

Fourteenth Meeting of the UNCTAD Research Partnership Platform

Room XVII, Palais des Nations, Geneva

5 July 2023

Presentation

Prof. Dr.iur. Tania Zúñiga Fernández

Pontificia Universidad Católica del Perú

This material has been reproduced in the language and form as it was provided. The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

14th RESEARCH PARTNERSHIP PLATFORM**IGE2023****[INTRODUCTION]**

Good morning dear colleagues from the academia, dear Mrs. Teresa Moreira, dear Mr. Yves Kenfack, dear Mr. Juan Luis Crucelegui, dear Experts and colleagues. Thank you very much for the invitation.

It is a pleasure to participate in the 14th session of the UNCTAD's Research Partnership Platform (RPP) and to be able to contribute with a presentation. And I am really very honored to represent today the Pontificia Universidad Católica del Perú within the academic framework at global level.

First, I ask for your understanding that I am thousands of kilometers away, now in the southern hemisphere, overseas, but I trust that virtuality can bring us closer together in some way. I would like to share the presentation. Please just a moment.

[START OF THE CONTENTS]

The presentation will address the challenges of competition policy in the Latin American and Caribbean region, under a perspective of institutional regimes of competition policy, the market economy and protectionism, the digital economy, the standard of legal certainty in the analysis of cases in various jurisdictions as well as a look at the Andean Community regulations in order to build a regulatory convergence.

When one refers to the Latin American and Caribbean region, it would seem to place it in a one-dimensional scenario, however, its conception is not necessarily homogeneous.

First, the assessment is complex in the institutional sphere, as different agency models can be identified, with diverse organization and attributions integrated in the same authority that not only evaluates free competition but also other areas of public policy. There are agencies with integrated competences in the field of consumer affairs, intellectual property, bureaucratic barriers, regulatory policy, dumping and subsidies, and regulated sectors such as telecommunications. Secondly, the dissimilar pronouncements issued by the authorities in different jurisdictions on the same economic operation, as in the case of merger control in digital platform, for instance, which may affect legal certainty related to the competitive process in the markets.

On the other hand, social problems of rising prices, basic goods, medicines, during and after pandemics has opened the debate on the need of pseudo-protectionism measures and the revision of the goals framework of competition policy, which in some countries of the region has even led to a debate on new constitutional frameworks that question the role of the state in the economy.

It is worth mentioning that the Latin American region has experienced from the 1990s to date an important evolution of reforms in favor of the market economy, the promotion of private investment and the culture of competition, as fundamental pillars of sustainable economic development.

Fundamental is to test how resilient an institution is to political or economic shocks. Intellectual infrastructure is for paramount importance. Generating incentives and locks for the continuity of the authorities' staff is an ongoing challenge. Chile, Brasil and Mexico would be examples of a gradual and continuous process of upward mobility and improvement, with institutions that have found formulas for stability and effectiveness.

Countries in the region are committed to achieving international standards for the protection of the effective competitive process and have consolidated regulatory frameworks with legislative reforms. In the last decades many of them have amended substantive provisions of their competition laws, in particular merger control and the leniency programme.

Most Latin American and Caribbean countries have merger control. For instance, Peru already has merger control since 2021, in which as academic of counsel I was directly involved in the drafting of the text, Law 31112. The UNCTAD participated in the technical assistance and I would like to express our gratitude for the important contribution. Other countries, like Chile has established a mandatory merger notification since 2016, Argentina has a merger control regime since 1999 but only in 2018 modified it from ex post control to ex ante control, and Brazil also introduced the ex ante control model in 2011. In Mexico, after the 2013 constitutional reform, the new competition law was introduced in 2014.

[DIGITAL ECONOMY]

Although the digital economy is global and we are witnessing the rampant advancement of technology, it is necessary to note the differences in the assessment of cases between developed and developing countries, in particular in the application of the theory of harm. This leads us at the same time to consider the size of the economy and socio-economic issues as a starting point in reflections on the resulting differences. We could cautiously summarize it in three aspects: 1) generation and access to data, 2) availability and access to digital infrastructure, 3) perception of the added value of the use of digital technology in market transactions.

Indicators of infrastructure, coverage and access to the Internet in the region show levels below those of developed countries. Besides that, the lack of detailed information also limits the possibility of justifying broad or narrow relevant markets using empirical evidence.

I would like to refer in an illustrative way to the assessment of the implementation of regulatory frameworks in the digital economy and the treatment of cases in Latin America region. This will be brief but to the point due to the time available for this presentation.

Walmart's acquisition of Cornershop was assessed in Mexico and Chile, with different results. In Chile the transaction was approved, but not in Mexico.

The merger was banned by the Mexican Authority on concerns, among others, that it would allow Walmart Mexico to harness its market power in physical space into the digital marketplace, but Walmart Mexico is essentially an intermediary of a wide range of grocery products. None of these products gives Walmart the ability to block the entry of any competing platform.

The Chilean authority's arguments to rule out the risks were: prior to the transaction, Walmart only used Cornershop and Cornershop was focused on Walmart; supermarkets' online transactions do not amount to 1% of purchases in physical shops and there are no insurmountable barriers to entry and expansion for new apps to emerge. . It is striking that one of the largest online retailers is Walmart, but these does represent less than 2.3% of its revenues.

The Chilean authority indicated that these markets are highly dynamic and that there is uncertainty about their evolution

The analysis of these two cases shows the evolution of the theories of harm used, the risk of competitive pressure. The divergences in the analysis and decisions made by the agencies in each case.

[FOREIGN DIRECT INVESTMENT]

Another interesting aspect worth mentioning is that in recent years foreign direct investment has increased significantly globally, providing a source of capital and at the same time stimulating competitive forces. In this respect, there are various legal frameworks in the EU, USA, Germany, France and the UK that establish a review procedure for FDI in specific strategic sectors. In countries of the LAC region, there are legal frameworks for the promotion of foreign investment and chapters in Free Trade Agreements that allow the entry of foreign capital in different economic sectors.

However, in the case of natural monopolies, in the case of a single operator, in the field of energy generation or distribution, exploitation of natural resources or mega-ports operation, due to the concession, open the discussion about the legal framework to assess the effects on strategic markets is being analyzed, especially when it comes to FDI operations as a result of a business concentration operation. When it comes to the debate at the Parliament, it will be necessary to distinguish the goals of competition policy from other public policies, a task that will be complex due to the questioning of the origin of the incoming capital and the profile of the strategic sector.

[REGIONAL INTEGRATION]

It cannot be overlooked that in a globalized world, where several multinational companies have revenues larger than the GDP of several countries, regional competition agencies may be a way of solution to effectively prosecute international cartels and control multinational concentrations.

In the Latin American region, the integration process of the Andean Community through its Court of Justice has produced important results in the field of intellectual property and collusive practices. The CAN was established by the Cartagena Agreement in 1969 and its current members are Bolivia, Colombia, Chile, Ecuador and Peru. Decision 608 is the legal framework for competition policy, which does not address merger control. In this respect, not only the Tribunal but also the Andean Committee for the Defence of Free Competition, as an organ of the CAN system, needs to be empowered, but this requires political will and a sufficient budget for regulatory reforms.

[CONCLUSIONS]

Coming to the conclusion section, I would like to point out the following.

Latin America is a region where there are countries with lower and mid- income levels, and the degree of institutional development of competition authorities is not directly related to the constitutionalisation of the principle of competition, there are some other factors. It is rather the experience and capacity building that explains its evolution. International organisations such as UNCTAD contribute significantly to this process.

While the digital economy is a catalyst for prosperity and innovation, it is drawing a new map of economic power, which must be analysed in its true dimension under the recognition not only of legal instruments and economics, but the knowledge of market characteristics in jurisdictions of less developed economies and the education and capacity building programs for policymakers within the digital landscape. It is a challenge for authorities to work with sophisticated instruments in markets where access to and use of technology is somewhat different in less industrialized economies.

It is very important to facilitate peer-to-peer exchange and disseminate good practices among Member States in order to enforce effective and solid competition policy.

[THANK YOU VERY MUCH]

With thanks for your kind attention I would like to express my distinguished greetings to other colleagues, specially to Mrs. Teresa Moreira, Yves, Juan Luis and the members of the panel. I look forward to keeping in touch.

Thank you.

TZF/.