Antitrust Chronicle

ARE COMPETITION AUTHORITIES DOING IT WELL?

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CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The Antitrust Chronicle (AC) brings this month a special edition on agencies' performance, with contributions from practitioners, judges, academics and international organizations. Readers will enjoy articles about the ex-post evaluation of agencies' enforcement actions, judicial review of agencies' decisions, the role of international organizations in antitrust and some thoughts on due process and transparency.

Additionally, in this month of April and its numerous and relevant international competition fora such as the International Competition Network Annual Meeting, this year's host, the Competition Commission of Singapore, has contributed with a special feature on their advocacy work and a preview of the ICN annual meeting to be held in Singapore.

In this special edition, CPI Talks presents our exclusive one-on-one interview with Commissioner Margrethe Vestager, where our managing director discusses with the Commissioner about some of the hottest topics in the European Union. Our readers will also have the opportunity to enjoy the video interview and a supporting article with further information.

Finally, you will find more information about the activities CPI is organizing in Singapore during the ICN's annual meeting. Do not miss the opportunity to attend our live events or follow the sessions through our website, where all major events will be streamed for CPI subscribers.

We hope you enjoy reading this new issue of our AC magazine.

Thank you,
Sincerely,

CPI Team

CPI Talks...

Interview with Margrethe Vestager, Commissioner DG Competition, European Union.

In this issue CPI interviews Commissioner Margrethe Vestager about public consultations, recent controversial investigations, common EU approach in certain subjects, regulation of platforms and multi-sided markets and much more. Additionally, in this issue our readers could also enjoy the video-interview with Commissioner Vestager.

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The lifecycles of competition systems: observations on the evolutionary paths.

By William E. Kovacic and Marianela Lopez-Galdos

Studying the lifecycles of competition systems can assist existing competition agencies to understand what they must do to improve performance, and it can help new adopters to anticipate what they will face in establishing a competition policy system. The analysis of the lifecycle of competition systems reveals that managing expectations on what a competition agency might be able to accomplish and patiently building on institutional reputation are key elements to a success path.

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The long and winding road towards a unified competition law enforcement model in the EEA

By Johan Ysewyn and Andrea Zulli

On November 4, 2015, the European Commission initiated a consultation on the need, and means, to give national competition authorities broader and more effective enforcement powers. It is the first time, since the adoption of Regulation 1/2003 , that the European Commission is seeking views on the efficiency of the system put in place more than 10 years ago and, especially, as to how its efficiency can be enhanced. What remains to be seen is whether the Commission will actually pick up on the issues raised by the various stakeholders and proceed with the further fine-tuning of Regulation 1/2003.

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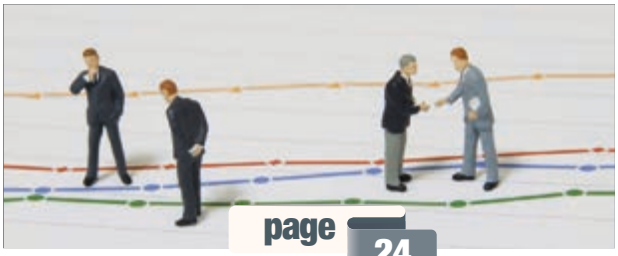
Why ex-post evaluation is so important (and so little used) in antitrust

By Juan Delgado and Hector Otero

This article explores why the ex-post analysis of antitrust and mergers decisions is important, how it can be performed and what the obstacles to the implementation of ex-post evaluation programs are. The ex-post analysis of competition policy is essential in order to evaluate the extent to which competition policy is being useful to society. Despite the fact that the role of competition policy has become increasingly important throughout the world and the number of competition authorities has grown exponentially, there is still little evidence of the consequences of such phenomena and the extent to which competition policy and Competition Authorities are ultimately helping and benefiting consumers.



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Experience is the teacher of all things. Improving enforcement decisions through ex-post evaluation

By Silvia Carrieri

Competition Authorities willing to improve their efficacy and to advocate the value of their work should consider ex-post evaluations as a valuable tool for this purpose. Great benefits come from such an exercise, and constraints in terms of time, data availability and resources can be overcome through the use of simplified approaches.

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Competition community & multilateral development banks: Opportunities for further cooperation

By Beatriz De Guindos Talavera and Marianela Lopez Galdos

The absence of a level playing field or even the mere perception of an anticompetitive environment undermines the capacity of countries to attract private sector investments that are essential for economic growth. It seems imperative for the international organizations providing financial assistance to developing countries to work hand-in-hand with competition experts and further explore the relationship between economic development and competition policy.

Indian Competition Law: Awaiting Judgment

By Nisha Kaur Uberoi

Recent orders of the COMPAT will certainly shape competition law jurisprudence in India and bring the CCI's decision-making process at par with the justice delivery system in traditional courts of law. In order to impart a sense of faith and responsibility in the system, it is vital that CCI orders are in consonance with the law in letter and spirit, substance and procedure. However, a matter of graver concern is the CCI's struggle for jurisdiction with Indian courts and it remains to be seen whether the courts would exercise the necessary judicial restraint in allowing this specialized regulator to fulfill its mandate.

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Towards Fairness and Transparency in Agency Antitrust Investigations and Cases

By Roy Hoffinger

As many jurisdictions enter the field of or intensify their enforcement of competition law, and agencies adopt decisions that benefit local competitors and customers at the expense of foreign companies, members of the business and academic communities are concerned that the outcomes of agency decisions may not reflect the application of sound competition law principles to a complete and accurate record. Greater skepticism may be warranted where the same organization acts as investigator, prosecutor, judge and jury. The prevailing system in such jurisdictions provides enormous incentives to agencies to rule against the respondent in an investigation, especially when the respondent is a citizen of a different jurisdiction.

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Relevant Cases in Mexico's Jurisdiction for Economic Competition

By Adriana Campuzano

Among the first matters resolved by the Mexican Supreme Court over the interpretation and application of the law, was the laying down of foundations for the system. It was upheld, among other matters, that all verification and sanctioning procedures should be carried out at the administrative offices, meaning that (unlike other jurisdictions) they would not be subject to criminal or civil courts; that the interpretation of the law's basic concepts would have to rely on Economic sciences, considering these concepts to have already been adequately defined by the discipline.

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Special Feature

Competition Commission of Singapore: Our Competition Advocacy Journey

By EeMei Tang, Eugene Chen & Weilu Lim

Even with a decade of advocacy experience under its belt, CCS continues to face challenges moving forward. One of the key challenges is keeping pace with technological advancements and the disruptive changes they bring about in the market. CCS needs to understand these market changes so that it can ensure that its analytical frameworks remain sufficiently robust. At the same time, it needs to be knowledgeable about these new advancements so that it will remain a credible advocate to different stakeholders.

CPI Spotlight

This month the spotlight is on the release of the new book:

"Matchmakers: The New Economics of Multisided Platforms"

by David S. Evans and Richard Schmalensee.

Many of the most dynamic public companies, from Alibaba to Facebook to Visa, and the most valuable start-ups, such as Airbnb and Uber, are matchmakers that connect one group of customers with another group of customers. Economists call matchmakers multisided platforms because they provide physical or virtual platforms for multiple groups to get together. Dating sites connect people with potential matches, for example, and ride-sharing apps do the same for drivers and riders. Although matchmakers have been around for millennia, they're becoming more and more popular—and profitable—due to dramatic advances in technology, and a lot of companies that have managed to crack the code of this business model have become today's power brokers.

Don't let the flashy successes fool you, though. Starting a matchmaker is one of the toughest business challenges, and almost everyone who tries to build one, fails.

In Matchmakers, David Evans and Richard Schmalensee, two economists who were

among the first to analyze multisided platforms and discover their principles, and who've consulted for some of the most successful platform businesses in the world, explain how matchmakers work best in practice, why they do what they do, and how entrepreneurs can improve their chances for success.

Whether you're an entrepreneur, an investor, a consumer, or an executive, your future will involve more and more multisided platforms, and Matchmakers—rich with stories from platform winners and losers—is the one book you'll need in order to navigate this appealing but confusing world

Available on Amazon amazon

Announcements

CPI is delighted to announce its presence at the ICN annual meeting in Singapore. Here you will find relevant information about the two public events CPI is hosting:

April 26 – Navigating the New Matchmakers Economy.
When: 12.30pm – 2.00 pm
Where: Raffles Hotel (Singapore)

MODERATOR:
David S. Evans - *Global Economics Group*

SPEAKERS:

Mr. Tolan Steele
Visa

John Fingleton
Fingleton Associates

William Kelly
Uber

Judge Douglas Ginsburg
Judge, US Court of Appeals

Donny Soh
Qlipp

Daniel O´Connor
CCIA

SIGNUP FOR THE EVENT

April 28 – Seminar on the Role of Antitrust in ICT licensing disputes.
When: 6.30pm – 8.00 pm
Where: Marina Bay Hotel (Singapore)

MODERATOR:
Aitor Ortiz - *Competition Policy International*

SPEAKERS:

David S. Evans
Global Economics Group

Judge Douglas Ginsburg
Judge, US Court of Appeals

Dina Kallay
Director Intellectual property and Competition law, Ericsson

Cristopher Yoo
University of Pennsylvania.

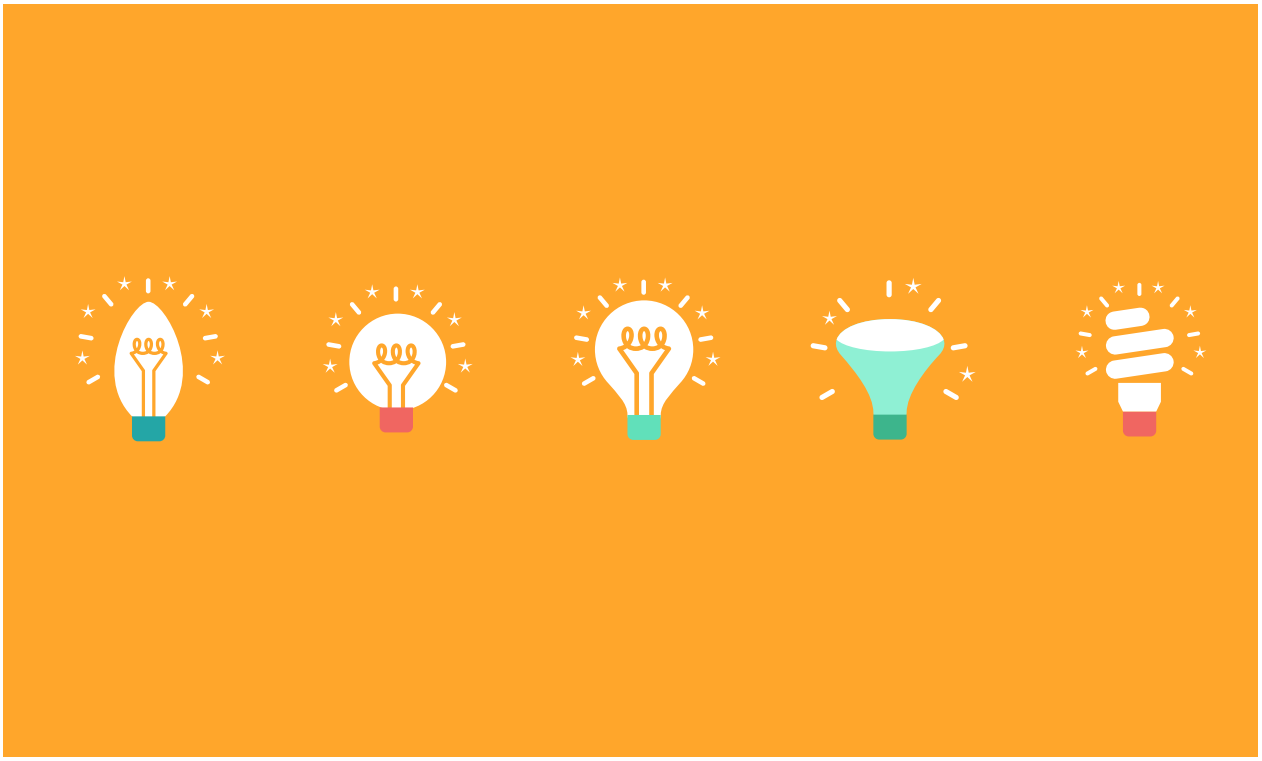
What is Next?

This section is dedicated to those who cannot wait to know what CPI is preparing for you for the next month. Spoiler alert!

May is for mergers. In this edition, legal advisers representing some of the companies involved in the biggest mergers of the year will explain to CPI the do's and don'ts in some complex filings and the reasons why some were cleared and some others failed.

THE LIFECYCLES OF COMPETITION SYSTEMS: OBSERVATIONS ON THE EVOLUTIONARY PATHS

BY WILLIAM E. KOVACIC & MARIANELA LÓPEZ-GALDOS[1]



I. INTRODUCTION

Since the late 1980s, the number of jurisdictions with competition laws has soared from fewer than 15 to over 125,[2] and more are on the way. Never before has a system of economic regulation gained such widespread global adoption in so short a time. Despite the abundance of new competition systems, there is relatively little comparative analysis on the evolutionary paths of those systems. The implementation of these competition systems merits an in-depth analysis that permits the compilation of lessons learned through diverse experimentation with competition law across jurisdictions.

In this Article, we preview the results of a more detailed inquiry into the lifecycles of

1 Kovacic is a Visiting Professor at the Dickson Poon School of Law at King's College London and Global Professor of Competition Law at the George Washington University Law School, where he directs the Competition Law Center. López-Galdos is a legal consultant at the Inter-American Development Bank and S.J.D. student at the George Washington University Law Center, where she directs the Competition Law Center's Global Benchmarking Project. The views expressed here are the authors' alone.

2 This estimate is based on a review of the membership data compiled by the International Competition Network, www.internationalcompetitionnetwork.org, and from the data on competition law systems assembled by the Competition Law Center of the George Washington University Law School, www.gwclc.com.

competition law systems.[3] We focus on how well various jurisdictions have created the institutional predicates for effective policy implementation. Our approach here is part of a larger examination of trends in institutional design at the George Washington Law School's Competition Law Center (CLC),[4] and it reflects our view that improvements in institutional arrangements serve to strengthen policy outcomes.

We begin by setting out what we believe to be realistic expectations about how long it takes for a jurisdiction to set the essential foundations for effective policy implementation. The Article then describes three lifecycles that have characterized the development of new systems and presents examples of each. We conclude with some observations about the factors that determine which lifecycle a competition law system will experience.

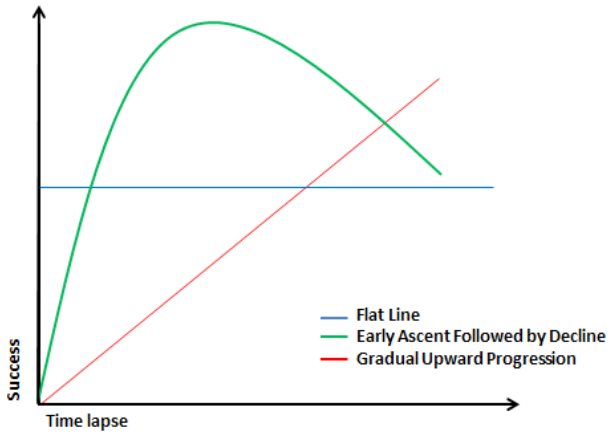
II. REALISTIC EXPECTATIONS

When can we form reliable views about the quality of institutional arrangements and the capacity of an agency to perform assigned policy duties? Our research suggests that it takes twenty to twenty-five years to gauge progress in a meaningful manner. Put another way, for most jurisdictions it takes at least this long to construct and set the system's institutional footings — to adopt and refine the initial statutory scheme, to obtain judicial interpretations of the law's substantive commands and procedural features, to build capacity within the competition agency, and to foster improvements in collateral bodies (e.g., universities) whose contributions are necessary to sustain an effective system.[5]

Some systems during their first years are often not identified as fast-rising stars. For example, in Latin American in the mid-1990s the competition regimes of Chile and Mexico were not seen as obvious candidates for success. Over time, however, they showed steady improvement and grew resilient by reason of better resourcing, staffing, program selection, and political support. Others were leaders in their regions, such as the case of Venezuela in the early and mid-1990s, but eventually crashed into the ground. Visibly, anti-market political movements and other political turmoil have deeply impacted on the evolutionary path of some competition systems.

III. THE LIFECYCLES OF COMPETITION SYSTEMS

Based on intensive analysis of trajectories of evolution of different competition systems, competition systems may be classified into three group using metaphoric vectors, namely: (i) Early ascent followed by decline; (ii) Flat line; and (iii) Gradual upward progression.



Each of these groups comprises the following evolutionary paths:

- Early Ascent Followed by Decline: Competition systems that fall under this category are those that have risen early and then entered a sustained period of

3 William E. Kovacic & Marianela Lopez-Galdox, The Lifecycles of New Competition Agencies: Explaining Variation in Successful Implementation of New Competition Law Regimes, *Journal of Law & Contemporary Problems* (Forthcoming 2016). We also draw upon the observations contained in William E. Kovacic, Competition Lifecycles in Latin America, in Competition Law in Latin America: A Practical Guide 7 (Julian Pena & Marcelo Calliari eds. 2016).

4 Since 2012, the CLC has performed research to benchmark all of the world's competition law systems according to key institutional characteristics. A survey of the results from the benchmarking project will appear later this year in the *Journal of Antitrust Enforcement*.

5 The institutional prerequisites for effective policy implementation are described in William E. Kovacic, The Institutional Foundations for Economic Law Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 Chicago-Kent Law Rev. 265 (2001).

decline. A common ground that applies to agencies that fall under this category is that in the early years, such agencies often are heralded as success stories. Nonetheless, there are discernable differences that are worth exploring to fully comprehend the circumstances that affect systems' evolutionary tracks as it will be analyzed below.

- The Flat Line: A second vector resembles a flat line. Some new systems never get off the ground after the adoption of the law and the formation of the competition agency. For various reasons, they are unable to apply their nominal powers to enforce the law or perform advocacy tasks.
- Gradual Upward Progression: The third vector is a path of gradual upward progression. The slope of progress can vary — some steeper (e.g., Brazil, Singapore, South Africa), and some more gradual (e.g., Chile, Indonesia, Kenya, Latvia, Lithuania, Mexico). The vector usually is not an unbroken upward arc, as the agency encounters successes and setbacks along the way.

IV. EXAMPLES OF THE THREE PRINCIPAL EVOLUTIONARY PATHS

Venezuela is a good example that fits the profile of a competition system that had a sharp vertical ascent followed by a descent as dramatic as the initial climb. Ana Julia Jatar, as the first-generation leader of the agency, propelled the sharp ascent. Her formula consisted on attracting superior talent into the agency that allowed the agency to build strong technical cases unlikely to resolve without the necessary human capital.

Differently, other systems included under the same category such as Argentina or Peru, did not crash into the ground. Rather, the level of the agencies' performance derived to very low levels by comparison to its initial accomplishments, that the agencies became irrelevant in practice. [6]

In all the foregoing jurisdictions, there were various factors that impacted the decline of the agency such as the departure of the first generation charismatic leader or a regime change in national leadership and ascent of political philosophies that question the value of giving market-oriented reforms a decisive role in national economic policy (e.g., Argentina).

Finally, in some other instances, political upheaval is the main mechanism that debilitates agencies. Cases in point include Egypt and Ukraine. The political crisis in Ukraine over the past two years now threatens to destroy a competition system that was formed in the early 1990s and had shown gradual progress in its first two decades.[7] In mid-2015, the government reconstituted the ACMU with a new chair and a new board. To a significant degree, the institution is being re-created from the ground up.

Similarly, Egypt's competition system enjoyed a promising start with good funding and inspired leadership. The country's political turmoil following the Arab Spring placed the competition policy system into virtual suspension during which the agency has strived to retain, with mixed success, many of its best professionals, who devoted themselves during the hiatus to research and analysis tasks in anticipation of a future resumption of operations.

Under the category of the flat line fall those systems that were created by law, but in reality were never active such as the case of Thailand, Paraguay or those systems in jurisdictions that suffer severe poverty and do not enjoy financial support from external support i.e., from national aid agencies or multinational donors.

For example, in Paraguay, although the competition authority exists, the lack of political support has stalled implementation. In Dominican Republic, the competition agency still awaits (five years after its creation) awaits the appointment of an official who, by law, must approve the initiation of law enforcement proceedings. The new agency trains its people and engages in advocacy measures such as public education, but it is unable to apply enforcement powers that,

6 The waning of political support for the "Washington Consensus" and market-based economic policies (including competition) in Argentina and other countries in Latin American after the mid-1990s is discussed in Julian Pena, Promoting Competition Policies from the Private Sector in Latin America, in Competition Law and Policy in Latin America 469 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

7 In 2014, the economic and political crisis in Ukraine led the government to impose a 70 percent cut in the budget of the Antimonopoly Commission of Ukraine (AMCU). The drastic austerity measure forced most agency officials to take involuntary half-time leave. This caused numerous managers and staff to leave the agency.

on the surface, were a major reason to create a competition regime

Armenia represents an example of why these agencies should not be considered as irretrievably failed. Indeed, Armenia's competition authority has shown signs of overcoming badly inadequate funding levels and a most unfavorable political environment to take steps that could establish a useful program. These changes may put the competition system on a path of upward progression.

Finally, Mexico represents a leading example of how to achieve successful progressive evolutionary path. Since the creation of the first Mexican competition agency to the recent developments creating COFECE with the parallel improvement of the competition policy statutory frameworks, Mexico has been able to follow a continuous successful evolutionary path, though not without challenges.

V. FACTORS DETERMINING THE SUCCESSFUL IMPLEMENTATION

Various factors determine the successful implementation of competition systems. The degree to which each of these elements affects jurisdictions varies from country to country. Nonetheless, it is worth compiling the obstacles that impede the upward progression of systems to understand in more detail the reasons behind the diverse evolutionary paths of systems.

The first and most obvious factor impacting the evolution of competition systems is that of political support. As explained earlier, the political turbulence that happened in jurisdictions like Egypt, Ukraine, and Venezuela dampened the prospects of their respective competition systems. Weak political support or episodes of severe political instability inevitably lengthen the period for effective implementation of the competition law.

Hand in hand with the factor of political support is that of funding. Well-funded agencies generally outperform poorly resourced regimes. For example, Singapore and South Africa enjoyed robust financial support from the beginning, and are two examples of agencies that have undergone gradual, steady improvements in implementation.[8] Others such as Colombia and Mexico the gradual ascent of the competition system has benefited from periodic substantial increases in outlays. We note here that good results can be achieved by agencies with 15-20 employees when the agency develops a rigorous process for choosing priorities and selecting projects.

Resourcing, in turn, deeply influences a third vital condition. Well-funded agencies have greater ability to attract and return top rate talent and to spend funds for external consultants. The agency's ability to establish effective law enforcement or advocacy programs hinges largely on its human capital.[9] As the agency's talent increases, it can undertake more ambitious programs. The level of skill should be paramount in the choice of enforcement and non-enforcement matters.

As suggested above, resource limits place a premium on the agency's discipline in matching program commitments to delivery capacity. This is the main reason why poorly financed agencies face bigger challenges when prioritizing programs. Failure to set priorities carefully places agencies at the risk of becoming so ambitious that the capacity of staff is overrun. Badly overextended agencies also tend to experience the spillover effect of failing before the courts. It is often the case that new agencies operate at a tempo that exceeds, to some extent, its ability to complete all of its projects successfully. At the same time, if the gap between early promises and actual delivery becomes too great, many projects will collapse in a manner that demoralizes the agency's staff and creates a reputation for ineptitude.

Pakistan illustrates elements of the foregoing scenario. The first generation of the reformed agency's leadership undertook an

8 South Africa provides a good example of how the government underscored its support for the new competition system with the budget. The first quarters for the new Competition Commission of South Africa and the Tribunal in which it brings its cases was an elegant office part near Pretoria. The campus resembled the accommodations one might expect from a prosperous law firm or business venture. The institutions since have been relocated to facilities in Johannesburg, yet still in a manner that reflects the stature and importance of the competition agencies.

9 Building this crucial dimension of capacity has proven difficult in many transition economies. D. Daniel Sokol, The Development of Human Capital in Latin American Competition Policy, in Competition Law and Policy in Latin America 13 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

agenda of high profile challenges in major sectors of the economy. Nonetheless, within years, it has become apparent that the CCP lacked the capacity to manage a large number of ambitious projects capably, especially in the face of stout resistance from the affected businesses, which enmeshed the agency in protracted, indeterminate litigation in the country's courts.[10]

The effort to avoid mismatches between commitments and capacity requires attention to the agency's experience level. The more effective agencies also have made wise use of the learning of other competition law regimes — either directly from individual regimes or indirectly through the work of international bodies such as the ICN, OECD, and UNCTAD.

The underestimation of difficulty is especially pronounced for action-forcing mechanisms that compel the competition agency to devote resources to certain types of matters. There is a chronic tendency to underestimate the administrative burdens imposed by some requirements such as the ones relating to merger review. This has been true for even well-resourced agencies in undertaking new programs. There is a lengthy learning process by which agencies adapt to cope effectively with these and similar mandates.

An informative example involves merger control mechanisms that require advance notification of certain transactions and impose a suspensory period in which the parties are barred from closing their deal. Over 60 jurisdictions have established variants of this process, and many have underestimated the administrative burdens it entails. Severe early implementation difficulties with mandatory reporting systems have beset newer systems[11] and older regimes, alike.[12]

The implementation of competition law depends heavily on the quality of collateral institutions — bodies that Allan Fels has called "co-producers." A nation with a well-functioning judicial system confers a great advantage on the development of the competition regime. A country with feeble or, worse, corrupt courts faces a lengthy process of retooling its judiciary or establishing new tribunals dedicated to competition law.

Lastly, engagement with other jurisdictions — either through bilateral programs of technical assistance or agency-to-agency cooperation, or though participation in international regional alliances or larger international networks — can help agencies overcome resource limits, accelerate learning, and build political support. To an increasing degree, these mechanisms enable agencies to obtain highly valuable know-how about the substance and process of competition law, and to train agency leaders about how to deal with sensitive issues involving political pressure and relations with other public agencies.

VI. CONCLUSION

The analysis of the lifecycle of competition systems reveals that managing expectations on what a competition agency might be able to accomplish and patiently building on institutional reputation are key elements to a success path. The right state of mind for a new system is a combination of realism, to avoid disappointment in the face of what may seem at first to be slow progress and substantial resistance, and ambition, to press ahead with institutional improvements and the pursuit of increasingly challenging law enforcement and advocacy projects.

The best experiences have taken place in jurisdictions that pursued gradual increases in the tempo and difficulty of implementation. The most successful implementation efforts have taken place in jurisdictions that undertake periodic reviews of the competition system. The virtuous cycle one observes in the best systems consists of a three stage process of experimentation, assessment, and refinement. Many authorities (e.g., Brazil, Mexico) have returned to the national legislature to obtain major upgrades in their systems. As such, the need for a deliberate, phased approach is most acute in countries with unfavorable initial conditions — badly funded

10 On Pakistan's modern experience, see Fernando Furlan & William E. Kovacic, Peer Review of the Competition System of Pakistan (UINCTAD 2013).

11 China greatly underestimated the administrative difficulties that its premerger notification system would present. See William E. Kovacic, China's Competition Law Experience in Context, 3 Journal of Antitrust Enforcement Supp. 1, at 2 (2015) (discussing early implementation of China's Antimonopoly Law and its merger review mechanism).

12 On the early difficulties of the Federal Trade Commission in implementing a program of compulsory advance merger notification, see William E. Kovacic, HSR at 35: the early US premerger notification experience and its meaning for new systems of competition law, in New Competition Jurisdictions 9 (Richard Whish & Christopher Townley eds., 2012).

agencies, weak political support, and thin human capital.

Studying the lifecycles of competition systems can assist existing competition agencies to understand what they must do to improve performance, and it can help new adopters to anticipate what they will face in establishing a competition policy system. In sum, to study the lifecycles of various competition systems is to see factors that tend to improve the prospects for successful implementation. In view of future, the foregoing observations and lessons learnt should not be ignored when engaging in competition policy reforms.

THE LONG AND WINDING ROAD TOWARDS A UNIFIED COMPETITION LAW ENFORCEMENT MODEL IN THE EEA

BY JOHAN YSEWYN & ANDREA ZULLI[1]

On November 4, 2015, the European Commission (the "Commission") initiated a consultation on the need, and means, to give national competition authorities (the "NCAs") broader and more effective enforcement powers. It is the first time, since the adoption of Regulation 1/2003[2], that the European Commission is seeking views on the efficiency of the system put in place more than 10 years ago and, especially, as to how its efficiency can be enhanced. What remains to be seen is whether and how the Commission will actually pick up on the issues raised by the various stakeholders and proceed with the further fine-tuning of Regulation 1/2003.

I. *HELP* : BACKGROUND

In 2014, the Commission published a Communication whereby it presented an overview of the enforcement of competition law at a national and European level over the ten years since the adoption of Regulation 1/2003 (the "Communication"). In continuation of that effort, the Commission initiated a public consultation on how to better empower the NCAs in order to make them more effective enforcers and to reduce differences between the national competition enforcement regimes in the European Union (the "Consultation").

Regulation 1/2003 essentially decentralized the application and enforcement of EU competition law by conferring the possibility of applying Article 101 and 102 TFEU upon the NCAs that, alongside the Commission and the Courts, became responsible for the public and private enforcement of EU competition law. Furthermore, it set up a system of cooperation between the Commission and the NCAs the European Competition Network (the "ECN") in order to

1 The authors are lawyers with Covington & Burling LLP in Brussels and London. They would like to thank Sophia Dipla and Julie Adyns for their invaluable assistance in the preparation of this article. The views expressed are the personal views of the authors and do not necessarily reflect those of Covington & Burling LLP or any of its clients.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1–25.

ensure a coherent enforcement of competition rules across Europe.

II. *ALL YOU NEED IS LOVE*: THE COMMUNICATION AND THE CONSULTATION

The findings of the Commission's Communication were quite straightforward: Regulation 1/2003 works well. The objectives of the "modernization" of the European competition enforcement rules, i.e. greater contribution to the enforcement of competition rules by the NCAs and national courts and less burden on the Commission, have been met.[3]

This is illustrated by the fact that from May 2004 to December 2013, 112 antitrust cases were handled by the Commission and 665 antitrust cases nearly six times more cases were dealt with by the NCAs.

Furthermore, despite the change in the way competition rules are enforced, the Commission and NCAs seem to have moved along the same enforcement lines, thereby creating an "institutional infrastructure"[4] in EU competition law enforcement. The bulk of enforcement efforts made by both the Commission and the NCAs relate to cartels (48 percent and 27 percent, respectively) and the investigation of horizontal and vertical agreements (24 percent and 46 percent, respectively). The Commission and the NCAs have been concentrating a large part of their enforcement efforts on basic and manufacturing industries, i.e. industries that produce materials that are supplied to other industries.[5]

The statistics show that the NCAs have gradually become key institutions for the application of EU competition rules. In the same vein, the role of the ECN has become central to the consistent application of EU competition rules by the Commission and the NCAs.

Despite the fact that Regulation 1/2003 empowered the NCAs to apply EU competition rules, thereby transferring a substantial amount of cases to the NCAs, it did not necessarily follow that all of the NCAs receive the necessary means and instruments to enforce these rules. In this context, convergence among NCAs has been achieved via "soft rules", such as the recommendations issued by the ECN.[6] However, even though it is fair to say that good results have been achieved so far, "recommendations have their limits"[7] — and a material degree of divergence as regards the enforcement of EU competition rules by the NCAs still remains across Europe.

Against this background, in November 2015, the Commission initiated the Consultation. The areas on which the Consultation focuses — and which were already identified in the Commission's Communication — are:

i. resources and independence of the NCAs;

ii. enforcement toolbox of the NCAs;

iii. fining policies; and

iv. leniency programs of the NCAs.

III. *WE CAN WORK IT OUT*: THE NEED FOR MORE CONVERGENCE

From a legal — and especially business — perspective, further convergence is a necessary step in the modernization of the EU competition law enforcement rules. The lesser the degree of procedural and institutional divergence between NCA's, the smaller the risk of substantive discrepancies — and ultimately legal uncertainty.

In this section, we would like to submit some views and endeavor to put forward some recommendations in favor of a more consistent approach by the NCAs in enforcing competition rules, in line with the four topics identified by the Commission in the Consultation.

3 European Commission, Press release database, Brussels, 30 March 2004, Commission finalises modernisation of the EU antitrust enforcement rules.

4 Giovanni Pitruzzella -President of the Italian Competition Authority- "The Public Consultation on Regulation 1/2003: A Stronger Institutional Infrastructure for Fostering the EU Common Competition Culture Journal of European Competition Law and Practice 1 (2016).

5 Communication from the Commission to the European Parliament and the Council "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, Brussels 9 July 2014, COM (2014) 453 final.

6 See e.g. ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information; ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means; ECN Recommendation on Assistance in Inspections conducted under Articles 22(1) of Regulation(EC) No 1/2003, http://ec.europa.eu/competition/ecn/documents.html.

7 Commissioner Margrethe Vestager, Speech "Perspectives on Europe," London School of Economics, 20 November 2015.

A. *WITH A LITTLE HELP FROM MY FRIENDS*: RESOURCES AND INDEPENDENCE OF THE NCAS

NCAs have become increasingly important players in the EU competition law arena. Therefore, it is of the utmost importance that all NCAs can function independently and have sufficient resources. This will increase their efficiency, both in terms of antitrust-specific focus and breadth of analysis, and is ultimately essential for further market integration.

Currently, businesses involved in multi-jurisdictional investigations are too often confronted with differing levels of technical skills, a lack of economically sound analysis, diverging interpretation/application of key EU competition law principles, substantially different timetables, etc., which, on occasion, give rise to unpredictable or divergent outcomes and delays.

Accordingly, more harmonization as to the level of resources each Member State allocates to its NCA is highly desirable. This is confirmed by many NCAs, such as the UK Competition and Markets Authority (the "CMA"), according to which "a certain level of resources is also critical to underpin that independence and enable effective enforcement". [8] This view and recommendation is also echoed by other stakeholders, such as the American Bar Association (the "ABA") that points to the need for the NCAs to retain or hire economists to analyze complex cases. [9]

In conclusion, and taking into account the current economic climate in Europe, it is essential that Member States receive a clear signal that their respective NCAs must have sufficient resources to ensure a level playing field for companies.

While increased resources are a more straightforward point, the issue of political independence is more delicate. Despite NCAs, in most Member States, being independent public bodies, they "necessarily operate within a political context". [10]

Though Member States' governments can indeed seek to guide competition policies and objectives, NCAs ought to be fully independent in enforcing competition rules in that context. [11]

For example, the CMA takes into account the "Strategic Steer" of the UK Government — a non-binding statement of strategic priorities outlining the government's aims for the CMA [12] — but remains fully independent in enforcing competition rules and selecting the cases to investigate.

There can be little doubt that the political interference in the enforcement of competition rules is highly undesirable for a number of reasons: it undermines the credibility of the NCA; it seeks to deal with issues that are by definition unrelated to the principles of competition law; and it interferes with the level playing field competition enforcement seeks to create.

Beyond the case of direct intervention of governments into the day-to-day operation of their NCA, such as the Greek government's recent legislative proposal whereby NCA's officials may be dismissed for disciplinary offences that are vaguely referred to rather than clearly defined in the proposal[13], there are more insidious ways in which competition law principles can be affected. For example, to what extent is it acceptable that national laws ex ante provide for clearly and narrowly defined cases of government intervention in the public interest? Again, the UK provides a good example: the Secretary of State can intervene on grounds of public interest, e.g. national security, media plurality, or the stability of the UK financial system, and in exceptional circumstances it has used this power in the past without negatively affecting the proper enforcement of competition rules[14].

8 CMA submission, para. 13.

9 ABA submission, p. 2.

10 CMA submission, para. 13.

11 Cf. U.S.: ABA note 18: The ability to exercise discretion in choosing which investigations to conduct, and cases to bring, is so important in the American system that it is almost completely unreviewable by the courts. See Heckler v. Chaney, 470 U.S. 831, 831-32 (1985).

12 CMA submission, para. 14.

13 See PaRR, January 29, 2016 "Greek agency lambastes reform proposal as attack on independence" referring to the example of the Greek government's recent legislative proposal whereby NCA's officials may be dismissed for disciplinary offences that are vaguely referred to rather than clearly defined in the proposal. Furthermore, according to the legislative proposal, it would amount to a conflict of interest for any president, vice-president or board member, or their spouse, to be a sitting MP in the Greek or European parliaments, or a government minister. This clause was allegedly specifically targeted at the current vice-president of the Greek NCA.

14 In the midst of the financial crisis, on 18 September 2008, the Secretary of State for Business and Enterprise issued an intervention notice in the merger of HBOS and Lloyds TSB on public interest grounds to ensure the stability of the UK financial system.

However, in Germany, this has recently led to a rift between the Government and the Bundeskartellamt leading to the resignation of the chairman of the Monopolies Commission.[15]

For businesses, protectionism and political interference with competition proceedings risks undermining legal certainty and due process, and should simply be avoided.

B. *THAT MEANS A LOT*: THE ENFORCEMENT TOOLBOX

Since the investigatory powers of the NCAs are broadly similar, the key concern in this regard — in particular for businesses — is represented by the lack of a consistent EU-wide approach to Legal Professional Privilege ("LPP"). The Consultation offers an opportunity for a much needed reflection on the need of a consistent approach to LPP throughout Europe. Currently, the case law in a number of Member States[16] is clearly diverging from the principles set out in Akzo[17], and regulatory intervention may be required to create consistency here.

A further procedural point to consider relates to a formalized system of coordination of investigations through working groups as part of the ECN[18]. In these working groups, NCAs would cooperate on cross-border cases, with uniform investigative powers and adequate guarantees for procedural fairness. These working groups would also have the power to adopt joint settlement decisions[19]. This system would increase consistency and legal certainty, but would indeed require a carefully crafted and balanced mechanism to address possible divergence on substantive issues.

15 Daniel Zimmer, Chairman of the German Monopolies Commission, announced his resignation after the Government conditionally approved the Edeka/Kaiser's Tengelmann deal which had previously been rejected by the Bundeskartellamt. See GCR, "German advisory board head quits over Edeka/Kaiser's Tengelmann," 21 March 2016.

16 See e.g. Belgium, where the Brussels Court of Appeal ruled that in-house advice is covered by a confidentiality obligation (Brussels, 5 March 2013, Belgacom). In the Netherlands, the Supreme Cour thas confirmed that in-house lawyers who are members of the Dutch bar are covered by LPP, in the same way as independent attorneys.

17 ECJ 14 September 2010, C-550/07P, Akzo.

18 ABA submission p. 5-7. The American States can also form informal joint working groups.

19 In the hotel bookings case, the French, Swedish and Italian NCAs negotiated a de facto joint settlement with Booking.com. Other NCAs, like the German Bundeskartellamt, pursued their own investigation, sometimes resulting in diverging outcomes. The President of the French Conseil de la concurrence, Mr. Lasserre, was quoted saying there should have been earlier coordination between all NCAs (see MLex, 29 September 2015).

C. *MONEY, THAT'S WHAT I WANT*: FINES

The Commission traditionally stresses the importance of sufficiently deterrent fines on undertakings. In the context of the Consultation, we would however like to caution against an excessive focus on public enforcement characterized by high fines, without taking into account the significant added deterrence caused by the surge in private enforcement in the European Union (and in particular, in the UK, Germany and the Netherlands).

Effective enforcement requires a balanced — and well-considered — mix of sanctions and other deterrents, while avoiding the stifling effect of over-deterrence. A uniform method for calculating fines is of course desirable, and would greatly improve efficiency and predictability of antitrust enforcement in the different Member States. However, the goal of further convergence should not be an ever-increasing level of fines. To achieve optimal deterrence, a balanced mix between (i) fines on undertaking, (ii) sanctions on individuals and (iii) private enforcement, is indeed more appropriate.

The 10 percent fining cap is a notable example of a concrete — and problematic — divergence between Member States, which should be addressed. Whereas some NCAs rely on the national turnover (sometimes including export sales) to determine the legal maximum of the fine, others rely on worldwide turnover. A uniform approach would greatly improve legal certainty, and it seems proportionate and logical to rely on a 10 percent cap of national turnover for fines imposed by NCAs.

As to the possibility for Member States to impose criminal sanctions and sanctions on individuals, further harmonization — although desirable — may be difficult since the criminal field basically remains under Member States' exclusive jurisdiction. We are of the opinion that sanctions on individuals — be these criminal or administrative in nature — are an efficient and compelling way to deal with "rogue employees"; however, it is paramount for the attractiveness of leniency programs that systems which provide for sanctions on individuals, also provide for leniency for individuals.

D. *TWIST AND SHOUT* : LENIENCY

Further harmonization of leniency programs throughout Europe should be a top priority.

The current summary application system complicates the application process, and entails serious risks for applicants.

First of all, it requires applicants to have a full understanding of the geographical scope of the behavior early on in the application process, and to follow-up as more details about the behavior emerge.

Secondly, as is demonstrated in the recent DHL judgment[20], summary application has become a misleading term. Applicants should ensure their summary applications describe the behavior in sufficient detail to avoid obtaining leniency in one jurisdiction but risking losing it in another.

It is difficult to gain insight in the motives convincing undertakings to go in for leniency or not, let alone to quantify the actual chilling effect of certain legislation. However, it is clear that the current system of summary applications is lacking in clarity and efficiency, thus undermining legal certainty.

In this respect, despite certain NCAs being not necessarily convinced of the need for a more streamlined system for leniency application across Europe[21], we advocate for the adoption of a "one-stop-shop" for leniency applicants, taking inter alia into account the success of such a model in the merger arena.

20 ECJ 20 January 2016, C-428/14 - DHL. DHL had submitted an immunity application to the European Commission relating to the international freight forwarding cartel, and summary applications to the Italian Competition Authority. After receiving conditional immunity from the European Commission, DHL submitted further information to the Commission relating to freight forwarding by road. The Italian NCA found the initial application did not cover freight forwarding by road. DHL submitted an additional summary leniency application, but in the meantime Schenker Italiana SpA (a subsidiary of Deutsche Bahn AG) had already submitted a leniency application to the Italian Competition Authority. In the end, DHL received immunity in the proceedings before the European Commission, which only related to freight forwarding by air, but only a 50 percent discount in the proceedings before the Italian Competition Authority. The ECJ ruled there is no legal link between a leniency application before the Commission and a summary application before a NCA, which would oblige the NCA to interpret the summary application in light of the application to the Commission.

21 For example, the CMA "is not aware that the absence of such a system is in fact currently deterring applicants from coming forward such as to have a material adverse effect on either leniency incentives or cartel enforcement" - see CMA submission, para. 41.

This view is shared by several stakeholders, such as the ABA that notes "As commendable as the summary application process is, it reduces — rather than eradicates — the risks borne by the applicants"[22]. The goal should be to eradicate uncertainty and risks borne by the applicant. A one-stop-shop for leniency applications is the only way forward.

E. *HOW DO YOU DO IT?* SOFT CONVERGENCE, DIRECTIVE OR REGULATION?

The decentralization of competition enforcement through Regulation 1/2003 has proven to be a big challenge for the Commission and the Member States. Substantial convergence has already been achieved through soft law, but we have reached the limits of a system based mostly on soft law and general principles of law. As a result, at a national level, inconsistencies remain to a certain degree, giving rise to legal uncertainty for businesses with cross-border activities in the EU.

Even though this is an issue that has not been covered in the Consultation, it may now well be the time to resort to a binding system of convergence. In that regard, the Commission will have to choose between a regulation or a directive depending on the legal effect it wants to achieve through the act it will adopt. Bearing in mind that a regulation is "binding in its entirety and directly applicable in all Member States" and that a directive is binding as to the results to achieve but "leaves to the national authority the choice of form and methods"[23], we would suggest that the Member States maintain some leeway only with respect to certain aspects of the EU competition law enforcement. For instance, as regards the NCAs' resources and independence, the Commission could adopt a directive — like it did with the antitrust damages — thereby giving more leeway to the Member State and allowing them to "ensure that new rules are consistent with their existing substantive and procedural legal framework"[24]. On the other hand, as regards a potential one-stop-shop for leniency, a regulation would probably be the most appropriate tool as it would ensure a consistent approach in all Member States.

22 ABA submission, p. 7-8.

23 Article 288 of the Treaty of the Functioning of the European Union.

24 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 11 June 2013, COM(2013) 404 final.

IV. *WE CAN WORK IT OUT*: CONCLUSION

All in all, more convergence is needed in relation to all the areas on which the Consultation focuses. Independent NCAs with sufficient resources will ensure more legal certainty and predictability for businesses with cross-border activities.

As to the enforcement tools NCAs have at their disposal, the lack of a consistent approach to LPP is currently a major issue for businesses operating in the EU. Further convergence as to criminal or administrative enforcement, and a more uniform approach to sanctions on individuals would also improve legal certainty, as would a formal system of coordination of investigations and the ability for NCAs to adopt formal joint settlement decisions.

A uniform approach to fine calculation would be welcomed by businesses, but a balanced mix between public and private enforcement is needed to avoid a stifling environment of over-enforcement. A uniform approach to the 10 percent cap would also greatly improve legal certainty and consistency throughout Europe.

Finally, the Consultation is a timely opportunity to introduce a one-stop-shop for leniency application.

WHY EX-POST EVALUATION IS SO IMPORTANT (AND SO LITTLE USED) IN ANTITRUST

BY JUAN DELGADO & HECTOR OTERO

I. WHY EX-POST EVALUATION IS IMPORTANT

Time Warner Cable increased its prices just 10 days after the state regulator approved its merger with Charter.[1] Even if it's too soon to determine whether this price increase is a direct consequence of the merger, it is a potential sign that the decision might have been detrimental to consumers.

Several questions arise from the observation of post-decision conducts like the one above. Could the regulator have anticipated such behavior from the analysis of previous media mergers (e.g. AT&T/DirecTV[2])? Do competition authorities know what happens after a merger approval? Would knowing it be useful for the adoption of future merger decisions in the same or other industries? The ex-post evaluation of the impact of a decision helps anticipate the effects of

1 Time Warner Cable Increases Rates in New York After $55B Merger with Charter was approved (January 20, 2016) http://www.vcpost.com/articles/114646/20160120/time-warner-cable-increases-rates-new-york-55b-merger-charter.htm

2 Why the AT&T-DirecTV merger might actually limit choices for consumers (July 27, 2015) http://www.consumerreports.org/cro/news/2015/07/at-t-directv-merger-limit-choices-consumers/index.htm

future decisions and so improve the effectiveness of competition policy. Moreover, it provides indications on how well competition authorities are performing and how to take the appropriate decisions to improve their future performance.

This article explores the benefits of conducting a more extensive analysis into what happens after an antitrust or merger decision is adopted and explains why this does not happen more often. That is, the article explores why the ex-post analysis of antitrust and mergers decisions is important, how it can be performed and what the obstacles to the implementation of ex-post evaluation programs are.

The ex-post analysis of competition policy is essential in order to evaluate the extent to which competition policy is being useful to society. Despite the fact that the role of competition policy has become increasingly important throughout the world and the number of competition authorities has grown exponentially, there is still little evidence of the consequences of such phenomena and the extent to which competition policy and Competition Authorities are ultimately helping and benefiting consumers.

There is little information on whether the application of competition law is too harsh or too lenient. Even if the literature has made an extensive analysis of the problems with under-application and over-application of competition policy, it is not clear how far we are from an optimal scenario.[3] In addition, it is not clear whether competition policy is having sufficient deterrent effects.[4] Ex-post analysis is essential to evaluating whether the level of application of competition law is adequate or whether Competition Authorities should modify certain preconceived ideas about their activities.

The article starts by stating the objectives of the ex-post evaluation of competition policies (section 2). Next, it proposes an evaluation strategy (section 3) and, finally, it explores potential obstacles that could distort, prevent or delay the implementation of evaluation programs (section 4).

II. THE OBJECTIVES OF EX-POST EVALUATION

The objectives of ex-post evaluation can be summarized in three items: to analyze the effectiveness of Competition Authorities' past interventions, to improve the performance of future interventions and to enhance transparency and accountability of Competition Authorities.[5]

The main goal of ex-post evaluation is to assess how competition policies and antitrust agencies perform. To do so, one has to determine what would have happened in the absence of intervention by a Competition Authority, and then measure the degree to which the intervention by the antitrust agency has contributed to enhance consumer welfare in comparison with the counterfactual scenario.

The design of an ex-post evaluation methodology should assess to what extent competition agencies have reached their goals and quantify the impact of their interventions on consumer welfare. Such quantification should not only consider direct effects on consumer welfare but also the potential deterrence effect on future anticompetitive conducts.

The ex-post evaluation of impact provides essential feedback for improving future antitrust and merger decisions. Knowing the effectiveness of past decisions and remedies allows the fine-tuning of the application of competition law in the future. It does not only help improve antitrust decisions but also internal organization decisions regarding prioritization and resource allocation. Given the limited resources of antitrust agencies, it is essential to allocate those resources to activities and markets with a larger contribution to social welfare and that maximize the cost/benefit ratio of the intervention. In this context, analyzing the impact of past decisions provides essential feedback that is useful for improving

3 For a review of the problems of selecting an optimal level of antitrust enforcement see: William M. L. (1983), "Optimal Sanctions for Antitrust Violations", 50 U. CHI. L. REV. 652; Wils, W. P. J. (2006), "Optimal Antitrust Fines: Theory and Practice". World Competition, Vol. 29, No. 2; and Padilla, J. and D. S. Evans (2005), "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach", University of Chicago Law Review, Vol. 72

4 Numerous articles have explored the deterring effect of cartel fines. See, for example, Motta, M., (2008), "On Cartel Deterrence and Fines in the European Union". *European Competition Law Review* 29: 209-220, and Connor, J. M. (2007). Optimal deterrence and private international cartels. *Working Paper.*

5 Kovacic, E. (2006), "Using ex-post evaluations to improve performance of competition policy authorities", Journal of Corporation Law, Vol. 31, No. 2, pp. 503.

strategic decision-making regarding prioritization and resource allocation.

Finally, the independent character of Competition Authorities requires a high degree of transparency and accountability. Ex-post analysis is useful to audit their activities and also to increase the public awareness about the benefits from competition.

Ex-post analysis is especially relevant in the presence of "new competition trends" or "sectoral merger waves". For example, the European Commission is currently dealing with several issues in Internet markets such as the case against Google or the sector inquiries about geo-blocking and internet-based platforms. The follow-up of any measure adopted in the context of such initiatives would be very relevant for future interventions in Internet markets.

A similar situation occurs in "sectoral merger waves", when economic or technologic changes in a specific industry unleash a series of mergers, such as the mergers in the airline industry occurred from the beginning of this century (KLM-Air France, Iberia-BA, AA-US Airways...) and the current mergers in the telecoms industry in different European countries (e.g. EE/BT and Telefónica/Hutchison in the UK and VODAFONE/ONO and ORANGE/JAZZTEL in Spain).

The evaluation of the effects of the mergers themselves and of the effectiveness of the remedies imposed would be crucial to monitor the evolution of the market and to assess future mergers in the industry.

III. AN EX-POST EVALUATION STRATEGY

Ideally, ex-post impact analysis should be conducted on a case-by-case basis. The global impact of antitrust agency activities would be thus obtained from the aggregation of individual impacts. A detailed impact assessment of all the activities of an agency is, however, not feasible due to the complexity of the exercise and the amount of resources required.[6] A more realistic and feasible alternative would be a system that combines both the evaluation of global performance of competition policy and authorities, using general proxy indicators, and a detailed analysis of the impact of the most relevant cases.

The selection of relevant indicators for an ex-post analysis should be based on a trade-off between the informative value of the indicators and the difficulty of obtaining the required information. Three layers of indicators can be established depending on the extent to which impact can be directly or indirectly measured[7]:

1. *Activity Indicators,* such as the number of decisions, the number of market investigations and the resources consumed. These indicators reflect the level of activity of a competition authority. They can be calculated for most activities but they provide limited information about the impact of the authorities' interventions.

2. *Relevance Indicators*, such as the market value of the industries affected by a decision or the amount of sanctions imposed. These indicators reflect the scope and potential impact of actions performed by antitrust agencies and, thus, can only be calculated for interventions that involve remedies or recommendations, or that affect a specific market or industry.

3. *Impact Indicators,* such as the ex-post evolution of prices and concentration measures. These indicators reflect the actual effects of intervention on competition and consumer welfare. They should be the main aim of the ex-post evaluation exercise, but, given the difficulty in calculating the impact on welfare of many of the agencies' activities, they can often cover only a limited proportion of the activities of competition authorities.

IV. OBSTACLES TO THE IMPLEMENTATION OF EX-POST EVALUATION PROGRAMMES

Even though there are powerful reasons to develop ex-post evaluation schemes, the evidence shows

6 Gunnar, N. and D. Reinder (2008), "Competition Policy: What are the Costs and Benefits of Measuring its Costs and Benefits?", De Economist, Vol. 156, No. 4, pp. 349-364.

7 See Delgado, J., H. Otero and E. Pérez-Asenjo (2016), "Assessment of Antitrust Agencies' Impact and Performance: An Analytical Framework", *Journal of Antitrust Enforcement.* doi:10.1093/jaenfo/jnw003

their use is fairly rare. According to the OECD,[8] only sixteen Competition Authorities out of 46 (35 percent of the total surveyed) regularly perform a quantification of the benefits generated by their interventions; and in many cases, the analysis has a very limited scope. For instance, only 13 percent of the authorities surveyed quantify the benefits from competition advocacy.

There are structural obstacles limiting the implementation of ex-post analysis schemes, related mostly to the complexity of the analysis and the amount of resources and data needed. However, this does not seem an important obstacle if one first admits that ex-post analysis is as relevant in deterring anticompetitive conducts as other activities, such as cartel prosecution, and second, one adapts the scope and complexity of the exercise to the resources available, in the same way that other activities of the agency are dimensioned.

A related structural obstacle is the availability of public statistics and industry data. The poorer the quality of public statistics and industry data, the greater the effort required to gather the necessary data to perform a rigorous ex-post analysis. The difficulty in gathering sound market data partially explains why Competition Authorities in emerging economies do not engage in ex-post evaluation. However, it is precisely at the initial phases of implementation of a competition policy system when ex-post evaluation is most crucial, given that corrective measures can probably be more easily adopted, and that such measures can produce profound benefits in the long run.

The implementation and development of ex-post analysis also faces other obstacles related to behavioral factors.[9]

First, Competition Authorities do not necessarily always behave as welfare-maximizing institutions. Competition Authorities, as many large organizations, will suffer from the so-called "principal-agent problem": each of the individuals and groups of individual within the institution will have their own objective functions which aggregation will not necessarily coincide with the objective function of the institution.

For example, staff members might be more concerned about their own career goals than about consumer welfare. Consequently, those workers could be reluctant to implement an ex-post analysis program if they perceive that the system can be used to scrutinize their work and can ultimately affect their career prospects in a negative way.

Both individuals and institutions tend to prioritize tasks that provide them with higher short-tem visibility rather than investing in tasks that produce long term results, such as ex-post evaluation programs. Individuals and institutions might be more interested in performing activities in industries with higher internal and external visibility such as internet-related industries and flagship cases, while relegating other activities that do not attract immediate public attention. In such a way, public opinion might have a positive perception of the agency's work but the impact on welfare might not be necessarily maximized.

These misaligned objectives are not only present among the authorities' technical staff, but also among term-appointed Commissioners. As their term is limited, Commissioners will tend to favor activities that produce short-run benefits and relegate those whose benefits will materialize after their term is over. Ex-post evaluation programs imply important costs today and will only produce results in the medium and long-term. Thus, they are likely to be left out of the agenda of "myopic" Commissioners (unless the results can be publicly attributed to them in the future).

Second, the implementation of ex-post analysis could also change agents' behavior. Both institutions and individuals might have incentives to maximize the value of indicators, which might not be equivalent to maximizing consumer welfare. Some simple indicators, such as the number of cases handled and the amount of fines imposed, could give us significant information about the activity of the institution but are not necessarily correlated to consumer welfare. Ex-post evaluation indicators should be carefully designed to avoid opportunism by the assessed institutions and individuals. Also, the analysis of the indicators should be aware of such

8 Organisation for Economic Co-operation and Development (OECD) (2013), "Evaluation of competition enforcement and advocacy activities: the results of an OECD survey", February, DAF/COMP/WP2(2012)7/FINAL.

9 See presentation of J. E. Harrington "Investigating the investigators: what does a competition agency maximize?" at the Fourth International Conference on Competition and Regulation (CRESSE), July 2009, for a review of behavioural obstacles, available at http://www.cresse.info/uploadfiles/KP_2009_Harrington.pdf.

limitations. The institutions might need to put in place detection mechanisms to avoid the misuse of indicators, and should limit staff rewards based on over-simplistic indicators.

Competition Authorities as institutions could also oppose any system of ex-post analysis, as more transparency over previous cases could be used against their own decisions in courts. Acknowledging their own errors could be perceived as a sign of weakness by courts.

Finally, Competition Authorities might have multiple priorities, other than consumer welfare. This is especially relevant in the case convergent authorities that are responsible for both competition policy and industry regulation, where industry objectives and political motivations could interfere with competition policy objectives.[10] Under such circumstances, the definition of ex-post analysis methodologies could be especially challenging, since those methodologies should internalize the difficult trade-off between different objectives.

V. CONCLUSIONS

Competition policy has acquired a central role in an increasing number of jurisdictions and there is a wide consensus about the benefits from competition for society. Making sure that competition policy and competition authorities maximize welfare in an effective and efficient way is therefore a central element for any competition policy system. The ex-post evaluation of competition policy interventions helps to make sure that competition policy works, provides useful feedback to improve future interventions and increases the accountability of public agencies.

However, the implementation of ex-post evaluation programs faces a number of structural and behavioral obstacles. In addition to problems related to data availability, institutions and individuals might be reluctant to go through with the implementation of evaluation programs, especially if their objectives differ from the theoretical objective of competition policy, which is typically the maximization of social welfare.

Both the design and the implementation of ex-post evaluation programs should be aware of the problems caused by the misalignment of objectives and of the likely change in agents' behavior that the adoption of an ex-post evaluation program might imply.

Very few competition authorities perform a comprehensive evaluation of their activities. Further efforts are needed in this direction to improve competition policy-making and guarantee that competition policy benefits consumers. The lack of incentives for Competition Authorities to implement self-evaluation programs might be overcome through the adoption of incentive mechanisms, such as making part of their budget depend on performance, or facilitating the comparison of performance between different competition authorities. To this end, collaboration between agencies in the design and implementation of evaluation programs and their coordination through multilateral institutions such as the OECD and the ICN might be a useful tool for accelerating the implementation of ex-post evaluation programs and improving the overall quality of competition policies.

The ex-post evaluation of competition policy interventions is as important for deterring anticompetitive conducts as prosecuting cartels and limiting the exercise of market power. It should therefore be an integral part of any competition policy system.

10 For a review of the priority setting problems arising from the integration of regulatory and antitrust agencies see Delgado, J. and E. V. Mariscal (2014), "Integrating Regulatory and Antitrust Powers: Does It Work?" *Competition Policy International*, Vol. 10, No. 1, Spring 2014.

EXPERIENCE IS THE TEACHER OF ALL THINGS. IMPROVING ENFORCEMENT DECISIONS THROUGH EX-POST EVALUATION.

BY SILVIA CARRIERI[1]

"Experience is the teacher of all things", Julius Caesar once said.[2] In the realm of competition enforcement, ex-post evaluation can be a powerful tool for grasping the teacher's lessons.

An ex-post evaluation is an examination of a Competition Authority's decision[3] that satisfies 3 criteria: (i) it is performed to determine what has been the impact of the decision on the affected market, relative to alternative scenario(s); (ii) it is performed sometime after the decision; and (iii) it is based on the use of ex-post data. Ex-post data consist of the information that was not available to Competition Authorities at the moment when they took the decision, for example whether entry would occur or how prices would evolve.

The number of ex-post evaluation studies has grown considerably in the last decade: more

1 This article is based on the OECD report "Reference guide on ex-post evaluation of competition agencies' enforcement decisions", Paris, 2016, DAF/COMP(2016)2. Any additional opinions expressed or arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or its member countries. An earlier version of this article was published in the newsletter of the OECD-GVH Regional Centre for Competition, Issue No. 6, January 2016 http://www.oecd.org/daf/competition/hungarycentrenewsletter.htm

2 Julius Caesar, *Commentarii de Bello Civili* (Commentaries on the Civil War), 2.8

3 Ex-post evaluations can be performed for antitrust decisions (mergers, agreements, abuses), for market studies or for other types of interventions. Anyway, this article focuses only on ex-post evaluations of antitrust decisions.

authorities are undertaking them or are planning to do so, and academics are getting more and more involved in this area of work. But why is this the case? What benefits can a Competition Authority obtain from ex-post evaluations?

First, many Competition Authorities perform ex-post evaluations to improve decision making to better design future interventions. To reach this objective, ex-post evaluations should be incorporated in the decision-making process, as shown in the figure below.

Learning from past experiences is necessary because enforcement decisions are taken in conditions of uncertainty. This calls for their evaluation to determine which forecasts, assumptions and hypotheses proved to be true and which did not. Ex-post evaluations can therefore try to determine if the decision was the appropriate one and why, but could also have a narrower scope and focus on some specific elements of the decision. They can for example just test key assumptions and expectations, or the effectiveness of remedies. They can aim at improving analytical tools and economic theories. Often, they are used to better understand competition in specific sectors.

The benefits from ex-post evaluation are maximized when the studies are performed regularly. Indeed, a few studies can provide valuable information, but only regular evaluations can identify patterns over time or recurrences in specific sectors.

A second but equally important goal is advocacy. Measuring the impact of their activities on markets and consumers allows Competition Authorities (CAs) to justify their work and budget to stakeholders and governments. This holds as well for policy areas other than competition enforcement: this is why in OECD countries more and more institutions across different policy fields are starting to perform ex-post evaluation.

The hospital merger retrospective[4] performed by the US Federal Trade Commission ("FTC") constitutes a powerful example of how ex-post evaluations can simultaneously serve advocacy purposes, improve analytical tools and clarify how competition works in a specific sector. In the late 1990s, the US Department of Justice ("DoJ") and FTC lost seven consecutive hospital merger cases in court. That is why, at the beginning of the 2000s, the FTC decided to conduct retrospective analyses of four consummated hospital mergers. The findings provided important methodological insights:

- the method used at the time to establish market definition – the so-called Elzinga-Hogarty method - resulted in geographical markets that were too large
- not-for-profit hospitals actually exercise market power instead of acting in the community interest, as was previously believed
- the bargaining process between hospitals and insurers needs to be appropriately modeled and taken into account

Thanks to these lessons, the FTC was able to reverse the trend and successfully challenge the Evanston/Northwestern/Highland Park merger in court. The FTC prospective merger program in the hospital sector is now very active: six mergers have been blocked or abandoned since 2008.

In practice, the ex-post evaluation process consists of nine steps:

1. Selecting the decision to assess
2. Choosing the evaluation team
3. Identifying the counterfactual, that is, the hypothetical scenario assuming that a different decision had been taken
4. Selecting the methodology to use
5. Determining the variables to study (price, quality, variety)
6. Collecting the necessary data and information
7. Performing the analysis
8. Verifying the robustness of the results
9. Drawing conclusions and derive lessons

Each of these steps requires careful consideration to assure that the assessment reaches robust conclusions. For example, should the evaluation team consist of internal staff or external consultants? Should the ex-post evaluation only consider the effect of the decision on prices or also on other factors such as quality and variety of the product mix? What type of data is needed and where can the information be found?

4 The studies are published in a special volume of the *International Journal of the Economics of Business* (Volume 18, Issue 1, 2011) http://www.tandfonline.com/toc/cijb20/18/1

It is precisely in order to answer these questions and to provide guidance to Competition Authorities on the correct design and performance of ex-post evaluations that the OECD has decided to publish a *Reference Guide on the Ex-Post Evaluation of Competition Agencies' Enforcement Decisions* (forthcoming). The Guide contains an in-depth overview of all the issues linked to ex-post assessments and constitutes an excellent resource both for CAs who are planning to start performing ex-post evaluations and for those who already do it but want to improve the quality of their assessment.

The Guide is also rich in examples and references, to show how previous studies solved the practical problems encountered in the design and performance of the analysis. For example, as point 3 above indicates, there are cases in which identifying the counterfactual scenario of the decision is not straightforward: more than one counterfactual may be possible for a single decision. This happens, for instance, in case of conditionally cleared mergers: the possible alternative scenarios are merger prohibition, unconditional clearance or conditional clearance with a different set of remedies.

Usually only one counterfactual scenario is examined in the ex-post evaluation. The most likely alternative to the decision that was actually taken is typically chosen as a counterfactual. However, Friberg and Romahn (2014)[5] provide an example of an ex-post evaluation using more than one counterfactual. The two authors assess the impact of the merger between Calsberg and Pripps in the Swedish beer market. Given that the merger was cleared conditional on the divestiture of some brands, they examine three different counterfactual scenarios: (i) merger prohibition, (ii) unconditional clearance, and (iii) conditional clearance with a different set of remedies. Using two different methodologies, Friberg and Romahn find that beer prices would have been lower if the merger had not been allowed. Yet, divestitures had a beneficial effect in limiting the post-merger price increase. Such effect would have been smaller if the divested brands, instead of being bought by a small rival firm, had been acquired by the merging parties' biggest competitor.

For an ex-post evaluation to obtain robust results, not only the counterfactual must be carefully chosen, but also the methodology. This requires, among other things, the identification of the correct time frame for the analysis. For instance, a merger will often simultaneously have an anticompetitive effect due to the increased market power and a pro competitive effect driven by efficiencies. However, the two effects do not necessarily take the same time to manifest themselves. If the time-horizon analyzed is too short, the assessment may observe the partial effect of the merger and miss the overall one.

Focarelli and Panetta (2003)[6] provide a seminal example of an assessment of the short term and long term effects of a merger. The authors assume that the anticompetitive effect a merger will happen soon after the acquisition, because the newly acquired market power can immediately be exploited. The pro competitive effect will instead appear later, since efficiencies take some time to materialize. Focarelli and Panetta thus assess a series of mergers in the retail deposit market in Italy in the 1990s. The findings of the study prove that their assumptions were correct: prices increase in the transition period (from the year of the merger until two years after the merger) but decrease during the completion period (from three to five years after the merger). The pro competitive effect of the merger completely outweighs the anticompetitive one, and the overall impact is a decrease in price. If the researchers had adopted a shorter time frame, the conclusions may have been very different.

If what we have seen above is true and ex-post evaluations are truly useful, then why are many agencies still not performing them? An often-cited reason is the fear that excessive resources are required, in terms of time, money and staff. This is not necessarily true. Of course, ex-post evaluation is not a trivial exercise. Yet, valuable results can also be obtained from simplified approaches, for example using qualitative methodologies.

An excellent example is the study carried out by the New Zealand Commerce Commission, *Targeted Ex Post Evaluations in a Data Poor World*.[7] The study was aimed at testing the validity

5 Friberg, R., & Romahn, A. (2014). Divestiture Requirements as a Tool for Competition Policy: A Case from the Swedish Beer Market. *International Journal of Industrial Organization*, 42, 1-18

6 Focarelli, D., & Panetta, F. (2003). Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits. *American Economic Review, 93*(4), 1152-1172.

7 Csorgo, L. & Chitale, H. (2015). *Targeted Ex Post Evaluations in a Data Poor World*. New Zealand Commerce Commission. http://www.comcom.govt.nz/the-commis-

of specific expectations on anticipated market developments. Therefore, it targeted mergers that were cleared because the competition concerns were expected to be resolved by factors such as low barriers to entry, divestitures or buyers' countervailing power. Gathering data was neither too complex nor expensive, because the assessment was based on publicly available information and on interviews with market participants. The Commission then tested whether the hypotheses that had led to the merger clearances had proven correct. Results showed, for example, the importance of taking into account exchange rates when predicting import competition and the role of sunk costs in entry decisions. The New Zealand approach thus proves that informative ex-post evaluations can be undertaken despite constraints in terms of time, data availability and resources.

Another recurrent concern among Competition Agencies is: What if the ex-post evaluation reaches negative conclusions and points out mistakes? Should the study be published or not? Will the agency's reputation be damaged? Could it lead to a lawsuit?

Some reassuring considerations are due. First, an unexpected evolution of the market does not necessarily imply that the authority made a mistake. Unpredictable circumstances may have occurred, or incorrect information could have been provided. Even when the assessment points out a mistake in the analysis, the experience of the most active CAs (the UK CMA, the Dutch NMA, the US FTC and DoJ) is encouraging: making the assessment public did not cause them reputational damages or subsequent lawsuits.

Yet, risks cannot be completely ruled out: each agency must weigh pros and cons. Publishing every ex-post evaluation contributes to the transparency and accountability of the authority. At the same time, this could cause a bias in the choice of the decisions to assess: authorities may have an incentive to only evaluate cases that are likely to reach positive conclusions. One approach may be to decide on the publication of results on a case-by-case basis.

In conclusion, Competition Authorities willing to improve their efficacy and to advocate the value of their work should consider ex-post evaluations as a valuable tool for this purpose. Great benefits come from such an exercise, and constraints in terms of time, data availability and resources can be overcome through the use of simplified approaches. The OECD *Reference Guide on the Ex-Post Evaluation of Competition Agencies' Enforcement Decisions* constitutes a helpful resource for competition agencies. The in-depth overview and the numerous examples included in the Guide will provide authorities with guidance through the design and implementation of ex-post assessments, in order to help them make the most out of their past experience.

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Find out more about the OECD's work on the evaluation of competition interventions at http://www.oecd.org/daf/competition/evaluationofcompetitioninterventions.htm

sion/media-centre/speeches/targeted-ex-post-evaluations-in-a-data-poor-world/

COMPETITION COMMUNITY & MULTILATERAL DEVELOPMENT BANKS: OPPORTUNITIES FOR FURTHER COOPERATION

BY BEATRIZ DE GUINDOS TALAVERA[1] & MARIANELA LÓPEZ-GALDOS[2]

I. INTRODUCTION

Lewis noted in his famous book on the power of productivity that the "really big" distortions to competition are in poor countries.[3] In fact, the absence of a level playing field or even the mere perception of an anticompetitive environment undermines the capacity of countries to attract private sector investments that are essential for

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3 Ω This analysis is based on an article published by the same authors in the Anuario de la Competencia 2015 (Fundacion ICO, Marcial Pons 2015) that provides for a holistic perspective of the use of competition policy by the MDBs.

Lewis, W.W., "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability", The University of Chicago Press, 2005.

economic growth.[4] In line with this premise, the new Sustainable Development Goals ("SDGs") place substantial importance on the private sector role to foster economic growth.[5]

The success of these recently adopted SDGs will depend to a high extent on the capacity of development assistance to facilitate and strengthen the private sector in the poorest countries. In this context, competition policy, as the Asian Development Bank highlighted, becomes fundamental since "appropriate enforcement of competition law both enhances the attractiveness of an economy as a location for foreign investment and is important for maximizing the benefits that flow from such investment."[6]

In view of the foregoing, it seems imperative for the international organizations providing financial assistance to developing countries to work hand-in-hand with competition experts and further explore the relationship between economic development and competition policy.

To cultivate this relationship, this analysis presents a holistic perspective on the use of competition policy by Multilateral Development Banks' ("MDBs") as an instrument to fulfill these organizations' mandates vis-a-vis poverty and inequality reduction and reveals the areas that could benefit from further cooperation with the competition community.

II. OPPORTUNITIES FOR COOPERATION

To inform the preceding discussion, the analysis focuses on three main areas that merit further examination, namely: (i) competition policy/ advocacy, (ii) anti-cartel enforcement and (iii) procurement data analysis.

A) *Competition Policy And Advocacy Role Of MDBs*

MDBs mandates are well aligned with the overall developmental impact that the 17 SDGs pursue.[7] Thus, through the realization of their respective institutional strategies, MDBs will play a key role in the success of the so-called 2030 Agenda.[8] As such, MDBs endeavor to reduce inequality and promote economic growth through a mix of concessional and non-concessional finance to support investment projects, technical assistances and policy reforms that stand-alone banks may find too risky to invest in. Competition policy components are embedded in many of these financial instruments through the privately and/or publicly channeled financial aid.

PUBLIC SECTOR. The role of MDBs in terms of competition policy is a cross-cutting one to their advisory services and investments in different sectors. Indeed, development banks aim at increasing market efficiency through sector reforms, removing barriers to entry, improving investment climate or assisting countries in privatization processes. In all these areas, competition policy issues play a critical role. At the same time, MDBs also provide for more targeted technical assistance programs to develop the national competition systems including the legal frameworks and institutional arrangements.

The above-described approaches are complementary and necessary to ensure effectiveness and development impact. In fact, most jurisdictions count on national legislation on competition but only a few benefit from fully effective law implementation.[9] This is the main reason why, often, cartel structures throughout entire value chains (from primary input markets to downstream product markets and services) exist in developing countries' markets. Additionally, higher levels of public intervention in economic activities become the standardized practice in

4 De Guindos Talavera, B. and Lopez-Galdos M., "Derecho de la Competencia en los Organismos Multilaterales de Desarrollo: Una Perspectiva Holística," Anuario de la Competencia 2015, Fundación ICO, Marcial Pons, 2015.

5 The Sustainable Development Goals, otherwise known as the Global Goals, build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. More information available at http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html

6 "Asian Development Outlook 2005," p. 270, Asian Development Bank, 2005.

7 *See* footnote No. 3 supra.

8 All Heads of States, Governments and Institutions that gathered at the UN last September 2015 agreed on the new 17 Sustainable Development Goals and the need to scale up efforts to implement the working program ahead both at national and international levels to take this agenda forward according to the realities in each country and respecting the national policies and priorities in each case.

9 http://blogs.worldbank.org/psd/tirole-wbg-twin-goals-scaling-competition-policies-reduce-poverty-and-boost-shared-prosperity

many of these developing economies.

MDBs count on a wide toolkit of analytical and diagnostic products to address such competition concerns in their client countries: from competition assessments that feed into the sector reforms to neutrality assessments of State-owned enterprises or ex post evaluations of the antitrust watchdogs to gauge effectiveness of competition policies.

Yet, it would be a big mistake to go for a one-size-fits-all approach in the MDBs advocacy role *vis-a-vis* the competition systems of the developing countries. These countries share the need for a solid private sector that contributes to job creation and reduces poverty and inequality, but local market conditions, regulatory frameworks and institutional capacity may vary widely from one country to another. That is why competition policy action from MDBs in low-income countries tends to focus more on opening markets to external competition and removing inefficient legal barriers that protect incumbents in the different sectors rather than promoting the adoption of comprehensive competition legislative and institutional packages.

For instance, in the Philippines, the World Bank has supported the Government in the revision of the maritime regulation, contributing to a clear reduction of the waiting list and times to register new ships and fostering the entrance of new competitors in each route. As a result, the domestic maritime industry traditionally characterized by high costs, low quality of service, and a poor safety record has undergone several reforms with potential savings up to 5 percent in the costs of transport and logistics.

Similarly, through technical assistance from the World Bank, Honduras has introduced a non- discriminatory register for pesticides and related products for agricultural use that has led to a triple increase in the number of products registered and an average 10 percent decrease in prices.

Differently, MDBs efforts in middle income countries are concentrated in reinforcing national competition frameworks, providing capacity building and promoting private sector development through more transparent and predictable legal frameworks to create the necessary enabling environment for private investments. Recent policy loans of the World Bank addressing competition issues in this sense have been approved for Kazakhstan, Georgia and Morocco, among others.

These differentiated approaches based on the different client needs are especially prone to South-South cooperation.[10] Against this background, the International Competition community could provide guidance based on its own experience on what works best according to a country's specific economic and market-culture context and help build the best tailor made solution in each case.

All MDBs pursue through their actions a developmental impact that needs to be (economically, socially and environmentally) sustainable. Therefore, cooperation among the different actors involved and sharing knowledge and best practices according to the different needs and environments seem to be the way forward to ensure transformative but at the same time sustainable solutions, including the competition policy domain.

PRIVATE SECTOR. MDBs include among their activities the so-called private sector development branches. These areas contribute to strengthen private actors through loans and/or equity projects with the private companies selected for their projects.[11] Hence, the MDBs private sector institutions such as the International Finance Corporation (IFC) in the case of the World Bank or the Inter-American Investment Corporation (IIC) at the Inter-American Development Bank, are especially well suited agencies to introduce efficiency and competition in the markets of developing countries in which their projects

10 South-South cooperation is a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains. Involving two or more developing countries, it can take place on a bilateral, regional, subregional or interregional basis. Developing countries share knowledge, skills, expertise and resources to meet their development goals through concerted efforts. For more information please refer to http://ssc.undp.org/content/ssc/about/what_is_ssc.html. When South-South cooperation is channeled through an MDB, it is sometimes known as triangular cooperation.

11 Unlike commercial banks or investors, MDBs private sector institutions bring together financial resources and developmental impact through their investments, acting as an honest broker in those countries and sectors where risk aversion and lack of financial resources can be hindering the very much needed development of the private sector.

take place. Indeed, these institutions have an opportunity to address competition concerns during the three phases of their investment projects: preliminary assessment, preparation and implementation.

First, during the initial study aimed at identifying business opportunities (preliminary assessment), MDBs could pay increased attention to market structures and sectors and try to identify the possibility to contribute to the opening of otherwise foreclosed markets. This could be done through the identification of the most appropriate investment (loan, equity, guarantee, etc.) taking into consideration competition concerns as part of the analysis e.g. number of existing competitors. The apparent conflict between considering competition factors and the maximization of benefits that an investment officer might confront should be resolved by granting a higher priority to the development mission of MDBs. In fact, it is precisely the developmental mission of the MDBs what should be prioritized in all their interventions, and therefore all efforts should be channeled to maximize efficiency both in the public and the private sector in order to foster the benefits of shared prosperity in the form of competitive prices and high quality of basic products and services to these societies.

Second, during the preparation phase, once investment officers decide on the type of investment to pursue, the selection of the counterparties and sponsors could also consider competition related factors. In this respect, the selection of those players that can truly contribute to increase competition in the markets and that adhere to the highest integrity standards could bring about increased benefits from a development perspective in the long run. Therefore, the due diligence process that compliance officers perform on potential counterparties and sponsors during the preparation phase should bear in mind competition concerns and review whether the former have engaged and been sanctioned for anticompetitive practices. This "integrity review" process should become a core priority.

Finally, during the project implementation phase, MDBs must ensure that awarded contract partners adhere to and comply with the MDBs rules and procedures that include integrity standards that prohibit collusion, as it will be further explained in the following section. In this respect, it is worth noting that collusive arrangements are draining huge amounts of resources of economies that have a need to make the most efficient use of aid resources to maximize developing related benefits.

Against this background, and given the unique position of these institutions vis-a-vis private sector, MDBs should become a pivotal transformative instrument to spur corporate governance in the private sector, curbing the impact of illicit flows stemming from bid rigging in public tenders and/or abuses of dominant positions in monopolistic markets.

B) *Integrity Units- Anti-Cartel Enforcement*

Inevitably, MDB's projects and operations are vulnerable to corruption and anticompetitive practices including cartel agreements, which can thwart realization of MDB's developmental goals. With a view to fulfill MDBs fiduciary duties, MDB's integrity units were created in parallel to the implementation of the so-called sanction systems that penalize collusion, among other practices.[12]

MDBs sanction systems share several common features such as the two-tiered structure of investigation and decision-making, the administrative nature of sanctions proceedings, and reliance on the "preponderance of evidence" as the standard of proof.[13] Between 2007 and 2015, 368 entities were sanctioned or debarred by the World Bank Group and 359 faced temporary suspensions.[14]

Despite the impact that the MDB's sanctions have on the markets for developing countries, the competition community has limited awareness of the existence of these integrity units and vice versa, which eventually results in a disadvantageous gap from a cooperation viewpoint. The closure of this gap could bring about important synergies at least from institutional,

12 For detailed history of evolution of the Bank's Sanction System, see *The World Bank Sanctions Process and Its Recent Reforms*, Anne-Marie Leroy, Frank Fariello, The World Bank Group, 2012

13 *Understanding the World Bank Group's Anti Corruption Measures in Project Financing*, Maria Barton, Bloomberg Law Reports, Risk and Compliance, Bloomberg Finance LP, Volume 4, 2011; *The Increasing Prominence Of World Bank Sanctions*, Timothy Dickinson, Corinne Lammers and Morgan Heavener, www.law360.com

14 The World Bank Office of Suspension and Debarment Report on Functions, Data and Lessons Learnt, 2007-15, Second Edition, available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSD_Report_Second_Edition.pdf

procedural and substantive angles.

INSTITUTIONAL OPPORTUNITIES. From an institutional perspective, it is predictable to conclude that both the competition community and the MDB's Integrity Units could benefit equally if they establish a more intense relationship and carry out joint and parallel cartel investigations.[15]

The use of dawn raid powers serves as a good example to illustrate some of the benefits that enhanced cooperation could bring about. MDB's integrity units have no dawn raid powers that are key when searching for evidence to dismantle and sanction cartels. Hence, considering that the vast majority of national authorities can make unannounced inspections, MDBs investigators could carry out parallel or joint investigations that would benefit all parties involved.

MDBs Integrity Units could provide information to national authorities of possible cases of collusion based on the information MDB's have of the projects they finance and the sectors that are subject to deep analysis from these institutions for technical assistance and policy reform. In turn, the national authorities of these developing countries could carry out dawn raids to gather evidence. As a result, national authorities would have better information on possible bid rigging cases, and the MDBs could have better results in their efforts to combat collusion in the programs they finance and to rape full benefits of the sector reforms they promote through their budgetary and technical support.

SUBSTANTIVE OPPORTUNITIES. From a substantive standpoint, both MDBs and competition authorities could join efforts when carrying out economic analysis to build upon the circumstantial evidence often used to substantiate cartel investigations.

MDBs as many national authorities in developing jurisdictions have the great challenge to incorporate economic analysis to the cartel investigations in order to substantiate the cases that depend vastly on circumstantial evidence. It is therefore suggested that both national authorities and MDBs sanctions systems mutually devote joint efforts to incorporating economists who work together with lawyers and investigators to build solid collusion cases.

15 Lopez-Galdos, M., ¨Competition and Corruption: Two sides of the Same Coin Against Productivity¨, OECD Latin American Forum, 2016.

PROCEDURAL OPPORTUNITIES. Finally, from a procedural viewpoint, the competition community could work closely with MDBs with regards to the implementation of leniency programs and mutually assist each other by participating as *amicus curiae* in litigation phase.

Most competition systems include among its instruments to combat anti-competitive agreements leniency programs. As is known, leniency programs encourage companies to confess to the competition authorities of their participation in a cartel and to cooperate by providing information with respect thereto, in order to obtain full or partial immunity concerning their participation in such a scheme. The effectiveness of these programs is unquestionable.

Despite the successful experience in the use of leniency programs to combat anti-competitive agreements, MDBs remain largely reluctant to use them. It should, therefore, conclude that greater cooperation between the MDBs and national authorities and endeavors to show the benefits of having leniency programs could improve the cartel detecting capabilities of MDBs that could also benefit at the end of the day national authorities capacity to detect and fight collusion in developing countries.

Additionally, once cooperation between MDBs and competition authorities is intensified, the possibility of national competition authorities to participate as *amicus curiae* during the MDB's litigation phase and vice versa could yield significant benefits. This is particularly the case in collusion cases that are based on circumstantial and economic evidence. The incorporation of amicus briefs in collusion cases could help to obtain deference from sanction officers of MDBs as well as the judiciary from developing countries and enhance the fight against cartels.

C) *Knowledge Sharing- Data On Procurement*

MDBs count with invaluable data on public procurement as most of the contracts included in the projects they finance are publicly procured. As it is well known, one valuable tool for competition authorities and for MDB's integrity units is to analyze and identify anticompetitive pattern behaviors that take place in the procurement processes.

The systematization of the MDBs

procurement data broken down by sector, markets, countries and regions could provide the competition community with superior information to work with. This would yield better results for competition authorities in their endeavors to ensure effective competition in markets, thus contributing as well to the MDBs development mission through an enabling environment for private sector growth and job creation. Indeed, the study of systematic information on public tenders could contribute to finding innovative solutions for the detection of cartels, such as the identification of multijurisdictional patterns. At the same time, the economic analysis of such data would produce more accurate estimates of the costs of collusive agreements, increasing awareness of the toll it is taking on developing economies and, therefore, reinforcing the right incentives to fight against it.

In view of the foregoing, it seems that there is a window of opportunity for MDBs and competition agencies as well as competition scholars to agree on how to share the information MDBs have from a procurement standpoint and work with the data thereof.

III. CONCLUSION

The summary included in this article has attempted to illuminate potential cooperation opportunities between MDB's and the competition community with the aim of bringing closer together both communities and yield mutual benefits. It is expected that a closer cooperation between the two stakeholder groups would generate synergies that equally benefit the respectively pursued goals. The latter is particularly important given the fact that the MDBs shareholders are the Governments of its country members, which should be an additional incentive to engage with their national competition authorities.

This analysis has identified a few areas where cooperation could and should be enhanced. The benefits of such increased cooperation overweight the cost of implementing those cooperation efforts. Thus, it is a low-hanging fruit that would help boost shared prosperity and benefit the poorest. It is now the turn of interested parties to make such cooperation happen.

INDIAN COMPETITION LAW: AWAITING JUDGMENT

BY NISHA KAUR UBEROI[1]

I. INTRODUCTION

Competition law in India has been enacted by the Indian Parliament in the form of the Competition Act, 2002 ("Act"), which came into force on May 20, 2009. The merger control provisions of the Act were subsequently brought into force in June 2011. The Act provides for the establishment of a specialized investigative and quasi-judicial body, the Competition Commission of India ("CCI") along with its investigative arm (i.e. the office of the Director General ("DG Office") to investigate and adjudicate upon contraventions of the Act. A judicial appellate body in the form of the Competition Appellate Tribunal ("COMPAT") is also established to exercise oversight over the decisions of the CCI.

The Act provides for appeals from certain decisions of the CCI to the COMPAT. Decisions of the COMPAT can then be further appealed before the Supreme Court of India ("Supreme Court"). However, such appeals to the Supreme Court would only be entertained on a point of law. During these seven years of competition law enforcement in India, only a handful of cases have been appealed before the Supreme Court (certain matters are also being litigated before various High Courts — on issues pertaining to the CCI's jurisdiction). However, the floodgates at the COMPAT now seem to be open. An analysis of the

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The author would like to acknowledge the contribution of senior associate, Shweta Vasani and associates, Neelambera Sandeepan and Arunima Chandra of the competition law practice of Cyril Amarchand Mangaldas.

cases filed before, argued and disposed of by the COMPAT indicates a clear enforcement priority: application of competition law principles is a must, but not at the cost of due process.

The principles of due process form the bedrock of any justice dispensation arrangement and are integral to any formal legal system. The Constitution of India, 1950 ("Constitution") provides for the basics that all administrative agencies must follow while exercising their decision-making powers and this includes adherence to the principles of natural justice. While due process, as a concept, is derived from common law principles, it is an indispensible component of India's justice delivery system and by way of precedents, the Honorable Supreme Court has established that it is imperative for judicial, quasi-judicial and administrative authorities in India to follow due process in all their proceedings. For instance, in the seminal case of *Maneka Gandhi v. Union of India*[2] the Supreme Court emphasized the importance of adoption of "fair, just and reasonable" procedure by judicial and administrative authorities. The Act is no exception to this rule.

Section 36(1) of the Act unequivocally provides that while the CCI has the power to regulate its own procedure, it shall be guided by the principles of natural justice in the exercise of its powers. Further, regulations that supplement the Act also lay down that the CCI and the office of the DG must adhere to the principles of natural justice while dealing with enforcement proceedings. The Supreme Court's seminal judgment in *Competition Commission of India v. Steel Authority of India Limited*[3] ("SAIL Case"), forms the foundation of Indian jurisprudence in the field of competition law and due process. The Supreme Court while examining the scheme of the Act, held that the CCI being a quasi-judicial authority, is bound by the principles of natural justice. Subsequently, the COMPAT has followed and subscribed to the Supreme Court's precedent in the SAIL Case and in a series of judgments, emphatically opined that the CCI is obliged to adhere to the principles of natural justice.

However, despite the abovementioned unambiguous provisions of law and clear mandate from the Supreme Court, there have been instances in the recent past where the CCI has deviated from the principles of natural justice in its proceedings and not followed due process of law. It would appear that the CCI, its in eagerness to meet justice on the perceived merits of a case, often overlooks certain basic due process principles that ought to be followed. As a result, the affected parties in such instances have challenged the decisions of the CCI before the appellate authority on the very basis of non-compliance with principles of natural justice; with the merits of the case forming a second ground of appeal.

Based on an analysis of recent proceedings before the COMPAT, it would appear that the COMPAT is the sentinel of due process in the Indian competition law adjudicatory system and spends majority of its time in setting the CCI's house in order, by way of directions and strictures in respect of the decision-making process required to be adopted by the CCI. This is also an approach that is expected from the COMPAT, as a retired Judge of the Supreme Court or the Chief Justice of a High Court, with years of experience in a court of law, is at the helm of its affairs and presides over the proceedings before the bench.

II. JUDICIAL REVIEW OF CCI DECISIONS

This article analyses recent cases where decisions of the CCI have been tested at the altar of due process compliance and excesses or shortcomings of the CCI have been corrected at the appellate forum.

Recently, the CCI's well publicized and significant order in the case of *Builders Association of India v. Cement Manufacturers Association & Ors.*[4] ("Cement Cartel Case"), wherein a cumulative penalty of INR 63,070 million (approx. USD 945 million) was levied on the 11 cement companies found guilty of cartelization by the CCI, was set aside in entirety and remanded to the CCI for fresh hearings and adjudication on the following grounds:[5]

(a) The CCI Chairman, who initialed every page of the CCI Order and in all likelihood authored the CCI Order, was absent during the oral hearings

2 AIR 1978 SC 597.

3 (2010) 10 SCC 744, paragraph 86.

4 Case No. 29 of 2010.

5 The author represented Lafarge India Private Limited and Ambuja Cements Limited in the proceedings before the COMPAT and also subsequent re-hearing before the CCI.

held before the CCI. Accordingly, the CCI Order was vitiated due to the violation of the rule that "only one who hears can decide."

(b) The views and statements of the CCI Chairman were widely reported in several newspapers and the CCI proceeded with the case with a pre-determined mind to penalize the cement manufacturers and publicize the role of the CCI. Such conduct by the CCI violates the principle that justice should not only be done but should manifestly and undoubtedly be seen to have been done.

Citing a host of decisions by the Indian courts, the COMPAT observed that commissions, tribunals and other administrative bodies who have the power to adjudicate upon the rights of the parties or pass orders adversely affecting a person or imposing penalty, were required to act justly, fairly and in accordance with the principles of natural justice. Additionally, the requirement that the CCI abide by the principles of natural justice has been "statutorily engrafted in the scheme of the Act" by way of Section 36, which stipulates that the CCI "shall" be guided by the principles of natural justice.

The *All India Organization of Chemists and Druggists v. Competition Commission of India*[6] ("AIOCD Case") was the first instance in which the COMPAT took cognizance of the procedural anomaly in relation to signing of the orders of the CCI. In this case, the final order of the CCI was signed by members who were not present during the hearing before the CCI on February 27, 2014. Further, two of the five CCI members who had signed the order had not even joined CCI on the date of the hearing. The COMPAT, relying on landmark Supreme Court precedents, observed that "*an order passed by a person who had not heard the arguments offends the principle of judicial procedure*"[7]. Further, the COMPAT observed that "[...] *personal hearing enables the authority concerned to watch the demeanor of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality*"[8]. The COMPAT noted that "[...] *two of the five members who signed the impugned order had joined the Commission after more than 1.5 months of the date of hearing. Therefore, the only possible inference which can be drawn is that they had mechanically signed the impugned order and such an order cannot but be treated as vitiated due to the flagrant violation of the basics of natural justice.*"

Interestingly, on account of this *modus operandi* of the CCI whereby there is a disconnect between the CCI members that are present for hearings and the members that pass or sign the final order, Sections of the Act that allow for such a procedure are themselves being challenged in proceedings before the Delhi High Court. This issue has been raised on an appeal against the decision of the CCI in the *Automobile Spare Parts Case,*[9] where the CCI had fined 14 auto parts manufacturers for abusing their dominant position. The appellants argued that Sections 22 and 27 of the Act, which contain provisions for the conduct of meetings of the CCI and imposition of penalty, respectively, are *ultra vires*. During the final hearings of this matter before the CCI, while 7 members of the CCI heard the arguments advanced by the parties, the final order finding the spare parts manufacturers in violation of Section 4 of the Act was pronounced by only 3 members.[10] While this was in accordance with the provisions of Section 22 of the Act, which stipulates that a quorum for the purposes of an ordinary meeting of the CCI should comprise 3 members, the same is not in consonance with the practice established and followed in every judicial system wherein each judge who hears the case must be party to the final order determining the rights of the parties.

In early 2015, the COMPAT also set aside (in entirety) an order passed by the CCI against the Board of Control for Cricket in India ("BCCI") (*Board of Control for Cricket in India v. Competition Commission of India*[11] ("BCCI Case"),[12] on the ground of violation by the CCI of principles of natural justice in arriving at its final decision. By way of background, the BCCI filed an appeal before the COMPAT in relation to the CCI's order dated February 8, 2013 that held the BCCI to be dominant on account of the regulatory nature of its role, monopoly status, control over infrastructure, ability to control entry of other leagues, historical

6 Appeal No. 56 of 2014.
7 Appeal No. 56 of 2014.
8 *Union of India v. Shivraj* (2014) 6 SCC 564.
9 Case no. 3 of 2011.
10 W.P.(C) 6610/2014 and W.P.(C) 6634/2014.
11 Appeal No. 17 of 2013.
12 The author represented BCCI before the CCI and COMPAT.

evidence, etc. The CCI held that based solely on Clause 9(1)(c)(i) of the Media Rights Agreement ("Media Rights Clause"), the BCCI has abused its dominant position under Section 4(2)(c) of the Act by undertaking not to organize, sanction, recognize any other private professional domestic league/event that could compete with the Indian Premier League ("IPL"). The CCI concluded that such a practice resulted in the denial of market access to any potential competitor of IPL looking to establish a competing private professional cricket league or event, and imposed a penalty of INR 522.4 million (approx. USD 8 million) on the BCCI for abusing its dominant position. The specific grounds on which the COMPAT found the CCI to be in breach of the due process requirement in this case, are discussed below:

(a) The BCCI was only given an opportunity to address the views formed by the DG in relation to the definition of relevant market. However, the CCI, in its order, relied on an analysis and definition of the relevant market that was manifestly different from the definition of the relevant market in the DG's report. As such, the BCCI never had an opportunity to contest the relevant market definition that formed the basis of the CCI's decision. The COMPAT viewed this as a violation of the principles of natural justice as the BCCI was not heard in relation to the specific allegation on the basis of which it was found guilty.

(b) In order to strengthen the basis of its definition of the relevant market, the CCI relied on new information, which did not form part of the information that the BCCI had access to. While such information was largely publicly available — none of it was provided to the BCCI before the CCI proceeded to rely on it for the determination of the relevant market.

(c) Finally, the Media Rights Clause was neither identified by the DG as a violation of the Act in the DG report, nor raised as an issue by the CCI during its inquiry and hearings. As such, the BCCI was denied an opportunity to controvert the CCI's analysis. The BCCI argued that the CCI's finding in relation to this Media Rights Clause suffered from lack of sound reasoning, resulting not only in the violation of principles of natural justice but also a complete failure of justice and non-application of mind.

Pursuant to a detailed assessment, the COMPAT set aside the CCI's order as legally unsustainable and criticized the CCI for its clear breach of due process principles. The COMPAT criticized the CCI for its lack of due process and procedural fairness in relation to the investigation and unequivocally held that before issuing any adverse decision, the CCI must comply with the principles of natural justice, including following the rule of *audi alteram partem* and give an effective opportunity of hearing to the party against whom an adverse decision has been issued. Notably, the COMPAT also held that a defendant should not only be granted an opportunity to refute the allegations leveled against it but also the evidence (including any new information that is not part of the DG's Report) that is used to support such allegations. The COMPAT also observed that the CCI should pass speaking orders to indicate its application of mind to the relevant factors considered in assessing an alleged violation of the Act. Prior to the BCCI Case as well, the COMPAT had issued a clear mandate that the lack of reasoning in orders passed by judicial and quasi-judicial bodies amounts to the violation of principles of natural justice and due process. For instance, in *M/s DLF Limited v. Competition Commission of India & Ors.*[13], the COMPAT noted that the CCI had not provided a detailed order and remanded the case back to the CCI, requiring it to provide details in relation to the extent and manner of modification of the impugned agreement in question. Despite this clear mandate, the CCI faltered in the BCCI Case, which the COMPAT remanded to the CCI for fresh disposal in accordance with law.

In the AIOCD Case mentioned above, the COMPAT also commented on the violation of the rule of proportionality, which is covered within the ambit of principles of due process. By way of background, the DG had sought information from AIOCD on multiple occasions in relation to three complaints filed against AIOCD on substantially similar grounds. The information sought by the DG was similar for all the three investigations against AIOCD. Therefore, AIOCD argued that the required information was already submitted to the DG pursuant to the direction issued by the DG in relation to the second complaint and such information was sufficient for the purposes of the DG's investigation report in all three cases. However, the DG issued a show cause notice under Section 43 of the Act for non-compliance with the DG's directions in relation to the first complaint. While the DG completed its investigation in all the three cases and submitted an investigation report

13 Appeal No. 20 of 2011.

to the CCI, the CCI nonetheless levied a penalty on AIOCD at the rate of INR 25,000 (approx. USD 375) per day till the submission of the requisite information. Furthermore, the CCI miscalculated the number of days for which the violation persisted and continued to impose penalty for a period even after completion and submission of the DG report itself. The COMPAT reviewed the penalty imposed and held that the CCI had violated the principle of proportionality in ample measure by miscalculating the duration of non-compliance and extending the same to a period post submission of the DG report.

III. INDIAN COMPETITION LAW AND THE COURTS

The cases discussed above expose the CCI's shortcomings in its handling of matters from an administrative and due process perspective. While this is being remedied case-by-case at the COMPAT, there are certain inherent grey areas in the Act and regulations itself, which often results in the courts of India needing to step-in and take cognizance of purely competition law related disputes. For instance, the Act does not contemplate a scenario where the CCI can pass an order finding no contravention of the Act when the DG in his report has found the parties to be contravening the provisions of the Act. Accordingly, no right of appeal to the COMPAT is also provided for such a scenario. Given that the CCI is the adjudicatory authority under the Act, it is difficult to fathom that the legislature did not intend to assign the CCI the power to pass an order disagreeing with the conclusions of the DG. The CCI, in its wisdom, has not considered itself to be restrained by such a lacuna in the Act and has in certain cases found parties to be not guilty of a contravention despite findings in the DG report to the contrary.[14] Upon appeal, the COMPAT has taken a strict interpretation of the Act and held that the right of appeal is a creation of statute and as such, only orders passed under the provisions listed in Section 53 (A)(i)(a) of the Act can be appealed before the COMPAT, rendering the parties remediless.[15] In one such case (*Jyoti Swaroop Arora v. Competition Commission of India & Ors.*)[16], the High Court of Delhi is now seized of the issue of whether a right to appeal to the COMPAT is to be read into the provisions of the Act for such a scenario, or does the remedy lie directly before the courts of India.

There have also been instances where the exercise of investigative and penal powers of the CCI have been called in question before the Indian courts. For instance, the first dawn raid in India was conducted by the CCI in September 2014 at the registered and corporate offices of M/s JCB India Limited ("JCB") in relation to an abuse of dominance investigation. Subsequent to the dawn raid, JCB approached the High Court of Delhi that considered the manner in which the action was undertaken by the CCI and asked the DG to file a personal affidavit on the reasons that prompted him to take the "drastic action." At the outset, a warrant to conduct such a dawn raid is required to be obtained by the DG office from a Chief Metropolitan Magistrate and thereafter the calling into question of the DG's jurisdiction to conduct such raid certainly undermines the efficacy of the CCI's investigative wing. The DG investigation in this matter was stayed by the High Court on account of litigation pending before the courts between the party that filed a complaint with the CCI and JCB. The High Court of Delhi also stayed CCI's penalty of INR 10 million (approx. USD 150,000) on Google, which was levied on account of non-cooperation by Google in the CCI's investigative process.

Further, on pleas by defendants in other cases being investigated by the CCI, the High Courts of Delhi[17] and Madras[18] have also granted stay orders on the CCI investigation, significantly undermining the CCI's authority.

IV. KEY TAKEAWAYS

Recent orders of the COMPAT, discussed above, will certainly shape competition law jurisprudence

14 *Jindal Steel & Power Ltd. v. Steel Authority of India Ltd.* (Case No. 11 of 2009); *Prints India v. Springer India Private Limited & Ors.* (Case No. 16 of 2010); *Arshiya Rail Infrastructure Ltd. (ARIL) v. Ministry of Railway (MoR) & Ors.* (Case No. 64 of 2010, 12 of 2011 and 2 of 2011); *All India Tyre Dealers Federation v. Tyre Manufacturers* (RTPE Case No. 20 of 2008).

15 The COMPAT while arriving at this finding relied on the Supreme Court's judgment the SAIL Case. It is pertinent to note that Supreme Court in the SAIL Case while determining the appealability of a *prima facie* order and not a final order of the CCI adjudicated upon the scope of Section 53A of the Act.

16 W.P. (C) No. 6262 of 2015.

17 W.P. (C) 6610/2014 and W.P.(C) 6634/2014.

18 Writ Appeal No. 340 of 2015.

in India and bring the CCI's decision-making process at par with the justice delivery system in traditional courts of law. In order to impart a sense of faith and responsibility in the system, it is vital that CCI orders are in consonance with the law in letter and spirit, substance and procedure. However, a matter of graver concern is the CCI's struggle for jurisdiction with Indian courts and it remains to be seen whether the courts would exercise the necessary judicial restraint in allowing this specialized regulator to fulfill its mandate. An objective assessment would lead to the conclusion that while the CCI's shortcomings in certain aspects of case-handling and procedural justice are apparent, as a fairly new regulator it has certainly proved its mettle as the protector of competition law policy and consumer welfare. Further, given the slew of cases remanded from the COMPAT and CCI orders set aside on grounds of due process, it is expected that the CCI will take immediate remedial action in this regard.

TOWARDS FAIRNESS AND TRANSPARENCY IN AGENCY ANTITRUST INVESTIGATIONS AND CASES

BY ROY E. HOFFINGER[1]

I. INTRODUCTION

As many jurisdictions enter the field of or intensify their enforcement of competition law, and agencies adopt decisions that benefit local competitors and customers at the expense of foreign companies, members of the business and academic communities are concerned that the outcomes of agency decisions may not reflect the application of sound competition law principles to a complete and accurate record.[2] Greater skepticism may be warranted where the same organization acts as investigator, prosecutor, judge and jury. The prevailing system in such jurisdictions provides enormous incentives to agencies to rule against the respondent in an investigation, especially when the respondent is a citizen of a different jurisdiction. This bias is manifested in agency interpretation and application of substantive law, and facilitated by procedural rules and practices that are nontransparent and unfair.

The best way by far to ensure that outcomes in agency antitrust cases reflect the application of sound antitrust principle to a complete and

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2 *See, e.g.,* D. Sokol, *Tensions Between Antitrust Policy and Industrial Policy*, 22 Geo Mason L. Rev. 1247 (2015).

accurate record is to replace enforcement regimes in which the same agency serves as investigator, prosecutor, judge and jury with a regime that places these functions in separate and independent organizations. For example, investigations and prosecutions would be the responsibility of an administrative agency, while the adjudication functions would be performed by courts that are less subject to influence by personal ambition and industrial policy. The relative freedom from political and personal bias of courts is likely to result in procedures that ensure genuine "equality in arms" with regard to the collection, presentation and analysis of evidence.

Regrettably, the unfortunate combination of prosecutorial and adjudicatory functions is likely far too entrenched in many jurisdictions to hope for fundamental structural changes in the foreseeable future. The next best alternative for attaining some minimally acceptable level of transparency and procedural fairness is revision to agency practice. To date, however, many if not all of the significant initiatives to explore and recommend such revisions have been undertaken by associations or other organizations comprised of the very agencies whose political and personal agendas are served so well by the current system. While the continuation and expansion of these initiatives should be welcomed, they are prone to the same concerns that underlie the skepticism of government agencies toward industry "self-regulation." Accordingly, it would be imprudent to rely on them as the exclusive source of proposals and campaigns for change. The legal, business and academic communities need to devise and lobby for proposals for fundamental change, with these proposals serving as a benchmark against which agency practices and proposals may be measured. This article offers one set of such proposals.

II. BACKGROUND

Those who concern themselves professionally with economics and incentives cannot be oblivious to the incentives of an agency, including one run and led by public servants, that performs all of the functions described above. These incentives create enormous bias in favor of rulings against investigation targets.

Most fundamentally, when an enforcement agency concludes that the respondent has violated its jurisdiction's competition law, the agency may impose potentially enormous monetary fines that — even if not received directly by the agency — can be used by the agency to solicit support for continued or increased funding or expansions of its authority. The incentive increases when the respondent is a citizen of a different jurisdiction. In that circumstance, the fine represents a pure transfer of wealth from one jurisdiction to another. Such fines, and perhaps even more so "cease and desist" relief that limit the pricing and marketing actions of the target, may reduce competitive pressures on local enterprises, which have greater political power locally.

By contrast, there exists little or no incentive for an agency to drop an investigation without finding a violation by the respondent. Few, if any, antitrust enforcers have received huge boosts to their careers from a decision in favor of a foreign target of an investigation. Instead, such a decision may spur criticism or questions by local government, media and the public regarding the agency's competence or resource utilization.

The effect of the incentive scheme described above is evinced by the quick and strongly worded press releases by agencies touting the fines they collect, and the common use by agencies of data on cumulative fines they assess or collect as a metric of their success and worth, and their virtual silence in the rare cases when an extensive, highly public investigation is terminated with no findings against the target.

The ability of an agency to adopt and enforce decisions that reflect personal agendas and industrial policies is enhanced by procedural rules and practices that preclude the compilation of a complete and accurate record, and/or that inflame local opinion against their targets. The reliability of agency decisions from the perspective of sound antirust principle would be enhanced immeasurably by rules and practices that increase agency transparency and create true equality of arms between agency prosecutors and their targets in the compilation, presentation and analysis of evidence, as discussed below.

III. PROPOSALS FOR CHANGE

Timely Disclosure Of All Allegations, Theories And Evidence To Investigation Targets.

Perhaps no aspect of the investigative and adjudicatory processes is more critical than the timely disclosure to the target company of the allegations and evidence. All evidence, regardless of the investigator/prosecutors' opinion of its relevance or materiality,[3] should be disclosed without redactions to investigation targets.[4] Next to assigning to separate entities responsibility for investigation/prosecution, on the one hand, and adjudication on the other, thereby eliminating the biases described above, ensuring such disclosure is the measure most likely to enhance the prospect that outcomes in agency antitrust cases will reflect the application of sound antitrust principle to a complete and accurate record.

The importance of timely disclosure to an investigation target with timely access to all allegations and evidence is manifest. Evidence submitted to agency prosecutors by complainants and third parties standing to benefit from agency action may be entirely fabricated, inaccurate if generated by recollection, taken out of context or be incomplete. Inferences and conclusions drawn from evidence, moreover, may be unwarranted, erroneous or misleading. Sound decisions about the authenticity, reliability, relevance and materiality of evidence cannot be made without the informed input of the respondent, the party that typically has the most competence and incentive to challenge the evidence, and the validity of any conclusions and inferences drawn from it.[5] Agency personnel and third parties, no matter how competent and well intentioned, cannot without the informed assistance of the respondent arrive reliably and consistently at sound conclusions about the relevance and weight to be accorded particular evidence. In addition, agency prosecutors may not recognize or be disinclined to disclose to the target exculpatory evidence.

Alarmingly, however, few competition law agencies provide complete and timely disclosure to their targets of allegations and evidence and allow agencies to decide the course and outcome of an investigation based on secret evidence. In some jurisdictions, the respondent never receives access to any evidence; in other jurisdictions, the respondent is accorded access to selected evidence, though the criteria for predicting what will be disclosed and when are uncertain. In jurisdictions that utilize secret evidence, the agency's investigators (who are often also the agency's prosecutors and first-instance decision makers) merely assert to the respondent the existence of evidence of which there is little or no description, and advise the respondent of the conclusions they have drawn from it. The sources, vintage or form of the evidence or, more accurately, *alleged* evidence, remain undisclosed. The respondent has no means to confirm the existence or authenticity of the alleged evidence, challenge its credibility or dispute the interpretation thereof by the agency.

The justification most frequently invoked by agencies for the use of secret evidence in antitrust cases is that the evidence is "confidential" to the providing party, including complainants and third parties that stand to benefit from sanctions against the defendant. The "confidentiality" exception to due process is indefensible, however.

3 Limiting disclosure to materials "relied upon" by the investigators/prosecutors to allege or prove a competition law violation is inadequate. First, such a limitation may be interpreted to exclude exculpatory evidence. Second, the phrase "relied upon" is undefined and open to different interpretations even as to evidence that may tend to be incriminating. True equality of arms can be achieved only by providing to targets timely access to all evidence submitted to the agency by complainants and third parties.

4 Written "Guidance" on Investigative Process issued last year by the International Competition Network ("ICN"), an association of government agencies charged with enforcement of their nations' competition laws, calls for the disclosure to investigations targets of access to all "evidence relied upon" (para.5.4) by the agency no later than its adoption of formal allegations of competition law violations. The ICN Guidance identifies and supports certain measures for protecting genuinely "confidential" business information (para. 9). Notably, however, those measures *exclude* nondisclosure of the information to investigation targets. Nondisclosure is an option only with regard to the public (*id.*). The ICN Guidance is welcome, but inadequate because it is non-binding and because it allows the secrecy of evidence to be maintained until the final hearing, at which time agency views may have hardened and public pressure to find a violation too great to overcome.

5 *See* judgment of July 8, 1999 of the Court of Justice of the European Union Case C-51/92 P, *Hercules Chemicals NV v Commission* EU:C:1999:357, para. 75 ("access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections").

Preliminarily, "confidentiality" is a classic example of an exception swallowing the rule (in this case, disclosure to respondents). Determining whether a document or information is genuinely confidential is a highly burdensome process, and the frequency with which an agency undertakes it as doubtful. Indeed, an example of the absence of transparency in agency proceedings is the absence of information about whether, when and how an agency attempts to determine the legitimacy of confidentiality designations. Given the incentives described earlier in this argument, it is unreasonable to assume that agencies expend much if any effort on such an exercise, as disclosure may undermine rather than support a decision against a target. Accordingly, complainants and third parties hostile to the respondent are often inclined to designate virtually everything they submit as "confidential," a practice that appears not to trouble and may even be welcomed by the agency. A confidentiality exception to the due process requirement that all evidence be provided to a respondent, especially if the exception applies merely to information designated confidential by the provider with no review by an independent tribunal, seriously undermines the importance of the disclosure principle generally.

More fundamentally, confidentiality, however, provides no basis for dispensing with a measure so critical to the compilation of a complete and accurate record and preventing government abuse.[6] Even legitimately confidential information should be disclosed to respondents or at least their legal representatives. Measures are available to protect documents and information that are legitimately found "confidential" without opening the door to prosecutorial abuse or otherwise diminishing the contribution a respondent can make to the compilation of a complete and accurate record. These include prohibiting the respondent from using the documents and information outside of the investigation or proceeding, as well as limiting disclosure to the target's counsel and experts. This is the practice of United States' courts; documents and information are virtually never withheld from a defendant on confidentiality grounds, but are instead disclosed pursuant to a protective order placing appropriate limits on use and access, the violation of which may be punished severely. There are exceedingly few instances in which violations of protective orders are alleged, much less found.

Authorizing Collection Of Evidence By Investigation Targets

In most jurisdictions, including the European Union, China, South Korea and Japan, there is a gross disparity between the authority of the agency, on the one hand, and the targets of the agency's investigations, on the other, to obtain evidence from complainants and third parties. More specifically, most agencies have broad authority to compel production of evidence by threatening and imposing sanctions for non-compliance, while respondents have no authority at all to do so directly, or even indirectly through the agency. In addition, complainants and interested third parties that frequently stand to reap commercial advantage from an agency order against the target are quite willing to assist the agency to develop a record appearing to support such an order, while refusing to cooperate with the target. By contrast, few if any jurisdictions where the prosecutorial and adjudicatory functions are combined grant any authority whatever to investigation targets to compel the production of evidence from complainants and third parties, which typically lack any incentive to cooperate with the target and may even incur the risk of an agency's wrath were they to provide such cooperation.

This gross disparity in the ability to collect and present evidence is inimical to the compilation of a complete and accurate record. Agencies claiming to strive for such a record should revise or if necessary seek authority from their governments to revise their regulations to provide a means by which investigation targets may compel production of documents and information from third parties subject to their jurisdiction, and from complainants. One such means could be mandatory service by agency personnel on complainants and third parties of discovery requests prepared by targets, with responsive materials disclosed to the agency

6 A distinction needs to be made between disclosure of evidence to a defendant, on the one hand, and to the public, on the other. The use of secret evidence threatens the respondent, not the public, with deprivation of liberty (e.g., "cease and desist" relief) and property. This article takes no issue with refusals of agencies to provide for or allow for disclosure to the public of documents and information that are legitimately designated "confidential."

as well as the target (subject, as appropriate, to a protective order). The scope of such discovery should be the same as that permitted the agency.

Outside Legal Counsel For Targets

Competition law agencies in most jurisdictions allow targets of their investigations to be represented by outside legal counsel licensed to practice in their jurisdiction. A citizens of a jurisdiction different than that of the agency should also be allowed, at its option, to include outside counsel from its own jurisdiction, acting under the supervision of local counsel, as part of its defense team. The outside counsel with the greatest knowledge of the target, its business and its industry is likely to be located in the target's own jurisdiction. Such counsel can provide great assistance to both the target and local counsel, reducing the burden and cost on the target and its in-house counsel. The efficiencies of employing outside counsel from the target's home jurisdiction are even greater in a world where multiple agencies can and often do investigate the same conduct by the same target. Such outside counsel should be permitted to attend and speak at all hearings, meetings and conferences with agency investigators, prosecutors and decision-makers. This would be in addition to and never in lieu of participation by the target's outside local counsel, who would be responsible among other things for ensuring compliance with local rules and procedures.

Appointing And Expanding The Authority Of Hearing Officers

Some agencies employ "hearing examiners" (*e.g.,* the European Commission) or "administrative law judges" ("ALJ") (*e.g.,* U.S. FTC) to supervise certain aspects of the agency's investigation and post-investigation hearings and other procedures. One of the primary reasons for employing such officials is to allow for more neutral handling, relative to the agency's investigators and prosecutors, of scheduling and other procedural matters. All agencies should employ hearing examiners to minimize reliance on agency prosecutors to handle and resolve disputes with targets over such matters. These would include not only scheduling (*e.g.*, the timing of required submissions, hearings) but also disputes over the collection, disclosure and presentation of evidence. For example, hearing officers should resolve:

- disputes over the scope and timing of discovery requests propounded by agency personnel, and the investigation target;
- disputes over the legitimacy of any confidentiality designation, the completeness or timeliness of disclosure of allegations and evidence to respondents, and the need for and terms of a protective order to safeguard any legitimately confidential information; and
- requests for extensions of time to file responses to discovery requests and other submissions to the agency.

In addition, hearing officers should be authorized to receive and required to distribute to Commission personnel deciding the merits of a case complete and uncensored briefs and other materials submitted by the target.

Agency hearing officers/ALJs should be independent from agency investigators and prosecutors to the maximum extent possible. Measures that promote such independent include having these officials report to and be supervised by agency personnel who are not responsible for investigations and prosecution. Nor should agency investigators and prosecutors have input into the compensation or other terms of employment of hearing officers/ALJs.

Hearing Before Agency Decision-Makers/ Prohibition On Ex Parte Communications

If the agency's investigators/prosecutors decide to formally charge a target with violations of their jurisdiction's competition law, the target should be entitled to a meaningful, live hearing to contest and present evidence and argument. The hearing should be scheduled by and presided over by a hearing officer or ALJ, to whom agency prosecutors and targets have equal access, and attended by all members of the agency who will vote on the agency's final decision. The hearing should be conducted on the merits and decided without deference to the agency prosecutors' view of the facts or applicable law. The agency should bear the burden of proof on all elements on alleged violation. The subjective beliefs of agency investigators and operators, no matter

how strongly or sincerely held, should not formally or informally be used to shift the burden to the respondent.

In addition, all *ex parte* contacts between the hearing examiner/ALJ and agency members (and their personal staffs) on the one hand, and agency investigators/prosecutors or the target and its representatives on the other, should be strictly prohibited. Such *ex parte* contacts at which evidence and argument are presented by only one party to a legal or administrative proceeding, outside the presence of or without service on the other party, are the antithesis of a fair and open proceeding; yet such contacts by agency investigators and prosecutors may be routine. The absence of agency transparency forecloses any definitive statements about the frequency of this practice.

The prohibition on *ex parte* contacts should commence at the outset of the investigation. If there is any exception to the prohibition, it should be for communications during the early stages of the investigation intended to allow senior agency personnel to exercise some control over their agency's expenditure of resources. Absent an outright ban on *ex parte* contacts, a target and its representatives should be allowed to seek *ex parte* contacts with agency members entitled to vote on the agency's ultimate disposition of the case, and such members should be required to accept such contacts if they accept them from agency investigators/prosecutors. True equality of arms requires no less. Currently, e*x parte* contacts by an investigation target or its representatives may be regarded as inappropriate in at least some jurisdictions.

Agency Communications With The Media And Other Members Of The Public

In certain jurisdictions, the media and others often report statements about the preliminary or other views of agency personnel about the merits or status of a particular case or investigation, prior to the target having had an effective opportunity to challenge the allegations and evidence against it. These statements virtually always indicate guilt on the part of the target, and have the effect if not intent of creating expectations on the part of the public for a decision against and the imposition of serious sanctions on the target. The likelihood of prejudice is especially palpable in the case of investigation targets that are citizens of a jurisdiction different than that of the agency, and that may lack the domestic political support required to counter the pressure on the agency to issue a decision against it.

To minimize potential prejudice from statements or reports in the media attributed to agency personnel, the commencement of an investigation, whether formal or informal, should be announced just once, and accompanied by a statement that fact of an investigation is not a tentative or other finding that particular conduct has occurred or is illegal, and should not be regarded by the public or other tribunals as evidence of conduct or guilt. Statements that an agency has decided to proceed with a formal investigation following an informal investigation are prejudicial and unjustified by any legitimate countervailing purpose. However, it is not unreasonable for an agency to respond to inquiries by noting that an investigation remains pending, if accompanied by the disclaimer that this is not a finding or evidence of a violation.

There is little doubt that statements about an agency investigation or case appearing in the media may be falsely attributed to identified or unidentified agency personnel. In that event, the agency should upon being informed of the statement promptly disavow it in the same media or other outlet in which the statement has been reported.

An agency should never punish or threaten to punish a respondent that attempts to refute a media report about a proceeding against it, or inform its own government about the conduct and status of such a proceeding.

IV. CONCLUSION

Agency enforcement of competition law today is too often driven by industrial policy and skewed incentives inherent in systems that entrust the prosecution and adjudicatory functions to a single entity. The absence of transparency and

procedural fairness in agency proceedings is both a symptom and cause of these problems. Absent the dismantling of these systems, agencies can restore at least some measure of confidence in the integrity of their decisions by adopting measures like those proposed herein. Until they do, their decisions should enjoy no presumption of validity, and should be disregarded by other tribunals conducting investigations and deciding cases against the same enterprise for the same conduct.

RELEVANT CASES IN MEXICO'S JURISDICTION FOR ECONOMIC COMPETITION

BY ADRIANA CAMPUZANO[1]

Mexico's history of Economic Competition legislation originates with the first Constitution to rule over the newly independent country, as well as with those that succeeded it. Like the first, these prohibited commercial monopolies, allowing them only for activities reserved exclusively for the State and its enterprises, a prohibition that was bolstered by secondary laws, the first of which can be traced back to 1926.[2] Likewise, we find record of matters settled by the Supreme Court of Justice ("SCJN" in its acronym in Spanish) beginning in the 1930's.[3]

1 Judge of the Second Administrative Collegiate Tribunal specialized in Economic Competition, Telecommunication and Broadcasting.

2 "… While the Constitution of 1857 conceived monopolies as violators of individual freedom in economic matters, the Constitutional assembly of 1917 prohibited them, not only for being contrary to freedom of commerce, industry and employment, but in virtue of their representing an attack against collective goods, for which they were to be controlled… In this sense, the original text showed two main dimensions, in principle, of seeking the defense of individual interests and, later, of public welfare…" Resolution, June 24 2013 in the Acción de Inconstitucionalidad 14/2011, available at: http://200.38.163.178/sjfsist/Paginas/DetalleGeneralScroll.aspx?id=24622&Clase=DetalleTesisEjecutorias&IdTe=2005517

3 The oldest resolution available appearing in the available resolution states that the regulations for the bread industry contradict the constitutional prohibition on monopolies, as they forbid the opening

The elaboration of jurisprudence during this time focused on conflicts related to the distance between commercial companies involved in the same business; hoarding of essential goods and facilities; privileged industries and the formation of producer associations.

Years later, with the passing of the country's first Federal Economic Competition Law (1992) and the creation of a specialized autonomous entity to apply the best practices of the time, the courts saw an influx of cases looking to challenge the investigations and fines imposed over alleged monopolistic practices.

Among the first matters resolved by the SCJN over the interpretation and application of the law (2000), was the laying down of foundations for the system. It was upheld, among other matters, that all verification and sanctioning procedures should be carried out at the administrative offices, meaning that (unlike other jurisdictions) they would not be subject to criminal or civil courts; that the interpretation of the law's basic concepts (such as Economic Agent, relevant market, market power, absolute monopolistic practices, etc.) would have to rely on Economic sciences, considering these concepts to have already been adequately defined by the discipline. Finally, the procedure is divided into two phases: a unilateral research phase, similar to a criminal procedure. The other phase, the defense, is where all possible violators would be heard.[4] These matters are relevant, as their directives continue to guide current decisions.

Due to the reforms carried out on the Federal Economic Competition Law, the country's highest court upheld in 2007 that the order for 'dawn raids' at company offices, as well as the setting of penalties involving the sale and divestment of active assets, rights, social projects and their execution, were not matters for the judiciary, but for the regulator itself — which greatly helped to strengthen the Administration.[5]

Years later (2013), the court had the chance to weigh in on a very important matter for the community. The Mexico City government issued a ruling, which restricted self-service supermarkets to areas where small corner-shops were not allowed. According to the decree, this was intended to protect the neighborhoods and traditional public markets. The decree was indicted and the Supreme Court declared it unconstitutional, as it went against free competition by ignoring the preferences of consumers.[6]

The ruling determined that, by stopping self-service establishments from opening in close proximity to these small corner shops, the latter would be allowed to fix prices in the area by exploiting this geographic exclusion. This would in turn harm consumers, who have a right to access the widest possible range of products, selecting them according to their preferences.

Another relevant issue came from the penalties imposed on a world-level soft drinks company and their relative monopolistic practices. The decision by the Supreme Court (2007) was relevant in that it, among other concepts, used the idea of an economic group to attribute the behavior of several companies linked to one another. The concept has been used in other cases, most recently to identify companies that should be subjected to the "preponderance" regime in telecommunications and broadcasting. [7]

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of bakeries within a 300-meter radius of any existing bakery, thus preventing competition. The extract is entitled "Regulations on the Bread Industry"

4 Resolution extracts are published in the Federal Judicial Weekly, register 191 364, 191 431 y 191 362, under the titles: "COMPETENCIA ECONÓMICA. LA LEY FEDERAL CORRESPONDIENTE NO TRANSGREDE LOS PRINCIPIOS DE LEGALIDAD, SEGURIDAD JURÍDICA Y DIVISIÓN DE PODERES PORQUE CONTIENE LAS BASES NECESARIAS PARA DETERMINAR LOS ELEMENTOS TÉCNICOS REQUERIDOS PARA DECIDIR CUÁNDO SE ESTÁ EN PRESENCIA DE UNA PRÁCTICA MONOPÓLICA", "COMPETENCIA ECONÓMICA. LAS CARACTERÍSTICAS DEL PROCEDIMIENTO ESTABLECIDO EN LA LEY FEDERAL CORRESPONDIENTE, LO IDENTIFICAN COMO ADMINISTRATIVO Y NO COMO CIVIL" y "OMPETENCIA ECONÓMICA. EL PROCEDIMIENTO OFICIOSO DE INVESTIGACIÓN PARA LA PREVENCIÓN Y DETECCIÓN DE PRÁCTICAS MONOPÓLICAS, CONTENIDO EN LA LEY FEDERAL CORRESPONDIENTE, NO VIOLA LA GARANTÍA DE AUDIENCIA", available at http://sjf.scjn.gob.mx/SJFSem/Paginas/SemanarioIndex.aspx

5 Unconstitutionality complaint 33/2006 presented by the General Attorney and resolved by the plenary sesión of May 10 2007. Available at http://goo.gl/FUpXkv

6 Unconstitutionality complaint 14/2011 presented by the General Attorney and resolved by the plenary sesión of June 24 2013. Available at http://goo.gl/FEHyMy

7 Appeal pending 169/2006 on October 24 by the First Chamber of the SCJN, available at http://goo.gl/e15fTL

The ruling said that an economic group exists when a group of physical or moral entities are found to have compatible commercial and financial interests, so that they coordinate their activities to reach a common goal. That is, they come together to carry out a particular task or in order to satisfy their common commercial and financial interests; that the collective behavior of people must be analyzed, and whether one person can directly or indirectly coordinate the group's activities in the markets and whether they could have decisive influence or control over the group, either *de jure* or *de facto;* that *de jure* control can be applied through share ownership, the ability to manage others or by delegating to others, or by controlling the operation through supply, financing or sales contracts' or the existence of family ties' while the *de facto* control can be the result of other structural factors or interests.

In the same case, the Collegiate Circuit Court that took the case (2008) took on, among other subjects, the raising of the corporate veil in order to establish that Moral entities are instrumental and do not free the people who act through them from the consequences of their actions or from the evidence against them.[8]

The ruling states that, in some cases, the creation of collectives has been used to carry out abuses, simulations or fraud. Therefore, the process known as "lifting the veil from a judicial person or corporate veil", allows us to discover the economic truth behind outward appearances in order to determine if an irregular conduct took place.

Two relevant cases also involved participation by commercial groups, or chambers.

The National Chamber for Cargo Transport was fined, as were several companies in this sector due to relative monopolistic practices, specifically a price-fixing agreement in exchange for services. The taxes on their activities had recently been raised, and so the market leaders, using the chamber in which they sat on the board of directors, developed a strategy to pass on to consumers the impact of this new tax hike. Penalties were also imposed on the company's representatives. The Supreme Court denied their appeal before a Collegiate Court in 2013, establishing clear guidelines on the criteria for the responsibilities of moral and physical entities as part of a collegiate body. Along with them, the court struck down several penalties.[9]

The court's decision analyzed several hypothetical situations that may present themselves when, in engaging in a monopolistic conduct, several individual people are involved, who are in turn representatives of moral or collective entities. For example, it was said that any conduct carried out by individuals acting in representation of moral entities may be held personally responsible, as they cannot alienate themselves from their own will; that violations will not be held as the responsibility of moral entities unless evidence exists to show that their own representation structures have adopted the agreement or decision to perform the offending conduct and the individual representative is incapable of exercising the Social Will on his or her own; and that both are responsible when the individual executes a collective mandate.

Over the previous year, the high court has been presented with two relevant cases, both of them related to absolute monopolistic practices.

The first of these cases was the product of an investigation into the public tender procedures for certain medications (insulin) to be purchased for the Mexican Institute of Social Security (IMSS, the Federal entity in charge of public healthcare) which uncovered an agreement between several laboratories to manipulate results and prices. The decision (2015) is relevant, as it shows a well-sustained construction of the argument and evidence, introducing an economic analysis as part of the decision for the first time.[10]

The high court held, among other matters, that when dealing with public tender contests for contracts, the following may be considered evidence of collusion: a) A pattern of winning and losing bids; b) Prices offered by winners and losers are somewhat similar; c) There exist economic agents who consistently win the contracts,

8 Appeal pending 479/2006, tried by the Fourth Collegiate Court in Administrative Matters for the First Circuit on June 18th 2008. Available at http://goo.gl/Yu0gFK

9 Appeal pending 398/2011, tried by the Eighth Collegiate Court in Administrative Matters of the First Circuit on February 14, 2013. Available at http://goo.gl/H4Rzig

10 Appeal Pending 453/2012 tried by the Second Chamber of the SCJN on April 8 2015, Semanario Judicial de la Federación, Reg. 2 009 655, available at http://goo.gl/cEEFBM

with noticeable differences to the rest of the competitors; and d) That the entrance of new players reflects a drastic change and reduction of price offerings.

The second case (2015) examines the constitutional validity of the Federal Economic Competition Law through the lens of a case sanctioning the agreements between fresh chicken sellers to lower the sales price of a product. In this case, the high court determined that a monopolistic practice should include all price-fixing agreements, whether they were price increases or reductions.[11]

An extract from the resolution states that, if the Constitution prohibits monopolistic practices and all other acts that represent an unfair, exclusive advantage in favor of one or several persons, to the detriment of the general public, it is clear that this prohibition must include all price-fixing agreements, whether involving increases or reductions, as they both distort the competitive process, eventually affecting the consumer who will not be acquiring these goods and services at a price that reflects real costs and prices.

Finally, revisions by the courts have begun on a group of resolutions related to declarations made by dominant economic agents when working to comply with the provisos of the 2013 reform. The first resolutions are concerned with broadcasting, setting the basis for future cases to consider, where the Constitution had set only a few precise rules for the making of the new competition regime, with its actual development left in the hands of the sector regulator (Federal Telecommunications Institute), which was in turn awarded broad faculties for attracting cases. It was also established that it is the responsibility of the affected parties to demonstrate that these declarations are in violation of applicable norms. [12]

The resolution held that, in terms of economic competition, the essential characteristics of economic groups are units of action, control and coordination, similar to the way that national jurisprudence has, in other areas, recognized that a group of people should be treated as a unit for certain regulatory effects; that is to say, as a focal point for the assignation of rights and obligations.

These cases are relevant, as they illustrate the inclinations of the courts on this subject.

Finally, we could add that, according to previous experience, Mexico's judicial oversight over economic competition matters presents, among others, the following characteristics:

1. It is enforced by the Supreme Court of Justice of the Nation and special tribunals with National jurisdiction, through appeals and other judicial mechanisms for constitutional oversight (un-constitutionality actions and controversies). It is not currently handled by ordinary courts. [13]

For example, one cannot currently indict the actions of the Federal Telecommunications Institute or the Federal Commission for Economic Competition through administrative-criminal courts.

2. It is developed along two dimensions:

Concentrated and diffused constitutional oversight, including in matters relating to the convention on human rights.[14]

Legal oversight, which presupposes a conflict between the actions involved and the secondary laws contained in the Federal Economic Competition Law, other laws and general regulations issued by the regulating agency.

For example, constitutional oversight has been exercised over the ability of the President of the Republic to establish regulations that define the facts and actions that configure a monopolistic practice, as it is considered a legislative matter[15]. Also, legal oversight has been applied

11 Appeal pending 839/2014 tried by the Second chamber of the SCJN on August 5 2015, Semanario Judicial de la Federación, reg. 2 009 937, available at http://goo.gl/0ZCvFh

12 Among others, appeal pending 62/2014, tried by the Second Collegiate Court in Administrative matters, specialized in Competition, Broadcasting and Telecommunications, February 19 2015 available at http://goo.gl/243vUP

13 Constitution, article 28

14 Semanario Judicial de la Federación. Tesis registro No. 2 010 143 "CONTROL CONCENTRADO Y DIFUSO DE CONSTITUCIONALIDAD Y CONVENCIONALIDAD. SUS DIFERENCIAS." Available at: http://goo.gl/bnPfS0

15 Semanario judicial de la federación, Thesis no. 180696 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 7o., FRACCIONES II, IV Y V, DEL REGLAMENTO DE LA LEY FEDERAL RELATIVA, AL ESTABLECER QUE DETERMINADAS CONDUCTAS DEBEN CONSIDERARSE COMO PRÁCTICAS MONOPÓLICAS, VIOLA EL PRINCIPIO DE RESERVA DE LEY CONTENIDO EN EL

on resolutions that define a relevant market to declare and identify an agent with substantial market power.[16]

3. Several terms are analyzed:

General norms (laws, regulations, general technical guidelines issued by the administration, and others.)

Administrative acts (individual resolutions).

4. Related to different fields:

Related to regulation, including all policies for prevention and intervention into the workings of the market, including dominance, essential facilities and barriers. The idea of a Regulator State works as a context for analyzing the modalities imposed upon private activity and individual rights.[17]

Related to the sanctioning authority that includes absolute and relative monopolistic practices, as well as illegal concentrations.

For example, declarations of substantial market power in some telecommunications markets, public offerings by dominant actors, and the sanctions imposed over certain collusion agreements coordinated by professional unions (such as anesthesiologists) have been examined.

5. All elements of the norms and acts are subject to judicial review, although held to different standards: Strict scrutiny is applied when dealing with restrictions on human rights, when there is precise constitutional guidance or when complaints arise of a violation to the principle of equality. Other cases receive only normal scrutiny.[18]

For example, when talking of norms, a strict standard has been applied to clearly determine what constitutes a forbidden conduct;[19] and when dealing with acts, it has used the ordinary revision standard to review the definition of relevant markets when declaring that a particular agent has a substantial power over the telecommunications market, for which the methodology used by the competition authority and its economic tests were analyzed.[20]

6. The legislator's freedom of configuration is recognized in order to achieve the constitutional objectives, and the discretion (including technical discretion) of the regulatory body. However, under both cases, control is to be exercised through a proportionality test, as well as other principles such as reasonableness, equality and non-discrimination.[21]

For example, these parameters have been used to examine the regulator's decision to consider only Open television services, while excluding radio broadcasting services to define a dominant actor in broadcasting.[22]

7. Several assumptions prevail during trial procedures:

The constitutionality of norms, which implies that it is the responsibility of the plaintiff to demonstrate and/or certify their shortcomings.

Presumption of innocence when dealing with administrative sanctions, imposing upon the authority the burden of proof for demonstrating the responsibility of the persons suspected of a

ARTÍCULO 28 DE LA CONSTITUCIÓN FEDERAL", available at http://goo.gl/3JFylo

16 Appeal pending 90/2015, tried by the First Collegiate Court on Administrative Matters specialized in Competition, Broadcasting and Telecommunications on November 5 2015, Available at: http://goo.gl/d4yPlF

17 Semanario Judicial de la Federación. Tesis registro No. 2 010 881 "ESTADO REGULADOR. EL MODELO CONSTITUCIONAL LO ADOPTA AL CREAR A ÓRGANOS AUTÓNOMOS EN EL ARTÍCULO 28 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS." Available at: http://goo.gl/A1uJHo

18 Semanario Judicial de la Federación. Tesis No. 2 007 406 "DERECHO ADMINISTRATIVO SANCIONADOR. EL PRINCIPIO DE LEGALIDAD DEBE MODULARSE EN ATENCIÓN A SUS ÁMBITOS DE INTEGRACIÓN", available at : http://goo.gl/0cUuxw

19 Semanario Judicial de la Federación. Registro No. 2 009 673 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 9o., FRACCIÓN IV, DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 6 DE JULIO DE 2014, NO VIOLA LOS PRINCIPIOS DE TIPICIDAD Y EXACTA APLICACIÓN DE LA LEY AL DEFINIR LAS CONDUCTAS QUE SANCIONA", available at http://goo.gl/r6xwrl

20 A.R. 90/2015 tried on November 5 2015 by the First Collegiate Court on Administrative Matters, specialized in economic competition, broadcasting and telecommunications, available at: http://goo.gl/r02dGC

21 Semanario Judicial de la Federación. Thesis. No. 165 745 "MOTIVACIÓN LEGISLATIVA. CLASES, CONCEPTO Y CARACTERÍSTICAS", available at: http://goo.gl/BgYPXx

22 Appeal pending 62/2014, tried by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications on 19 February de 2015, available at: http://goo.gl/245vUP

violation, through any of the generally accepted means, particularly through the presentation of evidence and analyzing the existence of any alternative explanation to the facts.[23]

The legality of the administrative resolution (unless operating under the previous assumption), according to which the plaintiff must demonstrate its vices and shortcomings.

For example, a case where collusion was detected in the fresh chicken retail market, had the sanction annulled due to a failure to demonstrate that the individual being fined was a representative of the economic agent.[24] Likewise, an agreement between competitors in the commercial coupon market had its own sanctions annulled after demonstrating an alternate explanation for the facts.[25]

As can be seen from this retelling judicial control, wielded by Mexican courts and tribunals, is fully enforced over the economic and competition regulator bodies.

In this sense, the following months are expected to see the SCJN and specialized courts analyzing a number of issues dealing with market dominance, regulatory capabilities and sanctions, as established by the new constitutional framework.

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23 Semanario Judicial de la Federación. Thesis No. 2 009 671 "COMPETENCIA ECONÓMICA. EL ARTÍCULO 31, PÁRRAFO PRIMERO, DE LA LEY FEDERAL RELATIVA, VIGENTE HASTA EL 6 DE JULIO DE 2014, NO CONTRAVIENE EL PRINCIPIO DE NO AUTOINCRIMINACIÓN" available at: http://goo.gl/d4YdlT

24 Appeal pending 57/2014 , trie don 26 November 2015 by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications available at: http://goo.gl/pTU82q

25 Fiscal Revision 2/2015 tried on 10 March 2016 by the Second Collegiate Court for Administrative Matters specialized in Competition, Broadcasting and Telecommunications available at: http://goo.gl/SiG1Ly

COMPETITION COMMISSION OF SINGAPORE: OUR COMPETITION ADVOCACY JOURNEY

BY EEMEI TANG, EUGENE CHEN & WEILU LIM[1]



I.INTRODUCTION

The Competition Commission of Singapore ("CCS") was established as a statutory board under the Ministry of Trade and Industry ("MTI") in January 2005 and is empowered to administer and enforce the Competition Act (Cap. 50B, hereafter "the Act"). There are three main prohibitions under the Act. These are:

- The Section 34 prohibition, which prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that prevent, restrict or distort competition within Singapore;

- The Section 47 prohibition, which prohibits any conduct on the part of one or more undertakings, that is an abuse of a dominant position, in any market in Singapore; and

- The Section 54 prohibition, which prohibits mergers and acquisitions that result in a substantial lessening of competition within Singapore.

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CCS's mission is to make markets work well to create opportunities and choices for businesses and consumers in Singapore. CCS adopts a two-pronged approach to achieve this. Firstly, we enforce the Act by taking stern action against undertakings that infringe the Act. Secondly, we advocate the importance of competition in the marketplace by (i) encouraging businesses to voluntarily comply with the requirements under the competition law, (ii) educating consumers on the benefits of competition, and, (iii) advising government agencies on how to achieve their policy objectives with the least impact on market competition.

II. COMPETITION ADVOCACY

"Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."[2]

To achieve its mission, CCS's advocacy effort focuses on four key target audiences: 1) the private sector (i.e. local businesses and competition practitioners); 2) the general public; 3) the public sector (i.e. government agencies) and; 4) overseas competition authorities.

Outreach To The Private Sector

1. Local Businesses

As enforcer of the Act, CCS is aware that concepts within competition law may be new to some businesses. CCS therefore strives to ensure that the business community is aware of the importance of competition law compliance, that there is broad engagement with different business groups and trade associations through talks and exhibitions, and pertinent information on competition compliance is made available as widely as possible and in a timely manner.

In this regard, CCS has set up a dedicated webpage[3] to guide businesses on competition law compliance. A publication on Competition Compliance Program ("CCP") is made available on the webpage. It broadly explains the importance of CCP and how businesses should go about putting together a CCP. To make the publication accessible to more businesses, it is available in both English and Chinese languages. An interactive training module has also been developed for businesses to educate their staff on the "Dos and Don'ts" under the Act.[4] This training module is especially useful for Small and Medium Enterprises ("SMEs")[5] that may struggle to find the necessary expertise and resources to put in place a CCP.

CCS's collaterals serve as another important outreach tool to educate stakeholders on recent developments in competition policy and law ("CPL"). Over the years, CCS has developed various collaterals, which have been well received locally and internationally. Besides the CCP publication, there is a series of manga comics[6] as well as leaflets (available in English and Chinese) covering four different topics, namely the merger notification process, business information exchange as a potential infringement of competition law, and case studies on price-fixing and abuse of dominance cases in Singapore.

To ensure the collaterals remain relevant to businesses, CCS has recently revamped its collaterals and developed new booklets that contain useful information such as the key prohibitions under the Act, and what businesses can do to protect their business.

2. Recent Example of CCS's Competition Advocacy to Local Businesses: e-Commerce

E-Commerce activities in Singapore are growing rapidly and the size of Singapore's online retail market was estimated to have reached S$4.4 billion in 2015, which is four times the size of the market in 2010.[7] However, there is still

2 ICN's definition of competition advocacy, adopted in its 2002 report on Advocacy and Competition Policy. http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf

3 https://www.ccs.gov.sg/tools-and-resources/conducting-a-compliance-programme

4 https://www.ccs.gov.sg/tools-and-resources/education-resources/interactive-learning-or-e-learning

5 Singapore's definition of SME: "A company's annual sales turnover of not more than S$100 million OR employment size not more than 200 workers."

6 http://www.ccs.gov.sg/tools-and-resources/education-resources/manga

7 SingPost reported Euromonitor estimates of online shopping sales value of US$3.45 billion (approximately S$4.66billion) in 2015 (SP eCommerce, 2014, eCommerce in Singapore: 9 Must Knows: http://www.specommerce.com.s3.amazonaws.com/dl/fs/141211_fs_singapore_factsheet.pdf). PayPal (2011) forecasts the on-

considerable potential for growth. Online sales account for only 4-5 percent of total retail sales in Singapore whereas in mature e-Commerce markets such as China, UK and the US, online sales account for 10 percent, 13 percent and 6.5 percent of total retail sales respectively.

E-Commerce facilitates the entry and expansion of businesses. In particular, companies are able to use e-Commerce to overcome traditional limitations they face in Singapore, such as rental cost, manpower shortages, and small market size. With e-Commerce, businesses are able to reach a wider pool of customers beyond Singapore's shores.

Given the potential growth of e-Commerce activities in Singapore and the benefits they can bring to local businesses, CCS commissioned a study in 2015[8] to better understand the development and characteristics of e-Commerce, the competition issues that e-Commerce activities can give rise to, as well as the implications of e-Commerce on CPL in Singapore. The key findings were presented at the CCS e-Commerce Seminar held on December 2, 2015.[9] Speakers from public and private sectors provided insights to local businesses on how to ride the e-Commerce wave and navigate the competition landscape in Singapore and regionally. CCS intends to continue its work on how competition policy and law can facilitate the adoption of e-Commerce by businesses and consumers in ASEAN.

3. Competition Practitioners (i.e. private practice lawyers and economists)

To cater to stakeholders who require more in-depth understanding of competition law and economics, CCS and the Singapore Academy of Law ("SAL") jointly organized the CCS-SAL Competition Law Seminar in August 2014. The event brought together competition practitioners, government regulators, academia and businesses to exchange views on the challenges, successes and lessons learnt since the introduction of competition law in Singapore, as well as the role of competition law and CCS for the years ahead. Issues such as multi-jurisdictional leniency applications, competition compliance for transnational businesses, as well as fast-track settlements and commitments were debated upon during the seminar.

CCS also regularly organizes roundtables involving competition practitioners, with the aim of facilitating their understanding on how CCS uses competition law and economics in its investigation and enforcement activities as well as to obtain their feedback and views on specific topics. For example, CCS organized a competition economics roundtable in January 2015 to discuss topics such as Vertical Restraints and Most Favored Nation clauses. A legal roundtable was held in March 2015 to obtain feedback on several existing practices as well as new initiatives that CCS was contemplating.

Outreach To General Public

To raise the level of awareness of competition law and its benefits among the general public including students, CCS adopted a more creative and accessible approach. CCS has organized three runs of the CCS Animation Contest since 2011. The aim of the contest is to encourage young students and professionals to explain the Act to the public in a creative manner. For example, in 2014, entries to the contest consisted of animation clips explaining the three key prohibitions in the Act.[10]

CCS also organized essay competitions to encourage the public, particularly students, to discover more about competition law. The inaugural CCS-ESS[11] Essay Competition held in 2014, sought to promote awareness and understanding of competition law and to encourage debate on competition policy and issues in Singapore. The essay competition received very good entries from students from pre-university and university levels, as well as entries from private law firms and economic consulting firms.[12] Due to the positive feedback received, CCS will be organizing the CCS-ESS Essay Competition again in 2016, on the topic of Disruptive Innovation.[13]

line shopping market to hit S$4.4billion in 2015.

8 https://www.ccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/publications/occasional%20paper/e-commerce%20in%20singapore/dotecon%20ecommerce%20final%20report.ashx

9 https://www.ccs.gov.sg/tools-and-resources/events/e-commerce-in-singapore

10 http://www.ccs.gov.sg/media-and-publications/ccs-campaigns/ccs-animation-contest

11 CCS partners the Economic Society of Singapore ("ESS") for this competition.

12 https://www.ccs.gov.sg/media-and-publications/ccs-campaigns/ccs-ess-essay-competition-2014

13 http://www.ccs.gov.sg/media-and-publica-

CCS has also actively leveraged on social media for its outreach efforts. Different social platforms are deployed to cater to different target audiences. For example, Facebook[14], Twitter[15] and YouTube[16] cater to the general public, while the Competitive Edge e-Newsletter[17] is aimed to reach out to the local business community. The CCS blog[18] on the other hand is specifically targeted at competition practitioners or professionals (e.g. competition authorities, lawyers, economists and academics).

Moving forward, CCS intends to quantify the benefits of competition law enforcement to assess how its interventions have led to better outcomes in the market. This will enable the public to better appreciate the purpose and benefits of CCS's interventions and in turn, support CCS's work to create well-functioning markets.

Advocacy To The Public Sector

1. Importance of Government Advocacy

Competition may be impeded, not only by anti-competitive behavior by businesses, but also, inadvertently, by government's participation in markets. The government can participate in markets directly (for example as a seller or buyer) or indirectly (for example through regulation or taxes and subsidies). The way in which the government chooses to participate in markets can bring about different impacts on competition in affected markets. Further, the activities, agreements and conduct of the government and its statutory bodies are generally excluded from the Act.[19] As such, it is of utmost importance that adequate resources are committed on advocacy to government agencies, to ensure that they understand and give due consideration to competition issues arising from their policies and initiatives.

2. Policy and Markets Division

CCS has the duty to advise the government agencies on national needs and policies with respect to competition matters. CCS set up the Policy and Markets Division ("PM Division") in January 2014 to dedicate resources on engaging and advising government agencies on competition matters, and to conduct market studies and research projects. With the formation of the new PM Division, CCS has seen a substantial increase in numbers of advisory requests from 8 in 2012/13 to 31 in 2014/15 – almost a fourfold increase.

CCS's government advocacy efforts take many forms – including development of new collaterals, providing competition advice, carrying out joint market studies, organizing seminars for sector regulators to network and share best practices, and conducting technical workshops.

3. New Collaterals for Government Officials

CCS has developed new collaterals targeted specially at government officials. As part of the recent revamp of CCS's collaterals, a new booklet – *Competition Act and Government Agencies* targeted at public officers was created. A dedicated webpage for government agencies[20] was also created. The collaterals contain information on how government agencies can approach CCS for advice, how they can go about assessing the competition impact of their initiatives, and examples of CCS's past advice.

4. CCS's Advisories

Over the past years, CCS worked closely with various government agencies to gain a better understanding of the markets they oversee, and to provide competition advice on a wide range of activities within these markets.

5. Examples of CCS's Competition Advice to Government Agencies

Advice to MOM and WDA on JobsBank

In April 2014, the Ministry of Manpower ("MOM") and the Singapore Workforce Development

tions/ccs-campaigns/ccs-ess-essay-contest

14 https://www.facebook.com/ccs.sg

15 https://twitter.com/CompetitionSG

16 https://www.youtube.com/user/theccs05

17 http://www.ccs.gov.sg/media-and-publications/publications/e-newsletter-competitive-edge

18 http://www.ccs.gov.sg/media-and-publications/ccs-blog

19 Section 33(4) of the Act provides that the Act shall not apply to any activity carried on by, any agreement entered into or any conduct on part of (a) the government; (b) statutory body; or (c) any person acting on behalf of the government or that statutory body, as the case may be, in relation to the activity, agreement or conduct.

The reason for the exclusion is because the intent of competition law is to regulate conduct of market players, and not the government and statutory bodies that perform public and statutory functions.

20 https://www.ccs.gov.sg/approach-ccs/seeking-advice-by-government-agencies

Agency ("WDA") consulted CCS in relation to the proposed new Jobs Bank web portal ("Jobs Bank"), particularly on whether the creation of Jobs Bank will lead to any competition concerns. The Jobs Bank, administered by WDA, is a free service provided to all Singapore-registered employers and local individuals to make job vacancies more visible to local job seekers and allows employers to have access to a larger pool of candidates. The Jobs Bank also supports MOM's Fair Consideration Framework that requires employers to consider Singaporeans fairly for job opportunities.

CCS worked closely with MOM and WDA to better understand the design of Jobs Bank, after which CCS conducted a competition impact assessment to assess how Jobs Bank will affect competition in the online recruitment portal market in Singapore. In its assessment, CCS noted the potential benefits that Jobs Bank may bring. CCS also provided MOM and WDA with several recommendations aimed at maintaining competition in the market, including how information relating to Jobs Bank should be disseminated to the industry, so that no interested parties are unintentionally left out.

6. Third-party Taxi Applications Recognized by the International Competition Network and the World Bank Group

CCS's efforts in government advocacy have not gone unnoticed. Singapore was named a winner at the 2014 Competition Advocacy Contest organized by the International Competition Network and the World Bank Group for CCS's work in promoting competition in the taxi industry. CCS had worked together with the Land Transport Authority ("LTA") to facilitate the entry of third-party taxi booking applications (third-party apps), while ensuring that taxi commuters' interests are safeguarded regardless of whether a booking is made through a taxi company or a third-party taxi booking service provider.

Third-party apps help to improve the matching of taxi supply and demand, especially during peak hours. Taxi drivers also benefit by being able to get passengers from varied sources of taxi booking. In formulating its regulatory approach, LTA worked with CCS to assess the competition impact of these third-party taxi booking apps on the taxi industry, as well as how to encourage innovation within the market, while preserving the fundamental tenets of LTA's taxi regulatory policies.

7. Market Studies

CCS proactively conducts in-depth market studies in selected markets to better understand the structure and dynamics of these markets, and to identify areas where competition can be improved to benefit both consumers and businesses. The findings of these market studies have been shared with relevant government agencies. For example, CCS shared the findings from its e-Commerce study with the relevant government agencies so that they would have a better appreciation of market development and potential regulatory issues that could impede the growth of e-Commerce businesses in Singapore. CCS also assists government agencies by jointly conducting market studies into specific markets, so that they have the necessary insights and inputs for their policy formulation and review.

8. Community of Practice for Competition and Economic Regulations

The Community of Practice for Competition and Economic Regulations ("COPCOMER") was established in December 2013 as an inter-agency platform for CCS, sector competition regulators and other government agencies to share best practices and experiences on competition and regulatory matters.

Together with the Civil Service College and the Public Service Division, CCS facilitates regular activities for the COPCOMER agencies. Some of the activities include hosting an annual gathering for senior representatives from COPCOMER agencies to discuss emerging competition and regulatory issues Singapore faces, seminars for government agencies to share their experiences on competition and regulatory issues, and specialized workshops to equip COPCOMER officers with the necessary technical knowledge. Newsletters are also circulated to COPCOMER agencies regularly to raise awareness on key competition and regulatory developments overseas.

Outreach to Overseas Competition Authorities

The open and global nature of Singapore's economy means that Singapore is inextricably tied to developments in the regional and global economy. Against this backdrop, CCS actively participates in and contributes to both regional and international events in the area of CPL. This will enable CCS to forge ties and cooperate with competition authorities overseas to foster a

culture of fair competition and compliance and also, to minimize cross-border anti-competitive practices that adversely affect domestic as well as international trade and hinder economic development.

Regionally, CCS has been active since the establishment of the ASEAN Experts Group on Competition (AEGC) in 2008 to serve as an official network for competition agencies and other relevant authorities in ASEAN for the exchange of policy experiences and institutional arrangements on competition policy and law. CCS took on the inaugural chairmanship of AEGC and helped to set up three working groups, which were tasked to look into capacity building for the region, formulating a set of ASEAN Regional Guidelines on CPL and developing a Handbook on CPL in ASEAN for Businesses. CCS also chaired the work group on developing ASEAN Regional Guidelines on CPL, which was completed in 2010 and served as a useful, common reference for all ASEAN Member States (AMSs) on international best practices in CPL development and implementation.

Currently, CCS is chairing the Working Group on Regional Advocacy to develop a toolkit/ handbook to guide AMSs on conducting effective advocacy campaigns, with the aim of helping AMSs to more effectively reach out and engage various stakeholder groups in their respective countries. Other recent deliverables of this Working Group include the development and launch of an AEGC regional web portal[21] in 2013 (which serves as a one-stop information center on CPL in all AMSs) and the publication of collaterals to raise public awareness on CPL in the region.

CCS has also contributed to capacity building and technical assistance activities to help AMSs establish and implement CPL. Apart from hosting staff attachments from AMSs in 2013 and 2015, CCS collaborated with the U.S. Federal Trade Commission and the U.S. Department of Commerce to conduct a five-day training program in 2015 for representatives from ASEAN competition authorities, on procedural fairness relating to competition law enforcement. It also hosted various conferences and workshops to exchange CPL experiences among competition authorities in ASEAN, including the Third ASEAN Competition Conference in 2013 and a workshop on promoting competition law compliance in 2014.

21 http://www.aseancompetition.org/

On the international front, CCS participates actively in international forums such as the International Competition Network ("ICN"), the Organisation for Economic Cooperation and Development ("OECD") and the Asia-Pacific Economic Cooperation ("APEC") to promote competition policy and law. In June 2015, CCS partnered the OECD-Korea Policy Centre to host a "Leaders Seminar on Advocacy" in Singapore. The objective of the seminar was to help authorities from the Asia Pacific region dealing in competition matters equip themselves with the experience, know-how and tools for advancing the acceptance and promotion of competition policy to various groups of stakeholders in their own economies. The seminar attracted about 50 participants that included senior experts on advocacy, including several heads and former heads of competition authorities.

CCS's regular participation in ICN events also provides it with the opportunity to engage the global competition community and be updated on the latest developments on competition law around the world. In particular, CCS will be hosting the 2016 ICN Annual Conference from 26-29 April in Singapore. This is the first time the ICN Annual Conference will be hosted in Southeast Asia, and takes place in the context of an exciting state of competition law developments in the region over the past few years. This year's ICN Annual Conference includes a Special Plenary on "Building Economic Communities with Competition Policy" that will be led by established panelists. This is particularly meaningful given the establishment of the ASEAN Economic Community in 2015. Also, having the global competition community and ASEAN representatives gathered in Singapore for the Conference to discuss the latest CPL developments will serve as a catalyst to further strengthen the CPL developments in this region.

In addition, CCS is undertaking a special project on government advocacy and disruptive innovations with the assistance of several ICN members.

Disruptive innovations refer to new products/services, manufacturing processes and business models that drastically alter markets. While disruptive innovations may give rise to new business opportunities and can help to enhance competition, they may also raise public concerns in areas such as employment, consumer protection, safety and health, which may require government

regulations. Hence, disruptive innovations can bring unique challenges to competition authorities by creating tension between regulation and competition policy.

Competition agencies have an important role to play in advocating for regulations that strike a balance between achieving public policy objectives and promoting a conducive environment that enables the entry and expansion of disruptive firms in order to increase competition within these markets. In this regard, the 2016 ICN Special Project led by CCS will survey ICN members on the critical success factors for competition advocacy, the different approaches undertaken for competition advocacy as well as recommended practices for successful competition advocacy with regard to disruptive innovations.

III. CONCLUSIONS

Even with a decade of advocacy experience under its belt, CCS continues to face challenges moving forward. One of the key challenges is keeping pace with technological advancements and the disruptive changes they bring about in the market. CCS needs to understand these market changes so that it can ensure that its analytical frameworks remain sufficiently robust. At the same time, it needs to be knowledgeable about these new advancements so that it will remain a credible advocate to different stakeholders.

The CCS will be conducting its Stakeholder Perception Survey ("SPS")[22] in 2016 to do a "dip-stick" test among various key stakeholder groups to gauge their CPL awareness level and the general competition culture in Singapore. The SPS also helps to identify areas for improvement in terms of outreach/advocacy. To this end, CCS will continue to develop and implement various engagement platforms with various stakeholder groups to garner support for its work.

22 https://www.ccs.gov.sg/media-and-publications/publications/ccs-stakeholder-perception-survey

COMPETITION POLICY INTERNATIONAL PRESENTS

INTERVIEW WITH COMMISSIONER MARGRETHE VESTAGER COMMISSIONER FOR COMPETITION OF THE EUROPEAN UNION

INTERVIEW TRANSCRIPT

Today in CPI Talks we have the pleasure of interviewing EU Commissioner Margrethe Vestager, current Commissioner of the European Union and Head of the DG Competition. We will be asking a few questions about the 'Hot Topics' we will be talking about in our Chronicle.

Thank you, Commissioner, for accepting our invitation.

AITOR ORTÍZ: **Our first question (while not so new anymore) is about State-Aid and rulings in the Tax field. We have heard about Starbucks, Amazon, etc. The first question is - Why these companies and not others? Seems like the Tax rulings could apply to other companies, or other countries with different tax rulings. Why these ones?**

Margrethe Vestager: First of all, because they have come to our attention that they may not be playing 'by the book.' Second, we try to find cases from different sources. Some of these cases come from hearings in parliaments (the UK parliament, among others); others come from the media or we may ourselves get worried about whether the situation is as it should be. And our concern is of course, if two companies compete door-to-door with similar products and they compete on prices, services, quality; but when one company has a selective advantage - not to pay full taxes- then of course the playing field has been completely tilted. That is the reason why we put quite a lot of effort into looking into these cases from a State-Aid perspective because in the EU, this has been against our treaty from the very early days - to twist the playing field like this, and enabling some companies to have selective advantages.

AO **- Some people have mentioned to us that the Criteria of Selectivity might not be very strong, that these tax rulings might**

apply across the board to all companies, and that the selectivity might be a little weak before the court. Do you agree with this assessment?

MV: Well, that is eventually up to the courts to decide on. The question of selectivity is very very important: That a tax ruling gives a specific advantage to you which is not available to me as a company. Tax rulings are typically Specific - they concern specificities within the company, the transfer classes used, the internal interest, the financing of the companies. For us, it is obviously important to be able to prove selectivity, because these cases are all built on facts, and on evidence, and on how this evidence is being interpreted in terms of the State-Aid cases. And that of is very important.

We sometimes find selectivity in more general schemes. We found a scheme here in Belgium which gave a selective advantage to multinationals, which was not open to a stand-alone company, and that is also selectivity that is illegal in our treaty.

AO: **We have recently seen, in the Sharing Economy or MFN clauses, that different member states are taking different approaches- UK, France, Germany - they're all conducting different investigations, and sometimes the results are not very consistent across Europe because of the different regimes. Do you think these topics will soon have a common EU approach?**

MV: Well, for us it has been a learning experience in terms of how we work. But before I get into that, I think we have to resolve that issue for all member states. The MFN clauses have been shrinking - they were very wide before - and the work done by the member states has enabled a much more narrow use of MFN clauses. In some member states they are completely forbidden, but I still think that we're moving forward.

What we have learned from the case is of course, that we should coordinate even closer. We are now discussing with member states and within the European Competition Network how we can create such an 'early warning system', if a member state pays attention to a specific issue and then wants to build up the case. I think that is very crucial - that we learn from how we work, in order to coordinate better.

AO: **Can we say that the recent Public Consultation that was closed recently about the Sharing Economy, platforms, etc. will help for promoting this approach? Or is it a different consultation?**

MV: It is a different consultation, but I think it helps to give us a much broader but also a much more detailed understanding of how platforms work. We launched it very neutrally as a fact-finding consultation. And what came out was all these pictures of platforms being very very different, but also that platforms offer a lot of innovative services to consumers within the Union. That of course is a huge benefit for consumers, and of course there were those who thought that it could be regulated easily. On the contrary, it is quite tricky because we don't want to lose the innovative forces of platforms.

AO: **Regarding multi-sided platform regulation- We can have Ex Ante regulation or Ex Post intervention, all with their own benefits and risks. Where do you (or the commission) stand in regards to ex ante intervention or ex post regulation?**

MV: I think it's very important not to regulate if competition law enforcement can do the job. Therefore, it takes quite a deep analysis to make sure that, if we regulate, that we get it right. And we're in the process of analyzing both what came from our public consultation, but also where it would lead us. Because the risk of legislating is of course that you get a beautiful piece of legislation for the past, right? But it's not equipped for the future, where competition law should always be applied here and now, in ways that enable innovation, different choices, different prices, that we would all like to have, but of course i think it is important to keep an eye on whether developments would trigger needs for new regulations.

AO**: In Europe, can we expect a shift in the analysis of Dominant cases? Maybe trying to be more flexible?**

MV: I think what we're seeing is that markets have widened. Over the last 10 years the number of markets we see that are more than European-wide, I think has grown by 13 to 15 percentage points, from well below 50 to the other side of 60-something. For us, I think it's a very important starting point for our analysis to take note of the market. Otherwise, you miss the consumer's perspective. Where can I turn to if the merging companies lower quality, raise their prices— whatever may happen in a merger? Is there somewhere else that I can turn to? Can I get another mobile phone subscription? Can I get my product from another vendor?
I think that, as a starting point for the analysis, is a very good thing. It's not the end of the story, but to know where the market begins and where customers face that there's nowhere else to go, I think that's important in merger cases in order to get the right facts of the market into the process.

AO**: But some customers may find it difficult to understand why the Commission is looking at some private services, because for them it might be beneficial. One example could be Uber, could be Google - but for consumers not knowledgeable about competition it's just a new service, a new product, they benefit… So, how to explain to these consumers that what is actually benefiting them is not correct, or that they could benefit even more after these investigations?**

MV: I think very often consumers are quite right: If they say "Well, this is a wonderful product and I want to use it", well that's the success of the company. I think one should congratulate companies if they are successful. Only thing is that congratulations stop if we get the concern that a dominant position is being misused- to for instance, promote yourself in neighboring markets, or to ask consumers for something that you shouldn't ask, but that you can ask for just because you are dominant. In that, I think quite a lot of consumers realize that you can both have the benefits of a wonderful product that appeals to you and you like to use it, and that it is a good thing that someone is still looking over the shoulder of the company to see if things are still as they should be.

The thing is that some of the services that we use today - they weren't even invented, or even thought of ten years ago. If the market had been completely closed, then no innovator would have had the courage, the energy, or been able to raise the capital to innovate and launch a new product, and get the attention of consumers. In that respect, I think that it is very important that the market stays open, because otherwise innovators would be discouraged.

AO: **Since you arrived to the Office a year and a half ago you have definitely left a finger-mark compared to your predecessors. Also very interesting- the number of fines is increasing, the number of high-profile cases is also increasing… Why these changes, and what can we expect in the next two-and-a-half to three years of your term?**

MV: First of all, on the question of fines: Unfortunately, that cannot be ascribed to this or that Commissioner, because it depends quite a lot on how cases develop. The cartel cases and antitrust cases that would provoke a fine may have a very, very long life before they get to the final decision or get through the court system. Therefore, you find that the level of fines goes up and down over the years. That is more a question of timing of the casework.

I think it is important to apply competition. Europe has been through a socially, economically and humanly very hard crisis, first with the financial crisis, then with the sovereign debt crisis. In rebuilding the economies, I think it's very important for people to know that, if I do my best, then I have a fair chance of making it. The bigger ones are not closing the market. Member states are not just pouring taxpayers' money into my competitor - I have a fair chance of making it. That for me is a very important part of the job: To say "this is what we do", but also to apply it. That people know that it is actually a competition. If I do my best I have a fair chance of making it. It's not fixed, it's not doped, it's not anything - it's a fair playing field.

AO: Some people have said - Citizens, not people in Competition - that the EU works well when everything is going well. When it was a time of success and wellbeing everything was

good. Now that we have a few crises - the economic crisis, immigration, Brexit; also the two-speed Europe and that when things go wrong barriers are created again, etc. Why does it seem like Europe works well when everything is good for everybody, but when you start having problems everyone becomes more nationalist?

MV: I think it's a natural thing. I think it goes for member states within the Union, and I think it's a tendency that we find in ourselves as humans. When things become more stressful we turn inwards to the family instead of turning outwards. The paradox is that some of the times when the Union has developed the most is in crisis and post-crisis situations, realizing that we need to do more. For instance, in the financial crisis it took quite some time, where member states said "I think about myself first". But then, eventually and gradually, came this sense of urgency: "I cannot do this alone, we need to work together." That enabled a very strong, very solid new demands on the financial sector: If they make a mess of it to pay for themselves and not to take taxpayers' money, to give you the very short version. I think that shows that, even though things look very, very troublesome, sometimes solutions are found. Now from decades of experience- you may lean back for a while, but if you want to solve things, you have to lean forward and work with other people.

AO: **Thank you very much, Commissioner. It was a pleasure having this interview.**

Don't miss our full video **(www. vimeo.com/competitionpolicyint)**


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