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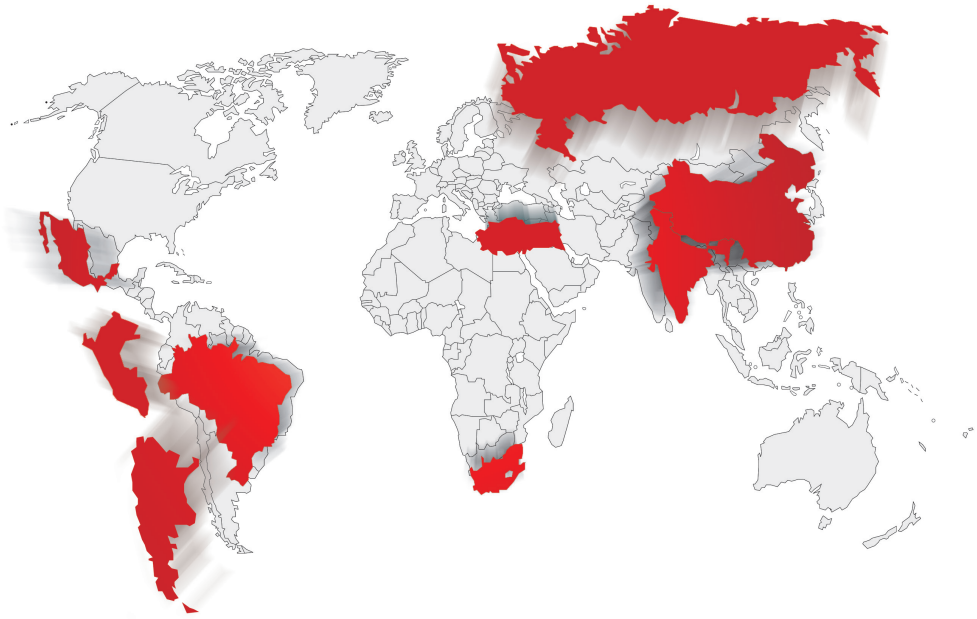

ANTITRUST AND DEVELOPING AND EMERGING ECONOMIES

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Friday, October 26, 2018 | 5th Annual Conference – New York University

PROGRAM

8:40 am WELCOME REMARKS

Trevor MORRISON | NYU School of Law, New York

8:45 am OPENING KEYNOTE SPEECH: TOWARDS A BROADER VIEW OF COMPETITION POLICY

Joseph STIGLITZ | Nobel Prize-Winning Economist | Professor, Columbia University, New York

9:30 am COMPETITION, INDUSTRIAL POLICY AND DEVELOPING COUNTRIES

Dennis DAVIS | President, Competition Appeal Court of South Africa, Cape Town

Kirti GUPTA | Senior Director, Economic Strategy Qualcomm, San Diego

Frédéric JENNY | Chairman, OECD Competition Committee, Paris

George PAUL | Partner, White & Case, Washington DC

Simon ROBERTS | Professor, University of Johannesburg, Johannesburg

Moderator: **Eleanor FOX** | Professor, NYU School of Law, New York

11:00 Coffee Break

11:15 MEGA MERGERS AND DEVELOPING COUNTRIES

Tembinkosi BONAKELE | Commissioner, South Africa Competition Commission, Pretoria

Gönenç GÜRKAYNAK | Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Lawson HUNTER | Senior Counsel, Stikeman Elliot, Toronto

Nicholas LEVY | Partner, Cleary Gottlieb Steen & Hamilton, London

Ioannis LIANOS | Professor, University College London, London

Moderator: **Harry FIRST** | Professor, NYU School of Law, New York

12:45 Lunch

1:45 pm BRICS: A COMPETITION AGENDA?

Dennis DAVIS | President, Competition Appeal Court of South Africa, Cape Town

Alexey IVANOV | Director, HSE-Skolkovo Institute for Law and Development, Moscow

Cristiane SCHMIDT | Commissioner, CADE, Brasília

Xianlin WANG | Professor, Shanghai Jiao Tong University, Shanghai

Moderator: **Daniel RUBINFELD** | Professor, NYU School of Law, New York

3:15 pm Coffee Break

3:30 pm ENFORCER'S ROUNDTABLE: WHAT'S UNDER THE RADAR?

Roger ALFORD | Deputy Assistant Attorney General, US DOJ, Washington DC

Tembinkosi BONAKELE | Commissioner, South Africa Competition Commission, Pretoria

Randolph TRITELL | Director, Office of International Affairs, US FTC, Washington DC

Joseph WILSON | Adjunct Professor, McGill University, Montreal Former Chairman, Competition Commission of Pakistan

Moderator: **Frédéric JENNY** | Chairman, OECD Competition Committee, Paris

5:00 pm CLOSING WRAP-UP: NEW YORK MINUTE

Eleanor FOX | NYU School of Law, New York

Harry FIRST | NYU School of Law, New York

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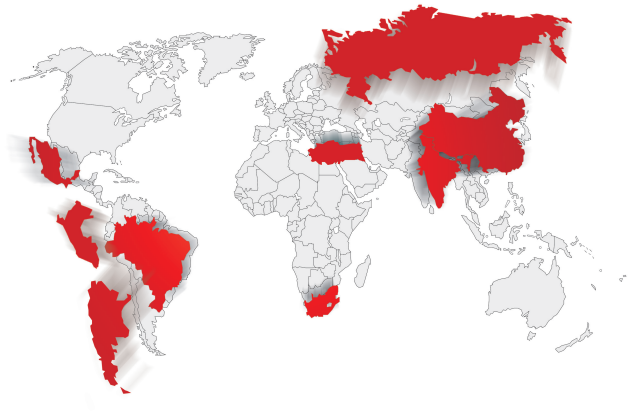

FOREWORD

The 5th edition of the Conference "Antitrust and Developing and Emerging Economies" organized by Concurrences Review in partnership with New York University School of Law took place on October 26, 2018, at the NYU School of Law. Among the 150 attendees were enforcers, academics, attorneys, economists, and students who engaged in a lively debate about the competition law systems of developing economies.

The keynote speaker for this year's event was Nobel-Prize winning economist Professor Joseph Stiglitz, who opened the conference with an address on the need for antitrust policy to take a broader view of market power and threats to competition, and called for new thinking about presumptions and remedies.

The conference discussion analysed industrial policy and its relationship to competition policy in developing countries. The speakers examined mega mergers, as well as the nature and extent of actual and potential cooperation between the BRICS countries on competition law and policy. The conference also featured a roundtable discussion with US and developing country competition enforcement officials regarding current enforcement issues.

We would like to thank the sponsors Charles River Associates, Cleary Gottlieb Steen & Hamilton, ELIG Gürkaynak Attorneys-at-Law, Qualcomm, Ropes & Gray, and White & Case who helped make this event such a success from both scholarship and networking perspectives.

We hope to see you again at the sixth conference in 2019. Meanwhile, we invite you to review the highlights from the 2018 conference, as set out in this booklet. ■

Eleanor Fox
Walter J. Derenberg
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New York University School of Law

Harry First
Charles L. Denison Professor of Law
Co-Director, Competition, Innovation,
and Information Law Program
New York University School of Law

Nicolas Charbit
The Editor
Concurrences Review

KEYNOTE ADDRESS

TOWARDS A BROADER VIEW OF COMPETITION POLICY

PROFESSOR JOSEPH STIGLITZ

The conference opened with a keynote address delivered by **Professor Joseph Stiglitz** (Nobel Prize-Winning Economist, University Professor, Columbia University, New York) on the need for antitrust policy to take a broader view of market power and threats to competition.

Professor Stiglitz invoked his experience with competition policy during his time at the World Bank, where he served as Chief Economist. During his tenure, experts assumed that markets were "automatically" competitive and that any inefficiency and exploitation observed in developing markets could be addressed by market reform and liberalization. Contrary to these assumptions, Professor Stiglitz often observed that when inefficient government regulators were removed, they were quickly replaced by even more exploitative and inefficient private monopolists.[1]

Professor Stiglitz called for a broad rethinking of antitrust policy, both in the United States and in developing economies. He argued that current antitrust frameworks have been unable to respond to increased market power by firms, growing concerns about monopsony power, and rising income inequality. Antitrust policy must acknowledge that technological changes mean that today's monopolists, like Google and Facebook, probably exercise more market power than Standard Oil and American Tobacco once did.

Citing evidence of a significant and growing "market power problem" in the American economy, Professor Stiglitz observed that, since the 1970s, the economy has seen dramatically increased income inequality, high firm profits, low investment, and decreased entry and growth of small business. More recently, the economy has seen a lack of competition in a number of important industries, including internet service providers, cell phone services, cable TV, and airlines. The lack of competition is often more pronounced on a local level, where many consumers are faced with just one or two options for important services such as retail banking or pharmacies. On a macroeconomic level, the share of the income going to both labor and real capital has fallen, and more income has been captured by rents, including monopoly rents.

Business schools often work at cross-purposes with antitrust, teaching their students strategies that are anticompetitive. A number of prominent business leaders teach how to build "moats" around their businesses to avoid competition. Professor Stiglitz also pointed to a growing body of research on the effect of broad cross-ownership of multiple firms in the same industry. Such research has identified an empirical effect on the behavior of such firms; although, Professor Stiglitz said, the mechanism by which broad cross-ownership affects firm behavior is unclear. Professor Stiglitz also noted that cross-ownership of firms was one of the primary concerns that motivated the passage of the Sherman Act.

Stiglitz noted that a consensus has been developing within academic economics that market power is a real problem, at the same time that the Supreme Court has continued to incorporate "Chicago School" economics into antitrust jurisprudence. Game theory has highlighted the ease with which a small number of firms can collude, and behavioral economics has suggested that firms can exploit the bounded rationality of consumers (such as the different consumer perceptions of "discounts" versus "penalties" for credit card usage). Recent economic research has also focused on dynamic competition, such as the ability of firms to merge with nascent competitors before they are able to grow large

enough to trigger scrutiny by enforcement agencies. In contrast, assumptions underlying Chicago School economics, such as the first welfare theorem's requirements of zero transaction costs and perfect information, have been broadly critiqued or rejected.

Professor Stiglitz argued that this mismatch between current economics and modern antitrust policy has allowed firms to abuse efficiency defenses. For example, American Express successfully argued to the Supreme Court that two-sided markets could not be addressed with traditional analysis. But modern economic literature makes empirically-falsifiable predictions about prices in two-sided markets, and these predictions do not fit observed behavior in credit card markets.

Professor Stiglitz called for new thinking about presumptions and remedies. For example, Professor Stiglitz called for a presumption that below-cost pricing is predatory, as opposed to current law, which requires a very high burden of proof before such practices can be condemned. Such a policy would take into account insights from game theory about how predatory pricing can be rational and effective for firms. Courts and practitioners should focus on more direct tools to demonstrate market power as opposed to requiring very high market shares. Persistently high profits, the ability to price discriminate, and prices much higher than marginal costs all demonstrate market power, even if market shares are relatively low. A broader array of remedies should be considered, including breaking up firms, bars on already large firms entering into upstream or downstream markets, and direct regulation of prices.

Professor Stiglitz recognized that, while market power problems exist in both developed and developing economies, such problems can often be more complex and dire in emerging economies. Emerging economies must balance promoting competition with the need to create viable markets and to promote development, equality, and anti-corruption. Professor Stiglitz suggested that, despite fears about potential abuses, competition policy in developing countries should address a broader range of concerns than just "consumer welfare," including distributional concerns. South Africa's handling of Walmart's acquisition of a small local retailer provides an interesting example of how antitrust enforcement can be used to promote broad public interest goals and place small firms on a more level playing field with a large monopsonist.

In response to questions following the address, Professor Stiglitz reiterated that he considers today's digital monopolists to be far more dangerous than past monopolists because of their access to big data and AI as well as significant network effects and very high upfront costs. Remedies are also likely to be more difficult to design because such firms cannot be easily split up without risking other harms, such as further harms to consumer privacy. However, the fact that such firms are so reliant on data may mean that it is easier to prove anticompetitive behavior in court, if it can be detected. Professor Stiglitz also argued that developing economies should not try to replicate the antitrust paradigms used by the United States. Instead, they should develop their own policies that recognize developing countries' differing priorities and desires. ■

1 Throughout his address, Professor Stiglitz used the term "monopoly" to refer to domination by either a single firm or a small number of firms with market power.

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The report has been prepared by the editors and rapporteurs above. The views expressed are those of individual speakers' and not necessarily those of their respective agencies or companies.

PANEL 1

COMPETITION, INDUSTRIAL POLICY AND DEVELOPING COUNTRIES

Moderator **Eleanor Fox** *(Professor, New York University School of Law, New York)* led a lively discussion about the intersection of industrial and competition policy in developing countries. The conversation centered around the potential role of industrial policy and difficulties stemming from lack of convergence and clarity in application.

Frédéric Jenny *(Professor of Economics, ESSEC, and Chairman, OECD Competition Committee, Paris)* began with an analysis of industrial policy and its relationship to competition policy. Industrial policy, he said, is essentially structural in nature, whereas competition policy concerns the creation of appropriate incentives. Despite these differing aspects, Professor Jenny stated that only some industrial policy is truly at odds with competition policy. The question therefore is not whether industrial policy should be a part of competition law, but what kind of industrial policy should be used, and how to integrate the two.

Professor Jenny cited cases in which industrial policy had been a success and cases that have been failures. The difference lies in the engineering of such policies. Professor Jenny proposed a competitive neutrality framework, with the hopes of ensuring that industrial policy decisions do not conflict with competition. According to Professor Jenny, this would prevent the abuse of industrial policy through clear delineation of public interests. With sufficient clarity and transparency, he said, industrial policy can be a helpful tool.

Professor Jenny cited China as the clearest example of difficulties posed by incorporating industrial policy into competition policy. In particular, China gives insufficient clarity on the separation of the competition and public interest elements.

George Paul *(Partner, White & Case, Washington, DC)* argued to the contrary that competition policy is a poor tool for industrial policy. Mr. Paul said that the goal of antitrust is to promote consumer welfare. Industrial policy, which Mr. Paul defined as picking winners and losers, is often inconsistent with consumer welfare. We are better served with a competition policy that resists political influence and capture, he said, and instead focuses strictly on consumer welfare. Mr. Paul commented that the inclusion of industrial policy in competition policy would inevitably stifle innovation and production and raise prices. He reiterated that consistency and coherence are important to the business community, and vacillations based on industrial policy can threaten predictability and discourage business activity on both national and global markets. Mr. Paul concluded by briefly discussing the trajectory of United States antitrust law. He praised the competition agencies' movement towards economic analysis and adherence to consumer welfare as the standard of analysis.

Simon Roberts *(Professor, University of Johannesburg, South Africa)* began by responding to a question posed by Eleanor Fox: was there resolution between the respective positions of Professor Jenny and Mr. Paul. Professor Roberts said that it is quite difficult to reconcile the perspectives. While some observers see recent economic developments as a symptom of failing markets and new forms of barriers and power, others see the current marketplace as dynamic and competitive.

Professor Roberts challenged Mr. Paul's contention that the combination of industrial policy and competition policy would make competition policy political. He said that competition policy is inherently political; it changes over time with the broad political consensus, but must avoid capture by short-term interests.

Professor Roberts noted the continuum between fundamentalist respect for market forces and sympathy for industrial policy. He said competition authorities have much to learn from the plurality of approaches nations have taken towards the variety of industrial policies. Professor Roberts emphasized the importance of a dynamic approach towards review of multinational corporations entering new countries, stating that we want to encourage these firms to invest, and to find a way to do so while recognizing the ways in which a country's markets will likely be shaped as a result of their entry.

Finally, Professor Roberts referenced South Africa's experience with Walmart's entering South Africa by acquiring the much smaller Massmart. Entry of the huge global firm was, at the time, without precedent for the country's competition policy. The competition agency had to be nuanced in finding a solution that worked for all stakeholders. It engaged in continuing dialogue with Walmart and interested parties within South Africa and sought to reach a grounded understanding of the potential effects of the merger.

Kirti Gupta *(Senior Director, Economic Strategy at Qualcomm, San Diego)* made three points that centered on the importance of congruence and consistency in international competition policy. The first was that there has been a major proliferation of antitrust agencies worldwide. Multinational corporations are encountering unchartered territory in global antitrust, and consistency in the enforcement and interpretation of competition law is key. Competition agencies should be mindful that multinational firms must comply with the laws of multiple jurisdictions, often with differing and opaque objectives in their application.

Second, Ms. Gupta noted that authorities vary widely in objectives and the ultimate goal for competition policy in their jurisdictions. But the international standard is consumer welfare, and significant deviation from this standard toward unclear rules increases agency discretion, which can threaten consistency of application.

1 **Panel**
2 **Eleanor M. Fox**
3 **Frédéric Jenny**
4 **George Paul**
5 **Simon Roberts**
6 **Kirti Gupta**
7 **Dennis Davis**

As her third point Ms. Gupta emphasized the importance of due process for multinational firms. It is important that competition agencies state plainly their objectives in enforcement and the standard of review, so that firms can act accordingly. Consistency and predictability of enforcement are key.

Dennis Davis *(President, Competition Appeal Court of South Africa, Cape Town)* engaged with the question of the consumer welfare standard. He said it was not comprehensible as a standard. It means different things to different people. He argued that competition and industrial policy need not conflict. Judge Davis referenced a recent report of the World Bank finding that trends towards suppressed demand, low productivity, and inefficiency are resulting from high levels of economic concentration. Accordingly, reducing this economic concentration, a central aspect of competition policy, should prompt related policy benefits.

For Judge Davis, this suggests that competition has a role to play in the structural arrangement of an economy. Competition policy, Judge Davis said, is too often discounted in dealing with such issues of inclusion, and it should not be. For countries like South Africa, ensuring that markets work in a participatory way has a huge effect on the country itself. Judge Davis believes competition policy should be used to make sure the economy works for the majority of the population. The challenge, then, is articulating a clear competition policy that favors inclusiveness while offering process and predictability for corporations.

The moderator remarked that the panelists shared much common ground; for example, on due process, transparency, and reasonable predictability; and seemed to agree that some forms of industrial policy can be market friendly; but disagreed where good pro-market policy stops and anti-market industrial policy steps in. Mr. Paul commented that there is a place for industrial policy, but that such policies should operate in parallel rather than in conjunction. Ms. Gupta contended that issues arise in incorporation of industrial policy when there is a conflict in the aims of industrial and competition policy. Judge Davis agreed that predictability in application of competition law is valuable, but maintained that is also important to recognize that utilizing a singular standard for competition analysis belies the complexities of modern economies. Professor Jenny added that the consumer welfare standard works well in a static environment, but economic assumptions about competition are not all realistic. He again emphasized the importance and utility of adopting a competitive neutrality framework. He said: *"The adoption in all the countries of a competitive neutrality framework protecting producers from distortions created when rival firms receive subsidies or other support from their governments would be extremely useful to complement competition policy and to minimize the possible contradictions between competition policy and law enforcement, on the one hand, and industrial policy, on the other hand."* . ■

PANEL 2

MEGA MERGERS AND DEVELOPING COUNTRIES

Moderator **Harry First** *(Professor, New York University School of Law, New York)* began the panel by framing some initial questions. First, what challenges do emerging economies with scarce resources face when leading competition agencies struggle in understanding, obtaining data, information, and documents? Second, in cross-border M&A, where each country has different issues dependent on their economies, institutions and structures, what difficulties do emerging countries face? Third, referencing the Walmart/Massmart merger in South Africa which was conditioned to help South Africa's economy, he asked whether there are any opportunities that mega mergers provide for developing countries. And finally, overall, do these mega mergers have a good impact on emerging economies?

Tembinkosi Bonakele *(Commissioner, South Africa Competition Commission, Pretoria)*, said merger regulation involves more ICN cooperation than any other activity, and ICN has improved communication among agencies. However, he found it troubling that mega mergers are rarely blocked in an increasingly concentrated global economy. He worried that the message authorities are sending is that: mega mergers are not an issue in general, and that any problem can be solved using remedies. Furthermore, remedies have proven to focus inwards, as each authority looks into its own market when determining remedies, although the problem is global.

Especially in developing countries, competition agencies are young; their legitimacy is constantly questioned. If they cannot solve issues of concentration and market power, political intervention will occur. Mr. Bonakele questioned whether developing countries, with their inherent size disadvantage, are able to regulate huge mergers, where firms are becoming more and more powerful. Moreover, political concerns arising out of large concentrations and failure to address the concerns will only prompt further political intervention within individual nations.

Mr. Bonakele stated that, given the uncertainty facing smaller nations' competition authorities, the existing merger review mechanisms need to be reevaluated and changed. Revisiting the inability of small and developing countries to block a merger independently, he proposed increased global cooperation centered around harmonization of timelines and increased communication between agencies regarding not only market information but also ultimate decisions when blocking a merger or imposing remedies. He concluded by asking leading jurisdictions to understand their responsibility and their role in creating momentum regarding merger control, particularly in regard to increased scrutiny of mega mergers.

Gönenç Gürkaynak (*Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul)* stated that fostering innovation is a policy objective that belongs in each antitrust regime. Digitalization of the market clearly demands new tools in evaluating the effects of a given merger on innovation, he said, but we have not yet demystified innovation. As a result, we are at a crossroads between the constant need to engage in fact-based economic analysis and to take account of the mergers' effects on innovation, versus the lack of existing robust models that can adequately approximate innovation effects.

Mr. Gürkaynak cautioned mature agencies against use of new innovation theories against mergers where the understanding of innovation effects is in its infancy, and when agencies seem to ignore innovation effects that may count for the merger. He cautioned developing country agencies not to be tempted to copy untested theories.

Mr. Gürkaynak further cautioned that agencies should not use the power of prohibition as leverage to get conditions they want, such as public interest conditions.

Nicholas Levy *(Partner, Cleary Gottlieb Steen & Hamilton, Brussels and London)* observed that the global antitrust community has achieved a remarkable consensus and consistency in merger control over the past 25-30 years. The question today is whether that consensus will hold or instead give way to divergent enforcement standards that take account of national security, public interest, and industrial policy considerations.

There has been an explosion in merger control since the EU adopted the Merger Regulation in 1990. At the beginning of Mr. Levy's career, only four or five agencies had developed systems of merger control. Today, many transactions are subject to 20 to 30 reviews across the world. This growth has been accompanied by increasing sophistication and maturity on the part of developing countries' agencies. As a result, concerns about divergence and inconsistency have not been realized to the extent once feared. The current system of multiple review of largely common issues is nevertheless duplicative, burdensome, wasteful, and frustrating. There is also an increasingly widespread view that agencies have been too permissive, that consumer welfare is too narrow a standard, and that merger control should in future take account of public interest criteria.

How should we address these concerns without jeopardizing the progress that has been achieved? First, Mr. Levy emphasized the importance of increased coordination. In some cases, this might result in agencies' effectively ceding jurisdiction (or allowing

1 **Panel**
2 **Harry First**
3 **Tembinkosi Bonakele**
4 **Gönenç Gürkaynak**
5 **Nicholas Levy**
6 **Ioannis Lianos**

other agencies to lead the review of a given transaction) to avoid duplication and expedite merger review. Second, if concerns that agencies have been permissive are valid, and Mr. Levy questioned whether they were, agencies should resolve to be more interventionist, to say "no" more frequently, and to remove the stigma of prohibitions. There was no need to adopt new tools or rethink the existing analytical framework. Third, Mr. Levy discouraged incorporating industrial policy and national politics into merger control. Antitrust agencies are not well suited to applying and monitoring industrial policy – these are largely political considerations that and should be left, if at all, to politicians.

Ioannis Lianos *(Professor, Chairman of Global Competition Law and Public Policy, University College of London)* invoked the idea of a bargaining model in developing countries' vetting and ultimately conditioning mega mergers. Developing countries agencies' are as a practical matter unable to block mergers they decide are harmful to them, so they enter into a negotiation to get the best achievable outcome, through remedies.

Professor Lianos suggested that viewing international merger review by developing countries through this bargaining framework changes how we see remedies and public interest, and their roles in antitrust enforcement. Professor Lianos described a two-tiered approach. The first tier takes place between developed and developing countries. It does not involve enforcement but rather structuring bilateral or multilateral agreements that address the concerns of developing nations while still allowing for smooth international review of mega mergers. The second tier involves bargaining between multinational corporations and governments, with the parties working towards a set of remedies that provides assurances to smaller nations and an additional measure of agency in the mega merger approval process. ■

PANEL 3

BRICS: A COMPETITION AGENDA?

The third panel, moderated by **Daniel Rubinfeld** *(Professor, New York University School of Law)*, comprised representatives from four of the BRICS countries namely, Brazil, Russia, China, and South Africa. The BRICS aim to strengthen cooperation among between the member countries and the BRICS as a whole in order to promote economic development. The key focus of the panel was the nature and extent of actual and potential cooperation between the BRICS countries on competition law and policy.

Alexey Ivanov *(Director, HSE-Skolkovo Institute for Law and Development, Moscow)*, announced a new initiative. The BRICS countries have established a research platform. It will host various working groups to share knowledge and expertise on critical issues relating to trade, investment, competition, the global economy and economic growth. The working groups already include infrastructure, agribusiness, skills development and the digital economy; and the group has already completed a report in the food sector with an examination of food value chains. Mr. Ivanov concluded by noting that, like the other BRICS countries, Russia has been grappling with using competition law to promote opportunity for small businesses and create a more inclusive economy.

Cristiane Schmidt *(Commissioner, CADE, Brasília)* expressed the view that a BRICS platform is not a priority for Brazil. She said that Brazil's competition regime is different from other BRICS countries such as South Africa and China, which have their own unique socio-political and economic objectives. Although Brazil struggles with high levels of inequality and has many challenges, its competition law and policy is nonetheless focused on orthodox efficiency and consumer welfare objectives to promote rivalry and stimulate economic growth. Schmidt noted that the recent BRICS discussions (outside of competition) have largely focused on the establishment of the new development bank and the financing of sustainable infrastructure within BRICS countries. Finally, Ms. Schmidt reaffirmed CADE's commitment to collaboration with other competition agencies through valuable information exchanges and sharing substantive and procedural experiences in relation to mergers and anticompetitive conduct that may undermine competition and jeopardize economic growth.

Xianlin Wang *(Professor, Shanghai Jiao Tong University, Shanghai)* reported that China was the last BRICS country to enact a modern anti-monopoly law. China's Anti-Monopoly Law came into force in August 2008. It affirms the place of competition law in the context of China's socialist market economy. There are similarities and differences between the competition policy objectives of the BRICS countries. On the one hand, the laws of all BRICS countries aim to maintain free and fair competition to improve economic efficiency and protect interests of consumers. On the other hand, broader objectives - expressed or implied - reflect differences across historical backgrounds, economic systems, socio-political goals and international environments. For example, Russia emphasizes the importance of maintaining free movement of goods within a unified domestic market. As part of Brazil's reforms to liberalize trade, it emphasizes the social attributes of property and prevention of abuse of economic rights. Due to the past history of racial exclusion from the economy, the South African Competition Act emphasizes the protection and development of SMEs and public interest objectives which are different from that of China's socialist market economy. The value of BRICS is to recognize both the efficiency goals necessary for crucial long-term economic goals and at the same consider social goals necessary to boost the national economies of BRICS countries.

Dennis Davis *(President, Competition Appeal Court of South Africa, Cape Town)* recounted that South Africa's Competition Act was adopted as a public policy intervention in the economy to correct the injustices associated with the structure of the apartheid economy. For these reasons, South Africa's antitrust legislation aims to balance orthodox efficiency goals with broader socio-economic objectives necessary for economic growth, transformation, and creation of an inclusive economy. Each BRICS country has a particular historical and economic context that has informed the objectives of its competition regime. The differences across these countries are sizable, and cut against the possibility of creating a homogenous competition framework that works cleanly for all parties. However, the BRICS countries are still tremendously influential. They have the ability to build an alternative competition narrative that challenges a blind acceptance of traditional antitrust doctrines associated with western jurisdictions, particularly the United States and the European Union. A major challenge in pursuing these broader socio-economic objectives is the lack of precedent and concrete knowledge and experience on how to give meaningful content to these ambitious goals. In his view, BRICS could promote shared knowledge and experience to assist individual countries with putting flesh to on a skeletal framework. ■

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1 Panel
2 Daniel Rubinfeld
3 Alexey Ivanov
4 Cristiane Schmidt
5 Xianlin Wang
6 Dennis Davis

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PANEL 4

ENFORCERS' ROUNDTABLE: WHAT'S UNDER THE RADAR?

The closing panel was moderated by **Frédéric Jenny** *(Professor of Economics, ESSEC, and Chairman, OECD Competition Committee, Paris)* and focused on the challenges and perspectives of competition law and policy from the enforcers' standpoint, with special focus on procedural issues, substantive analysis, cooperation and current and future initiatives.

Roger Alford *(Deputy Assistant Attorney General, US DOJ, Washington DC),* opened the session by explaining the DOJ's recent efforts to discuss and develop procedural and due process norms that could serve as a reference or standard for antitrust enforcers around the globe and that are applicable to the investigation phase as well as to the actual enforcement procedures.

Mr. Alford emphasized the importance of promoting the rule of law and due process around the world. He explained how the DOJ has been working behind the scenes, reaching colleagues around the globe, to discuss and produce a draft Multilateral Framework on Procedures in Competition Law Investigation and Enforcement. Mr. Alford explained that a set of shared process values can be found at the core of most competition statutes and enforcement practices, regardless of the legal system, the size of the agency, and the strength of the economy.

According to Mr. Alford, the identification of universal norms has been mostly not controversial and non-aspirational but rather reflective of the current most-widely-accepted procedural standards. In differentiating this from initiatives within the ICN, Alford said, the Multilateral Framework establishes a meaningful review mechanism for promoting voluntary compliance with the standards. Mr. Alford said that the initiative has been well received by the global antitrust enforcement community and that currently the DOJ is reviewing the comments and proposals received in order to further find consensus and prepare a final draft that will be complementary to the valuable efforts that the OECD and ICN have made in the same direction.

Turning to **Tembinkosi Bonakele** *(Commissioner, South Africa Competition Commission, Pretoria),* Professor Jenny noted the pending amendments to the South African Competition Act, which would ease burdens of plaintiffs, increase the relevance of public interests such as small business and historically discriminated persons, increase the role of the minister, strengthen market inquires, and add national security provisions. Jenny asked Bonakele to respond to criticisms of the changes.

Mr. Bonakele said that South Africa's institutions have been working well and that the main concerns addressed by the amendments are market concentration and the inability of the legal regime to effectively address abuse of market power. Mr. Bonakele said that most of the proposed changes are not incompatible with other widely accepted competition regimes. In connection with new market inquiry powers, Mr. Bonakele noted that the amendments will give the competition authority power to introduce binding remedies (not only recommendations) and to recommend the divestiture of an anticompetitive structure along lines of a power held by the UK competition authority.

Other changes, said Bonakele, introduce control of monopsony power in order to ensure the participation of medium and small companies. What was unexpected was the "national security provision," introduced late in the amendment process. This provision provides for the establishment of a committee that will have veto power over particularly concerning acquisitions of firms in South Africa. Another notable change would give the minister power to direct the Competition Authority to initiate a market inquiry. Finally, regarding excessive pricing, the amendments will replace the existing test with a reasonability test that is broad enough to help the authority craft more specifically tailored remedies.

Mr. Bonakele noted that these changes were the result of a long process that involved participation by the business and labor communities, as well as competition authorities.

Randolph Tritell *(Director of the Office of International Affairs, US FTC, Washington DC)* spoke first about the agency's international engagement. The FTC now has its full complement of Commissioners, all of whom are committed to continuing the Commission's robust international competition engagement. This includes cooperating with colleagues around the world on cases under mutual review with the goal of reaching sound and compatible outcomes. For example, the FTC cooperated with 10 foreign agencies in the recent Linde/Praxair merger.

The FTC also plays lead roles in multilateral competition fora including the International Competition Network, the OECD, and UNCTAD. For example, in the ICN, the FTC leads the network's project on procedural fairness, and co-chairs its Merger Working Group and Implementation Network. The FTC also heads the "ICN Training on Demand" initiative, which has developed a video competition curriculum, primarily to assist young competition agencies. Tritell also noted the FTC's worldwide technical assis-

1 Panel
2 Frédéric Jenny
3 Roger Alford
4 Tembinkosi Bonakele
5 Randolph Tritell
6 Joseph Wilson

tance program, which has recently provided resident advisors to agencies in the Ukraine and Philippines, and conducted judicial training in India.

Mr. Tritell then discussed the FTC's "Hearings on Competition and Consumer Protection in the 21st Century." Modeled on the hearings initiated by the late former FTC Chairman Robert Pitofsky in 1995, the current hearings are considering whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities, and policy. The hearings take advantage of the FTC's unique research function to canvass experts from many disciplines with a wide range of viewpoints. Topics include challenges arising from the digital economy in the context of globalization, such as concentration, platforms, data privacy, and "big data." The Commission approaches the hearings with an open mind and looks forward to diverse input to help set its agenda for the coming years.

Closing the session, **Joseph Wilson** *(Adjunct Professor, McGill University, Montreal and Former Chairman, Competition Commission of Pakistan),* discussed the evolution of the enforcement of competition law in Pakistan since introduction of a new law in 2007. Mr. Wilson explained how the Pakistani Competition Authority has shifted its focus. During its early years (2008-2011), the authority almost exclusively focused on prosecuting antitrust infringements such as cartelization and abuse of dominance. Over the past few years, the agency has primarily focused on deceptive marketing. Mr. Wilson provided data showing that, since 2013, very few new antitrust cases have been initiated by the competition authority ex-officio; rather, they have been triggered by complainants.

Further, Mr. Wilson raised issues surrounding the review of the acquisition of Daraz by China's high tech e-commerce giant Alibaba. Mr. Wilson argued that the Commission failed to analyze the impact of the merger on buyers and sellers using the platform, and failed to address potential abuses by Alibaba against local online market places. Noting that the Pakistani competition law gives the Commission the power to review the Act and make recommendations for amendments, Mr. Wilson urged the Pakistani Competition Commission to self-assess and correct priorities, while launching a study with a view to revising the merger control regime, in order to better address the dynamics of online businesses in globalized markets.. ■

VIDEOS

During the conference, some speakers summarized their ideas in short videos. Watch the videos on concurrences.com (conferences > October 26, 2018).

Eleanor Fox | NYU School of Law

Harry First | NYU School of Law

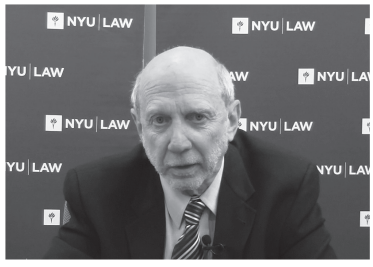
George Paul | White & Case

Alexey Ivanov | HSE-Skolkovo Institute for Law and Development, Moscow

Frédéric Jenny | OECD Competition Committee

Joseph Stiglitz | Columbia University

Nicholas Levy | Cleary Gottlieb Steen & Hamilton



Daniel Rubinfeld | NYU School of Law

Cristiane Schmidt | CADE

Simon Roberts | University of Johannesburg

Randolph Tritell | US FTC

Gönenç Gürkaynak | ELIG,Attorneys-at-Law

Joseph Wilson | McGill University

PRESS REPORTS

ALFORD CALLS FOR DUE PROCESS NORMS IN ANTITRUST ENFORCEMENT

JULIE JACKSON, © GLOBAL COMPETITION REVIEW

Amid growing debate about one-size-fits-all competition regimes, antitrust enforcers are continuing to work toward identifying common due process policies, a deputy assistant attorney general at the US Department of Justice has said. Roger Alford said the DOJ has been reaching out to competition agencies around the world in an effort to promote fundamental due process standards in the investigation and the decision-making stages of enforcement. He was speaking in his personal capacity on Friday at a conference on antitrust and emerging economies in New York. (…)

The DOJ is trying to focus on identifying the core procedural norms on which everyone can agree, regardless of whether a country has a civil or common law regime – or if it has a strong or fledgling economy, Alford said. He added that it is possible "to have common due process norms" in most countries. (…) Alford and Trittel spoke on a panel considering what is under the radar in competition enforcement. They were joined by Joseph Wilson, an adjunct professor at McGill University in Montreal and a former chairman of Competition Commission of Pakistan; Frédéric Jenny, chairman of the Organisation for Economic Co-operation and Development's Competition Committee in Paris; and Tembinkosi Bonakele, head of the Competition Commission of South Africa. ■

To read the full report, visit https://globalcompetitionreview.com/article/1176111/alford-calls-for-due-process-norms-in-antitrust-enforcement

IDEA OF ONE-SIZE-FITS-ALL COMPETITION LAW IS NAIVE, SOUTH AFRICAN JUDGE SAYS

JULIE JACKSON, © GLOBAL COMPETITION REVIEW

A judge has said competition law in South Africa has reached an inflection point, following a vote by its lawmakers approving controversial new amendments to the country's antitrust rules.

Dennis Davis, president of South Africa's Competition Appeal Court, said he does not believe competition law alone can entirely solve the country's racial inequality problems, but he does not accept contrasting views that antitrust law should be limited only to consumer welfare. Davis spoke today at a conference on antitrust and emerging economies in New York. (…)

Frédéric Jenny, the chairman of the Organisation for Economic Co-operation and Development's Competition Committee; Kirti Gupta, senior director of economic strategy at Qualcomm; White & Case partner George Paul; and Simon Roberts, a professor at the University of Johannesburg spoke on the same panel.

Speaking on a separate panel, Cleary Gottlieb Steen & Hamilton partner Nicholas Levy said commentators are wrong to criticise enforcement in developing nations as being inconsistent. (…)

Tembinkosi Bonakele, Commissioner of South Africa's competition watchdog; Gönenç Gurkaynak, a partner at ELIG Gürkaynak Attorneys-at-Law; Lawson Hunter, a senior counsel at Stikeman Elliott; and Ioannis Lianos, a professor at the University College London, was also on that panel. ■

To read the full report, visit https://globalcompetitionreview.com/article/1176045/idea-of-one-size-fits-all-competition-law-is-naive-south-african-judge-says

SOUTH AFRICAN ENFORCER SAYS NEW LEGISLATION IS TRYING «TOO MUCH»

JULIE JACKSON, © GLOBAL COMPETITION REVIEW

The head of the Competition Commission of South Africa has said that proposed new competition rules recently passed by the country's lower legislative chamber are an example of the government attempting to use antitrust laws to tackle "too much". South Africa is currently considering the implementation of drastic new changes to its antitrust rules, which lawmakers voted to adopt last week. But Tembinkosi Bonakele said he is concerned that many of the amendments will require accompanying guidelines and bylaws. (…) Bonakele spoke at a conference in New York on antitrust and emerging economies. His remarks followed those of the president of South Africa's Competition Appeal Court, who said at the same conference that competition law in South Africa has reached an inflection point. Dennis Davis said he did not believe competition law alone can entirely solve the country's racial inequality problems, but he did not accept contrasting views that antitrust law should be limited only to consumer welfare. (…). ■

To read the full report, visit https://globalcompetitionreview.com/article/1176114/south-african-enforcer-says-new-legislation-is-trying-too-much

TECH GIANTS ARE BIGGER ANTITRUST THREATS THAN STANDARD OIL: STIGLITZ

VICTORIA GRAHAM, © BLOOMBERG LAW

Tech giants' market dominance could be more troublesome than any antitrust threats seen in U.S. history, and federal regulators have been slow to react to it, Nobel prize winning economist Joseph Stiglitz said. "Google and Facebook represent a more serious threat than Standard Oil did," the former World Bank chief economist said, referring to the oil giant that gave birth to the antitrust law in the U.S. in the early 1900s. (…) U.S. antitrust enforcers also should pay more attention to the tech industry's control of consumer data, Stiglitz said. Tech companies gain market power by pursuing more consumer data. And that could "make it more difficult" for smaller companies to compete with dominant companies, he said. (…) FTC Commissioners Rebecca Slaughter and Rohit Chopra say the commission needs to critically assess if the FTC and U.S. antitrust law have done enough to regulate new and emerging tech players. The FTC, Facebook, and Google, which is a unit of Alphabet Inc., didn't immediately reply to Bloomberg Law's requests for comment. ■

To read the full report, visit https://biglawbusiness.com/tech-giants-are-bigger-antitrust-threats-than-standard-oil-stiglitz/

JUSTICE DEPT.'S ANTITRUST REVIEW UNIFORMITY EFFORT IS "WELL-RECEIVED": OFFICIAL

VICTORIA GRAHAM, © BLOOMBERG LAW

The Justice Department's efforts to harmonize antitrust review processes worldwide have been "well-received," a department official said. "I've been on the phone non-stop over the past six months, calling, visiting competition commissions abroad to engage in these bilateral discussions," deputy assistant attorney general Roger Alford said at a New York University Law school antitrust event in New York. (…) Meanwhile, the European Commission's competition chief, Margrethe Vestager, has pushed back against U.S. efforts to establish procedural norms. At an event in September, she said the model would be "duplicative" since the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD) already have rules to ensure antitrust review procedures are fair globally. Alford said he will meet with other countries' antitrust agencies at an OECD conference in November to continue to hammer out details. ■

To read the full report, visit https://biglawbusiness.com/justice-dept-s-antitrust-review-uniformity-effort-is-well-received-official/

BRICS COMPETITION ENFORCERS VALUE COOPERATION, QUESTION CENTRALIZATION, SEEK COLLECTIVE POWER - ANALYSIS

JUSTIN ZACKS, © PARR

Competition enforcers from the developing BRICS economies see value in working together and leveraging their collective powers against large mergers, but are not convinced that a centralized BRICS competition super-regulator is the answer. The BRICS macro agenda was a political decision and one that has not worked for 10 years, Cristiane Alkmin, a commissioner at Brazil's competition authority CADE, told PaRR at a conference in New York City recently. (…)

Andrey Tsyganov, deputy head of the Federal Antimonopoly Service of Russia (FAS) echoed Alkim's sentiments in a recent interview with PaRR in Geneva. Tsyganov said cooperation among countries is a better option than having a super regulator. "It is easier and better to cooperate horizontally than to receive orders from what could well be a competition czar," he added. "We need to strengthen cooperation between competition authorities given the increasing global nature of M&A deals," Tsyganov said. This will avoid duplication and contradiction when it comes to imposing remedies, he said, citing the example of the Monsanto/Bayer transaction, which was notified in more than 30 jurisdictions. "Otherwise it can make it difficult for companies to fulfill remedies," he explained. (…)

As to the developed countries, Alkmin remarked that the US, the OECD countries and Europe, "they are always going to be our benchmark. We are not going to reinvent something that is [already] there." She noted the vast resources of the US agencies—75 economists with PhDs in industrial organization in just the Federal Trade Commission (FTC) compared to about 10 economists in the economics department in CADE—and said she sees them as a positive externality. That does not mean CADE should be copying the US enforcers, but rather "look what they are doing, and try to look at our legal framework, and see if its fits in some way." Its learning curve has been exponential, she said, in comparing CADE to world's leading antitrust agencies. "I think we are not there yet", but "we are going to be, and we are trying to be." ■

To read the full report, visit https://app.parr-global.com/intelligence/view/prime-2732417

DIGITAL MONOPOLIES MORE DANGEROUS THAN OIL, TOBACCO, STIGLITZ SAYS

JUSTIN ZACKS, © PARR

When it comes to monopolies, "Google and Facebook represent a more serious threat than did Standard Oil and American Tobacco," according to Nobel Prize-Winning Economist and Columbia University Professor Joseph E. Stiglitz. Delivering the opening keynote address on 26 October at the "Antitrust and Developing and Emerging Economies" conference organized by Concurrences Review at NYU School of Law, Stiglitz reiterated the increasingly popular mantra that market power around the world is on the rise, it is partially responsible for rising inequality and the current legal framework is broken. (…)

A representative from the government of India asked Stiglitz what the country's 16-year-old competition agency might do now that it is taking up review of its antitrust policy. "Don't copy the US antitrust law and our presumptions," he answered. "Our laws are not working in the US, don't expect them to work in developing countries," instead, "look around the world and look at practices that have worked," he said. He pointed to Europe's abuse of market power standard as the right one and, in particular, referenced the South African competition authority's 2011 judgment regarding Walmart's acquisition of Massmart which required behavioral remedies that helped support local African small and medium enterprises' (SME's) ability to enter the supply chain. (…). ■

To read the full report, visit https://app.parr-global.com/intelligence/view/prime-2731635

CAREEM/UBER: PAKISTAN LIKELY TO FOLLOW EGYPT IN OPPOSING MONOPOLY DEAL, FORMER ANTITRUST CHAIR SAYS

JUSTIN ZACKS, © PARR

Pakistan is likely to follow Egypt in opposing a merger between ride-hailing service firms Uber and Careem Networks, according to Joseph Wilson, former chairman of the Competition Commission of Pakistan (CCP).

A merger to monopoly of two players creating a dominant position would be problematic and likely be blocked even if there are efficiencies, Wilson told PaRR. He was sharing his personal views on how the CCP might view the proposed acquisition of the Dubai, United Arab Emirates-based ride sharing service Careem Networks by competitor Uber, speaking on the sidelines of the recent "Antitrust and Developing and Emerging Economies" conference at the NYU School of Law organized by Concurrences Review. (…)

FTC engagement

Meanwhile, the US Federal Trade Commission (FTC) Director of the Office of International Affairs Randolph Tritell, also speaking on the same panel as Wilson, highlighted the US antitrust agency's engagement with colleagues around the world. He noted that FTC teams recently met with European Commissioner for Competition Margrethe Vestager and her team in Washington, DC and were going to Mexico shortly to meet with Mexican and Canadian colleagues, as well as planning consultations with agencies in China and Japan early next year. (…) ■

To read the full report, visit https://app.parr-global.com/intelligence/view/prime-2730643

"EMERGING ANTITRUST": ONE SIZE DOESN'T FIT ALL?

ANDREAS STARGARD, © PR1MERIO

At the Concurrences "Antitrust & Developing and Emerging Economies" conference held at NYU Law on Friday, October 26, 2018— and aptly sub-titled "Coping with nationalism, building inclusive growth" — the audience was treated to a (rather iconoclastic, yet fascinating) keynote speech by Nobel laureate economics professor Joe Stiglitz, which highlighted what would become a theme woven throughout the four panels of the day: One size does not fit all when it comes to competition-law regimes, according to a majority of the speakers; imposing a pure U.S. or EU-derived methodology without regard to local economic and/or political differences is doomed to fail. (…)

Observes Andreas Stargard: "Commissioner Bonakele also pointed to the importance of international merger enforcers cooperating on remedies, in order to allow these positive outcomes to be maintained. Taking up Professor Harry First's hypothetical of a joint or 'merged' antitrust enforcement agency, Mr. Bonakele considered a combined merger authority for the African continent a possibility, especially in light of the many small jurisdictions which individually lack resources to police cross-border M&A activity."

Mr. Bonakele expressed the concern that "the smaller, national enforcers certainly feel as if they cannot block a mega deal on their own, so they largely defer" to the established agencies, such as the EC and DOJ / FTC. (…)

Counterpoint: Public Interest Or Politicization?

Prof. Ioannis Lianos characterized the "slightly fuzzy public interest test" as largely a scheme to enhance the bargaining power of the competition agencies that do apply such a test. Canadian attorney and former enforcer Lawson Hunter pointed out that the trend of growing political interference in the merger approval process has spread globally, not only in developing nations but also in well-established regimes — often under the guise of national security reviews, which are "obscure, opaque in process, fundamentally political, and without any 'there there'." Merger review has "simply become very broad and less doctrinal." "I found it interesting that Mr. Hunter recommended that other antitrust agencies should give more frank input into their sister agencies, if and when those stray from the right path," said Stargard, who focuses his practice on competition matters across the continent. (…) ■

To read the full report, visit https://africanantitrust.com/2018/10/31/emerging-antitrust-one-size-doesnt-fit-all/

INTERVIEWS

> “AT A FUNDAMENTAL LEVEL, IT’S A DAVID AND GOLIATH KIND OF STORY. IN THE ABSENCE OF SOME FORM OF REGULATION OR COMPETITION POLICY, THE FIRMS IN DEVELOPING COUNTRIES RISK BEING SQUASHED.”

JOSEPH STIGLITZ

Eleanor Fox > Concurrences Review, September 2018

Joseph Stiglitz (Columbia University) was interviewed by Eleanor Fox (NYU Law). Professor Stiglitz gave the keynote speech at the Antitrust and Developing and Emerging Economies Conference.

Professor Stiglitz, you have given a great deal of thought to competition policies in developing countries and you have been very important in helping many of them frame their policy objectives. You also have been a leader in thinking about globalization and its impacts.Thank you for agreeing to share your thoughts on these important topics. What do you think are the greatest impacts of globalization on developing countries, and, to the extent that they are harmful, can competition policy help and how?

The impacts of globalization differ depending on the country—from opening up trade opportunities, to investment and the transmission of ideas. One of the concerns is that firms in developing countries are, almost by their nature, small, new, and less experienced. One of the problematic aspects of globalization is that you confront these new firms with some very powerful global companies that have a large capital base and long experience.

At a fundamental level, it’s a David and Goliath kind of story. In the absence of some form of regulation or competition policy,

the firms in developing countries risk being squashed. The failure of those firms will in turn impede the growth of the developing country's economy. This risks turning developing countries into producers, the factory shop of the world—a term that was used in the context of China at one time—but lacking the sources of wealth that a real domestic entrepreneurship would have created.

Competition policy can partially level the playing field. In particular, it can make sure the "Goliaths" don't engage in extremely anticompetitive practices or take undue advantage of the benefits they already have. In the best-case scenario, you can have an outcome like that in South Africa, where competition policy has been used to take a more affirmative stance on levelling the playing field. When Walmart wanted to come into the country, South Africa required Walmart to help assist small, African producers who could be part of the supply chain—rather than replacing and destroying the prospects of small producers—in the hope that it would enhance them.

Some would say that leveling the playing field is a dangerous concept because it means handicapping the efficiencies of these global firms. What is the answer to that?

People make this argument based on the premise or presumption that markets are naturally efficient and that the unfettered outcome of market processes will be efficient both in the short and long run. But we know that's not true. The example I always use in my class is if Korea had had to rely on the static comparative advantages of 1965, it would have remained a rice grower rather than becoming the industrial country that it has become, and its standards of living would be a fraction of what they are today.

The market has imperfections that are associated with imperfect capital markets where the developed, large firms, have a market advantage over developing countries. Walmart can take advantage of its size to get goods at a lower price, which is a kind of unfair competition. There are lots of other examples where you can clearly see that the unfettered working-out of the market would not lead to efficient outcomes. In some sense, all governments recognize this. The United States has a Small Business Administration to help small businesses because we don't believe that the unfettered markets left to themselves will give a fair chance to small businesses.

In a broader sense, if you look across many markets in our economy, they are already distorted. We have concentrated market power in telecom, subsidies in agriculture, and government-provided research in many of the pharmaceuticals, all of which gived Western firms an advantage in those sectors. So the idea of this magical, efficient, competitive market left on its own is really just a myth.

Many developing countries suffer from longtime exclusions of a majority of the population from the economic mainstream. Is this an economic as well as social problem and should it be a factor in formulating principals of competition law in these countries?

It's obviously a problem—an economic, social, and political problem. It's an economic problem because if you believe that in a market economy, markets have advantages, then excluding them from the market is in effect not using its most important resource efficiently—its people. Unfortunately, because of the intergenerational transmission of advantages and disadvantages, those who are marginalized and excluded today will have children who are also marginalized and excluded. The problems get perpetuated and extended. To me, this is a very serious problem.

Good competition law must be construed broadly to advance societal well-being. It requires judgment. My own feeling is that, in the United States, we have successfully narrowly construed competition law. South Africa, for instance, has a broader mandate to that. To go back to the Walmart case, the use of competition policy to help promote African entrepreneurship and to integrate African entrepreneurs into the supply chain is a way to use competition to increase the likelihood that globalization will have a positive impact—and to avoid what otherwise might have been harmful effects from globalization in South Africa.

Should developing countries competition law be sensitive to issues of equality and inclusive growth. If so, how? Are you worried that attention to these factors will dilute efficiency and make everyone worse off?

Let me begin my response by saying that implicit in the last part of the question is an idea that has been propagated by the Chicago School of economics, but has been thoroughly discredited in advances in economics over the last 35 years. This fallacious idea is that you can separate issues of equity from efficiency. It's sometimes referred to as the Second Welfare Theorem. We now know that those two issues can't be neatly separated in that way.

Going beyond that, one of the reasons for the original interest in antitrust and competition law was not a search for more efficiency, but rather a reaction at the end of the Gilded Age to the growth of inequality, and the political power that was associated with that concentration of economic power. The very roots of competition policy go back to a concern about equity as well as efficiency.

Thank you, Professor Stiglitz. ■

“THE UNITY OF THE ANTI-MONOPOLY LAW ENFORCEMENT AGENCIES IS CONDUCIVE TO REGULATING MONOPOLISTIC BEHAVIORS.”

XIANLIN WANG

Daniel Rubinfeld > Concurrences Review, August 2018

Xianlin Wang (Professor, Shanghai Jiao Tong University) was interviewed by Daniel Rubinfeld (Professor, NYU School of Law). They participated in the panel «BRICS: A Competition Agenda?»

Early this year, China announced a major restructuring of its competition enforcement authorities, combining the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and the Ministry of Commerce (MOFCOM), into one super agency, the State Administration for Market Supervision (SAMS).

It is necessary to first clarify the exact nature of the restructuring. The State Council Institutional Reform Plan, passed at the 13th session of the National People's Congress in March 2018,

integrate[s] the responsibility and duty of the State Administration for Industry and Commerce (SAIC), the responsibility and duty of General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the responsibility and duty of the China Food and Drug Administration (CFDA), the responsibility and duty of price supervision and anti-monopoly law enforcement of the National Development and Reform Commission (NDRC), the responsibility and duty of anti-monopoly law enforcement on concentration of undertakings of the Ministry of Commerce (MOFCOM), and the responsibility and duty of the Office of the Anti-Monopoly Commission of the State Council so as to establish the State Administration for Market Regulation which is subordinate to the State Council.

The official name of the newly established ministry is thus 'State Administration for Market Regulation' (SAMR). The SAMR is mainly based on the whole SAIC, includes the Price Supervision and Anti-Monopoly Bureau of the NDRC (not the whole NDRC) and the Anti-Monopoly Bureau of MOFCOM (not the whole MOFCOM). This means a major change in China's anti-monopoly law enforcement system: ten years after implementation of the Anti-Monopoly Law (AML), the situation that three anti-monopoly law enforcement agencies co-exist in China comes to an end. The unity of the anti-monopoly law enforcement agencies is conducive to regulating monopolistic behaviors.

How do you believe SAMR will be structured administratively to handle merger and non-merger activities?

Since the newly established SAMR is responsible for all anti-monopoly affairs (price monopoly investigation, non-price monopoly investigation, and undertaking concentration review), and the agency staff members come from the former three

anti-monopoly agencies, the agency will better address the whole gamut of anti-monopoly responsibilities, including merger and non-merger activities.

Do you expect SAMR to issue a revised Anti-Monopoly Law (AML). If so, what revisions do you expect? If not, how do you expect the new agency to manage the current AML procedurally?

In China, making or amending law is the duty of the National People's Congress or its standing Committee. In accordance with practice, the concerned departments of the State Council may be entrusted with drafting laws. So the SAMR may organize drawing up the revised draft of AML. In fact, the Office of Anti-Monopoly Commission of the State Council has organized the researching and drafting of AML since 2015. So far, contents to be modified are more extensive, include both substantive and procedural rules, both merger and non-merger affairs, and may include some articles concerning new economy. Besides, by amending AML, the basic position of competition policy and fair competition review system may be established in the law.

Will SAMR be able to effectively reduce the uncertainty that market participants currently face when dealing with three distinct agencies?

In the past ten years, there were three anti-monopoly enforcement agencies in China, so market participants really did face some uncertainty. For example, the three agencies took different ways of delegation of authority to corresponding institutions at the provincial level; NDRC adopted a general delegation of authority, SAIC adopted a delegation of authority on a case-by-case basis, and MOFCOM delegated approval authority. Similarly, NDRC and SAIC developed different rules on leniency. With the 'Three in One' restructuring, great changes will take place in this aspect. In fact, the SAMR has been preparing to make and amend some relevant enforcement rules. This change is worth looking forward to. ■

TESTIMONIALS

I really appreciate the quality of the debate among the members of the panels as well as with the floor which is made possible because of the experience and expertise of the panelists." *2018*

ANNE TERCINET
EM Lyon Business School

The conference was another instance of super coordination and it was a superb experience." *2018*

MEL MARQUIS
European University Institute

The different views of the panelists sincerely and objectively exposed reflected how well the panels were constructed. I learned a lot." *2018*

RODRIGO BORGES
University of Pennsylvania Law School

This is an excellent conference which brings together enforcers, practitioners and academics. It is a real insiders view on the hot topics of the moment." *2017*

SIMON ROBERTS
University of Johannesburg

I was impressed by the breadth of topics covered and the energetic engagement between speakers and attendees. I appreciated the opportunity to meet and chat with both speakers and attendees during and after the conference." *2017*

KEVIN WU
NYU Law

An excellent conference with a splendid range of speakers: enforcers, in-house counsel, legal practitioners, economists and academics. The panel format allows for high quality in-depth discussions between experts. A real coup that the US Deputy Attorney General, responsible for US antitrust policy, made his first policy speech since taking office at the conference. Good scope for networking." *2017*

ANTHONY WOOLICH
HFW

Set up in a wonderful venue - at the heart of the NYC Village. The room was also very comfortable - with cozy sofas, chairs, and tables that made it easy to take notes. This conference is the best kept secret of antitrust conferences." *2016*

DINA KALLAY
Ericsson

I learned a great deal from our panel and from the entire conference, which occupies a unique and valuable niche in the antitrust landscape." *2016*

RANDOLPH TRITELL
FTC

It was a pleasure to be a panelist at this October 2016 conference on competition and developing economies and to have the opportunity to discuss competition policy in Turkey and its relation to regional development. The conference brought together an impressive list of speakers and delegates in New York and at a great conference setting. I am looking forward to next year's event." *2016*

GÖNENÇ GÜRKAYNAK
ELIG, Attorneys-at-Law

Very insightful and international oriented conference. I benefited a lot from the speakers, who are very experienced and knowledgeable, and I very much look forward to next year's event." *2016*

SUSAN NING
King & Wood Mallesons

ATTENDEES

AGENCIES

- CADE
- Competition Appeal Court of South Africa
- Competition Authority of Kenya
- Inter American Development Bank
- Ministry of Corporate Affairs, India
- OECD
- Office of the New York Attorney General
- South Africa Competition Commission
- UNCTAD
- US DOJ
- US FTC
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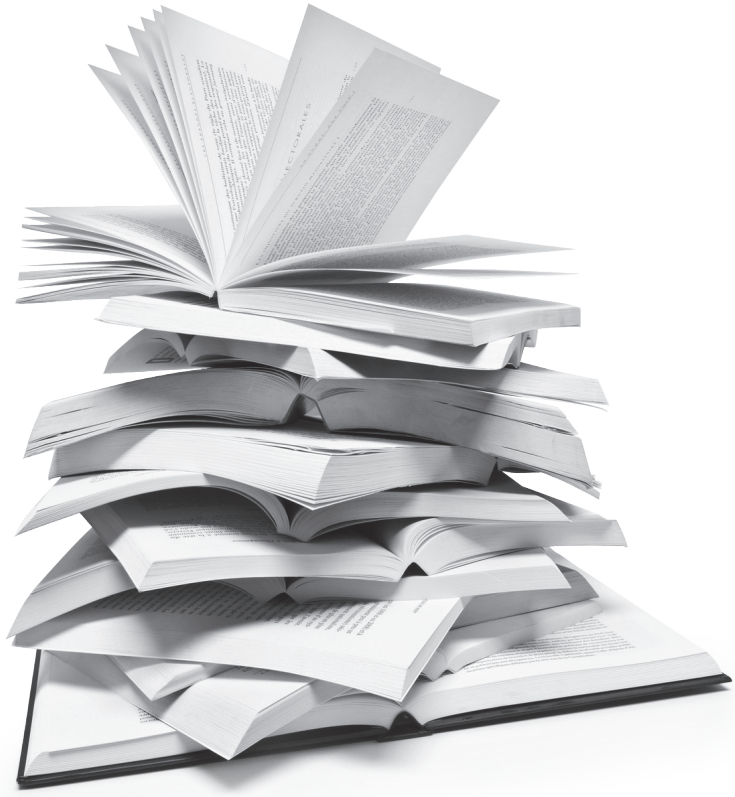

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