

## ENHANCING THE STANDING OF COMPETITION AUTHORITIES WITH CONSUMERS – PROJECT PROPOSAL FOR SUBMISSION TO THE SEOUL ICN CONFERENCE

The new competition regimes that have mushroomed around the world are found in a diverse range of countries. While some of these are among the most developed countries in the world, the vast majority are found in the developing and transition economies of Africa, Asia, Latin America and eastern Europe. Among this latter group of countries there are vast differences in the size of their various economies and in their levels of industrialisation. Some have relatively well developed, though often highly distorted, markets, while others have only recently made the transition from a command to a market economy.

This is the context in which the report of the Capacity Building and Policy Implementation Working Group presented to the ICN's Merida conference attempted to develop an overarching framework for identifying implementation challenges facing competition authorities in new competition regimes, and in developing and transition economies in particular. The report is rooted in the insight that fledgling competition authorities commonly confront a combination of ignorance and its opposite, narrow self interest, and that these conspire to underpin an environment in which the competition authorities struggle to make their voices heard, in which they struggle to achieve the level of acceptance and credibility that is a crucial component of any successful regulatory and law enforcement effort.

The Merida report identified five key stakeholders whose support, or, at least, respect, is considered critical to the success of the overall competition project. These are the government, the judiciary, the business community, the law and economics professions and, finally, the broad community of consumers. This project will single out the latter constituency – the community of consumers – and it will ask how competition authorities should go about the crucial task of securing their support.

The fundamental premise of this project is that no major element of economic policy, no matter how virtuous its intention or how well founded in economic theory, can hope to realise its objectives without support from powerful social groups. Certainly industrial and trade policies derive their legitimacy in large part from the support that they receive from business and labour interests and, frequently, from powerful sub-national regional interests. Competition policy, on the other hand, often appears to be an idea in search of a powerful champion, an idea supported by professional economists and a few dedicated lawyers and economists in the competition agencies, but with little or no broad-based societal support. And yet, competition policy claims to speak for the most broad-based constituency of all, the community of consumers.

In developing countries it is doubly important that competition policy is seen to address itself, ultimately, to the needs of consumers. This is because of the broad concern that every major piece of economic and social legislation be seen to be pro-development or, what has increasingly come to be seen as a proxy for development, poverty alleviating. A policy initiative in a developing country that cannot demonstrate a link at some level between its activities and programmes, on the one hand, and, on the other, poverty alleviation will not garner the level of support necessary to function effectively – in particular it will not attract the necessary resources from government and it will not attract the ‘best and brightest’ lawyers, economists and civil servants.

This is an uphill battle for competition authorities in developing countries, because the connection between sound competition policy and poverty alleviation is indirect at best, and competition agencies must be careful not to promise more than they can deliver. They will compete against programmes that are, on the face of it, directly poverty alleviating and whose positive outcomes can be more easily demonstrated. However, while some of these programmes may appear to have a positive short-term impact on impoverished consumers their long term impact may be questionable because of the distorting impact that they have on key markets. Accordingly, they may encounter opposition from the competition authorities while simultaneously garnering support from the poor and their advocates. For example, if the state prolongs the protection extended to a licensed monopoly in say telecommunications as a quid pro quo for the roll-out of the telephone network to the impoverished rural areas, the competition authority that points out the shortcomings that often at the heart of this sort of unholy pact with monopoly interests, will encounter the combined opposition of the government, the telecommunications monopoly and those who speak for poor rural consumers. Or consider the competition authority approached by small businesses whose very existence is threatened by the conduct of their larger counterparts whose superior resources enable them to offer better products at lower prices. The common experience of poverty, the solidarity between the marginalized, frequently ensure that even the very consumers who directly benefit from the superior offerings of the competitive large firm will support the proprietors of the struggling small businesses.

In short, consumer support for the activities of the competition authorities cannot be taken for granted. Occasionally, competition law, properly applied, will appear to conflict with the short term interests of consumers. It will frequently conflict with the interests of small producers who demand protection of the state and who are often able to present their demands for protection as an authentic plea on the part of marginalized ‘small guys’ everywhere.

But clearly the most significant obstacle to garnering consumer support is that consumers, although numerous and occasionally able to express their power through collective action, are generally poorly organised and no match for the powerful special interests arraigned against robust enforcement of competition

law. Indeed, consumers are often susceptible to having their voice and their interests hijacked by precisely those opposed to robust enforcement of competition law and policy. Accordingly, it often falls to those responsible for enforcing competition law to ensure that their actions strengthen consumer organisation and inform consumer views and actions. A greater understanding of how to achieve this, of how to promote and inform consumer organisation, is the objective of this project.

The project will difficult to develop in the abstract without looking at specific jurisdictions or a variety of jurisdictions in a comparative perspective. The challenge would arise principally because there is unlikely to be a single path or outcome to the balancing of various tensions and secondly, because the literature in this area does not provide a ready framework for integrating one's observations. However, the unique strength of the ICN is precisely our ready access to the concrete experiences of our members and, as with other ICN projects, we should draw on this invaluable resource in pursuing the project. These concrete work areas are suggested below. These could obviously be refined as the project advances. At the heart of the project's framework reside deeper questions related to the broader implications of competition policy for developing countries and probably ideas about societal goals. These are critical, broad and complex questions which are worth pursuing.

It is proposed that the project be organised under three headings:

1. The appropriate interface between competition enforcement and consumer protection.

A significant number of competition agencies established in the last twenty years combine traditional competition (or "antitrust") functions with consumer protection (or "unfair competition") enforcement authority. This is the case, for example, in Colombia, Peru, Panama, Russia, and Poland, and is likewise the case in more developed countries such as the United States (in the case of the Federal Trade Commission), Canada, the United Kingdom, Korea, and Australia. The agencies that combine these functions in this way, or those that are considering a combination of these functions, may benefit from a discussion of experiences with this structure: have consumer protection cases provided any useful information for addressing competition issues; and does the consumer protection operation aid in enhancing the credibility of the agency and improving public understanding and support of the agency's activities and mission.<sup>1</sup>

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<sup>1</sup> See generally T. J. Muris, "The Interface of Competition and Consumer Protection," Remarks to the Fordham Corporate Law Institute (Oct. 31, 2002), <http://www.ftc.gov/speeches/muris/02103fordham.pdf>.

2. Ensuring that the institutional design and procedures of the enforcement and adjudicative agencies are transparent and structured in a way that facilitates appropriate consideration of consumer interests

The appropriate structure of a relationship between an enforcement agency and consumers and their representatives is a critically important issue for new agencies. The agency can benefit by receiving useful and relevant information from the public. On the other hand, it must also retain the ability to control its investigatory and enforcement agenda and retain the practical ability to distinguish between those consumer complaints that suggest injury to competition and those that raise issues best dealt with by others or those that suggest action that would be inconsistent with a pro-competitive agenda. Agencies can therefore benefit by promoting understanding of their activities and how those activities affect consumers. Agencies should also consider how the selection of cases for enforcement action will affect the public's perception of what the agency does. The working group would explore ways that agencies have articulated to consumers what kinds of complaints are appropriate and what the agency does with complaints it receives, and how agencies, in general, can provide avenues for useful communication between the agency and the public.

3. Strategies for reaching out to the consumer community and building its capacity to support the competition agency's mission.

This issue is closely related to the preceding discussion. Agencies throughout the world can benefit from careful consideration of how NGO's, including consumer groups, can support the agency's mission. The working group can gather experiences and evaluate strategies for reaching out to the consumer community in ways that both create and support a competition culture and also assist the agency in achieving its immediate program goals.