

UNCTAD Research Partnership Platform Fifth Meeting, 11 July 2014

Summary of Discussions

The Research Partnership Platform (RPP) held its fifth meeting on 11 July 2014 at the Palais des Nations, Geneva with the participation of over 85 people from competition authorities, consumer protection agencies, universities and research institutes.

The meeting comprised of several parts: project coordinators provided updates of on-going and completed research projects; presentations of new project proposals were given by researchers; partners of the RPP were given the opportunity to present their own research; and a special interactive session was held on the Journal of Antitrust Enforcement.

Opening statements were given by Hassan Qaqaya, Head of the Competition and Consumer Policies Branch, and Graham Mott, Coordinator of the UNCTAD RPP.

On-going and Completed Projects

Measuring the Economic Effects of Cartels in Developing Countries

Aleksandra Khimich, PhD candidate at the Toulouse School of Economics, presented the findings of a research project to identify the level of economic harm caused by cartels in developing countries.

The research used a dataset compiled for the years 1995-2013, across a number of developing countries. Data was aggregated and related to GDP in order to estimate harm to the economy. Based on this data, the hypothetical market conditions without cartelisation were simulated using an econometric methodology and compared to existing conditions that are characterized by the presence of cartels. This allowed for the calculation of price overcharges and output effects.

Results from this process show that overcharge of cartels vary between 20-30%, with aggregate excess charging accounting for losses of up to 1% of GDP, which justifies the attention and intervention of competition agencies. Ms Khimich was keen to highlight that these results represent minimum figures due to the issue of missing data. For instance, deterrence rates (probability of cartels being detected) are around 24%, so only 1 in 4 cartels is detected.

In the following discussion, many questions were asked about the quality of data. Ms Khimich pointed out that one of the problems was that in many cases the data did not exist; many competition agencies in developing countries simply did not record the relevant type of pricing data and only used market share or profit indicators as evidence. In response to questions of the methodology's application to other countries, it was stated that it can be applied to any country as long as the parameters concerning market shares and prices were available.

Competitive Neutrality

In the absence of the project coordinator, Deborah Healey, Senior Lecturer at the University of New South Wales, Graham Mott, coordinator of the UNCTAD RPP launched the first publication in the UNCTAD RPP Publication Series: *Competitive Neutrality and its application in selected developing countries*.

Competitive neutrality policy is very important because this mechanism ensures a level playing field for competition where government businesses may have advantages merely because of their government ownership or control. Systematic consideration of the issues is essential to determine the most appropriate method to implement competitive neutrality within a jurisdiction. In this context, the project explores competition neutrality issues in China, Malaysia, Vietnam, India and also in international agreements.

The publication is available online:

<http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Competitive-Neutrality.aspx>

Competition Law and the State

Prof. Eleanor Fox, New York University School of Law, presented findings of the RPP Project on Competition Law and the State, conducted with Deborah Healey. Firstly, it was pointed out the issue addressed by this project is the extent to which competition law, not just policy, covers state anticompetitive conduct and measures. Often the State is the biggest barrier for competition enforcers. Prof. Fox emphasized that a principal challenge is how to draw a line between rogue acts, unwise anticompetitive acts and legitimate acts. To this there is an important normative part e.g., how far should the law go, a set of principles etc.

As well as presenting some of the results gathered from the questionnaires distributed to selected competition authorities, Prof. Fox suggested that the project may be further extended and proposed to go forward with UNCTAD to discuss the promotion of six norms. It was suggested that it would extremely useful to invite UNCTAD members to present examples of how to deal with State activities, and to include these in the UNCTAD Model Law.

Benchmarking Competition Systems

In this presentation, Ms. Marianela Lopez-Galdos, George Washington University, described the Benchmarking Competition Systems Project, which carried out a study that benchmarked the major institutional characteristics of competition authorities. By virtue of this research, being the first study of its kind, there was no relative material for reference and this vacuum required further input. The presenter emphasized that the objective of this study was to shape and influence the implementation of competition policy and law by synthesizing the different elements that characterize the existing competition authorities worldwide. It was further underlined that the finding of the best institutional frameworks based on comparison was out of the scope of this project. Questionnaires defining the institutional characteristics were circulated amongst competition authorities worldwide and responses were received from 121 competition systems embracing more than 125 competition agencies; with findings covering institutional characteristics such as independence, accountability, governance, architecture, policy duties, policy making agents, portfolio of policy instruments and decision making functions. Ms. Lopez-Galdos reported that much work had been carried out in the last year in clarifying and refining questionnaire responses, as some agencies had misreported.

In the following discussion, it was highlighted there had been many recent changes in institutional design, partly motivated by crises, efficiency gains and synergies. Ms López-Galdos agreed that reforms are on-going but while many agencies are progressing, unfortunately some agencies are going backwards.

Presentations of Partners' Research

Explaining variations across antitrust regimes

Prof. Anu Bradford, Columbia Law School, presented a project described as the most ambitious data-driven research project on international competition law and enforcement to date. Its goal is to explain what drives different competition laws and enforcement priorities around the world. For example, by examining whether differences in competition laws and enforcement trends can be explained by countries' level of development, size of their economy, regional economic ties, openness to trade, or maturity of the agency. For this purpose, the project is collecting information about countries' competition laws and enforcement resources and practices, and will aggregate this data into a large dataset that will allow for the detection of larger trends in laws and enforcement practices globally and regionally. In addition to gaining an enhanced understanding of competition laws and enforcement around the world, the project is measuring the extent to which countries cooperate with each other on competition matters. For this purpose, the project is collecting and analysing the texts of cooperation agreements among competition enforcement agencies, as well as examining whether countries include

provisions on antitrust laws in their preferential trade agreements with their trading partners. This allows for the measure of the extent to which anti-competitive practices are perceived as global in their nature and gain an understanding of the extent to which enforcement activity takes place across the borders as a result.

In the ensuing discussion, Prof. Bradford outlined a three year timetable for the project and stated that expectations were that many articles would arise from this project. Hassan Qaqaya stated that UNCTAD had conducted research into PTAs, where over 1000 provisions had been identified. Furthermore, UNCTAD has a depository of competition laws in the Handbook of national legislations. All of these resources would be made available the project.

External vs. Internal: The evolution of China's competition regime

Ivo Krizic and Lei Wang, University of Lucerne, presented their research, the aim of which is to analyze the internal and external drivers in the formation of new competition regimes. Drawing on the concepts of external governance and international policy diffusion, the presented paper takes the enactment of China's Anti-Monopoly Law (AML) as a case study to scrutinize the various channels through which emerging competition policy regimes have been shaped. The presenters first illustrated the limits of recent research, suggesting that the AML is essentially the product of EU competition rule "export". Recognizing the specific features of China's competition regime, the presented research then investigates the domestically driven process of inspiration from abroad and customization to domestic conditions. By highlighting the diversity of sources in domestically driven rule selection, the paper makes a first step towards capturing the complex diffusion process in international competition policy. The presenters concluded by stating that there is not simply a direct transplant

Balkans Comparative Study: Comparative overview of the Balkan competition regimes

Dimiter Iliev, Commission on Protection of Competition, Bulgaria, began with an introduction of the establishment and composition of eight Balkan Competition Authorities. The study presented explores a wide range of issues, including: competence and independence of competition authorities; comparisons of records of enforcement on prohibited agreements, abusive conduct and merger reviews; comparisons on priority setting, investigative powers, requirements for inspection, and powers during inspections; comparisons on judicial review and action for damage; and comparisons on competition advocacy.

African Competition Forum: Six Country Research Study

Omar Jobs, African Competition Forum, outlined some of the initiatives of ACF research, including: competition and market assessments for critical economic sectors (cement, sugar and poultry), promotion of international cooperation, and linking research to training and capacity building.

Regarding the market assessments, it was stated that these goods were chosen as there is a huge infrastructure deficit in Africa (cement) or they are essential household consumable supplies (sugar and poultry) The assessments cover the jurisdictions of Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia

The cement study found high market concentration, one producer across three countries accounts for more than 50% of production capacity (Zambia, Namibia and Kenya), and 3-4 producers across three countries accounts for 80% of production capacity (SA and Tanzania). A cement cartel across these countries operated until 2009 and the study makes comparisons of ex-factory prices across Zambia, Kenya, Tanzania, South Africa, Botswana and Namibia. The study concludes that low levels of effective competition in the cement market have substantial negative impacts for countries' economies, such as increasing the costs of investment and infrastructure, and raising prices to consumers. Price comparison indicates that more competition leads to much better prices, whereas trade barriers reinforce the market power of big companies.

Special Interactive Session from the Journal of Antitrust Enforcement

Ariel Ezrachi, Oxford University Centre for Competition Law and Policy, presented a review of the activities of the Journal of Antitrust Enforcement.

He began by outlining that the idea behind the Journal was to bridge the gap between the enforcement and legal theory, and provide more detailed discussion on core enforcement instruments.

The presentation continued with an introduction of the antitrust enforcement symposium, which aims to collect and capture unusual features of competition policy – many of which are related the developmental needs of competition authorities. In total, a survey poses 44 questions, and as well as gathering information, it is hoped that this process triggers authorities to think on both their role and operation, not solely the goals of the authority. The survey covers issues such as: agency appraisal, capacity building, objectives, board

and staff, media, independence and personal experience (indeed some very personal issues, such as mistakes made).

The special session continued with a panel discussion of the Symposium, with a panel comprised of: Prof. Caron Beaton-Wells, University of Melbourne Law School; Mr Tembinkosi Bonakele, Commissioner, South Africa Competition Commission; Prof. Eleanor Fox, New York University School of Law; and Mr. Pablo Marquez, Executive Director, Colombian Commission for Communications Regulation.

Presentations of New Project Proposals

The convergence between competition law and intellectual property

Hebert Tassano, INDECOPI, Peru presented the relationship of these two policies from the perspective of Peru's experience. Firstly, the structure of Peru's competition law and IP institutions were outlined and it was stated that developing countries experience a greater number of problems in the area of this convergence. Competition law and intellectual property share the common goal of promoting innovation and enhance consumer welfare due to the inclusion of technical progress as an essential process of competition. This has led us to a new vision of the relationship between the two disciplines, noting that although there may be some apparent conflict in the short term, in the long term objectives are in harmony.

The first possibility for this relationship is competition cases which involve IP. However it was stated that Peru has no experience in this area to date. The second possibility is compulsory licensing, which is the ability to use and exploit a patented product without authorization of the patent holder, in particular cases and properly defined by law. Mr Tassano presented Peru's considerable experience in this area.

Mr Tassano concluded that the interface between competition law and intellectual property does not mean there is a collision between two. In order to develop public policy to harmonize this relationship, INDECOPI has created the School of Competition and Intellectual Property; a space for reflection and discussion.

The role of technical assistance

Niamh Dunne, Centre for European Legal Studies (CELS), University of Cambridge began by outlining the concept of technical assistance (both the narrow and broader sense) and the distinction between it and capacity building. The project proposed will explore the motivation (internal and external drivers) of the providers and receipts of technical assistance and a

major target of political aspect of this research will to address questions such as: What is the role of technical assistance in developing competition policy worldwide? Who are the main players? How does it impact on the development of competition policy?

Ms Dunne highlighted technical assistance provided by specific national CAs and by multilateral networks (e.g. OECD, UNCTAD and World Bank) as a key research resource. The project would be based on a qualitative, rather than quantitative, assessment of the motivations for, and impact of, technical assistance, carried out through a series of case studies.

Finally it was stated that the overall aim of the project would be to understand technical assistance, not merely as a technical phenomenon, but also a political one.

Competition and Concentration in Latin American emerging economics

Tania Zuniga-Fernandez, CEPIC, ESAN University, Lima, Peru, presented her project proposal, the objective of which is to identify the performance outcomes and difficulties Latin American emerging economies have to face when applying merger controls in different economic sectors.

The research will seek to establish an analysis and in-depth comparison of the characteristics of merger control regimes applied in a number of Latin American emerging economies. Argentina, Brazil, Chile, Colombia and Peru have been selected for this survey.

This approach will require a country focus, and is very demanding not only in terms of the legal analysis but also of the institutional knowledge, the economic influence of trade agreements and foreign investments on the country in question. This research is thus not looking for a single factor to explain the difficulties of the antitrust enforcement, but rather for a multiple-factor approach.

This project will consist of legal framework case studies; analysis of questionnaires sent to CAs; and a final report