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**Procedural innovation in competition law for small economies**

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**ACER Conference, Livingstone, Zambia, March 2016**

* There has been considerable debate about how competition policy and law should be applied in smaller, less industrialised economies. I’m thinking in particular of work done by the likes of Michal Gal, Eleonar Fox and Daniel Sokol, and of course Simon Roberts, among others.
* Most of the discussion has concerned the *economic substance* of competition law.
  + For example, *economies of scale* may limit the potential for effective competition in some sectors.
  + In developing countries, an *economic and* s*ocial inclusion* agenda may lie behind the competition law, or a key goal may be to encourage small and medium enterprises to grow in the market.
  + Even how economics should be used in competition law decision-making has been opened to discussion by David Gerber and others.
* Smaller economies also face a major need for *prioritisation* of the agency’s resources.
  + Competition economics and law requires *specialist* *technical expertise,* and that is scarce. You might build Adam Smith’s pin factory with its 18 separate functions in a small economy, but try an effective competition agency.
  + The need to prioritise landmark cases is also constantly thwarted by other pressures, such as a mandate to deal with consumer disputes or pressure to make what amount to regulatory decisions, for example over pricing.
* In this context, rather than focusing on the *substantive economics*, the paper presented here is interested in whether there may be a *procedural dimension* that is also worth exploring.
* It looks into how *procedural mechanisms* might supplement classic models of enforcement and approval processes to strengthen the impact of resource-strapped competition authorities. It is focused on competition, but actually is even more relevant in regulated industries.
* The argument is relatively simple and, perhaps ironically, it draws on positive experience in larger, industrialised economies – but also in some cases in small developing economies as well. I’ll talk about cases I’ve been involved in later in the presentation.
* It focuses on how arbitration, mediation and trusteeship arrangements can help resolve competition problems. In each of these, in different ways, the parties themselves and third party neutrals play a role in addition to (or sometimes in place of) the competition authority or the Courts.
* These mechanisms have helped larger developed economy competition regimes be more effective.
* They are used commonly in regulated industries for competition problems.
* They have worked in civil court reforms to reduce the pressure on the courts.
* And there are also successful examples of use of such mechanisms in small economies, including competition cases.
* [It is essentially an argument for a bit of ‘*unbundling’ of the competition or regulatory institution itself*, a *liberalising of the ‘market’*, if we can call it that, *in regulating and enforcing competition laws*, for a wider *distribution* of what Max Weber, the father of modern sociology, might in this context have called the *‘monopoly on enforcement’*.]

**Mediation**

* In *mediation,* a trained neutral person, or a team of them, basically helps parties negotiate. At its core, while the mediator manages the process, the parties determine what they agree to voluntarily. A skilled mediator actively explores with the parties the underlying issues to be resolved, the possibilities for agreement, and the consequences if they fail to agree.
* Mediation accelerates and deepens understanding of the issues and parties’ interests and options, and allows for creativity in the process.
* Mediation has proven useful in resolving some *large competition cases*, including the *eBook price fixing case against Apple* and the *Silicon Valley hiring cartel cases* against Apple, Google, Intel and Adobe.
* Mediation can also be useful in *securing and implementing commitments* that achieve a more competitive market. These sorts of commitments have to be negotiated, and negotiation can usually be helped along through mediation.
* For example, an intense three-week mediation helped the US Department of Justice and 20 States reach a commitment settlement in the *Microsoft* antitrust action.
* Mediation can be useful in the *implementation* of commitments too. Take commitments by an undertaking that agrees to provide competitors access to its network or natural resources or intellectual property. In the European *DONG* energycase, DONG committed to make natural gas available by auction to third party competitors in Denmark. The Commission accepted DONG’s commitment to a mediation process to resolve disputes with third parties arising from the implementation of its commitment.
* 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 & US Airways, mediation is reported to have helped to find solutions to Department of Justice concerns.
* It would be naïve to think that mediation can replace the threat of enforcement action.
* But although it will not always succeed, mediation generally improves the probabilities of achieving agreement, or at least helps narrow the issues, allowing their more efficient resolution.

**Monitoring trustees**

* Another means of ensuring implementation of commitments has been to employ *monitoring trustees.* This is used in several jurisdictions, including the US, Canada and by the European Commission.
* Again, in access commitments, for example, access negotiations between the undertaking concerned and third parties may be supervised by a trustee.
* Judging by the German merger of *Telefonica/EPlus*, and similar mergers in Ireland and Austria, if Juilio’s team approves the British merger between O2 and Three, it will likely include a monitoring trustee arrangement to supervise the implementation of network capacity sharing, facilitate negotiations between the merged company and third party access seekers and report to the Commission on progress and compliance.
* By employing this kind of arrangement, the competition authority essentially delegates a circumscribed part of the function of monitoring compliance to a third party.
* Critically, the trustee paid for by the undertaking itself and not the competition authority.

**Arbitration**

* In arbitration, a third party neutral renders a decision after considering submissions from the parties.
* Much of the discussion in the competition law context been about the extent to which parties should be allowed to agree to determine their competition conflicts through their own chosen arbitrators, what the lawyers call ‘arbitrability’.
* Arbitration is now widely recognised as a legitimate means of resolving disputes over competition matters.
* Arbitration-type procedures can also be used to ensure compliance with commitments made in settlements and mergers.
* I mentioned the German *Telefonica/E-Plus* case. There, if negotiation between Telefonica and a competitor seeking access to its network 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 by the two party-appointed arbitrators.
* The tribunal would be able to make preliminary rulings and final awards in order to require Telefonica to comply with its network capacity sharing commitments.
* The European Commission would be permitted to participate in the arbitration.
* With this procedure, the Commission secured the expertise necessary to resolve the matter quickly while preserving the ability to influence outcomes through its participation in the arbitration.
* Arbitration is now being employed as part of competition commitments in intellectual property licensing, access to technical interfaces, access to infrastructure, supply and purchasing, termination of exclusive or long-term contracts, and anti-competitive distribution arrangements.
* The benefits of arbitration in such circumstances are a combination of speedier resolution and access to expert decision-makers without requiring the authority itself to be closely at hand monitoring every detail of every interaction with a company’s competitors.
* It decentralizes the monitoring and enforcement from the authority to the parties and arbitrators.

**What prospects for small countries?**

* So, these sound like big heavy remedies for massive jurisdictions like the European Union or the US. What prospects for *small and developing economies*? The answer is: better than you might think.
* Mediation has proven useful in removing barriers to entry and introducing competition in a few countries.
* For example, mediation was employed in two cases concerning the dominance of telecommunications operators such as Vodafone and Cable & Wireless in small South Pacific island nations. The Government’s attempts to liberalise these markets was blocked in litigation. A mediation process, sponsored by the World Bank, brought together the Ministers and CEOs with international mediators and resulted in a settlement on numerous questions of market structure and conduct. It involved a few short visits to the country, Fiji, by the mediators and a four-day mediation.
* Experience suggests that there is also scope for resolving competition matters through *arbitration* in small economies.
* There are lessons from competition disputes in regulated sectors. For instance, in the small nation of Trinidad & Tobago, disputes between telecom operators – including abuse of dominance and other competition matters – are resolved by arbitration. Cases have been brought and resolved successfully and quickly. Local sensibilities are addressed by including local economists or academics alongside international expertise on the panels.
* These processes are not costly in view of the scale of issues at stake, and the costs, including panel fees and expenses, are anyway borne by the parties.
* The advantage of this approach is that the parties are allowed enough involvement to influence key issues. This strengthens their confidence in the decision-maker’s 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.
* Use of arbitration-type mechanisms may extend also to *handling appeals* from authorities’ decisions. *Bahrain and Oman*, for example, both operate an arbitration mechanism for such matters with considerable success, as does *Papua New Guinea*, another small country.
* These examples barely scrape the surface of the possible.

## Areas for exploration

* Various key questions need to be considered in developing this approach. In closing, I’ll mention efficiency, reliability and legitimacy, and technical assistance.

**Efficiency**

* The fact that an international mediator or arbitrator will cost more than the staff of the average national competition authority or sector regulator 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. The advisers may write a report that is then adopted by the authority. Procurement processes make it difficult to do this on a timely basis.
* There is more scope in mediation and arbitration to bring in the needed expertise quickly with the costs borne by the firms involved.
* Also, there may be major cost savings if mediation helps avoid protracted legal proceedings, with their endless procedural wrangling and evidentiary submissions.

**Reliability and legitimacy**

* Relatively young competition authorities may be worried about entrusting important matters to private persons such as mediators and arbitrators, many of whom may be foreigners.
* Concerns may arise about keeping tight control in the competition authority, with its direct statutory legitimacy.
* 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.
* If the funding can be secured to engage experienced experts, these will bring strong substantive and procedural skills and should enhance results.
* Indeed, the insistence on a single agency’s monopoly control over the business of regulating competition may itself cause a bottleneck that liberalisation can unlock.
* These ideas 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.

**Technical assistance**

* This discussion would not be complete without mentioning *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 use of such procedures.
* The World Bank for instance has funded legislation and regulations that allow such mechanisms in regulated sectors, as well as even mediations themselves.
* Cultivating communities and groups of available experienced experts who combine the substantive economic and legal knowledge with dispute resolution skills will also be important.
* But 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 of money at stake.
* It should be feasible in many cases to provide for mechanisms and powers to ensure the parties will bear the costs.

**Conclusion**

* The argument is not about adapting the substantive economics of competition policy in small economies.
* Nor is it suggesting that competition authorities should be any less vigorous in deploying the coercive powers in investigations and enforcement proceedings, or deciding on merger or cartel exemption approvals.
* Rather, the paper suggests that competition authorities might complement their 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.
* There now appears to be scope for employing procedures such as mediation and arbitration in the general competition area.
* By lightening the burden on the competition authority, these may actually make its classic decision-making processes more effective.