Should the objectives of the competition law enforcement be complementary to the overall economic and social goals of the country related to poverty reduction?
- (b) Should competition agencies play a role in poverty reduction? If so, what should be their role?
- (c) What kind of sanctions and remedies could competition authorities design to alleviate the impact of cartels on the poor?
- (d) Should competition agencies prioritize their work taking into consideration the sectors or practices which are most likely to affect the poor and SMEs?
- (e) Should competition authorities in developing countries be concerned about distributional equity issues?
- (f) Should competition authorities evaluate the impact of their actions on alleviating the negative effects on the poor and SMEs?

³⁹ Ezrachi A. and Qaqaya H. (2012). UNCTAD's Collaborative Information Platform. *Concurrences Competition Law Journal*. Concurrences 4-2012 – Horizons, pp 204-207. Available at: http://www.concurrences.com/IMG/pdf/07.concurrences_4-2012_horizons_ezrachi_qaqaya-2.pdf