

# **UNCTAD Research Partnership Platform Fourth Meeting, 7 July 2013**

## **Summary of Discussions**

The Research Partnership Platform (RPP) held its fourth meeting on 7 July 2013 in Geneva with the participation of over 60 people from competition authorities, consumer protection agencies, universities and research institutes. The meeting was held in two parts. In Part I, project coordinators provided updates of ongoing research projects and during Part II, presentations of new projects were given by researchers.

### **Part I. Ongoing Projects**

#### **Session 1 - Competitive Neutrality**

Deborah Healey, Senior Lecturer at the University of New South Wales made a presentation on the Competitive Neutrality Project. Competitive neutrality policy is very important because this mechanism ensures a level playing field for competition where government businesses which might have advantages merely because of their government ownership or control. Where competitive neutrality mechanisms are in place the most efficient competitor will be able to supply goods and services at the lowest price. Competition issues arising from the relationship between competition policy, industry policy and state capitalism were recognised. Systematic consideration of the issues is essential to determine the most appropriate to implement competitive neutrality within a jurisdiction. In this context, the presenter shared the successful experience of Australia, where competition policy reforms have corporatized government business and separated commercial activities from those of the regulator, and a comprehensive competitive neutrality policy implemented. This involves determining the potential competitive advantages and disadvantages of government business, and in this respect OECD Recommendations 2012 outline eight priority areas for reform: operational forms of government business, cost identification, rate of return requirements, public service obligations, tax neutrality, debt neutrality, regulatory neutrality and public procurement. The project has so far received contributions from China, Malaysia, Pakistan, Switzerland and Russia. By analysing the responses from these countries, the presenter suggested the one approach: (a) addressing the advantages which might accrue to SOEs in all jurisdictions; (b) a complaints-based process involving the competition regulator is likely to be an effective tool; (c) allowing competitors to complain where they believe that playing level was not fair for them. In some jurisdictions the implementation of a comprehensive system would not yet be appropriate and an advocacy response by the competition agency may be more appropriate.

During the following discussion, project volunteers Prof. Shiyong Xu and Ms. Wan Khatina updated the meeting on the development that has been made in China and Malaysia respectively. In China, the Report to the Eighteenth National Congress of the Communist Party of China raised the issue of competitive neutrality policy for the first time, indicating the importance of ensuring that economic entities under all forms of ownership have equal access to factors of production in accordance with the law, compete on a level playing field and are protected by the law as equals. In Malaysia,

under the background of liberalization, there is political will to involve competitive neutrality into the policy and legislation frameworks. A participant asked for more details on the approach adopted for competitive neutrality policy at the global level. In reply, it was stated that the international framework was evolving, in response to new and internationally active SOEs. Many of the provisions addressing the competitive neutrality issue at an international level were contained within bilateral fair trade agreement.

### **Session 2 - Competition Law and the State**

Prof. Eleanor Fox, New York University School of Law, presented the intermediate 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. Prof. Fox emphasized that a principal challenge is how to draw a line between rogue acts, merely unwisely anticompetitive acts and legitimate acts. The central questions addressed by the questionnaire sent to competition authorities worldwide were outlined: (a) the applicability of competition law to SOEs; (b) privileges or exemption granted to SOEs; (c) laws against anticompetitive state and local measures; (d) state action defense; (e) remedies against the state. So far, 33 countries have provided responses and the intermediate findings of the research were: (a) all competition statutes cover SOEs; (b) about 70% of the respondents granted privileges to SOEs; (c) about 60% of the competition statutes cover state bodies; (d) less than one-half of the respondents allow for state action defense. EU's legislation was taken as a model of a more aggressive approach to invalid state measures. To draw the conclusion, Prof. Fox suggested four ways to address this problem: (a) democracy; (b) advocacy; (c) other specific law; and (d) competition law.

During the following discussion, one participant raised concerns of how a corrupt official, who facilitates procurement bid rigging but is not a member of the bid rigging cartel, could be held liable under competition law and asked of other cases at the international level. In response, it was stated that the EU holds facilitators liable and outlined an EU Swiss case, involving AC Treuhand. The same participant also asked whether law against abuse of administrative monopoly has ever been effective. Prof. Fox cited a Chinese case in which the law did work; the Chinese competition authority complained to the provincial government that had imposed the restraint and the provincial government lifted the restraint. Prof. Fox further highlighted the essentiality of a flexible approach for state governments to make national choices.

### **Session 3 - Benchmarking Competition Systems Project**

In this session, Ms. Marianela Lopez-Galdos and Ms. Elisa Ramundo, George Washington University gave a presentation on the Benchmarking Competition Systems Project. This project 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 presenters 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. The intention for this work is to provide a database for jurisdictions willing to create or reform competition authorities. The presentation was closed by stressing that additional analysis was required and sufficient institutional design experimentation was worth observing.

In the related discussion, one participant stated that considering whether or not the institutional framework was successful depended on demand and asked how it could be known if the authority structure had any influence of law. Further, it was asked if a causal link had been found between institutional characteristics and performance efficiency. Another participant expressed interest to know the differences of common institutional characteristics, between a good competition authority and a general regulator. One participant suggested other characteristics, such as the size of the budget, which might be relevant to efficiency. Finally, it was stated that the institutional characteristics might also have influence on priority setting.

#### **Session 4 - Competition Law and Aggregate Concentration**

This research project was presented by; Prof. Michal Gal of University of Haifa Faculty of Law, and Professor Thomas Cheng from the University of Hong Kong, Faculty of Law. The objective of this study is to examine to what extent competition law addresses and provides remedies to competition-related problems arising from high levels of aggregate concentration. For this purpose, aggregate concentration was defined as a small group of economic entities controlling a large part of the economic activities through holdings in many markets. It was emphasized that although high aggregate concentration levels are common in small economics, this phenomenon was not unique to them. As recent economic studies have indicated, aggregate concentration will raise competition concerns, such as: (a) increasing oligopolistic coordination; (b) strong deterrence for the entry or expansion; (c) stagnation and poor utilization of resources; (e) political economy concerns; (f) possibly limiting efficient regulation and (g) the “too big to fail” problem. To establish the “theory of harm”, questionnaires was distributed to competition authorities around the world, addressing the legislation and remedies that maybe relevant to aggregate concentration. Finally, case studies on Japan and South Korea were presented. The history of Zaibatsu in Japan and Chaebols in South Korea were recalled, and the legislation which may be relevant to aggregate concentration was discussed.

In the following discussion session, one participant referred to the background of prevalence of “business groups” being the predominance of industry policy within the economic policy framework. By giving the example of the important role which the structural problem of South Korea’s banking played at the time of the 1990’s crisis, it was added that once national economic policy shifted, the concentrated market structure would produce problems. Another participant stated the pros and cons of business groups and that these produced a conflict of different policy objectives; with a choice to be made between economic democracy and economic efficiency depending on the context of each country.

## **Session 5 - Research Presentation: Cartel Enforcement in Selected Latin American Countries, Present and Future**

Dr. Ivo Gagliuffi, (Partner of Laze, De Romana & Gagliuffi Abogados) presented a project on Cartel Enforcement in Selected Latin American Countries. In comparing antitrust legislation and polices 10 areas were considered: (a) legislation; (b) competition authority; (c) exemptions; (d) sanctions; (e) procedure; (f) ex-officio causes; (g) powers of the Agency; (h) competition advocacy; (i) international cooperation and (j) principle antitrust cases. In selected COMPAL countries (including Mexico, Guatemala, Dominican Republic, El Salvador, Honduras, Nicaragua, Costa Rica, Colombia, Ecuador, Peru, Bolivia, Paraguay and Uruguay), perspectives of the specialists were identified to improve antitrust policies and legislations in each country in order to increase the fight against cartels. Dr. Gagliuffi concluded: (a) the gap of significant differences at the level of experience and case studies can only be reduced through experience exchange; (b) the role of competition advocacy to change the market culture should be strengthened; (c) international cooperation, particularly regional cooperation should be encouraged by the government to investigate cross-border cartels.

## **Part II. New Projects**

### **Session 1- Interaction between Regional Competition Law Systems and National Enforcement.**

The first of the new project proposals was presented by Prof. Frédéric Jenny (Co-Directeur du Centre Européen de Droit et d'économie, ESSEC Business School). It was stated that the issue of the interaction between the competition law system at the regional level and the national competition law systems and as such, this research project aims at exploring the various facets of the potential conflicts and complementarities arising from this interaction. It was stated that the ultimate goal of the project would be to provide policy recommendations based on analysis of the mapping of out different dimensions of interactions across all regional groupings, in order to compare the solutions adopted in each possible area of conflict or complementarity. The presenter outlined in detail some of the characteristics that would be assessed. Following the presentation, a lively discussion took place concerning previous work that had been undertaken on the effectiveness of regional systems of competition law and the implications for this project.

### **Session 2 - Integration of Economic and Econometric Evidence in Competition Law**

Dr. Ioannis Lianos, University College London, presented a new project proposal on Economic Evidence and Econometrics in Competition Law. Both economic theory and econometric techniques have progressed at a fast pace over the last two decades. Competition authorities and litigants worldwide have increased the use of economic quantitative methods and economic expert witnesses as a means to produce and support evidence in antitrust cases. This research focuses on the admissibility and assessment of economic evidence and econometrics in competition law, by identifying the most commonly used quantitative techniques in antitrust analysis, qualifying their

use in competition law and studying whether it is possible to make a causal claim in law based on econometric evidence.

### **Session 3 - Best Practices of Consumer Redress**

In this session, a project on best practices of consumer redress was presented by Dr. Ying Yu, Fellow at the International Law Institute of Wuhan University. The functions of Consumer Protection Law include regulating behavior and correcting misconduct by service providers and providing redress for consumers when something goes wrong. However, the second function is somewhat overlooked by both international and national consumer policy and law. The objective of this research is to compare and analyse some of the best practices of effective consumer redress in different jurisdictions, and draw a clear picture of the circumstances under which the individual practices function well. Another area that may raise concern is the difficulties in resolving potential cross-border problems following the development of e-commerce, migration and tourism. In this context, the expected result of the project research will come up with suggestions regarding the possibility and the practical approach to building up an ADR (ODR) Platform of Cross-Border Consumer Redress globally.

### **Session 4 - Broad Competition Policies for Least Developed Countries**

The last presentation of the RPP meeting was given by Dr. Graham Mott (Economic Affairs Officer, UNCTAD), on Broad Competition Policies for Least Developed Countries. The objective of this project is to investigate the benefits of implementing a broad competition policy framework for the least developed countries, based on the reality that about 40% of the UN Member States have neither a competition statute nor authority. In many cases, these may be lacking due to considerations of limited professional and economic resources, lack of political will or a suitably supportive environment. Competition policy is very important for developing countries, because it can play: (a) a vital role in assisting to strengthen market-supporting institutions and implementing inclusive development strategies; (b) a key role in any market-oriented economic reform and pro-poor development strategy. Dr. Mott suggested that the project focus on a number of key areas for analysis of the broad competition policy framework in least developed countries; public procurement system, privatization, sectoral regulation, corporatization of SOEs and the effects of broad competition policy on governance.