United Nations TD/B/C.I/CLP/9

United Nations Conference on Trade and Development

Distr.: General
10 May 2011

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Eleventh session
Geneva, 19–21 July 2011
Item 3(a) of the provisional agenda
Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law, and studies related to the provisions of the Set of Principles and Rules

The importance of coherence between competition policies and government policies

Note by the UNCTAD secretariat

Executive summary

This background paper examines the interface between competition policies and other government policies. Coordination between various government policies is an important element to the realization of policy goals set by various governments in pursuit of improving the overall welfare of their people. When government policies are not harmonized, in terms of coverage and implementation coordination, the likelihood of achieving the desired results is hampered and the policies may be ineffective.

This paper attempts to define what policy coherence is and is not, and explores the need for coordination between competition policy and other government policies. It points out the potential benefits of coherence, as well as strategies for achieving coherence. Finally, it identifies policy issues and areas for further research.

Contents

Introduction

1. The primary sources for information in this note include UNCTAD studies, submissions received from member States in response to a questionnaire,[1] country submissions to the UNCTAD round-table meetings held on similar topics in 2008 and 2009, peer review reports from 2005 to 2010, contributions to the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices held on 8–12 November 2010, and publications of the International Competition Network (ICN) working groups and the Organization for Economic Cooperation and Development (OECD) round table held on the topic. The paper also draws on competition authority websites, and on the available academic literature.

I. Definition of terms and concepts

A. Competition and competition policy

2. Competition can be defined as the pressure exerted in the market by different players in search of market shares and profits. It is a game of outdoing one another in winning customers, so that customers will purchase a given company's goods or services. Competition is one area of market dynamics which calls for policy design. An UNCTAD study puts it as follows: "Competition policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop."[2] Competition policy has a broad dimension which includes all other government policies that promote competition in the market. Inter alia, such policies include consumer protection, investment policy, intellectual property rights (IPRs) and industrial policy.

3. When considering the role of competition law and competition institutions, the issue of coherence with other government policies that have a bearing on competition cannot be ignored. The link with other government policies creates a need for competition advocacy, which is an integral part of the enforcement of competition law and a driver towards enforcement coherence with such policies.

4. The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices recognizes the development dimension of competition policy, and urges member States to promote competitive markets as channels towards economic development. In this sense, effective competition can be considered as an important element of an economic development strategy. In an attempt to attain this goal, competition laws in many developing countries capture other policies – for example, the promotion of small and medium-sized enterprises, public interest objectives including formally disadvantaged parts of the population, the creation of employment, the promotion of exports, and exemptions for intellectual property rights (IPRs), to name just a few. The

[1] Responses to the questionnaire were received from Australia, Austria, Benin, Bhutan, Bulgaria, Burkina Faso, Chad, Chile, Colombia, Cyprus, the Dominican Republic, the European Union, France, Germany, Greece, Honduras, Hungary, Indonesia, Iraq, Japan, Malaysia, Mexico, Morocco, the Philippines, Portugal, the Republic of Korea, Senegal, Serbia, Slovakia, Spain, Sudan, Switzerland, Thailand, Tunisia, Turkey, Ukraine, Uruguay, the United States, Zambia and Zimbabwe.

[2] UNCTAD (2010). The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy. TD/RBP/CONF.7/3.

fact that competition laws explicitly encompass other policy mandates that are handled by other government bodies calls for policy implementation coherence. This is in order to avoid conflicts and duplication of efforts, or unjustifiable weakening of the competition process as the principal driver of economic development.

B. What is policy coherence?

5. Recently, during a high-level plenary meeting,[3] the United Nations Economic and Social Council (ECOSOC) called for "efforts at all levels to enhance policy coherence for development, noting that accelerated progress in achieving the Millennium Development Goals required mutually supportive and integrated policies across economic, social and environmental issues for sustainable development." The United Nations recognizes the importance of policy coherence across all development-supporting sectors. Furthermore, policy coherence is becoming an increasingly important concept in the development agenda of many countries – both in the developed and the developing world.

6. Governments in developing countries – as elsewhere – pursue many objectives which may not always be compatible. Coherence is an increasingly important element of development policy. It requires policymakers, when designing domestic policies, to be aware of the possible impacts – both negative and positive – on their economies. And it requires policymakers, when implementing their domestic policies, to take steps to avoid any negative impacts from inconsistencies in their economic policies on development, and, where possible, to seek to create positive spillover effects. Looking at national government structures, policy coherence issues could occur between different types of public policies, different levels of government, and different stakeholders, and even at the regional or international level.

C. Why is policy coherence ideal?

7. Looking at the development perspective of any nation, policy coherence implies that, while governments pursue national policy goals and objectives in areas such as trade, competition, investment, agriculture and the environment etc., they should try to avoid duplication, tensions and unnecessary conflicts. At the regional and international level, policy coherence entails avoidance of implementation overflows which negatively affect other member States of a regional grouping or other players in the world arena.

8. However, there are instances where policy coherence may not be feasible. For example, when there are liquidity problems and the government treasury needs to raise more funds to balance the fiscal budget, policy incoherence may arise if the government wants to sell a public enterprise, or if it wants to sell an exclusive concession, where the privatization or the concession may cause the new enterprise to abuse its dominant position, affecting competition. This may result from a failure by the ministry to seek the views of competition authorities, where they exist. Typically, such decisions are political.

9. To promote economic development and the well-being of citizens, governments – while they are designing new policies – should establish mechanisms to examine possible areas of tension, and they should use these as a means of improving coordination and establishing dialogue with the parties concerned. The debate on policy coherence can

[3] Note by the United Nations Secretary-General on coherence, coordination and cooperation on financing for development, from the special high-level ECOSOC meeting held in New York on 10–11 March 2011. See http://www.un.org/esa/ffd/ecosoc/springmeetings/2011/Programme.pdf.

contribute to the development objectives of a nation in terms of adding value to the process of good governance, by enabling policymakers to identify priorities and areas needing further analysis and action, as is explained below.

D. Types of policy coherence

10. Coherence can be classified as vertical or horizontal, and may have intended or unintended consequences. A vertical relationship exists in cases where in a government ministry, there are two different policies dealing with a related aspect of the market. An example would be if the finance ministry in country A was dealing with competition, insurance and banking policies. A policy clash can occur if there is an anticompetitive banking merger which the central bank wishes to authorize, or if the insurance commission endorses a price-fixing arrangement between the members of the association of insurers. Coherence can be internal, external, or intra. In this example, the minister has to deal with coherence issues arising from the three entities within its vertical relationship, with each institution operating in its own mandate space, while at the same time considering the overall vision of the ministry. This type of relationship between policies administered by the same government organ/ministry is also referred to as internal.

11. Horizontal arrangements can be found in cases where the policies being considered are administered by different ministries. Coherence in such cases is also referred to as intragovernmental. The interplay between competition authorities and sector-specific regulators falls under this category.

12. Coherence between policies that involve external aspects, trade, and foreign policy is known as external coherences. The advent of bilateral, regional and subregional trade agreements containing competition provisions has created the need for external policy coherences, in terms of how the enforcement of regional competition policies relates to national competition laws, and with other policies contained in the agreements.

13. The factors that affect coherence could be institutional, or they could relate to the way in which policies are implemented, or to the legal mandate – provided by instruments – which brings the policy into action. These instruments could be in the form of acts of parliament, laws, decrees, rules, or regulations that take the form of secondary legislation.

E. Competition and other government policies: What coherence does not mean

14. When examining coherence between competition policies and other policies, the focus should be placed on achieving the development goals of a specific country. This does not mean that all national goals and development objectives are achievable via market solutions. There are many social, political and economic goals that need other solutions in order to enhance total welfare. For example, in order for postal services to reach consumers in remote areas, the government may have to subsidize these services, rendering market forces ineffective in meeting such needs.

15. On the other hand, coherence does not mean that competition policy is the answer to all economic and social challenges. Depending on the circumstances at hand, other policies may be more appropriate. In times of natural disasters and other crises, governments find themselves operating outside their usual business, in an attempt to mitigate the impacts of the crises. At such times, there is a need to re-examine competition policy in terms of the

need to accommodate the temporary market distortions, and not to consider these actions as policy incoherence. The response from the United States[4] to UNCTAD's questionnaire states that although competition is vital to the promotion of consumer welfare, it is not the only tool, and that governments have to make decisions as to how the balance between competition policies and other policies is maintained, in order to promote the well-being of their people.

16. To promote proportionality, competition law enforcement agents should lend a listening ear to other policy actors. Competition authorities should look at the whole policy spectrum. As much as they would want to promote competition principles, there should be consideration of other policy objectives of promoting competition in the market, so that they can then strike a balance. They should also take up the role of encouraging other regulators to undertake an assessment of regulatory impacts.

II. The role of various policies in promoting economic development

17. There is consensus among many researchers that competition should be geared towards a particular measurable goal. Some scholars have pointed out that competition policy should have as its principle objective the maintenance and encouragement of competition in the market in order to promote economic efficiency and consumer welfare. Since anticompetitive practices exist in all markets, one question that needs to be addressed is: How long should anticompetitive conducts or their effects be tolerated? And how should competition policy be introduced?

18. The necessity for and introduction of competition law should be sequenced among the range of macroeconomic and microeconomic policies that governments need to address from time to time, which varies from country to country. For example, countries restructuring their economies develop all kinds of policies to address the various aspects of the reform process. In most cases, there is no coordination mechanism put in place to guide this process. Shyam Khemani (1997)[5] points out that particular government policy actions are guided by prevailing circumstances, which usually leave governments without many policy choices or room for manoeuvre.

19. Rotmans et al. (2001)[6] add that structural adjustment policies such as liberalization and privatization were the most important economic priorities in the 1980s and 1990s for countries wishing to move from state-controlled economies to competitive private-sector-driven markets. In the transition periods, governments had to come up with regulatory policies and laws – including competition policies to ensure that the process of creating competitive markets was not hampered by anticompetitive practices. The conversion of public monopolies to private monopolies and oligopolies was a major concern during that period. Policies on competition, on investment, and on export promotion were among the regulatory policies that governments introduced. Such sets of policies usually fall within the ambit of different ministers who have specific mandates, goals and visions, and their approach to market regulation is, in most cases, diverse.

[4] See the response of the United States to the UNCTAD questionnaire, at http://www.unctad.info/en/6th-UN-Conference-on-Competition-Policy/

[5] Shyam Khemani R (1997). *Competition Policy and Economic Development.*

[6] Rotmans J, Kemp R, van Asselt M (2001). More evolution than revolution: transition management in public policy. In: *Foresight*. 3 (1). February.

20. With this in mind, the government needs to create systems and to establish mechanisms for dialogue and exchange of information among policymakers and operatives in order to minimize conflict and to promote policy coherence. The dialogue system makes transition less painful to society, as new challenges and bottlenecks are discussed, and with the assurance of support from the government machinery, it can act as a stimulant to the development of new concepts, ideas and processes. New policy initiatives can be interpreted as additional ways of making the market work better, as opposed to taking away territory from existing policies.

A. Regulated sectors and competition

21. In terms of its relationship with other government policies, competition law enforcement interfaces with a broad range of government economic policies affecting competition in domestic markets. These range from policies on telecommunications, foreign direct investment (FDI), international trade, and financial markets, to policies on privatization. The enforcement of these policies will either enhance or impede the development of competitive markets, and will determine how effective the competition law enforcement is. Competition agencies should advocate the benefits to citizens from competitive markets, as well as the benefits to decision-makers.

The case of *Verizon Communications Inc. vs. V. Trinko, LLP*[7]

The need for coherence between competition authorities and sector regulatory bodies is exemplified by the *Verizon vs. Trinko* case, which took place in the United States. This case touched on the application of telecommunications law and whether antitrust law would effectively intervene in the matter on the basis of exclusionary conduct violation. There was also the question of whether the "saving clauses" in the Telecommunications Act, section (601)(b)(1), which state that nothing in the Act should contribute to, "modify, impair or supersede the applicability of antitrust laws", would be appropriate to apply in this case. The United States Supreme Court ruling was that the telecommunications law had implemented the necessary remedies to violations by Verizon on agreements to share interconnectivity with rivals, and therefore the antitrust claims did not have strong enough grounds for refusal to deal or for an exclusionary conduct case to be pursued. The Supreme Court overturned the Court of Appeal's decision to apply section 2 of the Sherman Act to this case. The Supreme Court urged that new systems needed to be created and implemented to address the access problem. The submission from the Department of Justice was in support of the fact that the saving clauses in the Telecommunications Act of 1996 are not violated in this case.

This case further shows the need to clarify the boundary between sector regulation and competition law application. It shows that where there is coordination of policy and law enforcement and sharing of information, an understanding can be reached as to the modus operandi of saving clauses. This can affect courts trying to solve cases related to competition and sector regulatory issues.

[7] *Verizon Communications vs. Law Offices of Curtis V. Trinko, LLP*, often shortened to *Verizon vs. Trinko*. 540 U.S. 398 (2004).
Available at http://www.ictregulationtoolkit.org/en/Publication.1593.html

III. Potential benefits of coherence between government policies

22. When there is coherence between various government policies, the likelihood of achieving the desired result of promoting economic development and improving the well-being of the people is greater than when there are incoherencies and conflicts between policy enforcers. Governments have to identify their policy niche areas where coherence-enhancing efforts can yield the best results. There is a wide spectrum of benefits that can be derived from policy coherence.

23. Some countries (e.g. the Netherlands and the United Kingdom) have identified, as a key element of enhancing coherence, the need to address the administrative burden created by regulation. A report produced in 2006 in the United Kingdom[8] identifies the following key elements in this process: (a) the removal, reduction, merging and improvement of regulations; (b) the simplification of procedures to comply with regulations; (c) information- and data-sharing; and (d) one-stop-shop systems for stakeholders. These elements can be applied as tools to reduce costs and enhance coherence in policy formulation and implementation. Policy incoherence imposes a cost on society in one way or another. Think of a procurement policy and law with the mandate of issuing tenders for road construction, and a competition law and policy with provisions to combat bid-rigging/collusive tendering. An absence of coordination in the enforcement of the two laws would create conflict in the market, through the possibility of tenders being awarded to a cartel group, thus transferring taxpayers' earnings to private companies.

24. The relevant competences between competition authorities and sector regulatory bodies are a key issue when discussing policy coherence. As spelt out in an UNCTAD study,[9] in many countries the co-existence of competition authorities and sector-specific regulators is evident. Technological and other developments taking place in the market shapes the government's regulatory role in it. As the recent financial crisis has taught policymakers, even in cases where certain sectors exhibit competitive pressure in the market, the relaxation of regulatory principles can be very costly to the world economy.[10] The co-existence of regulators and competition agencies provides some examples of the different approaches adopted by different countries on how the coordination or non-coordination of competition and sectoral regulatory policies has been tackled.

25. In order to ensure the success of market reforms, privatization was followed by the creation of new sector regulators. The most common sector regulators in the world are in the banking, telecommunications, airlines and energy sectors. In many countries, the banking sector regulator is the oldest. The bank (central, reserve etc.) was already in existence before privatization, globalization, structural adjustment and liberalization in many economies, and it remains the regulator of the financial sector in many jurisdictions.

---

[8] Ministry of Economic Affairs (Netherlands) (2009). *Regulatory Burdens on Businesses.* May. The United Kingdom's Better Regulation Executive and National Audit Office jointly developed a guidance document in 2006 for those undertaking reviews following the Hampton report, entitled "Reducing administrative burdens: effective inspection and enforcement".

[9] UNCTAD (2006). Best practices for defining respective competences, and settling of cases which involve joint action by competition authorities and regulatory bodies. TD/RBP/CONF.6/13/Rev.1.

[10] The financial crisis has been attributed to regulatory failure in the United States and by extension in Europe. See, for example: World Bank (2009). Is there a need to rethink the supervisory process? Prepared by John Palmer and Caroline Cerruti. See also: IMF (2010). Lessons and policy implications from the global financial crisis. Prepared by Stijn Claessens, Giovanni dell'Ariccia, Deniz Iga, and Luc Laeven. See further: European Commission. Economic Crisis in Europe: *Causes, Consequences and Responses. European Economy 2009.* See further: Mix DE (2010). *The United States and Europe: Current Issues.* CRS report for Congress. 8 December.

26. The OECD identifies four regulatory tasks, namely protection of competition, access to markets, access to essential infrastructure, and economic and technical regulation. Sector regulators usually fall into the category of technical regulation. With regard to sector regulatory policies and their interaction with competition policy, there are visible benefits that derive from enforcement coherence. Co-existence between competition authorities and sector regulators has become commonplace in many jurisdictions. The economic transformations of the 1980s and 1990s changed the spectrum of market operations by increasing private participation, which created opportunities for rivalry and competitive pressure. Competition is continuously being introduced in sectors that were previously dominated by monopolies. Over time, the traditional market setting has been overhauled by technological advancement.

27. However, the role of the government as the overseer of the market has increasingly been appreciated as an important ingredient in the new and emerging trends. Government intervention is needed even in very competitive markets. Particular rules and regulations have to be developed to guide the market towards competition for development.[11] In addition to competition law, sector-specific regulatory laws have emerged in certain sectors of the economy too – namely telecommunications, energy, banking, insurance etc.

28. In many cases, sector regulators and competition authorities have overlapping jurisdiction on certain issues. Mergers in the banking sector, licensing and price-setting in telecommunications, the setting of insurance premiums etc. are some of the areas requiring attention in this regard.

29. In some jurisdictions, some regulated sectors are exempted from competition law. Other legal systems have concurrent jurisdiction with competition authorities. In other cases, both competition and regulatory laws are silent on the possible overlaps. With all the mix, the chance of conflict and lack of coordination exists between competition authorities and sector regulators.

A. UNCTAD peer reviews and competition coherence

30. Since 2005, UNCTAD has facilitated voluntary peer reviews for a number of member States.[12] The peer-review reports indicate, among other things, that the issue of coherence between competition authorities and other government policies has featured as an area needing further attention in all the countries examined. While the peer review reports touched on many areas of policy coherence, including exemptions for IPRs, and for research and development and certain strategic sectors, which has made the work of the competition authority very difficult, making the authority ineffective in regulating competition in the market.

31. In Jamaica, the peer review identified a situation which makes coordination with other government policies quite difficult. Only the Telecommunications Act of 2000 recognizes the existence of the Fair Competition Act. Any other government policy containing some competition aspects requires the competition authority to justify the need to uphold competition principles. In addition, major provisions are absent from the

[11] See, for example, UNCTAD (2002). Analysis of market access issues facing developing countries: consumer interests, competitiveness, competition and development. TD/B/COM.1/47.

[12] The peer reviews have covered Jamaica (TD/RBP/CONF.6/7), Kenya (TD/RBP/CONF.6/8), Tunisia (UNCTAD/DITC/CLP/2006/2), the West African Economic and Monetary Union: Benin and Senegal (UNCTAD/DITC/CLP/2007/2), Costa Rica (UNCTAD/DITC/CLP/2008/2), Indonesia (UNCTAD/DITC/CLP/2009/2), and, more recently, Serbia.

competition act, including merger control provisions. This may explain why the Jamaican Competition Authority has devoted most of its resources to consumer protection issues.

32. In Kenya, the design of the competition law and its institutional framework was found to be a major bottleneck to coherence with other policies, and to the ability to effectively tackle anticompetitive practices. The Restrictive Trade Practices, Monopolies and Price Control Act, and its institutional framework, the Monopolies and Prices Commission, were among the first regulatory frameworks established in the Kenyan market (in 1988) after the onset of liberalization. A large number of regulated sectors, including banking, insurance, telecommunications, tea, coffee and energy, are exempt under section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act. The relationship between the Monopolies and Prices Commission and the other regulators is not defined either in the competition law or the regulatory laws.

33. The Tunisian peer review illustrated areas of opportunity for coherence between the enforcement of competition law and other regulatory policies. There were sectors shielded from antitrust regulation that the competition authority was unable to deal with. The peer review identified the electricity sector – regulated by the Tunisian Electricity and Gas Company – as having a monopoly on the distribution of electricity and a share of the electricity production. In addition, the insurance sector, the financial sector, the stock exchange, and telecommunications were among the sectors with established regulatory authorities with mandates allowing them to overlook anticompetitive practices in their sectors.

34. In Costa Rica, many sectors are exempted from the application of competition law. The peer review report states that "the following are exempted from enforcement of the law: (a) providers of public services by virtue of a concession, under the conditions provided by law; (b) State monopolies created by law; and (c) municipal or local governments, in both their internal regime and their relations with third parties (articles 9 and 72 of the Act and article 29 of the regulations)."

35. In addition, the fixing of fees by professional associations in Costa Rica is exempted from the competition law. Moreover, business chambers and associations are exempt if they are not acting as buyers and sellers of goods and/or services. This exemption appears in the definition of "economic agent". Examples from sector enquires conducted under the UNCTAD COMPAL project show that anticompetitive agreements are prevalent among associations, and competition authorities could not intervene.[13]

36. The West African Economic and Monetary Union (WAEMU) peer review brought out the regional aspect of policy coordination. The allocation of competences between regional and national competition authorities shows incoherence in enforcement and a lack of coordination among regional sector regulators. In a situation where jurisdictional issues occur, as in the case of WAEMU and its member States, the coordination of competition policy with other government policies becomes even more challenging. Some members of the Union were active in handling competition cases before the community rules came into effect in 2003. After the advent of the community rules, Senegal identified six suspected cartels and abuse-of-dominance cases which were tackled neither by the community body nor by the national competition authority. UNCTAD's peer review reports that the lack of sector regulation at the regional level and the approach whereby the WAEMU Commission has exclusive competence on competition cases are major hurdles to the work of national agencies and the regional competition body.

[13] UNCTAD COMPAL Programme (2005). *Strengthening Institutions and Capacities in the Area of Competition and Consumer Protection Policies in Latin America*. Available at http://www.unctad.org/en/docs/ditcclp20043_en.pdf.

37. The case of WAEMU – as well as certain aspects of other regional bodies in the developing world – exemplifies the complexities of dealing with policy coherence between national and regional bodies on competition enforcement, and by extension, on other government policies. If competition enforcement is not working well, then competition enforcers find it difficult to deal with other policies.

38. Another area where policy coordination would be beneficial to the enforcement of competition law and policy is with industrial policy. Over the years, it has been argued that industrial policy infringes on principles of competition, and that competition policy limits the discretion of state authorities to apply industrial policy. However, many studies have shown the complementarities of the two policies – that coordination can override the negative aspects of this relationship. The recent economic crisis has acted as a confirmation that, from time to time, certain market imperfections will increase the demand for targeted and measured state intervention in the market. Stimulus packages have been rolled out, from 2009 to as recently as the end of 2010. It is a commonly known fact that subsidies may generally obscure efficiency advantages in countries, but what other alternatives were available to mitigate a problem that risked bringing down the world economy? An UNCTAD study states that: "Governments (were) under pressure to provide economic rescue packages for industrial and financial companies. Competition authorities (were) under pressure to relax merger reviews and prohibitions of anticompetitive conduct in competition laws. Economic nationalism, in the form of trying to restrict the benefits of subsidies or state guarantees to domestic companies and consumers, can be glimpsed in some of these measures."[14]

39. The relationship between competition policy and industrial policy has been the most thorny, especially in troubled times. Developing countries and countries with economies in transition face a somewhat different challenge in terms of their ability to offer subsidies and stimulus packages. At the same time, the pressure to attract and rely on FDI may confer special advantages on transnational corporations, placing local companies at a competitive disadvantage.[15] In other instances, foreign companies can be at a disadvantage, when preferential treatment is accorded to domestic firms. An example from the intervention of the United States Federal Trade Commission in the case of the Chrysler Corporation bailout in 1980[16] shows that the competition argument does not always win, and also reiterates the policy balance issue.

40. Lewis (2009)[17] argues that the financial crisis and the consequent economic crisis are factors in regulatory failure. As governments try to address this challenge, the root cause of the problem should not be ignored. The regulatory frameworks – both financial and others, including competition – should work together to ensure that there is no repeat of this situation. Competition was evident in the financial sector long before the crisis, but financial-sector regulation entails adherence to a certain code of conduct to ensure liquidity and the survival of banks. In a nutshell, one could ask, was there policy coherence or incoherence here? And do we need to resort to the competition policy channel to find solutions? Whatever the case, competition policy's core objectives of consumer welfare and preserving the competitive process need not change.

[14] UNCTAD (2010). The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble. TD/RBP/CONF.7/6.

[15] See, for example, UNESCAP at http://www.unescap.org/tid/publication/tipub2540_chap3.pdf, chapter 3. See also: UNCTAD (1999). *Most Favoured Nation Treatment.* UNCTAD/ITE/IIT/10. Volume 3.

[16] See the United States response to the UNCTAD questionnaire on the UNCTAD website.

[17] Lewis D (2009). The role of competition authorities in the management of economic crises. Global Forum on Competition. OECD. DAF/COMP/GF/WD.

41. For government to establish the difference between anticompetitive and competitive neutral subsidies among its industrial policy tools, it must have access to adequate and timely information, and must ensure coherence between competing demands and objectives.

42. To enhance coherence between the two policies, while governments may overrule competition authorities in times of economic difficulty, as examples from Germany and the United Kingdom have shown, competition authorities should prepare for pro-competitive post-crisis restructuring and redesign of their regulatory formula.[18] From a global perspective, national policies should pay attention to possible spillover effects on other countries, particularly developing countries, from their actions or from their failure to take action. Ideally, countries should harmonize their efforts and interests for the benefit of the global economy. This would be an important aspect in promoting coherence between policies at the international level.

43. Intellectual property rights encourage innovation and thereby promotes economic growth and economic development. However, abuse of IPRs may stifle competition as a process, and therefore balancing IPRs with competition policy is another area where there is a need for coherence. This area of policy has been the subject of debate for decades. Many competition laws exempt IPRs from their scope of application, due to regard for IPRs as an avenue for research and development.[19] However, the so-called cross-licensing can be detrimental to competition if the patent-holders coordinate the prices, as this could raise entry barriers to market access for incoming competitors. The granting of new patents can have anticompetitive overtones when existing patent-holders acquire patents on non-significant improvements on the existing patented product. This evergreening of patents has the result of lengthening the period of exclusive rights beyond its original time. The *AstraZeneca* case in 2010[20] was framed on abuse of dominance by the patent-holder to delay the entry of generic drugs.

44. Coherence issues therefore arise between competition policy and intellectual property rights. Strong interagency collaboration would be necessary in order to avoid inconsistencies in policy regulation and in the enforcement of relevant laws. The development and publication of guidelines, especially by developing countries, on how competition policy should interact with IPR policy, pointing out areas where anticompetitive practices are likely to occur, should facilitate the process of protecting IPR while ensuring coherence with competition rules.

45. The promotion and completion of industry standards can provide significant benefits for consumers; these include incentives for innovation, product uniformity, interoperability, longer-life products, lower development costs for standards-based products, efficiency, consumer choice, allegedly higher-quality products for consumers as a result of expert comparisons of competing solutions, increased competition because of lower barriers to entering a specific market with standardized products, lower marketing costs for bringing products to a particular market, and the fostering of public health and safety. In particular, industry standards are accepted as being one of the engines of the modern economy because they can make products less costly for firms to produce and more valuable to consumers, and can serve as a fundamental building block for international trade. On the other hand, a standard may also slow innovation by locking in an inferior technology, and it may reduce consumer choice by reducing the number of differentiated but incompatible products.

[18] UNCTAD study on industrial policy and competition (2009). TD/B/C.1/CLP/3.

[19] UNCTAD study on competition policy and the exercise of intellectual property rights (2008). TD/B/COM.2/CLP/68.

[20] European Commission case T-321/05 AstraZeneca v. Commission. 1 July 2010.

Advantageously, standardization activities are not immune from antitrust scrutiny, since they can usually be reviewed under the rule of reason.

46. Another area to look at when addressing the issue of coherence between competition policy and other government policies is the relationship of competition policy with the enforcement of complementary policies within the government structure. One such key policy arm is the judiciary and the way in which competition cases are adjudicated as provided by the competition laws. An important element of competition enforcement is its ability to adjudicate cases that arise from the provisions of the law. This brings in the relationship with the judiciary. For the purposes of transparency and due process, decisions made by competition authorities should be open to review through courts, tribunals or any other review mechanism. The relationship with the judiciary for many competition authorities, especially in developing countries, is sometimes difficult, on account of judges' focusing on procedural aspects of the conduct in question. This may be the result of judges having insufficient experience in handling competition cases, or, as in the Trinko case, the judges believing that the sector regulatory law should have addressed the issue. To give a specific example: in a merger case, looking at market definition issues and the substantial lessening of competition test require that the judge have a clear understanding of the economic aspects of competition cases. Competition advocacy and training of judges can address this issue.

47. Another problem area arises when competition laws have created systems where there is no separation of powers between the prosecutor and the judge. The competition institutions perform both functions in many jurisdictions. This scenario is usually looked at with a critical eye, and any review of competition cases is seen as an end process where the judge is looking at the actions of the chief executive or board of commissioners, who could be more knowledgeable in the substance of competition law.

48. UNCTAD, ICN and OECD advocate for separation of powers, where the investigative and adjudicative processes have strictly different roles. In the same sense, the advocacy role of the competition institutions needs to work by establishing channels for training and discussions on matters of competition economics and law. This will enable the judiciary to develop competences in competition matters and will reduce conflict between the judiciary and the competition authority. This will promote an effective way of enhancing coherence and coordination in dealing with competition issues, by having an all-encompassing review of cases.

IV. Strategies for achieving coherence

49. In order to deliver policy coherence, governments need to adopt strategies and principles that promote internal and external coherence in the way they do business. The Netherlands and the United Kingdom have identified five principles which promote purposeful regulation. The United Kingdom's Department for Business Innovation Skills,[21] through the Better Regulation Executive, has been working to simplify regulation by issuing guidelines to stakeholders. The guidelines are aimed at ensuring that regulation encompasses the principles of proportionality, accountability, consistency, transparency, and targeting regulation. Three principles have been adopted and considered as tools to address coherence challenges in developing and enforcing government policies – including their relationship with competition policy. These are transparency actions with some aspects of consistency, and accountability and targeting with some aspects of proportionality.

[21] See: http://www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery

50. Before discussing the principles in this study, it is important to point out a key issue that can promote policy coherence between competition policy and other government policies. This brings in the important role played by advocacy and sharing of information. Many competition authorities can attest that competition advocacy is an instrumental aspect in competition enforcement. Some scholars have also urged young competition authorities to engage in advocacy activities in their first year, before getting into aggressive enforcement of the substantive provisions of the law. This is seen as a way of making competition law and policy understood by stakeholders, thus enhancing compliance with the law.

A. The role of advocacy

51. Competition advocacy is an important aspect of the work of a competition authority. The UNCTAD peer reviews over the years have consistently contained a recommendation to competition authorities to enhance their effectiveness in enforcing the law as well as their relationship with policymakers within government and with other stakeholders. Public awareness programmes and information dissemination have been identified as key elements in this process. The peer reviews for Armenia, Costa Rica, Indonesia, Jamaica, Kenya, Tunisia and WAEMU all uphold the issue of competition advocacy as necessary to promote effective enforcement and coherence. Member States' responses to UNCTAD's questionnaire uphold the role of advocacy in enhancing coherence (e.g. from Colombia, Japan, Malaysia, Mexico, Morocco, the United States, Zambia and Zimbabwe, among others).

52. Turning specifically to the issue of coherence with other government policies, including sector-specific regulatory bodies, competition advocacy has been identified as a key area needing special attention. Competition authorities have found the promotion of public awareness of competition issues to be a way of promoting a culture of competition and avoiding enforcement duplication and overlaps, and also a major avenue in minimizing administrative burden. Apart from sectoral regulatory authorities, there other entities which require coordination with the competition authorities; these may differ from country to country, but may range from ministries of trade, finance, agriculture, economic planning and health, to consumer associations and chambers of commerce, to cite just a few. In matters of case resolution, the judiciary is also a key policy area for coordination. However, there may be policy incoherences among different policies, and the competition authority has to explain how competition policy fits into the picture. Examples of competition authorities that have used this tool in their endeavour to spread the competition message to stakeholders are South Africa and Turkey.[22]

53. UNCTAD's experience in delivering targeted advocacy and training activities has proved to be very useful to competition enforcement. Specifically, trainings for the judiciary in Egypt, El Salvador, Indonesia, Kenya, Malawi, Trinidad and Tobago, the United Republic of Tanzania, WAEMU and Zambia have been conducted over the years. UNCTAD's training-of-judges programmes address the problem of information asymmetry, and the judges who participated in the courses have provided positive feedback and have appreciated the discussions on the economic analysis of competition cases.

54. One of the challenges that the South African Competition Commission faced in its early stages of operation was incoherence between financial and competition policy. The

[22] ICN report (2010) on the interface between competition policy and other government policies. Prepared by the Turkish Competition Authority and presented at the ninth ICN annual conference in Istanbul.

issue of who has jurisdiction over banking sector mergers came up. The competition law was amended to include the issue of concurrent jurisdiction with sector regulators. A memorandum of understanding was drawn up, spelling out how the concurrent jurisdiction would be affected and how coordination would operate between the two institutions. This established channels of communication between the competition authority and the banking regulator. The South African competition commission has been able to advocate for other memorandums of understanding with the telecommunications, postal and electricity regulator.

B. Transparency

55. Transparency is one of the policy tools that can enhance coherence in policy development and enforcement. It increases the pressure on policymakers to justify interference in the competition process. Since policies are usually formulated under ministerial or other government portfolios, it is important for governments to establish a policy coordination mechanism bringing together policymakers from different ministries or departments, and to create a forum to enable them to share their policy intentions and contents. This would help governments to identify the policy goals that are more likely to be achieved by market-based solutions, and those that are inconsistent with a well-functioning market. As mentioned earlier in this paper, having a one-stop shop for policy coordination and development would be an answer. The United Kingdom's Department for Business Innovation Skills has introduced a system of doing this, by issuing guidelines to government ministries and departments on how to address the administrative burden issues. These guidelines assist policymakers in evaluating their policy proposals and options. The introduction of the Administrative Burden Reduction guidelines report says: "… this document should inform your day-to day work as a policymaker. Reducing administrative burdens on business, the voluntary sector and society as a whole will lead to better policies, better implementation, better compliance, and ultimately, better government."[23] This statement shows that the Government of the United Kingdom has taken the initiative to address policy coordination in various ways through promotion of transparency and exchange of information.

56. In some developing countries, there are established offices that deal with the whole civil service. In Kenya, for example, all ministries report to the head of the civil service on their performance targets and strategic plans. For such countries, a policy coordination unit could be established to deal with policy coherence and coordination issues. This unit would coordinate with the Cabinet office on all matters of policy, and ministries would be required to table their policy proposals for discussions with the relevant stakeholders. In this way, the competition authorities would be in a position to assess proposals for new regulatory policies, to determine whether they raise competition concerns and look for ways of addressing them. This would provide a transparent process for evaluation and determination of the status of regulation in a given country, and would allow competition authorities and other regulatory authorities to discuss and agree on how to deal with anticompetitive effects from specific regulations, including the introduction of sunset clauses, among other options. The responses from member States to UNCTAD's questionnaire gave examples of their governments' efforts to establish consultation channels in the process of policy and law enforcement, including sector regulators.[24]

[23] See the website of the Better Regulation Executive at http://www.betterregulation.gov.uk.

[24] See responses from Chile, Colombia, Japan, Mexico, the United States and Uruguay at http://www.unctad.org.

57. Furthermore, there is a need in policy development and enforcement[25] to have a reasonable amount of predictability in decision-making, especially when it comes to universal service-oriented sectors such as telecommunications, postal services etc. Especially where the licensing of operators and enforcing compliance is concerned, clients must be informed simply and clearly of the conditions of the licence, and the terms should be explained by the regulator.

58. As far as transparency is concerned, regulatory authorities often set higher standards which exclude cheaper potential competitors that may or may not be riskier. For example, they may restrict conveyancing to lawyers, even though persons with a lesser degree of education may be able to perform that task. Another example is setting standards that exclude cheaper options, for example that exclude tourist taxi drivers who are only monolingual. Customers differ in how they value such attributes, so there may be customers who are better-off with cheaper albeit riskier transport options. In some cities, this is solved by having at least two different kinds of taxis, easily identified, in competition. The question is whether such issues should be part of the agenda in coordination meetings between competition and other government agencies.

59. In order to be consistent with competition principles, the conditions should be easily understood and free from ambiguity, so as to attract new entrants into the market, while at the same time being enforceable by the regulator. Transparency also demands that the conditions should be clearly defined regarding when the regulator's role is to advise policymakers and when it is acting as a decision-maker in terms of determining certain conditions, for example issuing operating licences or sanctions.

60. To a considerable extent, the regulator's effectiveness is measured by its ability to accept and include inputs from stakeholders, public policymakers, consumer representatives etc. The regulatory process is expected to be open and participatory. This can be done by publishing the regulator's decisions, the regulation proposals and the rationale behind them from time to time, in order to build confidence and credibility in the role of the regulator. This also enhances coherence with other complementary policy arms of the government.

C. Accountability

61. Policy coherence can also be enhanced by ensuring that each policy development is accompanied by an accountability statement. A good example is Botswana, where every policy proposal must be presented together with an account of how the policy fits into the macroeconomic framework and the national development plan, and how it impacts on the economy and the people. These proposals are required by the Cabinet before approval is given to the policy and, consequently, to the law. This is aimed at preventing the development of policy for policy's sake. This causes the policy proponents to be driven by an established need, and circumvents policy shopping by vested interest groups.

62. UNCTAD's report produced in 2008 on the independence and accountability of competition authorities[26] points out that although competition authorities are accountable to private sector, both domestic and foreign investors, their enforcement decisions affect the whole economy, they are also accountable to the general public, to consumers and to other stakeholders. The media has its eye on the operations of competition authorities too, and wants to see the outputs and the impact on the economy as a whole. As with other government policies, competition authorities must show accountability in their actions,

[25] http://www.upu.int

[26] TD/B/COM.2/CLP/67.

through coordination of policy development, and through enforcement and other policy actions. This can be done by making policy proposals, enforcement guidelines and legal drafts etc. available to all relevant stakeholders through websites and the press, but most importantly, by sharing information between competition policy enforcers and other government policy proponents.

63. Coherence between different government policy enforcement agencies can be boosted when accountability mechanisms are in place and are followed by each agency. Through information-sharing and the production of annual reports, other agencies will be in a position to point out areas that may be affecting their operations.

D. Targeting

64. Governments should ensure effective policy targeting that addresses their development objectives and needs. Some countries have introduced the concept of multi-sector regulators as a cost-cutting measure. To ensure that such institutions perform effectively, complementary policies are grouped together in a cluster and one regulatory institution comprising different instruments is organized in departments, bureaux etc. Through the "umbrella" regulator, outputs, outcomes and emerging policy impacts can be monitored to ensure that they are realizing their respective policy goals. Proponents of a multi-sector regulatory approach argue that evaluation of policy effectiveness is more feasible, due to the exchange of experiences between sectors, the widened approach to regulation, and the adoption of collective principles. In Latvia, there is a body known as the Public Utilities Commission,[27] which is an "umbrella" regulator for four sectors: energy, telecommunications, the postal sector and the railways. The various sectoral departments operate within the mandates of the respective laws and of government policy.

65. Other examples show that some competition authorities are actually part of a multi-sector regulatory framework. In Zimbabwe, the competition authority also deals with tariff policy issues; in Australia, the competition authority also deals with consumer protection.

66. Another angle of targeting is to consider a situation where, in order to meet the policy objective of infrastructure service to uneconomic consumers, sectoral regulators impose universal service obligations, either by requiring a licensee to supply such consumers, or by charging a fee, or by supplying consumers where the competition is based on a minimum subsidy. These are issues to be considered when discussing coherence.

67. Finally, the core principles of coherence, i.e. advocacy, accountability, transparency and targeting, should be nested within a three-phase framework:

(a) *Firstly:* Setting policy objectives and determining which ones are priority objectives, and whether there are incompatibilities between competition policy and other policies. Political commitment expressed at the highest levels and backed by policies that translate commitment into action is critical in order to achieve coherence between competition policy and other government measures. Commitment to coherence also entails working with the private sector, trade unions, consumer associations and educational institutions, among others, to raise public awareness for policy coherence to sustain broader support.

(b) *Secondly:* Policy coordination requires working out how policies, or the way they are implemented, can be modified to maximize synergies and minimize incoherence between competition policy and other objectives. These

[27] http://www.sprk.gov.lv

coordination mechanisms should resolve potential conflicts or address inconsistencies between policies, and should allow the politics behind policy decisions to be navigated.

(c) *Thirdly:* Effective systems for monitoring, evaluation and reporting would involve monitoring, collecting evidence about the impact of competition and other policies, analysis of the data collected, and reporting back to parliament/congress and the public. This phase provides the evidence base for accountability and for well-informed policymaking and politics.

68. Governments in several developed and developing countries have made progress in putting in place a system to achieve coherence between competition policy and other policies. These include Australia, Brazil, Indonesia, the Nordic countries, the Republic of Korea, South Africa and the United Kingdom. For many countries, however, progress on policy coherence between competition policy and other policies has had mixed results – especially countries that do not have a competition law.

V. Issues for discussion

69. A commitment to pursuing policy coherence for development creates challenges and opportunities for developing policy. Listed below are fundamental questions that policymakers have to answer and make hard choices about, as they seek to enhance policy coherence. These issues need to be looked at in further research and discussions:

(a) What are the best practices in introducing a system that ensures coherence between competition policy and other government policies?

(b) How can the competition agency play a role in promoting coherence between competition law enforcement and competition policy?

(c) How does policy incoherence affect development objectives? Why be concerned with coherence?

(d) Does policy coherence mean that governments should leave markets to regulate themselves? Is there a certain amount of incoherence that is acceptable?

(e) Does coherence mean that all government policies should be in line with competition law and policy? If not, which policies should be in line with the competition law?

(f) How do policymakers avoid industry regulatory capture when formulating policies, and how does the principle on openness and transparency assist?

United Nations TD/B/C.I/CLP/9/Corr.1

United Nations Conference on Trade and Development

Distr.: General
7 July 2011

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Eleventh session
Geneva, 19–21 July 2011
Item 3(a) of the provisional agenda
Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law, and studies related to the provisions of the Set of Principles and Rules

The importance of coherence between competition policies and government policies

Note by the UNCTAD secretariat

Corrigendum

Paragraph 32

For the third sentence, *substitute*

Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act grants exemptions to specific practices which are provided for under specific sector regulatory laws. Although there is a large number of regulated sectors in Kenya – including banking, insurance, telecommunications, tea, coffee and energy – that operate under different laws, their actions are not exempt from competition law if they are not clearly sanctioned in the law.