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Procedural innovation in competition law for small economies

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INTRODUCTION

There is considerable debate about how competition policy and law, as developed in larger, wealthier, more industrialised economies, should be applied in smaller, poorer, less industrialised countries (OECD, 2003; Bakhoum, 2012; Drexl et al, 2012; Fox, 2012; Gal and Fox, 2014; Gerber, 2014). Some question whether small countries have specific characteristics and face particular problems resulting from their scale, which merit an 'adapted' approach to competition law (OECD, 2003). Most of the discussion has concerned the economic substance of competition law introduced pursuant to agreements on trade or with facilitation of multilateral agencies and networks promoting 'international best practices'. Even the way economics can be used in competition law is under discussion (Gerber, 2014).

This chapter does not evaluate the merits of substantive economic paradigms in different contexts. It is interested, rather, in whether there may be a procedural dimension that is also worth exploring when considering how best to develop small countries' competition regimes. In particular, it looks into how procedural innovations might supplement classic models of enforcement and approval processes to strengthen the impact of resource-strapped competition authorities.

The chapter begins by recalling the challenges facing competition authorities in developing and particularly small economies. The requirements of the economic and legal expertise and procedures designed for the adversarial nature of enforcement make for a particularly heavy weight. The chapter then explores how alternative mechanisms are sometimes used in the general justice system and in competition law in larger developed markets, resulting in a wider distribution of roles and responsibilities rather than focusing all in the primary authority itself. It concludes by asking whether such mechanisms might usefully be employed in small countries to supplement classic authority-centric processes. Drawing on examples from the author's experience arbitrating and mediating competition-related cases, it is concluded that if credible enforcement can be demonstrated as a backdrop, such methods could be useful in reducing the burden on authorities. This, in turn, may allow them to concentrate better on strengthening the enforcement regime itself and the other classic means of administering competition policy.

CHALLENGES FACING COMPETITION AUTHORITIES IN SMALL ECONOMIES

Being a competition authority is generally challenging, but all the more so in small economies, and this for a number of reasons.

Economies of scale

The small scale of the market may limit the potential for effective competition to develop in some sectors, placing the very usefulness of competition law in question (Sokol, Cheng and Lianos, 2013). It may be difficult to attract new entrants to challenge incumbents in sectors traditionally dominated by one or a small number of firms, resulting in more entrenched market dominance.

Suppliers may find that they are too small to be economically viable in goods and services that are affected by economies of scale. Even where competition is viable in parts of the value chain, other parts may need forms of resource sharing that might be regarded as unlawful restraints on competition in larger economies. A small economy may

lack diversification, perhaps having only a small number of exports. The challenges posed by international export cartels may also make small countries more protective of their national industries.

Competition economics and law requires technical expertise that is usually difficult to find in a small country, so authorities often lack the human resources necessary to run an effective competition regime (Gal and Fox, 2015). They may have as many economists and lawyers per head of population as larger ones, but there will be fewer of them – yet there are economies of scale in building an effective competition regime. Specialisation needs sufficient numbers to work, so in small economies, there are more generalists.

It is not only the competition authority that needs to grapple with sophisticated law and economics; this impediment to building expertise also arises in the businesses and their advisers, who have to understand what they are and are not allowed to do. Even where businesses are motivated to review their practices against the norms of competition law, they may lack the resources to do so effectively.

Thus, while the application of competition policy norms may require expertise and experienced judgement to tailor internationally recognised approaches to the situation at hand, there may be even less such expertise and experienced judgement available. Attracting talent and integrating it into the competition authority's processes is a challenge, but also a high priority.

Relationships and culture

In small countries, the chances are higher that individuals – particularly leaders – know one another, have worked or trained together, come from the same community or are part of the same religious group. Such informal relationships, both within and outside the workplace, may produce a tendency to resolve issues through informal means, which are not aligned with best international practices in competition law, including bargaining between competitors or between authorities and the firms under their jurisdiction.

In some cases, cronyism may protect an established political-economic

order. Of course, one of the intended benefits of competition policy can be to loosen the drag of such bonds on economic performance. In other cases, competition laws may pose a disruptive challenge, not only to existing economic interests and restraints on trade, but also to the very manner of handling power and discord. Where customs of collaboration, which do not correspond to modern competition principles, are deeply embedded in social, cultural and political norms and behaviour, this may be particularly threatening.[1] Where competition policy is intended to change such community, religious, kinship, tribal or other customs, it can face difficulties from a perception that it is challenging the very fabric of the society itself (Fikentscher, 2001; Hazel, 2015).

There may be times when it is more effective for contentious matters to be resolved through negotiation rather than full enforcement. Sometimes it may even be better for the competition authority to be politically shielded by sharing some of the responsibility for reaching the outcome, whether with the parties involved or with internationally acknowledged experts.

Prioritisation challenges

Competition law aims to effect changes in behaviour and to instil a culture that is expected to lead to better economic performance. Competition authorities pursue this in reliance upon an economic analysis of markets, an assessment of market power and the collection of a body of evidence, through inquiry or investigation, sufficient to justify an enforcement or approval decision that will withstand scrutiny. The method aims to create incentives for behaviour against a backdrop of official coercion. Even where private parties have a right of redress in respect of harm caused by anticompetitive behaviour, this is viewed as a mechanism to further the policy objective of deterrence (even to the point that damages may be tripled to achieve the underlying deterrence goal).

In many small economies, where markets have not been subject to competition law in the past, the very idea that horizontal and vertical restraints on trade and abuse of dominance are unlawful, may be unfamiliar. The competition authority needs, then, to invest major

effort in developing the awareness of economic actors affected by such norms, that is, through establishing a history of successful cases and through advocacy.[2]

At one level, much of competition law is intuitive, such as bid rigging, price fixing and abuse of dominance, which are easily recognised as schoolyard bullying. However, as soon as one delves beneath the obvious, much becomes very unclear.[3] In many situations, the question of whether market conduct is anticompetitive may not have an obvious answer (or worse, the intuitive answer may be economically incorrect).

Providing training and awareness raising to industry on the nuances is important but insufficient to have far-reaching effects on behaviour. To bring home the economic paradigm of the competition law to business actors, there is nothing like a flagship case, the pursuit and resolution of which will have recognisable welfare benefits for consumers, illustrate the nature of anticompetitive practices, demonstrate the punitive consequences of carrying them out and, ultimately, deter such behaviour.

This means selecting cases in a sector of the economy that is widely used by consumers, which may be in consumer retail distribution and sales of goods, or sales of services that are widely used. Facing resource limitations, competition authorities in developing countries and small economies may pursue horizontal restraints, particularly hard-core violations such as price fixing, at the expense of abuse of dominance, which may be harder to prove. Such prioritisation issues are not unique to developing countries, but may be more challenging for them to address.[4]

Weakness in sector-specific regulation may also result in competition authorities being expected to take a lead in regulating prices and other activities that are not central to their role in improving competitiveness across the economy. Similarly, authorities that are driven by complaints processes may be unable to exercise the discretion they wish in selecting the cases that will influence behaviour (for example, see Kovács and Reindl, 2013). This may leave them with sparse resources for reforming regulatory systems that restrict competition and identifying anticompetitive conduct and enforcing against it.

The combination of these factors puts pressure on authorities that are trying to focus on a small number of landmark cases that send clear messages. As these are particularly resource-consuming, this may mean resolving the less high-profile cases more efficiently, with less demand on the authority's economic and legal resources. If classical methods of pursuing competition law's objectives cannot be used across the board, one might consider what complementary mechanisms might be employed, whether to improve the messaging of the high-profile cases or to cope with the larger number of others.

Tensions among underlying goals

The competition authority may be expected to focus on the structure of, and behaviour in, markets according to well-established economic notions of market definition, market power, horizontal and vertical restraints, abuse of dominance and remedies. But it may also find itself playing a wider role.

The function and perception of competition law may depend on the context in which competition policy has been introduced, and the underlying values of the society. The goals of competition law in a primarily agrarian or community-based economy, such as in some South Pacific nations, may differ from those where competition law is introduced in the transition away from command-and-control management of the economy, such as in Eastern European countries (Roberts, Tapia and Ybar, 2013).

These may be different in turn where the dominant political theme concerns economic inclusion of hitherto excluded groups (Chua, 1998). Competition law may have the aim of lowering barriers to participation and growth in the market as a means of broadening the distribution of wealth, forming part of a broader inclusiveness agenda (Soto, 1989; Fox, 2008).

The legislature may seek to encourage growth of small and medium enterprises, which might be expected to generate innovation, give greater attention to customers' needs and maintain or create employment (for instance, Kaira, 2013). It may thus have a fundamental poverty

reduction agenda at heart.

Intensifying the degree of business rivalry may have the aim of ensuring consumer surplus is not transferred to the hands of large, dominant firms or cartels. Yet if the focus is on economic efficiency, there may be a need to reach or maintain scale to reduce costs, increase efficiency or (particularly in small economies) enhance bargaining power with foreign suppliers or buyers.

Not all of these objectives sit well together. Tensions may arise among diverse goals that lie behind the introduction of competition policy. If the applicable competition law allows the 'public interest' as a justification for decisions, the competition authority may come under pressure to use it. The authority's role as a technical analyst of whether a transaction harms competition (and if it does, whether it may be justified by efficiency gains or other benefits that will be passed through to consumers) may give way to a larger role as arbitrator of whether competition policy should be applied at all in face of other competing policy objectives. The competition authority may become 'the social shock absorber, the mechanism that absorbs the tensions between these goals' (Kovacic, ND.).

The extent to which the competition authority will follow a narrow technical economic approach or have to weigh broader considerations will depend not only on its legislative mandate but also on the other institutions arrayed around it. Where robust ministries and agencies are present, it may find itself with a narrower focus, its zone of activity constrained by the bustling institutional pressures of fellow agencies.

Developing countries, particularly small economies, may not have well-resourced ministries and agencies which, by their very presence, would leave the competition authority with space to focus only on its narrow legislative mandate. In the absence of these, a competition authority may find itself taking a broader role, resolving conflicting visions of the economy and how competition should best serve the population's aspirations for economic participation, innovation and growth.

In this sense, '[w]hat becomes key for the competition agency is to

engage in a continuing discussion with the larger society, with public officials, about the appropriate focus of competition law, to continually define and redefine the aims of the law' (Kovacic, ND). This broader role may require mediating among the different interests and arbitrating among the different objectives that led to the competition law in the first place. While this could result in uncertainty in markets as to how a competition authority will use its powers, or even what law will apply over the long term, such debate over and refinement of economic policy may be necessary where a sufficient consensus on such matters has not emerged.

Addressing challenges sustainably using integrated procedures

That these challenges make competition law difficult to administer does not make them arguments against competition law. Rather, these challenges illustrate the difficulties it may face and may support stronger engagement efforts and assistance from beyond the country's shores (Licetti, 2013; Aydin and Büthe, 2015). Extensive assistance is available, with various institutions helping to build competition capabilities in many countries.[5]

However, it seems insufficient only to argue for greater resources for and assistance to competition authorities. Even where considerable thought goes into technical assistance,[6] advisory assistance is likely to be inadequate for long-term development. For instance, long-term assistance might generally be more valuable than short-term assistance (Sokol and Stiegert, 2007; FTC, 2008). Yet even with donor support, it is difficult for small economies to attract expertise over the long term with the desired impact, or to integrate such expertise as its own. An economy that is unsustainably dependent on external support may never become capable of continuously managing the complexity of modern competition law.

Between well-developed economic theory and practice, on the one hand, and the reality of application in small, developing countries, on the other, lies an all-but-inevitable gap due to the lack of resources to meet the challenges (and, perhaps to some degree, different economic

considerations that apply in such economies). That gap may not be sustainably or affordably bridged through consultant advisers. It is worth exploring whether the gap can be reduced through sustainable procedures – whether short- or long-term interventions – that are integrated into the authority's practices and that yield desirable outcomes.

EXPERIENCE IN LARGER ECONOMIES

Advanced jurisdictions have made considerable progress in using mechanisms other than the direct exercise of the competition authority's administrative powers and judicial proceedings to address competition problems. These are explored below, before turning to their potential employment in small economies.

Role of business in enforcement

The classic enforcement mechanism in many countries for pursuing competition problems begins with the competition authority carrying out a market investigation and, depending on its prosecutorial discretion and powers, proceedings leading to fines and other remedies. Structural and behavioural commitments may be given as part of a negotiated settlement between the competition authority and the entity facing investigation. However, the publicly funded investigation or prosecutorial process bears considerable risk in terms of the cost of pursuing an action, gaps in evidence and uncertainty of outcome.

Public enforcement is increasingly complemented by the right of private parties to bring private actions for damages – not only to give them direct redress but also to amplify enforcement as a public benefit.[7] Europe's Directive on Antitrust Damages, introduced in 2014, seeks to ensure that 'anyone who has suffered harm caused by an infringement of competition law … can effectively exercise the right to claim full compensation'.[8] In some countries, the scope for private action is amplified by other recent measures on collective redress in competition matters, among others (for example, EC (2013)).

The provision of private party enforcement rights is not merely about providing access to justice. It is effectively a form of liberalisation

of central state control over administration of a public policy objective. Into the coercive (in the case of full enforcement) or negotiated (in the case of settlements) process, the aggrieved party may pitch their case and directly influence outcomes. Such procedures and rights thus leverage the interests of directly affected private parties and share with them the burden of pursuing a public good. It may reduce the demand on resources borne by the public agency.

Sharing responsibility for enforcing competition law with those having an incentive to do so (as well as the courts, which may not be well qualified to administer it) has its risks and disadvantages. At the same time, though, as is often the case with liberalisation, it offers an opportunity for innovation. In particular, making parties more responsible for pursuing outcomes opens up the possibility of using different mechanisms to resolve the problems between the parties themselves rather than merely imposing top-down punishments.

Collective private actions schemes

Even where enforcement action has been taken and a business has been found to have infringed the competition laws, innovations in reducing the administrative burden of processing claims are being made. For instance, in the United Kingdom, the Consumer Rights Act 2015 provides for voluntary alternative dispute resolution procedures to facilitate negotiations between aggrieved parties and a company that has violated competition laws.

Similarly, the UK's Competition and Markets Authority (CMA) is authorised to certify voluntary redress schemes and an opt-out collective actions regime. The redress is decided by a board chaired by a lawyer and including an economist, an industry figure and a representative of the aggrieved parties. The CMA is providing incentives to 'nudge' businesses to use such schemes, offering reduced fines for those that do (CMA, 2015).

Using mediation to resolve private actions

The burden of resolving competition claims may be shared further

using consensus-oriented methods like mediation. Mediation is a process in which a trained neutral person, or a team of them, assists parties in negotiating a matter. At its core, while the mediator manages the process, the parties determine what they agree to voluntarily. It is typically confidential by agreement of the parties, but need not be so. A skilled mediator actively and realistically explores with the parties the underlying interests, the issues to be resolved, the possibilities for agreement and the consequences if they fail to agree. Mediation offers a focused process that accelerates and deepens understanding of the issues and the parties' respective interests, gives greater control over procedure and adds creativity to the process.

This idea is not new – the OECD has been considering how mediation can be used over many years.[9] Although not widely used internationally (ICN, 2007), mediation is common in the United States, where private right of redress has long been a key part of the antitrust regime.

Where aggrieved parties are entitled to bring an action against an entity that has engaged in anticompetitive practices, mediation may be a particularly useful remedy (Blanke and Nazzini, 2009). In such cases, it may reduce the burden on the court system. Even where such parties can only bring complaints to the competition authority, whose sole or primary procedural channel is to carry out an investigation, mediation might be employed to resolve the matter earlier and with less cost than a full investigation.

Mediation should not be regarded as only useful in minor cases. It has been useful in hard-core cartel cases. Israel sometimes employs mediation techniques in cartel cases, using a judge as a confidential facilitator to reach a settlement (ICN, 2008). Where there are tensions among underlying policy issues, particularly where technology and behaviour is outpacing the law, mediation can be a helpful procedure. In the 2012 US e-book case, in which three e-book retailers claimed that they had been forced out of business by price fixing by Apple and five major publishing companies,[10] the court ordered mediation among the parties. High-profile cases have been resolved with the

assistance of mediators in the United States, such as in cartel cases against Apple, Google, Intel and Adobe regarding hiring of Silicon Valley employees.

Using mediation to negotiate commitments

Mediation can also be useful in implementing conditions that achieve a more competitive market as opposed to merely resolving the matter between an infringing and an aggrieved private party. Commitments may be given by the merging parties or a party under investigation as part of a settlement in an investigation or during enforcement proceedings, or in connection with approval of a merger, cartel exemption or leniency proceeding.[11] In securing commitments, the competition authority can apply behavioural and structural remedies that lead to market-led outcomes and changes in commercial practices. These remedies can include processes that shift the burden of ensuring procompetitive behaviour to the parties involved.

These commitments have to be negotiated and, in many cases, negotiation can be helped along through mediation. Mediation offers a space for creativity, which can be valuable in the competition context. The involvement of a disinterested but curious and proactive third party mediator can change perspectives about the nature of the solutions the parties are pursuing.

For example, in the enforcement context, the *United States v Microsoft* antitrust action, brought by the US Department of Justice and 20 states, offers an example of complex antitrust mediation (Microsoft, 2000–2014). Microsoft was alleged to maintain its operating system monopoly unlawfully through exclusionary, anticompetitive and predatory conduct infringing section 2 of the US Sherman Act. The court ordered that Microsoft, the Department of Justice and the states enter into mediation proceedings to seek a settlement. Mediation with Judge Richard Posner did not produce a settlement over four months, but subsequent mediation by two other experienced mediators, Eric Green and Jonathan Marks, did. This was achieved over the course of three weeks, albeit after extensive preparatory work.[12]

Mediation's usefulness is not restricted to adversarial situations. It is helpful in many negotiating circumstances, including merger approvals. In the merger between American Airways and US Airways, mediation was used to find solutions to Department of Justice concerns (Bloomberg, 2013; Travelpulse, 2013).

Using mediation to implement commitments

In many cases where there are concerns as to market power and control over a bottleneck resource or service, negotiation between the competition authority and the business in question may result in the business undertaking to negotiate with third parties. For example, in a merger, the combination of physical or intellectual property rights that are essential to the business of other firms may create such market power that there is a risk of excessive pricing or exclusionary conduct. It is common in merger approvals to secure the parties' commitments to negotiate with third parties to grant them access to these assets.

Monitoring compliance with such obligations to negotiate presents a problem. It is desirable that commercial interests lead to a voluntarily negotiated outcome, yet where the party obligated to negotiate controls access to a valuable resource, there may be imbalanced bargaining power. This may lead to failed negotiations or outcomes that do not achieve the desired competitive conditions. The negotiations are also occurring in the shadow of the coercive power of the state that is compelling them. The competition authority also does not know what degree or timing of intervention may be required, if any. It may have to deploy a high level of expertise at short notice, creating a contingent demand on its resources.

In merger cases, the European Commission (EC) will sometimes ensure that mediation is part of implementing the remedy applied as a condition to merger approval. In the DONG/Elsam/Energi E2 case (EC, 2004), the EC accepted DONG's commitment to a mediation process to resolve disputes arising from the implementation of its commitment to make natural gas available by auction to third-party competitors in Denmark under a gas release programme. It also employed a monitoring

trustee arrangement. If a third-party competitor had reasons to believe that DONG was failing to comply with its commitments, the monitoring trustee could be instructed by the EC to act as a mediator to attempt to settle the dispute amicably.

Under the arrangement in DONG, the monitoring trustee would be allowed to appoint further professionals to assist, and would make a proposal as to who should bear the costs of the mediation procedure, which would take into account general mediation standards. The mediation would involve an exchange of written observations and then negotiations between the parties. If agreement was not reached, the monitoring trustee was empowered to recommend a solution, which would become binding upon DONG and the third party. The parties could oppose the recommendation in which case, the EC would decide the matter.

In such cases, instead of merely applying the threat of investigation and penalties with possibly endless litigation for non-compliance, a process is established whereby the post-merger entity must engage in a structured and facilitated negotiation process that is designed with incentives to reach a negotiated outcome.

Although it will not always succeed, mediation has generally been shown to improve the probabilities of achieving agreement, or at least to narrow the issues, allowing for more efficient resolution. It would be naïve to think that mediation can replace the threat of enforcement action. If it can be difficult to reach agreement on commitments that make a merger acceptable, it will be all the more challenging to reach settlements in cartel or abuse of dominance cases.[13]

But overall, the benefits of mediation can reduce the burden of resorting to the full duration of expensive confrontation with coercive power by the competition authority. It is being used because it offers procedural efficiency gains, that is, where remedies can be better implemented with it than without.

Using trustees to monitor implementation of commitments

Another means of ensuring implementation of commitments to nego-

tiate with third parties in several jurisdictions, including the United States, Canada and the EC, has been to employ monitoring trustees. These are used commonly, for example, to ensure compliance with 'hold separate' obligations and divestiture and other commitments in mergers (for example, ICN (2006)). To ensure that such obligations to negotiate would realise the procompetitive outcomes sought, the EC has required disputes over negotiations and agreements with the third-party beneficiaries to be supervised by a trustee (and as discussed further below, failures to agree and implementation disputes resolved by arbitration).[14] In doing so, essentially, the authority delegates a circumscribed part of the function of monitoring compliance to a third party.

An example of this is in the German merger of Telefonica/EPlus (as in similar earlier cases in Austria and Ireland). In order to mitigate the adverse effect on competition of consolidation, the EC required the merged entity to offer competitors access to its network capacity. While not amounting to divestment, this would make a concentrated resource more widely available among competitors.

To implement this, Telefonica committed to appoint an experienced, skilled 'monitoring trustee', which would be independent of Telefonica and without conflict of interest. Telefonica was required to remunerate the monitoring trustee 'in a way that does not impede the independent and effective fulfilment of its mandate'. Telefonica had to propose the individual to the EC for its approval. The role of the monitoring trustee was to supervise the implementation of the network capacity sharing arrangement, facilitate negotiations and report to the EC on progress and compliance.

Telefonica was required to cooperate with the monitoring trustee, provide it with information exchanged with third-party service providers requesting MVNO access, as well as 'full and complete' access to Telefonica's books and records, personnel, facilities, sites and technical information necessary to fulfil its duties, including offices on Telefonica's premises. Telefonica was even required to pay for any advisers the monitoring trustee would require for the performance of its duties.

The approach allows the EC in effect to leave parties more room

to resolve issues but with a delegated supervision and facilitation mechanism, the cost of which is borne by the parties. This reduces the burden on the EC in following detailed implementation of undertakings by making parties more responsible for the process and cost of ensuring compliance. There may be scope for using such mechanisms at a smaller scale in small economies.

Using arbitration to resolve competition disputes

Arbitration is now widely recognised as a legitimate means of resolving disputes over competition matters.[15] Arbitration is a process whereby a third-party neutral, usually chosen by the parties, renders a decision after considering submissions from disputing parties according to an applicable law. In most countries' commercial arbitration processes (and those recognised by conventions on recognition and enforcement of awards), the parties' role in consenting to the arbitration, selecting the arbitrators, framing the scope of the arbitration and establishing various procedural parameters is central to the process.

In plain commercial arbitration, where the only involvement of the state is in enforcing the agreement to arbitrate and the award itself, much of the discussion in the competition law context has revolved around arbitrability, and the extent to which parties should be allowed to agree to determine their conflicts through their own chosen arbitrators. This use of arbitration is an alternative to the courts hearing actions brought by aggrieved parties seeking redress for harm caused by competition law infringements (discussed earlier under 'Enforcement through private right of redress').

There is now extensive literature on the interaction between arbitration proceedings and the residual review powers of national courts (Blanke and Landolt, 2011; Landolt, 2012). It has not really been driven as a tool for better implementing competition law; indeed, arbitration had to 'make its case' before it became a trusted means of resolving disputes involving competition law. But now, the reality is that where arbitrators are making competition law decisions, the national competition authority bears a lighter burden. There is little sign that

arbitrators are carrying out their role in a manner that is undermining the competition law regime. On the contrary, the availability of party-trusted arbitrators to handle such cases widens the available resources for ensuring that competition law is implemented.

Using arbitration to enforce commitments

Arbitration-type procedures can also be used as a tool to advance competition law objectives by including it in remedies for potential ongoing competition disputes over compliance with commitments. In granting its approval to mergers and acquisitions, the EC has often used arbitration as a mechanism to guarantee implementation of a remedy where market consolidation reduces competition or creates or increases market power.

Arbitration is a sufficiently 'heavy' process, involving extensive written and oral submissions on procedure and the merits, factual and expert evidence, hearings and challenges that it is often preceded by escalated negotiation procedures. A 'fast-track' dispute resolution procedure was established in the German Telefonica/E-Plus case mentioned earlier, for situations where service providers requesting access claimed that Telefonica was not complying with its obligations to negotiate elements of the required access to its network capacity. If there was a dispute, there would be a focused negotiation process, including escalation to CEO level, to resolve the issue.

If this did not result in settlement, then the parties' dispute would be referred to arbitration under the auspices and rules of the German Institution of Arbitration. An expedited arbitration process would follow, with either a sole arbitrator appointed by the parties or a three arbitrator tribunal, consisting of one appointed by each party and the chairperson appointed by the two party-appointed arbitrators.

The EC would be permitted to participate in the arbitration by receiving the parties' arbitration submissions, all orders and awards of the tribunal, filing amicus curiae briefs and sending representatives to the hearing to question the parties, witnesses and experts. The tribunal would be able to make preliminary rulings and final awards in order

to require Telefonica to comply with the sharing requirements. A six-month time frame would apply to such an arbitration process.

By setting such a procedure in place, the EC thus secured assurance that the cost and effort of resolving ongoing competition problems resulting from market concentration would be borne by the parties. The Commission preserved the power to influence outcomes through its participation in the arbitration.

The EC's view of arbitration as a mechanism for resolving disputes in the context of competition law exemptions has gone 'from distrust to embrace' (Komninos, 2001), and it has used it in a number of cases.[16] Arbitration is now being employed as part of a competition remedy across multiple platforms, such as intellectual property licensing arrangements, access to technical interfaces, access to infrastructure, supply and purchasing relationships, termination of exclusive or long-term contractual arrangements, and anticompetitive distribution arrangements (Blanke, 2006). For example, in the media merger between BskyB/Kirch Pay TV in 2000, the Commission addressed its concerns over dominance in the German pay-TV market and digital interactive TV services by requiring the merged entity to provide interoperability to competing technical platforms with its own set-top boxes, and to grant non-discriminatory licences for set-top-box hardware manufacturers. Disputes with the third parties over such arrangements were required to be resolved by arbitration.

The benefits of arbitration in such circumstances are a combination of speedier resolution and access to expert decision-makers without requiring the EC itself to be closely at hand to monitor every detail of every interaction with a company's competitors. It decentralises the monitoring and enforcement from the EC to the parties and arbitrators.

This reflects a broader trend in the EC's approach to incentivising private actors to play a significant role in the enforcement of competition law, as evidenced in its promotion of private enforcement actions in the area of competition law (Ysewyn, 2006). There is also considerable opportunity for the use of arbitration in remedies at national levels.[17]

PROSPECTS FOR SMALL ECONOMIES

One of the most common barriers to doing business in small developing economies is investor uncertainty, in particular, a lack of certainty in the legal process. Companies regularly identify enforcement of their rights as being a major obstacle to conducting business in surveys and studies such as the World Bank's Doing Business reports. The courts may be overwhelmed, lack expertise or be corrupt, or a combination of these.

Where these problems have plagued small countries, progress has often been made in the general justice system through the introduction of alternative dispute resolution schemes (for example, IFC, 2010). The establishment of mediation and expert adjudication procedures, training staff to become mediators, and building a dispute resolution community and advocacy have combined to resolve large numbers of outstanding cases.

Regulated industries have also been a field for innovation in procedures, including in competition matters. Competition disputes arise extensively in regulated industries such as telecommunications, electricity, gas, rail and transport networks, and payment systems platforms. Many sector regulators have substantial competition powers, sometimes they are even more powerful than the competition authority.[18] (In some cases, competition authorities and sector regulators may have overlapping ex post powers to enforce remedies and obtain commitments in case of infringement proceedings, highlighting the important relationship between the competition authority and the sector regulator.)[19] Competition issues that regularly arise include refusal to deal, access to essential facilities, abuse of dominance, margin squeeze, predatory pricing, as well as cartels. In such industries, competition issues are increasingly resolved by mediation, expert adjudication and arbitration where businesses fail to agree on a negotiated solution.[20]

There is no particular reason why such mechanisms, which work in the general justice system and for competition-related matters in regulated industries, should not play a role in competition matters more generally. Indeed, as discussed below, some positive experiences in small

countries suggest that they can be a beneficial supplement to the coercive processes of the competition authority and the courts.

Using mediation to negotiate competitive outcomes

Negotiation over competition matters between businesses and between authorities and businesses is part and parcel of the business of a competition authority. As discussed earlier, competition authorities regularly negotiate with businesses in connection with infringements and with merger, cartel exemption and leniency programme approvals. In each of these cases, the authority is typically aiming to address issues of market structure or conduct with a view to providing for a more competitive environment. In each case, the competition authority uses its leverage in the process to extract the undertakings to enhance competition in the desired way. The business agrees to them because they are better than (in negotiation jargon) its 'best alternative to a negotiated agreement' or BATNA.

In merger cases, some authorities can be quite proactive in seeking structural and behavioural commitments. Some regulators have been criticised for pressing well beyond their statutory remits in requiring merger undertakings, obtaining results that they would not have had the power to impose in agency-initiated proceedings (Beard et al, 2015).

Such cases may be criticised as a misuse of the bargaining power of a mighty government bearing down on a business. Yet, the threat or initiation of an investigation or enforcement action or the denial of a merger application might actually restore some bargaining power, which the authority otherwise lacks due to insufficient resources or a weak enforcement regime.

These situations can create a polarised stand-off between the authority and businesses involved and, as a result, opportunities for negotiated outcomes (that is, negotiated between the authority and the businesses) may be lost. Or the authority may find it is ineffective in negotiations due to the relationships or culture involved. Furthermore, as discussed earlier, the authority negotiating with the businesses may find that it is not only confronting problems of market conduct and

structure according to narrowly defined questions of economic analysis but is also working out how tensions among values should be resolved in the outcome.

Here, experience suggests that procedures such as mediation can support the negotiation process, ensuring that all relevant considerations are voiced, helping reach agreement more quickly and firmly, allowing businesses to move forward with their plans, while obtaining the assurances required to obtain the desired competitive market.

For example, mediation was employed in two cases in small South Pacific island nations concerning the dominance of telecommunications operators. In Fiji, the government, Vodafone, Cable & Wireless and Telecom Fiji had reached an impasse over the operators' market power and performance in their respective relevant markets (mobile, international and fixed-line services) and over the government's plans to liberalise these markets. Litigation ensued and blocked the government's liberalisation efforts, but also created uncertainty for the operators as to their future operating environment and the government's market interventions. The mediation (the author acted as mediator), sponsored by a multilateral donor, brought together the government and the operators and resulted in a settlement on numerous questions of market structure and conduct. The mediation process involved a few short visits to the country by the mediator and a four-day mediation conducted at ministerial and CEO level.

It is important to be clear about how mediation can fit in. When referred to as a form of 'alternative dispute resolution', it would be a mistake to think that it is an alternative in the complete sense, in other words, that it can dispense with classic administrative or judicial processes. Mediation can be effective only where a negotiated outcome, which addresses the competition problem, is preferable to each party's best alternative. To secure redress and have a hope of influencing future behaviour, there needs to be genuine bargaining leverage, that is, it needs to occur against a backdrop of a credible threat of enforcement. Thus mediation is not a replacement for a robust enforcement regime, but is a supplement to it.

Its benefit is that, where resources are limited or where the legal position is not clear, mediation may be more effective in resolving other cases or narrowing the issues in dispute. By facilitating a structured exchange on the parties' interests, objectives and available alternative options, mediation may enable agreement to be reached where otherwise it would take more time or not be achieved at all. To the extent this liberates the demands on the authority, this could then, in turn, reinforce its enforcement capability.

Using arbitration for competition disputes in small countries

Experience suggests that there is real scope for resolving competition matters through arbitration in small economies. Arbitration mechanisms can be adopted that bring in the necessary expertise for the case at hand – using a suitable blend of foreign and domestic inputs – with appropriate funding.

There are further lessons from competition disputes in regulated sectors. In the small island nation of Trinidad and Tobago, the Telecommunications Authority of Trinidad & Tobago (TATT) has responsibility for resolving competition disputes in the telecommunications sector. TATT established a dispute resolution scheme providing for disputes between service providers to be resolved by arbitration and mediation. The authority would handle the exchange of pleadings between the parties all the way through complaint, response and reply. Within three months, TATT would notify the parties of its choice of persons to be appointed to a dispute resolution panel to hear the dispute, giving directions for the conduct of the proceedings. The parties are given an opportunity to object to the choice of panel members and directions.

This process has been used with some success. At an early stage of its existence, Digicel, a new entrant in the telecommunications sector, brought an abuse of dominance claim (among others) before the authority against the Cable & Wireless-owned incumbent. The panel in the dispute, which the author of this paper chaired, included a professor of technology at the local Trinidad university and a respected economist

at a local bank. The panel heard the dispute in much the same manner as an arbitration panel would, except that the terms of reference were set by TATT.

The process was not costly in view of the scale of issues at stake (the costs, including panel fees and expenses, were borne by the parties) and the matter was decided in less than six months, more quickly than any alternative method available (Macmillan et al, 2006). Subsequent disputes have also been handled successfully under this mechanism.

The advantage of this approach is that the parties are allowed enough involvement to influence key issues, strengthening their confidence in the decision-maker's substantive technical or economic expertise and ability to manage a complex dispute process fairly, while at the same time achieving a balance of international and local expertise – all at a reasonable cost. TATT did not face demands on its resources that it was unable to meet, and was able to navigate a particularly contentious situation by ensuring a professionally managed process.

Using arbitration for competition appeals in small economies

The use of arbitration-type mechanisms may also extend to handling appeals from an authority's decisions. In regulated sectors, arbitration is used in several small countries to appeal competition decisions. Again in telecommunications, for example, appeals of competition decisions of the Bahraini Telecommunications Regulatory Authority (TRA) are decided by arbitration between the TRA and the operator concerned. The TRA and the operator each appoints an arbitrator, and the two arbitrators together select a chairman and the panel hears and decides the dispute.[21] Several proceedings have been successfully handled under this mechanism.

In Oman, disputes, including on competition matters, between the Omani Telecommunications Regulatory Authority (TRA) and telecommunications operators are subject to arbitration in a similar manner. The author's experience – sitting as arbitrator in a case brought by Omantel against the Omani TRA – suggests that it is entirely possible to carry out effective proceedings that bring in the necessary subject

matter expertise without burdening the state's judicial resources. Papua New Guinea's National Information and Communications Technology Act 2009 also provides for appeals to an international arbitrator who may sit with a resident member. This has been quite effective at times in resolving competition problems.

Areas for exploration

The examples discussed barely scrape the surface of the possible. Already, the usefulness of innovative mechanisms has had a major impact, both in general justice systems of large and small countries as well as in competition regimes of large jurisdictions. Surely there is scope for experimenting with these in competition law in smaller countries.

Various key questions need to be considered in developing this approach. To the extent that the success of using such mechanisms lies in their deployment of international expertise, issues of cost, reliability, continuity, legitimacy and perception must be addressed.

That an international mediator or arbitrator will cost more than staff of the average national competition authority is not the point. The fact is that a certain level of expertise is required, and that this has a cost to it. Realistically, the alternative facing a given authority may be to enlist experts behind the scenes as advisers at similar cost to it. In such cases, the advisers may write a report, which is then adopted by the authority. Where the competition issue is substantial and the cost of mediation or arbitration can be borne by the interested parties without weakening an aggrieved party's access to redress (as in the examples given earlier), the cost may not be an impediment to realising the benefits. In some cases, mediation in particular can make for large cost savings through avoided protracted legal proceedings, with their endless procedural wrangling and evidentiary submissions.

In jurisdictions still grappling with the complexity of competition economics and law, and the risks of substantive and procedural error, there is likely to be concern about entrusting important matters to private persons such as mediators and arbitrators. However, the real concern may be the inverse. If the funding can be secured to engage

experienced experts, these will bring strong substantive and procedural skills and should enhance the results. Indeed, a certain shyness common among inexperienced national competition authorities in small countries often leads to a lack of openness, which can weaken the process and the result. In both mediation and arbitration procedures, the concerned parties may have greater assurance over their ability to influence the process and outcome, and thus reduce the uncertainties they face as to how the competition authority will decide matters. It may make for better results in which businesses can have greater confidence.

Concerns may arise about keeping tight control in the competition authority, with its direct statutory legitimacy, over the formation and continuity of the application of competition policy. There may also be discomfort about outsourcing the statutory responsibility to foreigners, who are not merely writing reports to be adopted by the authority but also taking on a direct dispute resolution role. However, these concerns may be overstated. As the real desire is often to achieve a workable outcome that is suitable to the situation, it can be surprising how quickly stakeholders accept – sometimes with relief – the involvement of external mediators or arbitrators.

This may support policy objectives to attract foreign investment as well. Foreign investors may have more confidence in a national competition regime that recognises the shortcomings of administrative resources and judicial processes for reaching outcomes. By providing processes that seek to deliver a result more quickly, giving the investor assurance of being heard, there may be greater certainty of and trust in the quality of the result.

Indeed, the insistence on a single agency's monopoly control over the business of regulating competition may itself, particularly where resources are constrained, cause a bottleneck that liberalisation can unlock. The value of precedent in emerging countries' competition law regimes may not be as important as a deeper understanding of the dynamics of markets and the nature of competition.

A concern arises as to whether external neutrals will have

the sensitivities to local issues that might drive a politically aware competition authority. Working through the tensions between the political objectives and socio-economic values that lie behind the given country's competition law may be difficult (see earlier section entitled 'Tensions among underlying goals'). However, mediation in particular is ideally suited to bring such concerns into the room, ensuring that stakeholders' interests are voiced and understood. Mediation methods can enable a dialogue between policy-makers and market participants about how competition law is to be applied.[22]

Foreign arbitrators may be less subject to political influence – if their remuneration is suitably structured to preserve independence. Thus, there may be less openness in a narrow arbitration setting to apply 'public interest' exceptions or other vague grounds for exemptions. Still, if arbitrations are managed in a way that ensures that important public concerns are fully expressed, there is every reason to think that a panel will give it due consideration. Providing (as in the Trinidad and Tobago case discussed earlier) that a panel includes local nationals can help ensure that local sensitivities are heard and understood.

The procedural ideas discussed in this chapter do not necessitate a long-term dependency on foreign experts. Indeed, the flexibility to involve local nationals outside the competition authority, such as from the local legal community or university, can help nurture local expertise. For example, time may allow nationals, who have acted as counsel in cases, to assume the role of a neutral.

Timing issues will also arise, particularly as to when in a process it is best to turn to mediation or arbitration. In the case of mediation, in complex cases, there can be major sequencing issues. Mediation may be premature until key issues have crystallised to the degree that parties can make realistic, informed assessments of their prospects through regulatory and adjudicative proceedings, that is, the BATNA. So, for instance, it is possible that decisions on relevant market definition – and even the existence of market dominance – may be helpful before seeking to resolve a dispute over a claim concerning abuse of dominance,

exclusionary practices or excessive pricing. Until then, both parties may face too wide a range of potential outcomes to be ready to seek to resolve the matter in meditation.

These factors can mean that there may be significant toing and froing with the judicial and regulatory authorities as the backdrop to the mediation process. Power imbalances are a common issue and mediators must be alert to these. For there to be a good prospect of reaching a settlement in a dispute, sometimes one party's power in the market may have to be counterbalanced by the other party's power in the legal or regulatory proceedings. This may mean that the case has proceeded to the stage at which the weaker party in the market has a real prospect of winning in the court or before the regulator.

The backdrop of ongoing litigation is common in mediation, but the proactive nature of regulation makes it all the more important that the mediator tailor the process to the unfolding judicial or regulatory proceeding. In some cases, a judge or regulator might even have a role in the mediation itself.[23]

This means that the conventional view, which emphasises separation of mediation from judicial and regulatory processes, may not hold in all situations. The great advantage of mediation is its adaptability to situations. The development of parallel mediation accompanying arbitration could be built into regulatory and judicial proceedings, with useful interplay between the adjudicatory/regulatory function of the regulator or court, on the one hand, and the exploratory/facilitative function of the mediator, on the other.

Competition cases attract significant media scrutiny. The temptation of journalists to cast the narrative in terms of the good guys and the bad guys leads to caricatures of unaccountable monopolies run by fat cats, and regulators as weak-willed, incompetent mandarins. The principle of transparency of public agency decision-making makes it important to disclose the outcomes reached and the reasons for them. Nevertheless, the opportunity to resolve competition matters in the privacy of a mediated process can allow space to get to the core of the issues at stake and make it possible to achieve agreement.

This discussion would not be complete without returning to the subject of technical assistance. A key question will be whether multilateral and bilateral agencies will provide support to small countries in developing legislation and regulations that enable the use of such procedures, and even fund some of the mechanisms. The World Bank, for instance, has funded legislation and regulations that allow such mechanisms in regulated sectors, as well as even mediations themselves.

Procedural innovations may be useful for one-off interventions or for ongoing matters. When a competition authority exacts structural or behavioural undertakings in connection with merger proceedings or enforcement action settlements, it effectively takes on an ex ante function. Trustees, such as discussed under 'Monitoring/divestiture trustees' above, can remain involved for a significant period, similar to a sector regulator with competition responsibilities. There is a host of learning from regulators on the use of mediation, expert adjudication, full arbitration and other procedural innovation in numerous sectors (for example, Macmillan (2010)).

Cultivating communities and groups of experienced experts, who combine the substantive economic and legal knowledge with dispute-resolution skills, will be important. This may go further, to the point of building dedicated teams of experts ready to be deployed to assist, embedding local officials within such teams on a rotational basis. This may bolster capacity to resolve critical issues well, without having to bet the farm, while also building doctrinal continuity in support. It would be worth experimenting through further technical assistance to see how these ideas could be brought to fruition.

Technical assistance should not be the primary means of supporting such procedural innovations. Where cases are going to address important segments of the economy, there are often significant sums at stake. Procedures providing for the use of such mechanisms and the powers to ensure the parties will bear the costs, including making advances on such costs, may suffice.

CONCLUSION

This chapter has not argued that the challenges faced by small countries require adapting the substantive economics of competition policy in small or developing countries. Nor is it suggesting that competition authorities should be any less vigorous in deploying the coercive powers available to them in investigations and enforcement proceedings, or deciding on merger, cartel exemption and leniency programme approvals.

Rather, the chapter suggests that competition authorities complement their array of traditional powers by adding methods aimed at achieving results faster and with less cost. This has had a major impact in general justice systems, as well as in competition disputes in regulated sectors, as illustrated by the examples provided. The chapter has explored how an approach that places less emphasis on classic procedures for implementing competition norms can promote the desired competitive outcomes. Not only does there appear to be scope for employing procedures such as mediation and arbitration, but by lightening the burden on the competition authority, these may actually make the authority's classic decision-making processes more effective.

NOTES

1 Familiar accounts of the formal and informal relations of Japanese Keiretsu and Korean Chaebol are but one example of this. In the author's experience in the South Pacific islands, for example, cultural norms may facilitate the sorts of communications and collaborations that might elsewhere be regarded as horizontal cartels.

2 The International Competition Network refers to advocacy as 'activities conducted by the competition agency related to the promotion of a competitive environment by means of nonenforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition' (Sánchez Ugarte et al, 2002).

3 For example, there is an extensive literature on the boundaries of appropriate conduct on the part of industry forums or professional associations.

4 Problems arising from dominance are often just as, if not more, pressing in developing countries compared with cartel cases due to historical origins of

large companies, many of which were previously state-owned (Tapia and Roberts, 2013).

5 Technical assistance and advice is being provided by organisations such as the World Bank, the International Competition Network, UNCTAD, the UK Department for International Development and Consultative Group to Assist the Poor (CGAP).

6 For discussions of technical assistance, see, FTC (2009) and Nicholson et al, 2007.

7 For instance, Europe has seen a shift from full reliance on public enforcement towards allowing private claims to resolve competition problems. The competition provisions of the Treaty for the European Union (Articles 101 and 102) are directly applicable and produce direct effects in national laws. This allows for national courts and agencies to enforce competition law in stand-alone claims brought as a 'follow-on' after the European Commission has found an infringement to have occurred.

8 Preamble to Directive 2014/104, paragraph 12.

9 See section 3 of OECD, 2010. See also, Nazzini (2009).

10 The five publishing companies were Macmillan, Hachette, HarperCollins, Simon & Schuster, and Penguin. See Albanese (2014).

11 See, for example, Article 9 of EU Regulation 1/2003.

12 The settlement terms included protection of equipment manufacturers and software developers from coercion or retaliation by Microsoft, giving them freedom to decide on using non-Microsoft middleware products and onfigure PCs accordingly, preventing Microsoft from ongoing exclusionary behaviour and discriminatory use of Microsoft's intellectual property licences. Eventually, all of the 20 states agreed to the terms (Green, 2006)

13 The European Commission struggled to reach settlements with Google and Gazprom, for instance. (See EC (2015))

14 For example, in the UK merger of T-Mobile/Orange, the European Commission required a monitoring trustee when it gave its approval on condition that T-Mobile would provide certain forms of access to its network (EC, 2010).

15 For example, in the United States, Mitsubishi in 1985, and in Europe, Eco Swiss in 1999.

16 When the Commission approved the merger of telecommunications providers Telia/Sonera, they were required to offer competitors wholesale fixed and mobile network services and international wholesale roaming on the mobile networks in Sweden and Finland. A fast-track arbitration procedure was agreed to apply to disputes relating to the merged entity's offer. Commission decision of 10 July 2002, OJ C201, 24.8.2002, at p. 19. Similarly, in connection with the merger of Vodafone Airtouch/Mannesmann, the merged entity undertook to provide roaming on services and to make certain standards and SIM cards available to its competitors. A fast-track arbitration procedure was approved for resolution of disputes between the merged entity and such competitors. Commission decision of 12 April 2000, OJ C141, 19.5.2000, p. 19.

17 For example, the Australian Competition and Consumer Commission (ACCC) uses expert adjudication procedures to resolve disputes between businesses over compliance with undertakings (ICN, 2005).

18 For example, fines for anticompetitive practices under Kenya's Information and Communications Act may amount to 10 per cent of turnover, compared to less than US $100 000 under the Competition Act.

19 For a discussion of this relationship, see Dunne, 2015.

20 For example, the UK's Financial Services (Banking Reform) Act 2013 created a Payment Systems Regulator (PSR) with the power to require an operator of a payment system to grant others access to it. The PSR's Powers and Procedures Guide makes clear that parties to commercial disputes over access to payment systems must seek to resolve their dispute by commercial means before raising it with the PSR.

21 Bahrain Telecommunications Act, section 68.

22 In the United Kingdom, a mediation approach was used to consider the interests of financial institutions in sector reform. The Centre for Effective Dispute Resolution (CEDR) 2014 'Dialogue with the regulator' brought together financial regulators and financial institutions.

23 This occurred in the MasterCard/Visa case in the United States. See Green, (2006: 1194).

REFERENCES

Albanese, A (2014) Judge orders mediation in latest e-book price-fixing suit, *Publishers Weekly*, 14 August. Available at: http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/63679-judge-orders-mediation-in-latest-e-book-price-fixing-suit.html [Accessed 15 October 2017].

Aydin, U and Büthe, T (2015) Success and limits of competition law and policy in developing countries: Explaining variations in outcomes, exploring possibilities and limits. Paper for the Kenan/Rethinking Regulation Workshop, Duke University, 4 May. Available at: http://kenan.ethics.duke.edu/wp-content/blogs.dir/2/files/2015/04/AydinButhe_SuccessAndLimits_2015-04-27.pdf [Accessed 15 October 2017].

Bakhoum, M (2012) A dual language in modern competition law? 'Efficiency approach' versus 'development approach' and implications for developing countries, *World Competition*, 34(3): 495–522.

Beard, TR, Ford, GS, Spiwak, LJ and Stern, M (2015) Eroding the Rule of Law: Regulation as cooperative bargaining at the FCC. Phoenix Center Policy Paper No. 49, October. Available at: http://www.phoenix-center.org/pcpp/PCPP49Final.pdf [Accessed 15 October 2017].

Blanke, G (2006) *The Use and Utility of International Arbitration in EC Commission Merger Remedies: A novel supranational paradigm in the making*. Groningen: Europa Law Publishers.

Blanke, G and Landolt, P (eds) (2011) *EU and US Antitrust Arbitration: A handbook for practitioners*. Alphen aan den Rijn, Netherlands: Kluwer Law International.

Blanke, G and Nazzini, R (2009) Litigating, arbitrating and mediating competition law disputes. An Update, International Arbitration Attorney. Available at: https://apps.americanbar.org/buslaw/committees/CL150011pub/materials/articles/iclg-2009.pdf [Accessed 15 October 2017].

Bloomberg Business (2013) AMR, US Airways, U.S. Agree to Mediator in Antitrust Case, 29 October 2013. Available at: www.bloomberg.com/news/articles/2013-10-29/amr-us-airways-u-s-agree-to-mediator-in-antitrust-case [Accessed 15 October 2017].

BskyB/Kirch Pay TV in 2000, Commission decision of 21 March 2000, OJ C110, 14.4.2000

Chua, AL (1998) Markets, democracy and ethnicity: Towards a new paradigm

for law and development, 108, *Yale Law Journal,* 1. Available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1340&context=fss_papers [Accessed 10 January 2019].

Competition and Markets Authority (CMA) UK (2015) Guidance on the approval of voluntary redress schemes for infringements of competition law. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf [Accessed 15 October 2017].

Drexl, J, Bakhoum, M, Fox, EM, Gal, MS and Gerber, DJ (2012) *Competition Policy and Regional Integration in Developing Countries*. Cheltenham: Edgar Elgar Publishing.

Dunne, N (2015) *Competition Law and Economic Regulation: Making and managing markets*. Cambridge: Cambridge University Press.

European Commission (EC) (2004) European Commission, Decision on merger of DONG/Elsam/Energi E2 (COMP/M.3868). Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m3868_20060314_20600_en.pdf [Accessed 15 October 2017].

European Commission (EC) (2010) European Commission, Decision on Merger of T-Mobile/Orange (COMP/M.5650).

European Commission (EC) (2013) European Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations granted under EU Law, *Official Journal of the European Union*, 26 July.

European Commission (EC) (2015) European Commission Statement of Objections to Google on 15 April 2015 (Commission press release IP/15/4780, MEMO/15/4782 and STATEMENT/15/4785) and to Gazprom on 22 April 2015 (Commission press release IP/15/4828, MEMO/15/4829 and STATEMENT/15/4834).

Eco Swiss, Case C-126/97, [1999] ECR I-3055, ECJ, 1 June 1999.

Fikentscher, W (2001) Market Anthropology and Global Trade, 1(1) Gruter Institute Working Papers on Law, Economics and Evolutionary Biology 1.

Fox, EM (2008) Antitrust, economic development and poverty: The other path. In H Qaqaya and G Lipimile (eds) *The Effects of Anticompetitive Business Practices on Developing Countries and their Development Prospects*. Geneva: UNCTAD.

Available at: http://unctad.org/en/Docs/ditcclp20082_en.pdf [Accessed 15 October 2017].

Fox, EM (2012) Competition, development and regional integration: In search of a competition law fit for developing countries. Economics Research Paper Series, s. 2-3.

FTC (2008) A conference on charting the future course of international technical assistance, Sponsored by the Federal Trade Commission and the Department of Justice. Available at: http://www.justice.gov/sites/default/files/atr/legacy/2008/09/08/236894.pdf [Accessed 15 October 2017].

FTC (2009) Charting the Future Course of International Technical Assistance at the Federal Trade Commission and U.S. Department of Justice, Issued by The Federal Trade Commission Staff and U.S. Department of Justice, October 2009.

Gal, MS and Fox, EM (2014) Drafting Competition Law for Developing Jurisdictions: Learning from experience, New York University Law and Economics Working Papers 4-2014. Available at: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1378&context=nyu_lewp [Accessed 15 October 2017].

Gal, MS and Fox, EM (2015) Drafting competition law for developing jurisdictions: Learning from experience. In MS Gal, M Bakhoum, J Drexl, EM Fox and DJ. Gerber, *Economic Characteristics of Developing Jurisdictions: Their implications for competition law.* Cheltenham: Edward Elgar Publishers.

Gerber, DJ (2014) Adapting the Role of Economics in Competition Law: A developing country dilemma. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426359 [Accessed 15 October 2017].

Green, ED (2006) Re-examining mediator and judicial roles in large, complex litigation: Lessons from Microsoft and other megacases, 86 *Boston University Law Review*, 1171. Available at: https://pdfs.semanticscholar.org/7478/cdfda6c83668d394fd049f27ef483c3760b1.pdf [Accessed 15 October 2017].

Hazel, DR (2015) Competition in context: The limitations of using competition law as a vehicle for social policy in the developing world, *Houston Journal of International Law,* 37.

International Competition Network (ICN) (2005) Merger Remedies Review Project, Report for the fourth ICN annual conference, Bonn, June. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/

doc323.pdf [Accessed 15 October 2017].

International Competition Network (ICN) (2006) Examples of Legislative Text, Rules, and Practices that Conform to Selected ICN Guiding Principles and Recommended Practices for Merger Notification and Review Procedures. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc325.pdf [Accessed 15 October 2017].

International Competition Network (ICN) (2007) Interaction of Public and Private Enforcement in Cartel Cases, Report to the ICN annual conference, Moscow, May. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf [Accessed 15 October 2017].

International Competition Network (ICN) (2008) Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf [Accessed 15 October 2017].

International Finance Corporation (IFC) (2010) Alternative Dispute Resolution Program (ADR) in the Western Balkans: Giving mediation a chance. Available at: http://www.ifc.org/wps/wcm/connect/991f510047e98d59a52ebd6f97fe9d91/PublicationBalkansGivingMediationaChanceADRStory.pdf?MOD=AJPERES [Accessed 15 October 2017].

Kaira, T (2013) The role of SMMEs in the formal and informal economy in Zambia: The challenges involved in promoting them and including them in competition regulation. In D Lewis (ed.) *Building New Competition Law Regimes: Selected essays*. Cheltenham: Edward Elgar Publishing.

Komninos, AP (2001) Arbitration and the modernisation of European Competition Law enforcement. In C-D Ehlermann and I Atanasiu (eds) European Competition Law Annual 2001: Effective private enforcement of EC Antitrust law. London: Bloomsbury.

Kovács, C and Reindl, AP (2013) The evolution of the Hungarian competition regime: 2 decades of dynamic change and continuity. In D Lewis (ed.) *Building New Competition Law Regimes: Selected essays*. Cheltenham: Edward Elgar Publishing.

Kovacic, W (ND) Presentation of history of competition law. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc938.pdf [Accessed 15 October 2018].

Landolt, P (2012) Arbitration and Antitrust: An overview of EU and national case law, e-Competitions, 13 April.

Licetti, MM (2013) Combating Cartels in Developing Countries: Implementation challenges on the ground, Competition Policy International. Available at: https://www.competitionpolicyinternational.com/assets/Uploads/CartelSeptember1.pdf [Accessed 15 October 2018].

Macmillan, R (2010) The Liberalisation of ICT Dispute Resolution, Trends in Telecommunication Reform, Chapter 2, International Telecommunications Union.

Macmillan, R et al (2006) Decision No. 2 of 2006. Available at: http://www.macmillankeck.pro/media/pdf/Trinidad%20and%20Tobago%20Arbitration%20Decision%2016082006.pdf [Accessed 15 October 2018].

Microsoft (2000–2014) *United States v. Microsoft Corp.,* 87 F. Supp. 2d 30 (D.D.C. 2000); *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir. 2001); *United States v. Microsoft Corp.,* 231 F. Supp. 2d 144 (D.D.C. 2002); M*assachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); Complaint, Microsoft, 87 F. Supp. 2d 30 (Civ. No. 98-1232). Available at: http://www.usdoj.gov/atr/cases/f1700/1763.htm; Motion of Defendant Microsoft Corp. To Consolidate, Microsoft, 87 F. Supp. 2d 30 (Civ. No. 98-1232), 1998 WL 34201999; Proposed Final Judgment, Microsoft, 231 F. Supp. 2d 144 (Civ. No. 98-1232). Available at: http://www.usdoj.gov/atr/cases/f9400/9462.htm; Revised Proposed Final Judgment, Microsoft, 231 F. Supp. 2d 144 (Civ. No. 98-1232). Available at: http://www.usdoj.gov/atr/cases/f9400/9495.htm; and Competitive Impact Statement, Microsoft, 231 F. Supp. 2d 144 (Civ. No. 98-1232) Available at: http://www.usdoj.gov/atr/ cases/f9500/9549.htm [Accessed 15 April 2018].

Mitsubishi v Soler Chrystler-Plymouth, 473 U.S. 614 (USSC, 1985).

Nazzini, R (2009) Litigating, arbitrating and mediating competition law disputes, CDR News, 6 February. Available at: www.cdr-news.com/categories/arbitration/litigating-arbitrating-and-mediating-competition-law-disputes#specificsiii [Accessed 15 October 2018].

Nicholson, M, Sokol, D and Stiegert, K (2006) Technical Assistance for Law and Economics: An empirical analysis in antitrust/competition policy, University of Wisconsin Law School Research Paper No. 1025. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917909 [Accessed 15 October 2018].

OECD (2003) Global Forum on Competition, *Competition Policy and Small Economies*. Available at: http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2486724.pdf [Accessed 15 October 2018].

OECD (2010) Hearings, Arbitration and Competition. Available at: www.oecd.org/competition/abuse/49294392.pdf [Accessed 15 October 2018].

Roberts, S, Tapia, J and Ybar, M (2013) The same and the other: A comparative study of abuses of dominance in Chile and South Africa. Centre for Competition, Regulation and Economic Development, University of Johannesburg, Working Paper 2/2013. Available at: http://static.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/52d8f04ee4b049910d1d4d0a/1389949006793/CCE%20Working%20Paper%2002-%202013%20Chile_SouthAfrica.pdf [Accessed 15 October 2018].

Sánchez Ugarte, F, et al (2002) *Advocacy and Competition Policy*. Report by the ICN Advocacy Working Group for the ICN Conference in Naples, Italy.

Sokol, DD and Stiegert, K (2007) An Empirical Evaluation of Long Term Advisors and Short Term Interventions in Antitrust Technical Assistance and Capacity Building, Global Competition Law Centre. Available at: http://ssrn.com/abstract=1095884 [Accessed 15 October 2018].

Sokol, DD, Cheng, TK and Lianos, I (2013) *Competition Law and Development*. Stanford, CA: Stanford University Press.

Soto, H de (1989) *The Other Path: The invisible revolution in the Third World*. New York: Harper and Row.

Tapia, J and Roberts, S (2013) Abuses of dominance in developing countries: A view from the South, with an eye on telecommunications. In M Gal, J Drexl, E Fox, D Gerber and M Bakhoum (eds) *The Economic Characteristics of Developing Jurisdictions and their Implications for Competition Law*. Cheltenham: Edward Elgar Publishers.

Travelpulse (2013) American, US Airways agree to mediation with DOJ over merger. Available at: www.travelpulse.com/news/airlines/american-us-airways-agree-to-mediation-with-doj-over-merger.html [Accessed 15 October 2018].

Ysewyn, J (2006) Private enforcement of competition law in the EU: Trials and tribulations. 19 *SPG International Law Practicum*, 14, 15.