

**UNCTAD INTERGOVERNMENTAL GROUP OF EXPERTS ON COMPETITION LAW  
POLICY MEETING: 13<sup>TH</sup> SESSION**

**PALAIS DE NATIONS, GENEVA, 08<sup>TH</sup> - 10<sup>TH</sup> JULY, 2013**

*CUTS participated in the UNCTAD IGE Meeting held on the above dates at the Palais de Nations, Geneva and prepared daily dispatches that were circulated extensively among governments, practitioners, civil society, development partners, etc. CUTS feels that it is the organisation's duty to keep such stakeholders informed of discussions on global competition policy issues, especially given the fact that not many of them get the opportunity to participate in these events.*

**CUTS Dispatch: Day I**

This year's UNCTAD IGE was marked by the address of Supachai Panitchpakdi, Secretary General, UNCTAD during the opening session. Supachai emphasised the importance of understanding the relationship between competition culture, growth and development. He also delved upon larger benefits of competition, including on poverty reduction.

The review panel for this year was introduced to the delegates which included: (a) Mr. Bruno Lasserre, France, President of Competition Authority and Member of French Constitutional Court as Chair of the IGE; (b) Mr. George Lipimile, CEO and Director General, COMESA; (c) Mr. Hebert Tassano, Peru, President of Indecopi; (d) Mr. Anatoly Golomolzin, Russian Federation, Deputy Head of Federation for Anti-Monopoly Services.

This was followed by a roundtable on the Impact of cartels on poor. The key note speaker for the same was Ms. Eleanor Fox and the panelists included Ms. Payal Malik and Ms. Deborah Healey. The roundtable acknowledged that the anti-competitive activities impact the developing countries and the poor the most. The need for capacity building, lack of cooperation between competition authorities and other regulators are other major challenges faced.

Ms. Fox mentioned that competition policy is as important as giving aid according to MDGs. If enforced properly, competition law can be empowering. While highlighting the importance of understanding the role and scope of competition law and policy, she stated that simpler rules should be followed for proper enforcement of competition law. Additionally, advocacy and collaboration, avoidance of corrupt practices are two strong tools to reduce poverty through competition.

She concluded by saying that there is already a pro-poverty approach in competition policy but that cannot reduce poverty. There is an urgent need to create a consciousness and the developed countries must come out and support in this effort.

Ms. Malik from Competition Commission of India, mentioned that competition policy is essential for development and eradicating poverty. The concept of developmental economics emphasises the importance of markets. There is a need for the competition law; which is just a part of competition policy; to permeate in all other laws also. CCI also emphasises the need for

competent infrastructure including lawyers, economics, competition law experts, etc. to work towards the same.

Ms. Deborah Healey from the University of New South Wales, brought in an Australian perspective to the topic. She acknowledged that although there is a strong competition and consumer protection law with particular emphasis on poor people suffering from anti-competitive practices such as cartels. The courts mainly take a legalist approach while deciding a particular case as against an economic view, which makes it harder to prosecute a cartel.

Contributions to the roundtable were made by OECD and few other countries. OECD mentioned that the focus on competition and poverty is of joint interest to both UNCTAD and OECD. Competition policy needs to be poor friendly. Different countries have different jurisdictional limitations in the same. Korea mentioned that it has serious wealth disparity and anti-competitive practices in sectors such as textile affect poor adversely. The Brazilian Anti-trust Agency was of the view that country's income growth rate does not mean much if not related to poverty and income inequality reduction. Turkey was of the opinion that the low income group people spend their income on basic needs and cartels, especially in food, etc. have the most impact on them. As per Turkey, competition advocacy will play an important role in reducing poverty. Benin suggested introducing subsidies on food to ensure that consumers have access to food.

In the second session substantive discussions took place on the voluntary peer review of the competition law and policy in Pakistan, which offered a good insight on competition regime in the country. The session was chaired by Mr. Bruno Lasserre with Manuel Sebastiao, Muhammad Nawir Messi, Richard Fleming and Ryohei Takai on the panel. The president of Competition Commission of Pakistan (CCP), Rahat Hassan, said that peer review is a tool of empowerment for any enforcement agency. Unless you know where you stand, you cannot progress further. CCP had volunteered for global competition review as well.

A number of points were raised by the speakers and debated at length over the course of the discussions, as has been summarised in the following paragraphs:

- The Pakistan Competition Act, 2010, provides for a reward payment scheme (financial reward to providing information on the formation of a cartel), this however does not apply to those involved in cartel formation
- On the other hand, the leniency provisions in the competition law has attracted positive response in some cases
- The major challenges faced by CCP are: (a) ensuring financial autonomy and self-sustainability; (b) huge backlog of cases with only one case been decided by the agency on merit; (c) recruitment and retention of good staff and preparing a succession plan for the chair after Rahat.
- Competition and regulatory policy need to be harmonized and the agencies must cooperate with each other, they should not be divorced from one another. This is vital for the functioning of a market economy.
- The importance of information sharing was acknowledged and CCP shared that Section 49 of the Competition Act empowers the federal government to enter into an MoU with competition agencies in other countries. However, the law does not prohibit informal

ways of information sharing, Eg. Pakistan seeks help from USA FTC on various competition related issues.

- With almost 25% of Pakistan's GDP devoted to public procurement and CCP being one of the very few competition regulator taking a closer look at public procurement issues, CCP should enter into an MoU with the Public Procurement Regulatory Agency and following are the desired provisions:
  - a. How to developing and build data base;
  - b. CCP personnel must familiarise themselves with terms of public procurement procedures
  - c. Checklist of do's and don'ts to be prepared for CCP officers and procurement agencies
  - d. Modules to be developed for procurement agencies
  - e. All relevant information to be available online to bring in transparency
  - f. Procurement laws in Pakistan need to be revamped to give the authority more enforcement power
- CCP seeks to keep the following action points for future:
  - a. Try to make CCP financially independent
  - b. Try to recruit more economists in CCP
  - c. Try to harmonise laws in conjunction with competition law
  - d. Try to further detail the CCP leniency regulations by including criteria, limits and deadlines. Leniency may be evoked even after decision of commission has been made..
  - e. Specific regulations on the acceptance of parties' specialised opinions and studies may be considered
  - f. Increasing opportunities for staff to work in foreign competition bodies for building their capacity.
  - g. Need to expand advocacy programmes to expand CCP's links with other governments.

Finally the UNCTAD Secretariat presented the *Technical Assistance Project Proposal for Pakistan*, a 3-year project to help Pakistan implement the recommendations given in the peer review and also strengthen its competition law enforcement by reviewing current legislation and reinforcing it with additional regulation and guidelines.

The session concluded with Rahat's vision to make CCP more competent and become an inspiration for other competition authorities.

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## **CUTS Dispatch: Day II**

The second day of the meeting of the Intergovernmental Group of Expert on Competition Policy and Law (IGE) kicked off with an interesting Roundtable on "*Priority setting and resource allocation as a tool for agency effectiveness*".

A background paper on "Prioritization and resource allocation as a tool for agency effectiveness" by UNCTAD was presented. The presentation, while defining priority setting as a process by which a competition agency determines which task should receive the highest priority and which should receive the lowest according to their available resources, summarised that efficient prioritisation and efficient allocation of scarce resources is required for any competition agency to perform effectively and to meet its mandate. The importance of clarity of basic concepts and prioritisation of cases was highlighted.

The presentation was followed by sharing of experience and challenges faced by young competition agencies with interesting exchange of information by the competition agencies of Spain, Latvia, Malta and Indonesia. Francisco Marcos, Professor of Law at Madrid Business School, mentioned that the objective of the competition agency in Spain is to focus on low prices, drive prices down through enforcement activities. The main problem faced by the agency in Spain is the lack of awareness and competition culture. He also stated that more work needs to be done to tackle enforcement of law along with developing the capacity to provide staff with good working atmosphere.

Jānis Račko, from Latvia, said that every agency has its specific problems given its local conditions. However, she said that there should be common principles in priority setting such as independency of agencies in decision making, advocacy, strategic planning, budgetary independency, etc. She added, the aim of competition council is also to modernize.

Sylvann Aquilina Zahra, from MCAA, Malta said that the agency shifted to an integrated investigation model in 2011 which made the decisions by the agency faster, led to a shift in priorities and publishing of a draft leniency programme. He suggested prioritization of cases where there is a widespread significant impact on consumers. The challenges faced by the agency include efficient application of leniency programme, capacity building, effort to manifest link between economic growth and competition, publicize achievements and adoption of publicity strategy, etc. Muhammad Nawi Messi from KPPU Indonesia, while highlighting the importance of transparency and internal audits, mentioned the need for independence and support from government.

Pursuant to this, select mature competition agencies of Chile, United States and OECD shared their experiences and best practices. Felipe Irrarrabal from FNE Chile mentioned the use of preliminary review criteria, selection criteria, better management, internal deadlines and transparency by FNE to meet its challenges. Felipe highlighted that the three parameters for priority setting are checking: (a) impact on consumers, (b) impact on economy and (c) impact on market structure.

Russell Damtoft, USFTC mentioned the importance of being proactive by identifying goals, focusing on outcomes, not activities, building internal and external support, using advantage to be able to set own agenda, application of full range of tools available, strategic planning and prioritisation, etc.

Professor Frederic Jenny, OECD rightly mentioned the importance of the principle of no one size fits all; there will be different prioritization for different countries' agencies depending on their

age. A competition agency needs to make best use its available resources. He however, questioned the entire hype created around prioritization mechanism.. He said that although a lot of focus is there on case selection, but there is room for more for efficient resource allocation. According to him cases selected at times leads the country to choose less cases and thus making the agency less threatening to cartels.

This was followed by an interesting debate. The panel concluded that the prioritisation will mean efficient allocation of scarce resources. The lessons that can be learned by competition agencies will include preparation of strategic plan related to national programmes, maintaining independence and autonomy, and earning good reputation in early years of an agency.

Peru, which is a 20 years old agency, acknowledged the need for efficient allocation of resources. It stated that the fight against cartels has a greater social impact than investigation of abusive dominance and social costs are more important, rather the economic costs.

Ecuador competition agency which is just 10 months old criticized emphasis on punishments and said that efforts should be made to work on matter of advocacy, without necessarily focusing on fines and sanctions. Malaysia, Chile and Peru acknowledged that a young agency should first focus on cases with greatest social impact.

It was agreed that that it is a question of choice between enforcement of law and promotion of competition. For young agencies the choice is more about the latter while the old agencies prefer enforcement of law.

The second session was on the Voluntary Peer Review of Competition Law and Policy in Ukraine. Mr. Vassyl Tsushko, Chair of the Antimonopoly Committee of Ukraine (AMCU), narrated the journey of competition policy since the fall of the Soviet Union and the committee's establishment 20 years ago. From an organizational point of view, the AMCU stressed its effectiveness in utilising a multi-level cooperative structure in which jurisdiction is shared independently by all levels of government-local, municipal, and federal. Expanding on comments about cooperation, the Chair also discussed coordination between the two courts-economic and administrative-in harmonizing their actions and decisions to better regulate in the face of competition law and policy. An interesting challenge that was brought up was the existence of natural monopolies, where dismantling the monopoly can prove very difficult it becomes necessary to implement alternatives that artificially create competitive market conditions.

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## **CUTS Dispatch: Day II**

The last day of the meeting of the Intergovernmental Group of Expert on Competition Policy and Law (IGE) saw presentation of two well drafted and interesting papers on "*Modalities and Procedures for International Co-operation in Competition Cases Involving More than One*

*Country*" and on "*Capacity Building and the UNCTAD Voluntary Peer Review as a Capacity-building Tool*" by the UNCTAD secretariat. This was followed by a peer review of Nicaragua.

The Background paper on "*Modalities and Procedures for International Co-operation in Competition Cases Involving More than One Country*" acknowledged the need for competition authorities to deal with cross-border anticompetitive practices and discussed different types of cooperation models. It elaborated on the extent to which cooperation arrangements enhance the capabilities of competition agencies to effectively enforce competition law. It also postulated on the challenges faced in enforcing competition law at regional and international levels.

On behalf of OECD, John Davis informed that majority of the competition agencies do not engage in co-operation with other competition agencies in different countries outside a regional agreement. His views were based on a survey jointly conducted by OECD and ICN. Although the total number of cases of co-operation has not been accounted but huge effective contribution comes from USA, EU, Canada, Australia and Japan. Various legal and practical limits on cooperation have been found.

Davis added that the areas where OECD and ICN may contribute to bring in necessary improvements are: (a) identifying a clearer legal framework to systemise confidential information, i.e. defining confidential information, rules on getting and using the confidential information, etc. and (b) systematising provision of waivers on countries.

The important challenges faced by competition agencies in cross-border co-operation are: (a) procedural challenges on how to get information from different countries and how to enforce judgments in other jurisdictions, since different jurisdictions have different sanctions for different anticompetitive practices, except cartels for which most of the countries have criminal liabilities. Davis highlighted the importance of co-ordination to deal with coherence of incompatible decisions; and (b) challenges about dealing with confidential information.

His suggestion to new competition agencies was to focus on reassuring business communities and building the trust that the agency will deal with their confidential information efficiently and safely. More can be seen about the report on: [http://unctad.org/meetings/en/SessionalDocuments/ciclpd21\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf).

Thereafter, Mr. Rafael Corazza, Director, COMCO, Switzerland and Mr. Sam Pieters, Directorate-General for Competition, European Commission discussed the recent developments in bilateral cooperation focusing on the case of 2012 EU and Swiss cooperation agreement on the application of their competition laws across the two jurisdictions.

Corazza acknowledged that the increased globalisation has led to increased need for global co-operation. Since economies of EU and Switzerland are so integrated there are lots of good reasons for such an agreement. It is also important to ensure that the competition laws of both Switzerland and EU are compatible. He also discussed the provisions relating to usage and sharing of confidential information in the agreement.

Pieters mentioned that the objective of agreement is to better structure cooperation between

Switzerland and EU and to allow free exchange of information, which was already happening before but informally. All this will lead to better enforcement of law on both sides and will avoid incompatible outcomes. Implementation of agreement is facilitated through general integration of legislations. He however mentioned that the co-operation comes at a cost for the agencies and it will be important to have a cost benefit analyses.

Pursuant to this, examples from emerging regional cooperation initiatives were highlighted by SADC and Central American Competition Group. The panelists included Gladmore Mamhare, SADC Secretariat and Francisco Diaz, El Salvador. Mamhare mentioned that a database is prepared by the competition agencies that centralises information and promotes collaboration on cross-border cases. There is also an online case management resource database prepared by the competition agencies that carefully selects cases based on their national and regional impact and has a database of around 50 competition cases from the member countries, examples of best practices from different member countries and competition law manuals. The database which is still in pilot phase has huge potential to become an important tool for enhanced cooperation within and outside SADC.

Diaz informed that not all countries in central America have a competition law yet, e.g. Guatemala, which is a recent addition to central America. However there is a good economic integration and cooperation of central America with other countries. He acknowledged the need for greater co-operation and co-ordination within the region by way of a formal regional agreement.

Pursuant to the above discussion, Nathalie Hardsdorfa and Anatoly Golomolzin shared the best practices in joint investigations on co-operation in the oil sector in Austria and Russia respectively. Nathalie acknowledged the need for online database for proper exchange of information between different jurisdictions. She also mentioned the important role of Oil Information Exchange Platform.. Golomolzin highlighted the importance of constant monitoring of wholesale and retail prices.

An intense interactive discussion ensued the roundtable. George Lipimile from COMESA acknowledged that there is no single definition for what constitutes confidential information. However, recently the definition is being added in the competition law of different countries.. Allowing countries to share information leads to increased efficiency of the competition agencies. WAEMU highlighted the need for a supranational competition authority with necessary available resources to deal with regional co-operation in competition cases. CARICOM that actively engages in competition advocacy was in favour of sharing information with similar regional groups like COMESA and WAEMU.

Next on agenda was the presentation on and roundtable to discuss the background paper on "*Capacity-Building and the UNCTAD Voluntary Peer Review as a Capacity-Building Tool*". The background paper provides an overview of UNCTAD voluntary peer review practice and draws lessons from experiences gained since its inception in 2005. Since 2005, 22 countries including Jamaica, Kenya, Japan, Tunisia, Benin, Senegal, Indonesia, Armenia, Serbia, Mongolia, Pakistan, Ukraine and Nicaragua have undergone voluntary peer review. (Readers may note that OECD too has conducted many voluntary peer reviews).

Experiences were shared by Armenia, Serbia, Zimbabwe, Mongolia, Tanzania and Zambia. The countries acknowledged the importance of peer review in revamping the competition agencies, influencing the enforcement of competition law, building institutional capacity and increased competition advocacy.

For future review processes, Serbia recommended that special topics should be covered as well. Zimbabwe mentioned that implementation of recommendations there is rather slow and hoped UNCTAD would lend support. Mongolia suggested that UNCTAD should focus more on follow up process of implementations. According to Tanzania UNCTAD should analyse more on the regional dimension on how competition agencies should interact with each other, and UNCTAD should suggest measures accordingly. Zambia highlighted the need for understanding of local markets and environment, since no one size fits all.

UNCTAD secretariat concluded the first session by announcing the draft agreed conclusions of IGE on Competition Law and Policy, the hard copy of which was shared shortly after that. It was followed by discussions on a provisional agenda for the 14<sup>th</sup> session of IGE on Competition Law and Policy, July, 2014.

The second session was the Voluntary Peer Review of Competition Law and Policy in Nicaragua. Pro-Competencia, the competition agency of Nicaragua gave a short background about its competition law and policy. It highlighted that the aim of competition law to protect market efficiency and consumer well-being, thus it covers most of the economic sectors and markets, except a few. It was highlighted that the challenges faced by the agency include, lack of clarity on article 15 of Law 601 of 28 September 2006 (Law for the Promotion of Competition) that opens an inconvenient gap to exclude several extremely important sectors of the economy with a direct impact on consumer' well-being from PROCOMPETENCIA's supervision. Other challenges include inconsistencies between law and regulations, resources etc. However, the agency acknowledged a good regional dialogue within the region and a good capacity building capability.

More can be read about the same on:  
[http://unctad.org/en/PublicationsLibrary/ditcclp2013d2\\_overview\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditcclp2013d2_overview_en.pdf).

**Conclusion:** The meeting ended with the adoption of the agenda for the 14<sup>th</sup> Session to be held in the summer of 2014, which will comprise of (a) benefit of competition policy for consumers, (b) communication strategies for competition agencies for effectiveness, (c) informal cooperation among agencies on specific cases, and (d) voluntary peer review of interested countries. Sources inform us that 15 countries have approached the Sectt for peer review but only three will be chosen.

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