

**IDRC Pre-ICN Forum on Competition & Development
The Hague, 17 May 2011**

Alliance building for a culture of compliance

Record of the proceedings

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Alliance building for a culture of compliance¹

Summary

On 17 May 2011, academic competition experts and practitioners from competition authorities gathered at the 6th IDRC pre-ICN Forum on Competition and Development to share experiences and discuss ways to build alliances for competition agencies in developing countries, in order to improve competition law enforcement and effectiveness of advocacy. The meeting was structured in four sessions: (i) the general case for alliance building, (ii) alliance building to offset or help to correct flaws in agency effectiveness, (iii) strategies to build a culture of compliance, and (iv) tools of competition enforcement in the remittance transfer market.

The three panellists in the first session debated the dilemma of competition authorities' independence and their advocacy effectiveness. While acknowledging the benefits of authority independence, the speakers agreed that complete independence reduces both advocacy effectiveness and law enforcement power. Government bodies need to be cultivated as allies of competition authorities. Cooperation with other stakeholders, such as unions, should be sought in order to have as many supporters of competition as possible. One speaker urged for competition principles as a constitutional value in order to improve agencies' enforcement effectiveness.

The second session identified common flaws impairing agency effectiveness such as lack of independence, funding, expertise, skills, conflicts of interests, and shortcomings of the courts. The panellists shared alliance building experiences in developing countries, in particular in West Africa, Zambia and Botswana. Alliances with universities, development funds, sister authorities and international networks could help to solve problems of lack or loss of highly qualified staff. Shortcomings in the statutory law could be lessened through alliances with the legislator, but also with the press and NGOs to make competition issues a public cause. To fight export cartels one speaker mentioned authorities from other developing countries with similar difficulties as being the best allies. Possible allies to bring court reform forward are the bar itself but also organizations such as the IMF, the World Bank and universities.

Finding strategies to build a culture of compliance was subject of the third session. It was agreed that the media shape public attitudes including attitudes of businesses. In relation to cartels, building a culture of competition through media needs the right ingredients such as trials against cartelists themselves individually rather than against firms only, the prosecution of cases affecting final consumers, admissions of guilt by violators of the law and the provision of estimates of harm. Furthermore, it was argued that competition policy today does not give enough attention to corporate governance principles: good corporate governance generally promotes good competition policy, and vice versa. The representative from an international corporation urged government agencies and businesses to cooperate to create shared "competition" values. Competition compliance is realized by the commitment of senior managers, a culture of compliance, compliance knowhow, controls and consistent monitoring.

The final session focused on competition challenges in the remittance transfer markets. World remittance transfers are bigger in volume than development assistance by a factor of 5. Challenges are high costs, regulatory burdens and lack of transparency, competition in the market and limited access to banking. The success story of competition enforcement in the Uzbek remittance transfer market, which was based on a well structured market analysis and household survey combined with successful government cooperation, was presented. A presentation of the situation in the Moroccan market suggested that the competition authority engagement should prioritize the needs of migrants and their families. Finally, the representative from the federation of all consumer organisations, Consumers International, recognized great potential for campaigning on remittance issues.

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Introduction and opening session

On 17 May 2011, academic competition experts and practitioners from competition authorities gathered at the 6th IDRC pre-ICN Forum on Competition and Development. The workshop was organized by the International Development Research Centre (IDRC, Canada) and co-sponsored by the Dutch competition authority NMa as host of the 2011 Annual Conference of the International Competition Network (ICN) that began the following day. The theme of the Forum was alliance building for competition agencies in developing countries. As elsewhere, developing country agencies' advocacy efforts are largely directed towards government departments and public agencies such as the sectoral regulators. The meeting considered whether competition authorities can look further afield and seek to build alliances with other, private and social sector, actors in order to strengthen a culture of compliance. Is whether alliance building is sufficiently important that even resource poor, newly established agencies should give it attention? The opening remarks were given by **Henk Don**, Chairman of the Board of the NMa, and **Arjan de Haan**, Team Leader, Supportive Inclusive Growth program, IDRC, Canada.

Henk Don

Henk Don announced that the meeting should stimulate the debate around the design and implementation of competition law in developing countries. He argued that competition authorities from developing countries, that now constitute the majority of members in the international competition network (ICN), have generally small and inexperienced staff and no pool of locally experienced competition layers and economists to draw on. While keen to report on collusion, price fixing and other anticompetitive practices, the media especially in developing countries is not familiar with the scope and potential of competition law. Moreover, few civil society organizations are active supporters of competition law enforcement and government ministries may scarcely have any greater knowledge of its importance as a policy instrument.

Institutional design, education and support as keys to a success of competition law enforcement.

Against this background, new authorities face the challenge of turning their institutions into effective enforcers of law and gaining credibility and support from the political and business classes and the public at large. For example, high commodity prices are currently threatening the livelihood of millions of poor people and indeed the stability of governments themselves but the ability of competition agencies to address this worrisome situation is very limited. Mr. Henk closed his remarks by stating that finding the right institutional design, properly educating the public about competition authorities' mandate and cultivating support where it is needed are key to the success of competition law enforcement.

Arjan de Haan

Need for appropriate human and financial resources and support from governments, civil society and international organizations

Welcoming the audience on behalf of IDRC, **Arjan de Haan** explained that the mandate of Canada's IDRC is to promote new knowledge, research capacity and the provision of evidence for policy formulation and evaluation in developing countries. IDRC believes that this mandate is a powerful entry-point to work on competition policy. Firstly, competition policy is a relatively neglected instrument in the armoury of the developmental state, but it is needed to generate fair and inclusive growth and to create competitiveness, innovation and jobs in the market economies of developing countries. Secondly, hard evidence on the circumstances under which, and the extent to which, competition policy can deliver beneficial outcomes for inclusive growth is to a great extent lacking. Thirdly, effective competition policy implementation is only possible in combination with the existence of sound institutions. Competition authorities need therefore the appropriate human as well as financial resources, the right support from domestic governments and civil society and international support from networking and informal collaboration with others in the field. Mr de Haan closed the opening session by noting that Forums on Competition and Development are intended to discuss and address this set of challenges.

Session 1: The general case for alliance building

The discussion on the type of alliance building that is appropriate for competition authorities in developing countries and the extent to which competition can be conceived of as a fundamental social value or constitutional principle was started by three senior scholars with practical experience in competition law enforcement: **David Lewis**, Gordon School of Business Science, South Africa, **Frédéric Jenny**, ESSEC and Cour de Cassation, France, and **Allan Fels**, Australia and New Zealand School of Government, Australia.

David Lewis

*Competition as a
fundamental social
value*

David Lewis addressed the issue of alliance building citing an issue raised in David Gerber's book "*Global Competition: Law, Markets and Globalization*"². Gerber makes a distinction between societies in which competition is a fundamental social value, such as the US and Germany, and those in which it is not. The origins of competition as a fundamental social value vary from case to case. For example, in the US it is part of the general belief that no one should be excluded from the merits of economic activity, whereas in Germany the social value of competition is based in respect for the social market model. Mr. Lewis then drew lessons for the experience in South Africa and other emerging and developing countries more generally.

*Social sentiment is
pro- competition
law enforcement...*

South Africa's competition system is about a decade old. It is based on a strong statute and reasonably well resourced and independent institutions. The institutions are taken up by society, including business, in the sense that competition law enforcement is accepted to be a positive thing and even the press writes extensively about it. This social movement towards "competition acceptance" is surprising as South Africa had a left-centre government in alliance with the communist party and the unions after apartheid in 1994. The pro-competition movement can however partly be explained, firstly, by the deep antipathy of the government party for concentration of economic power, and secondly, the development of the market economy system around the globe.

*... but the political
environment in
South Africa
is weak*

*Need for a
constitutional value
of competition
principles*

Mr. Lewis regretted however that the very strong competition law enforcement regime is surrounded by a very weak competition policy environment with a highly interventionist industrial policy, a lack of concern for publicly erected entry barriers, a powerful community of state-owned enterprises often overseen by weak and captured regulators and courts that do not understand the social basis of competition law. Among other examples, the speaker described how South Africa's competition authority came into strong conflict with courts in three cartel cases in the cement, milk and fertilizer industries. Investigations showed the existence of cartels and some involved parties have already admitted that they had engaged in these cartel conducts. But, the courts effectively stopped the competition commission's investigations at the very beginning. They were persuaded that the commission had violated the constitutional right of the accused for a fair trial. So the rights of accused firms completely overwhelmed the rights for consumers to get the best products to the lowest possible prices. According to Mr. Lewis, the competition commission thus has to advocate for competition principles or at least the right of consumers to become a constitutional value in order to make courts take account of this in their decisions. As a second example, Mr. Lewis mentioned recent acquisitions of two South African firms by international corporations, in which the interventionist South African trade minister tried to get these international firms to make concessions, for example, to give preference to national suppliers in the future. Although the competition commission's recommendation to the competition tribunal was to allow these acquisitions without conditions, on the grounds that the acquisitions were competition-neutral, the commission's enforcement power was hugely challenged by government bodies having special interests such as the trade ministry.

² Gerber, David (2010). *Global Competition: Law, Markets and Globalization*. Oxford: Oxford University Press.

*Lessons for
authorities:
engagement with
interest groups,
consumer interests
to the fore,
administration by
the treasury rather
than the trade
ministry*

Mr. Lewis concluded with three lessons from the South African case. Firstly, competition authorities should regularly engage with interest groups, such as unions, explain their decisions (even though the decision may have gone against the interests of the unions) and describe developments in law and enforcement approaches. Secondly, agencies should keep consumer interests, especially of the poor or small businesses, to the fore. This presupposes a close relationship with the media in order to make sure that all actions of the authorities are well explained and thus commonly accepted by the consumers and the interest groups. Finally, competition policy, having the objective of law enforcement, and industrial or trade policy, being of necessity selective in character, are fundamentally incompatible. Therefore, Mr. Lewis recommended that competition law and policy should rather be administered by the treasury, and the authority located with that ministry, which is less interest group driven than the trade, development or commerce ministry.

Frédéric Jenny

The second speaker, **Frédéric Jenny**, referred to the complex relationship between the independence of competition agencies and their ability to advocate for competition. He began with the description of an event. In January 2010, the President of the Republic of Korea appointed a new chairman of the Korean Fair Trade Commission (KFTC), before the end of the term of the former chairman. This event was commented on rather unfavourably by members of the competition community. It showed that the KFTC may be vulnerable to political interference and its independence was therefore at stake. Even so, Mr. Jenny explained, the KFTC is generally seen as one of the most successful competition agencies with regard to advocacy to the government.

*Two dimensions of
authorities'
independence:
specialization and
commitment*

Citing a recent paper by John Vickers³, Mr. Jenny argued that the case for the independence of competition authorities in their enforcement activities has two dimensions: the virtue of specialization and the issue of commitment. As to specialization, if competition authorities have a comparative advantage in promoting free competition but no comparative advantage in promoting other public policy goals, they should focus narrowly on the promotion of competitive markets and public policy makers should not burden them with other goals. The commitment or externality argument states that having an independent agency may signal a deeper commitment of the government to free markets than if the competition policy is administered by a non independent part of the government structure. This commitment builds in a positive externality to the extent that it gives confidence to investors that they can do business without much fear of future events. In short, the argument is that competition authorities should be independent both from the government and from the business community. Interestingly, the need for independence has sometimes been used to caution against attempts to establish competition authorities in developing countries. Mr. Jenny mentioned that some commentators, including the World Bank for a while, were sceptical about the possibility that competition authorities in developing countries could truly be independent and feared that competition decisions might be tainted by political expediency and discourage foreign direct investment.

*Operational
independence is
possible without
structural
independence*

Mr. Jenny then spoke to the dimensions and determinants of independence of a competition authority. The dimensions include: structural independence, that is, the structural separation of the competition agency from government entities; operational independence, that is, the agency can set its own agenda; and statutory independence, that is, its independence is guaranteed by law and terms and conditions. In many countries, structural and statutory independence are not present but agencies have operational independence. According to an OECD survey nearly 95 percent of the competition agencies consider themselves as highly independent in their law enforcement activity.

The second important role of competition authorities, after law enforcement, is

³ Vickers, John (2010). *Central banks and competition authorities: institutional comparisons and new concerns*. BIS Working Papers. Bank of International Settlement.

*Advocacy on
government needed
for promotion of
competition culture*

advocacy. Mr. Jenny argued that advocacy by competition authorities towards or within government is needed to promote a competition culture. Although, according to surveys by the OECD and other bodies, many agencies regard their advocacy work as being effective, the speaker was sceptical of this finding on methodological grounds and with regard to causality. Advocacy is usually evaluated according to input factors such as the number of times the chairman was mentioned in the press, but this does not explain how effective the output of the authority's effort has been. As to causality, it is often not clear whether the law was changed due to advocacy of the competition authority or for other reasons.

*Effectiveness of
advocacy
determined by
independence,
ability to express
opinions to
government, and
relationship with
other regulators*

Mr. Jenny described the factors that make advocacy more effective. Firstly, whether or not the competition agency is part of government is a critical factor. Recalling the example of the KFTC, he mentioned that the authority's advocacy effectiveness within government had largely been achieved because it is not independent of government bodies. Secondly, it is important that an authority has the ability to freely express its opinions to the parliament, government and the general public. Thirdly, the institutional relationship between competition authorities and other economic regulators is important for advocacy. Regulators may make decisions that have an impact on competition and cooperation with them is crucial.

*Dilemma of
independence and
advocacy*

Hence, the pursuit of both independence and advocacy results in a dilemma. Structurally independent agencies may lack good access to the decision makers in the legislative and executive branches and may be politically marginalized. For both reasons, they may face difficulties in advocating with government. Mr. Jenny argued that competition authorities are part of the public sector and are carrying out public policy, and that this can only be done if they work together with other government bodies. Therefore, even acknowledging the benefits from agency independence, Mr. Jenny was concerned about the recent trends towards more independent agencies, especially in European countries. First, independent agencies may not be able to react in a timely way as they do not have direct access to information about plans of new regulations, for example. Secondly, the advice from an independent chairman of the competition authority does not necessarily have the same weight as the advice from a chairman that is part of the government ministry. Finally, a fully independent agency has lesser ability to sensitize ministries to competition issues.

Allan Fels

*Independent
agencies as a
symbolic gesture*

The last speaker of this session, **Allan Fels**, took the opportunity to comment on some of the remarks made by the previous speakers. First, he discussed the question of independence. The well-known arguments for independence are freedom from politics and business and expertise in investigations and processes. However, in most cases the establishment of independent agencies is a symbolic gesture by governments who are not intending to act seriously against anticompetitive practices and set up agencies that are not intended actually to enforce competition laws. An alternative motivation for the establishment of independent agencies is the "Pontius Pilate" perspective, meaning that politicians realize serious competition problems and wash their hand of them by sending the problems to an independent competition authority. The speaker argued that independent agencies may be established to gain credibility for political commitment to enforce competition law. Furthermore, in some countries, competition policies have been set up primarily to demonstrate commitment to the market economy; this was the case, for example, in Germany after World War II. By contrast, some other countries struggle with the idea of an independent agency. For example, the ruling party in China does not intend to be checked by some sort of independent competition authority. Finally, independent agencies may be setup by governments mainly to follow the current fashion within the international community in doing so.

*Constitutional
requirement for
competition law is
difficult*

Touching on David Lewis' point on the constitutional value of competition law, Mr Fels argued that competition law is indeed fundamental and basic in the sense that it is needed to allow a market economy to function. He praised the great achievement of the promotion of

competition through constitutional provisions prohibiting interstate trade restrictions that had been adopted in many countries including the United States, Canada, Australia, and the European Union. However, he felt that competition law, may be difficult to fix as a constitutional requirement, even as an expression of competition as an absolute value that should be protected.

*More analysis for
effective advocacy
is urged*

Allan Fels also discussed the issue of affiliation of agencies with other government bodies. He argued that there are trade-offs between having an agency that is administered by a powerful treasury, which may not devote many resources to competition issues, and an independent agency or a government agency with a junior minister whose mandate is probably not regarded as very important. He closed the first session by stating that a lot more analysis is needed of the effects on competition of government restrictions and government processes of policymaking. Different agency models –whether independent or not, as in South Korea or the EU, should be assessed with respect to the effectiveness of their advocacy to government and business in that respect.

Session 2: Alliance building to offset or help to correct flaws in agency effectiveness

This session examined the circumstances in which alliance building can be used as a counterweight to weaknesses in the competition regime. The three speakers explored cases where poor enforcement outcomes were attributable to weaknesses in the organizational design, procedures and norms of the competition regime, rather than to difficulties in the political context. **Eleanor Fox**, New York University Law School, USA, provided a comparative perspective by looking across a set of competition authorities. **Mor Bakhoun**, Max Planck Institute, Germany, drew conclusions from his work on regional arrangements in West Africa. Finally, **Thula Gilbert Kaira**, Competition Authority of Botswana, described his experiences as the former head of the Zambian competition authority and as the current head of the newly established Botswana authority.

Eleanor Fox

*Common flaws
impairing agency
effectiveness:
independence,
funding, expertise,
skills, conflicts of
interests, and
shortcomings of
courts*

Eleanor Fox presented the results from an ongoing research project at the New York University. She gave special attention to the weaknesses of agencies in both developed and emerging countries that are attributable to design, procedures, processes and norms of the competition law. There is no single design for competition laws that ensures optimal effectiveness. Common flaws that impair agency effectiveness had been mentioned by previous speakers, including the lack of independence, and weaknesses in funding, technical expertise and management skills as well as conflicts of interests within agencies and structural or legislative flaws. She also highlighted shortcomings of the court system, which often includes corruption, incompetence and lack of expertise. There can also be a systematically unsympathetic approach to the competition agency on the part of the courts that includes insufficient allowance for deterrence and gives excessive avenues for appeal.

In the second part of her remarks, she described how alliance building can help to increase agency and court effectiveness with regard to competition law enforcement. Firstly, alliances with universities, development funds, sister authorities and international networks such as the ICN, the OECD or UNCTAD can help to solve problems of lack or loss of highly qualified staff. Secondly, as to shortcomings in the statutory law and the structure, Mrs. Fox argued that in many cases the statutes themselves have flaws, which make the law enforcement of agencies difficult and alliances with the legislator necessary. Alliances with the press and NGOs are also essential to make competition issues a public cause. Thirdly, a common flaw of agencies in developing countries is the problem of defending themselves against international export cartels, such as the Canadian potash export cartel. She reckoned that the best allies for such export cartels are competition authorities from other developing countries with similar difficulties. Agencies from developed countries, especially from the

*Alliances among
affected competition
authorities to fight
export cartels.*

homes of the cartelists, ought also to be allies. It might however be more difficult to convince them to fight these cartels. Fourthly, the lack of expertise of the courts and the efficiency problems of courts administering the law results either in long delays for competition cases or else failure to consider competition cases at all. Eleanor Fox concluded by postulating that court reform is extremely important for developing country competition agencies and arguing that the best allies for achieving it are not only the court reformers and the bar, but all the public agencies that might benefit from court reform. Additional allies might be the IMF, the World Bank and universities.

Mor Bakhoun

Exploring the experience of West Africa, **Mor Bakhoun** discussed regional institutional designs of competition authorities and asked whether regional integration can help to offset the weak national environment in individual countries and whether alliance building can offset design flaws at the regional level. Referring to international cartel cases, Mr. Bakhoun argued that under the assumption that the design of an agency is appropriate, cooperation could lead to more efficient enforcement and may achieve better responses.

*Competition
enforcement in West
Africa is possible
with good regional
institutions and
alliances with all
stakeholders*

The West African Economic and Monetary Union (WAEMU) regional competition authority has exclusive decision making power on competition cases. National authorities help the regional commission to do case inquiries. Mr. Bakhoun regretted that WAEMU's competition authority is not independent in its operations and its administration, has limited human resources - it has only three professional staff to cover the whole territory of the community. In practice, it has limited powers of inquiry with respect to businesses and member states because of weaknesses in collaboration with these stakeholders. The regional commission thus relies on inquiries and monitoring of authorities at the national level, which themselves have limited financial and human resources and may not have national competition laws. Accordingly, achievements since the entry into force of the regional competition law in 2003 are somewhat limited: 12 cases have been completed and 12 cases are ongoing. Ninety five per cent of these cases deal with state related anticompetitive practices. Furthermore, the commission is not always able to react to potential anticompetitive practices and businesses because individuals are not keen to bring anticompetitive cases to the commission, not least due to distance issues. To address these flaws, WAEMU has started a reform project seeking a more decentralized approach that will give more decision making power to the national level.

As to alliance building, the speaker recommended that regional competition cooperation initiatives should consult all stakeholders - in particular the national competition authorities, regulatory authorities, consumer associations, business communities as well as the court of justice – in the design and operations of competition policy. The lack of such alliances is one reason why competition enforcement is currently not working well in West Africa.

Thula Gilbert Kaira
*The case of Zambia
and Botswana:*

*Awareness of
stakeholder
opinions is
important during
design processes*

Finally, **Thula Gilbert Kaira** shared his experience from his work in Zambia and Botswana with regard to design, processes and agency effectiveness. While Zambia's competition law came into force in 1994, Botswana's competition act is not yet operational. Like the previous speaker, Mr. Kaira argued that the starting point for designing and implementing competition law and policy is awareness that the success depends on the support of all stakeholders. He argued that the Zambian and Botswana laws provide transparency and accountability and allow for reasoned decisions, fines and reviews of appeal processes. These components are important to sell the law to all constituents. It should also be noted that the Zambian law originally allowed the commission to fight all anticompetitive commercial undertakings including state-owned, but the government recently amended the law to limit competition law enforcement capabilities in this regard.

With regard to processes, the speaker explained that, in both countries, the

Alliance with courts needed to better direct outcome

commission can commence an investigation on its own account or by complaint. Investigation processes are however separated from the administrative adjudicative functions and commissioners have no power to direct that a certain outcome should be realised. Alliances with the courts are therefore of absolute importance. To enhance transparency, the Botswana legislation, but not the Zambian, makes it mandatory for commissioners to disclose their financial and business interests after appointment. One procedural criticism which is often addressed towards competition authorities (and also holds for the case of Zambia and Botswana) is that commissions may play three roles in one competition case: the role of complainant, investigator and prosecutor.

Effectiveness depending on support from the political class

Mr. Kaira further pointed to the significance of allies in the political class. Agencies in Zambia and Botswana, as in other countries, are creatures of the political process. Institutional effectiveness and funding hinge largely on political support through the appointment of credible individuals to serve in the investigation and adjudicative organs. For the development of competition law enforcement in Zambia and Botswana, the speaker also appreciated peer-learning experiences offered by UNCTAD, OECD, ICN as well as regional alliances. While directors and staff of the competition authorities need the relevant academic qualifications, the speaker argued it is even more important that staff have the right passion, commitment, and attitude and that they are results-oriented and ethical.

Discussion

The first reaction from the floor came from **Elisabeth Farina**, University of Sao Paulo, Brazil, on the issue of export cartels. She wondered how targeted countries may be assisted either by the originating or by other countries also targeted. **Davis Lewis** responded by describing the example of the American export cartel case in the soda ash industry. After 10 years of negotiations, the South African commission successfully managed to fight the soda ash cartel and prices have decreased. However, the cartel continues to be operative in at least three other big markets, namely Mexico, Korea and Brazil. Coordination among targeted countries would have saved investigation resources and could be very effective in fighting export cartels on a global scale. **Eleanor Fox** added that poorly resourced competition authorities in developing countries may find it difficult to proceed against export cartels targeted at their nations. Coordination on the enforcement front is a very good idea, but it might not work. Moreover, just like pollution, stemming the problem at the source is much more effective than a posture of "catch me if you can." The WTO is probably best placed to cure the problem if it had the will, but we know from recent events that we cannot count on it. The ICN should be an excellent forum for developing a recommended practice against all hard core cartels, export cartels included.

Private stakeholder support ...

A representative of the American Antitrust Institute praised the discussion in the first two panels in favour of political economy and away from a technical and economic approach. He argued that the idea of a "competition enterprise" only works if the right political infrastructure is in place. His opinion is that public competition enforcement cannot succeed in the long run if no private stakeholders surround it in support.

... and alliances with government needed for

David Lewis wondered whether it is possible to have a regional competition regime as long as the single market in the region is almost inexistent or one country such as South Africa vastly outweighs the rest of the region in terms of economic size. **Mr. Bakhoun** acknowledged that intra-regional trade in West Africa, for example, is very small compared to trade with developed countries and design of a regional competition regime has to take account of these considerations. He mentioned the close connection between the project of constructing a common market and of establishing a regional competition regime.

competition enforcement

Responding to a comment by **Khelifa Tounekti**, Ministère du Commerce et l'Artisanat, Tunisia, **Mr. Bakhoun** closed the session with the argument that agencies should pursue alliance building with governments even if the governments are highly interventionist

and could themselves be the target of investigations. Government alliances - as others - are needed to achieve both effective enforcement and advocacy.

Session 3: Can leopards change their spots?

Elisabeth Farina

Aspects of debate for constructing a culture of compliance: arbitration vs. convergence, corporate governance and corporate social responsibility (CSR)

The chairperson, **Elisabeth Farina**, University of Sao Paulo, Brazil, introduced the panel and highlighted three important aspects for the construction of a culture of compliance, which were to be the subject of debate in this session: arbitration versus convergence, corporate governance and corporate social responsibility. The issue of “arbitration versus convergence” addresses the position of international companies in countries where the legal framework is weak. It is unclear whether companies strategically explore institutional asymmetries to better achieve their commercial objectives, making use of anticompetitive practices in the process. At the same time, they may be disseminating their internal rules of good conduct in order to suggest strong compliance to the law. Secondly, corporate governance should be such that particular powerful corporate incentives do not encourage breaking of the competition law. As to corporate social responsibility, she raised the question of whether it could contribute to build a culture of compliance with competition laws. Two legal scholars, **Andreas Stephan**, University of East Anglia, UK, and **Spencer Weber Waller**, Loyola University Chicago School of Law, USA, started the discussion and were followed by remarks given from a practical business perspective by **Anne Riley**, Associate General Counsel at Shell International Limited.

Andreas Stephan

Andreas Stephan emphasized the importance of a culture of compliance for ensuring that the business community adheres to cartel laws. Focusing mainly on cartel enforcement in the UK and the EU, he examined the role of the media in building a competition culture. Cartel enforcement is probably the least controversial anti-competitive practice. It should therefore be the easiest message to communicate to the business community and the public at large. Furthermore, lessons on competition issues learned from European countries are also relevant for transition countries, as competition practice in Europe is still at a very infant stage according to the speaker.

Public attitudes shaped by media

The media play an important role in shaping public attitudes (including the attitudes of business men) and help the public to understand the idea of competition enforcement. The media may also shape normative perceptions towards business practice and confer stigma on perpetrators of anticompetitive practices, which then is helpful for deterrence.

Examples for the weak competition culture in Europe and the UK

The speaker continued with anecdotal examples to show why competition attitudes, particularly in Europe and the UK, are still rather weak. One example was the case of a price fixing against a British Airways employee; during the period when the trial was pending, the same employee was promoted to the head of sales and marketing. Mr. Stephan called attention to the fact that an executive employee would probably be suspended (and surely not promoted) during a pending trial for any other crime. Another example is that companies having received cartel fines in the UK quite often congratulate their senior executives for a very successful year in their Annual Reports the following year. Similarly, cartel fines tend to be treated as a cost and no remarks on cartel fines or acknowledgement that the company has done something seriously wrong can be read in the Annual Reports. Thirdly, in a supermarket case in the UK, the supermarket went to out of court settlement and paid the fine but publically denied any wrongdoing.

Mr Stephan, then presented his results from a public opinion survey carried out in 2007. About 70 percent of respondents believed price fixing to be harmful, but fewer people thought that it was dishonest or that it should be punished. Only about 11 per cent thought it

should lead to imprisonment. Another survey recently done in Australia showed that prominent competition cases were very well picked up in the media and thereby widely known to business men and among the general public. The result may be a better culture of compliance in that country.

Poor media coverage of competition case.

Media contribution to competition culture strengthened by trials against individuals and firms, cases that affect final consumers, public admission of guilt, and provision of estimates of harm

Giving more detail on media reporting of competition cases, Mr Stephan's current research indicates that competition matters are not discussed on the front pages of popular newspapers. Furthermore, cases such as price fixing tend to be treated as symptoms of the free market. Actual competition matters are often negatively overshadowed by discussions of fines that are presented as excessive, although these should be of less concern than the competition outcome itself. He went on to discuss why media coverage is poor. Firstly, the remoteness of harm in competition cases is a problem. Media and their readers need a victim, which is difficult to identify in cartel cases, especially upstream cases. The harm is dispersed among many consumers and passed down along the production chain. Secondly, the wrongdoer in cartel cases doesn't fit the media image of what a wrongdoer looks like. Thirdly, the contradictory behaviour of government departments often seems to play down the severity of cartels. For example, the Australian prime minister the Australian prime minister described a company director involved in price fixing as being a very respectable person, even as the competition agency had just made its decision against his company.

In conclusion, the speaker made some recommendations on how a competition authority can strengthen its competition culture. First, just imposing high fines will not change attitudes and may not always attract media coverage. Secondly, investigations should go after individuals and not only firms. As mentioned before, it is hard to treat firms' payment of cartel fines, for example, as a serious issue. Involved cartelists should thus also be fined personally, or disqualified from holding positions of responsibility within a firm, to give weight to the matter. Thirdly, case selection is critical to building up a compliance culture. Some cases affecting final consumers should be selected, because this will increase media coverage. Good options are, for example, public procurement cases in which all tax payers are affected. Fourthly, leniency programs should require public admission of guilt by the convicted firm. And finally, competition authorities should not only publicize infringements in competition cases, but also provide some estimate of harm.

Spencer Weber Waller

Good corporate governance is good competition policy, and vice versa

The discussion was continued by **Spencer Weber Waller** who emphasized the importance of corporate law (dealing with duties of directors and senior managers) for competition policy and compliance. Directing his talk towards US principles of corporate law, he mentioned that the era of corporate governance was introduced in the 1930's with the publication of the book entitled "*A modern corporation and private property*" by Berle and Means⁴. The book highlights the separation of management and ownership in modern corporations and the ability of directors and managers to follow their own interests rather than the interests of the shareholders. Corporate governance is directed towards the alignment of these two sets of interests. Mr. Weber Waller's opinion was that competition policy today doesn't give enough attention to corporate governance principles. Good corporate governance generally supports good competition policy compliance and vice versa. One basic example showing how corporate law and competition law interact is the case of Eric Schmidt, head of Google and former director of Apple. Given that the two companies are likely to be competitors at least in some technologies and markets, his duties as an executive in both firms within a short period of time became absolutely critical for both corporate governance and competition policy.

The speaker also elaborated on Mr. Stephan's last point concerning enterprise versus personal liability. He explained that in the United States managers can be fined or imprisoned

⁴ Berle, Adolf and Gardiner Means (1932). *The Modern Corporation and Private Property*. New Jersey: Transaction Publishers.

for anticompetitive practice. The competition case that had received the biggest media attention in the US was the imprisonment of a prize fixing real estate manager. In short, the US competition system has a lot of good ingredients for fostering compliance, such as personal liability, criminal penalties, the amnesty program and a vigorous private damage mitigation system. But, as Mr. Weber Waller stated, the US system lacks many other important issues for compliance. He applauded, for example, the British Office of Fair Trading for their efforts to educate business men and the public on competition issues and to begin the process of seeking to disqualify directors. The best system both before and after a violation would be to create optimal deterrence and optimal compensation.

Anne Riley

Collaboration of government agencies and business to create shared "competition" values

Compliance programs help achieve deterrence of anticompetitive practice.

Giving some practical insights into corporate governance and compliance, **Anne Riley**, Associate General Counsel at Shell International Limited, started her talk by citing a recent paper by Michael Porter, Harvard Business School, on collaboration between government agencies and business to create shared values. She endorsed this approach with regard to the creation of effective competition compliance programs. Although speaking from a business perspective, she made clear how important antitrust enforcement and compliance is and said that the business community understands that the goal of these policies is not to levy fines, but to have no need for fines at all. Nevertheless, she noted that many competition agencies focus too much on the punishment side and do not put in enough effort to improve compliance programs, which are likely to be more effective for deterrence of anticompetitive practice. Furthermore, agencies should spread the word through channels such as media, as Mr. Stephan argued earlier, and promote ethical standards in companies and thus ensure greater compliance in practice. Working against the lack of public awareness and moral outrage is of absolute importance to increasing normative expectations in society and business for competition law compliance.

Companies themselves should also of course invest a lot of effort in compliance and corporate governance programs (including antitrust issues). Companies are motivated to invest in compliance programs by both fear of being punished and the desire to comply. Some companies however invest just enough in compliance to cover legal liability, but not enough to detect or prevent a violation. Ultimately, a good antitrust compliance program is to reduce the risk of any violation at all. Ms. Riley therefore recommended practitioners in competition authorities to read the UK Office of Fair Trading consultations paper, in which companies' motivations for compliance are described.

Ingredients for compliance: commitment, culture, compliance knowhow, controls, and consistent monitoring

In sum, agencies could increase compliance by requiring businesses to have compliance programs, giving clear guidance of what is considered to be a good compliance program. On the other hand, companies could express their own views on the advocacy of compliance programs through speeches or press releases, for example. Furthermore, in order to comply companies need commitment of the senior management, a culture of compliance within the whole organization, and compliance knowhow through interactive and simple trainings. They may perhaps also need a compliance and ethics office, controls through individual assessments or disassociation from inappropriate contacts, and consistent monitoring to ensure sustainable compliance.

Discussion

Less protection for directors by the business judgement rule is needed

The first reaction from the floor was from a professor from Taiwan asking about compliance programs and the business judgement rule. Mentioning his own experiences in consulting with companies about their compliance programs, he argued that directors of firms face difficulty in knowing how to interact appropriately and legally with their competitors, for example during takeovers. He wondered about the correct relationship between compliance programs and the business judgement rule. **Mr. Weber Waller** responded by saying it is in fact difficult for a board of directors in the United States to intervene during takeovers, especially if a very strong CEO is involved, not least because they generally have little information to analyze. His opinion is that directors should have the

possibility and indeed the obligation to require more information in such a situation and should be less protected by the business judgement rule. **Mr. Stephan** referred to in-house legal privileges, noting that they are non-existent in Europe, in contrast to the United States. Internal communication can in fact be used against the accused during antitrust investigations. **Mr. Weber Waller** stated that it shouldn't be very difficult to explain what topics are not allowed to be discussed with competitors, and also to better reward whistle blowers for detecting anticompetitive practices.

Disagreement over whether Dos and don'ts should be included in compliance programs

A second commentator from the floor, a participant from South Africa, stated that the problem with most company compliance programs is that they describe only what the company should not do and not what it should do to remain within the competition law. The two aspects are complementary and should both be considered in compliance programs. **Anne Riley** supported that view and emphasized that good compliance programs should include the Dos and the Don'ts and stress the benefits of real and fair competition. In contrast, recalling that companies know very well or should know how to be competitive, **Mr. Stephan** was doubtful that compliance programs supported by antitrust agencies should extend to include the "Do's".

Compliant companies as good examples for firms in developing countries

A representative from Mauritius explained that the competition authority and law in Mauritius is young and that the absence of a strong background of penalties might reduce firms' incentives to engage in compliance programs. His question was how companies in such an environment could be motivated to have good programs. **Mr. Stephan** recommended referring them to companies in other jurisdictions having good compliance, such as Shell, and using them as prestige examples.

Coverage of anticompetitive practice by CSR

The discussion was continued by **Phil Evans**, FIPRA and UK Competition Commission. He questioned how the corporate social responsibility (CSR) community could better work with the competition community. He argued that cartels, for example, are as unethical as many other topics covered by CSR and that the coverage of anticompetitive practice by CSR would likely have good disciplining effects. Ms Riley believed that educating the CSR community on to antitrust issues might well have knock-on effects. **Mr. Stephan** argued that antitrust issues are not as embarrassing for a firm as child labour, for example, and may therefore not be taken as a serious CSR issue.

Compliance programs to make law better understood

Responding to the comment by **Khelifa Tounekti** from Tunisia as to why compliance programs are needed in the first place and that firms should just comply with the law, **Ms. Riley** stated that in reality people need some practical guidance about what the law means and what their obligations are.

Session 4: Using different tools for enforcement: the case of the remittance transfer market

Phil Evans

Remittance transfer market is bigger than development

The final session focused on alliance building possibilities in the market for remittance transfers. According to the chairperson, **Phil Evans**, FIPRA and UK Competition Commission, the market is extremely important. It has a yearly volume of roughly 400 billion USDs, is bigger than world development assistance by a factor of five, larger than private capital flows from developed to developing countries and comes close to total global FDI flows. For middle income countries, remittance income makes up 2 percent of GDP on average and for low income countries it is 6 percent of GDP. The number is much bigger in

assistance by a
factor of 5

some countries, for example in Tajikistan it is 46 percent of GDP. Furthermore, remittance money is important as it goes directly to people and not to government agencies. In his presentation, **Lahcen Achy**, INSEA, Morocco and Carnegie Middle East Centre, Lebanon, added that remittance flows are more resilient than FDI flows, especially during crises, and that around 700 million people in least developed countries depend on remittances⁵. Recalling the 2009 G8 and World Bank initiative to reduce world remittances rates from 10 to 5 percent over 5 years, Mr. Achy regretted the low level of stakeholder involvement in this initiative and the lack of any success up until today.

Challenges in
remittance market:
high costs,
regulatory burdens,
lack of
transparency,
competition and
access to banking

The chairperson stated that remittance flows are subject to high costs and regulatory burdens as well as lack of transparency and competition in the fees market and limited access to banking. All these problems be perfectly addressed by competition agencies. The session speakers then examined the nature and developmental cost of anti-competitive practices and possible remedies and alliances in the market in two markets. With IDRC support, the case of Uzbekistan had been studied by Mr Golib Kholjigitov, and the situation in Morocco was discussed by **Lahcen Achy**. The representative from Consumers International, **Justin MacMullan**, considered to what extent the situation in the remittances sector fits their criteria for international campaigns.

Susan Joekes

Remittance market
in Uzbekistan

The case study of Uzbekistan was briefly presented by **Susan Joekes, Senior Program Specialist, IDRC Canada**, on behalf of the scheduled presenter, **Mr. Golib Kholjigitov, Director, Antimonopoly Improvement Centre, Uzbekistan** (the research and consulting arm of the Uzbekistan Competition Authority), who was not able to be present at the Forum for reasons beyond his control. Ms. Joekes praised Kholjigitov's study, seeing it as a benchmark for other market studies supported by IDRC. The population of Uzbekistan has become dependent in recent years on labour migration and remittance income, especially among poorer households. The study described the structure of the money transfer market with 11 providers and Western Union being the main supplier. Western Union charged relatively high fee, and it had the largest geographic coverage in Uzbekistan. Their expansion may have been due to some anticompetitive practices, which were exposed in studying their contract with banks, which contained some exclusivity deals with local banks. At that point, Kholjigitov had shared his findings with the government, which was persuaded to extend the existing competition law to the financial sector. The government then improved the functioning of the market in two ways. Firstly, Western Union was informed that a competition investigation in the remittances market would be likely under the new law and secondly, remittances transfer services were provided for the first time through the national post office. The outcome ultimately was that the rates of Western Union came down from 12 to 2 percent, saving workers and remittance recipients about \$50 million USD per year. Susan Joekes concluded with the observation that small, well-structured studies - such as Kholjigitov's - can lead to quick and effective competition enforcement with huge, easily demonstrated gains for consumers. She urged the panel and the audience to think how other countries could work together to reach such positive outcomes and to learn from each other.

Well-structured
market studies can
lead to quick and
effective
competition
enforcement

Lahcen Achy

Remittance market
in Morocco

The next speaker, **Lahcen Achy**, discussed the situation in Morocco, which still has high remittance fees rates and compared it to Uzbekistan. Ten percent of Morocco's population is living abroad, mainly in Europe. These migrants send \$6.4 billion USD, or 8 percent of GDP, each year back to their families in Morocco. Stated differently, each migrant sends 100 USD per month. Mr. Achy emphasized that remittances can be regarded as consumption sharing rather than savings: 23 percent of the money is used for food, 16 percent for health care and 15 percent for housing. As to the providers of remittance services, 70 percent of the funds are transferred by money transfer operators, mainly Western Union together with state-owned post offices, which have the highest fees and frequencies; 15

⁵ A recent overview of the global remittance market using World Bank data is provided [here](#).

percent is sent through banks and the remaining 15 percent is sent through informal channels such as friends who carry money back home. The mode of transfers is determined by destination: remittances to rural areas are mostly sent through money transfer operators as they have exclusivity rights with post offices in these areas. The other determinants are education and income: more educated migrants with relatively high incomes can send the money through banks as their relatives back home need to have a bank account themselves and volumes need to reach a certain size. Mr Lachy argued that a reduction of fees from around 12 percent to 5 percent would lead to a gain for migrants' families of 360 million USD, or the equivalent of the annual income of 120,000 people with incomes at the level of Morocco's annual GDP per capita.

Engagement of competition authorities to explain importance of remittances to all stakeholders

Investigations and market studies by competition agencies could help to explain the importance of remittances to governments and other stakeholders. The Moroccan government understands that remittances are a source of foreign exchange reserves that help to reduce the current account deficit. It needs also to recognize that remittances have great developmental importance as a source of inclusive growth and poverty reduction. Moreover, remittances have an impact on the private sector as a source of increased demand for commerce, construction and tourism, and on banks and micro finance institutions through provision of interest free deposits. Development partners and agencies should be interested in finding ways of lowering the costs of remittances as a huge contribution to economic development.

Prioritization for needs of migrants and their families

Concluding his speech, Mr. Achy argued that engagement should be prioritized to help the migrants and their families. To this end, particular aspects of competition could be targeted. Exclusivity rights should be removed and the access to banking services should be opened. Engagement should further be focused on migrant destinations (worker host countries) in which costs are particularly high. For Moroccan migrants this is particularly the case in France. Furthermore, priority should be given to address the fact that the poorest are even more overcharged than others. The less money migrants send home the higher the fee rates they have to pay. The financial literacy of migrants should be supported by using local languages and simple websites. Working with NGOs close to migrants may improve advocacy. Finally, it is important to build alliances with other countries to harmonize and improve remittances regulation and to make technology for online transfers accessible.

Justin MacMullan

The last speaker, **Justin MacMullan**, discussed how and why remittance issues could be an eventual campaign topic for Consumers International. Consumers International is the global federation of consumer organizations, with 220 member organization in about 115 countries, which all work on consumer rights and are independent of business. Consumers International particularly supports smaller member organizations to become stronger and more effective. It does global research and campaigning on international issues chosen by its members. One important ongoing campaign calls for global consumer and financial protection, in which improving competition is explicitly mentioned as a recommendation. The benefit of campaigning together and in coordination is that all members are pushing for the same thing, at the same time and towards the same target group. In the international campaign on financial protection, the target is the G20 group.

Civil society organizations, such as Consumers International, should campaign for improvements in remittances markets

The speaker explained that remittance issues are of great interest for consumer organizations due to excessive fees and charges, a lack of information for consumers, opaque systems of charges and foreign exchange conversion, a lack of security in the transfers without guarantees or insurance systems and lack of competition. Consumers International should look at remittances because several consumer rights are violated and huge numbers of relatively vulnerable consumers are affected. Migrants might not get information in their first language and might lack knowledge about the procedures for remittance transfers. Mr. MacMullan argued that good campaigns always state the problem and give recommendations on how to solve it. In the case of remittances, the problem is quite clear, but the solution may

*Consumer
organizations are
well placed to build
alliances with
various actors*

need more reflection than the World Bank and G8, for example, have provided in their 2009 objective on remittances⁶. He found that country studies, as presented in the session, gave valuable inputs for solutions to the problems. Consumer organizations could also prepare reports in the same vein, but most would certainly need support in terms of designing the projects and surveys. The results from such projects could then be used for campaigning. In terms of alliances, consumer organizations are well placed to bring different actors together at one table and to discuss issues of competition and remittances, for example.

Discussion

The discussion on the floor started with a question from **Andreas Stephan** who was wondering how agencies and consumer groups in migrant host countries could be motivate to campaign on remittances issues as the money is leaving the country anyway. Mr MacMullan agreed that the main benefit from improving remittances markets lies in the receiving country and that agencies in those countries should have the most interest in improving the situation for their consumers. Commitment for sending-country agencies may be smaller, unless sold as a development issue in which case there will be a large group of supporters. **Mr. Achy** added that developed countries are likely to be interested to lower the cost of remittances as it is an effective and easy way of development assistance and migration may be reduced because people will start their small businesses at home.

***Concluding
remarks by Susan
Joeke***

The meeting was closed by **Susan Joeke** who thanked all the participants for staying throughout a long day's meeting, and expressing the hope that discussions would continue after the Forum on how competition authorities can work together on issues such as remittance transfers and how agencies can cooperate with each other and with all stakeholders in the field of competition policy.

⁶ The developments in the joint G8 and World Bank initiative on remittances can be found [here](#).