

The UNCTAD Model Law on Competition after 30 years

Some reflections



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Nations**

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NOTE

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INTRODUCTION - UNCTAD SECRETARIAT

UNCTAD Model Law on Competition (Model Law) has been developed by member States' representatives gathered in UNCTAD intergovernmental meetings to provide guidance on competition legislations, particularly for developing countries that are not familiar with this field, recognizing their interest to be able to take appropriate actions towards anticompetitive practices.

The discussion on the Model Law in UNCTAD dates back to the 1970s, when only around 20 jurisdictions in the world had competition laws and authorities, and most were developed countries. The resolution of the third session of UNCTAD (UNCTAD III) in 1972 called upon the UNCTAD secretariat “to give urgent consideration to formulating the elements of a model law or laws for developing countries in regard to restrictive business practices”.¹ UNCTAD III also established the Ad hoc Group of Experts on Restrictive Business Practices, where the continuous work on the draft of the Model Law took place.²

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set), adopted by the General Assembly of the United Nations in 1980,³ provides the framework for the Model Law content, and makes the Model Law continue to be relevant today; Section F. 5 of the Set provides “[c]ontinued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation”, and member States “should provide necessary information and experience to UNCTAD in this connection”.

The Model Law consists of thirteen chapters indicating the content of key provisions which competition laws should include. The Model Law comprises Part I, which prescribes substantive possible elements to be included in competition laws and remains unchanged. Part II, which gathers commentaries on each chapter and showcases existing legislation and case-law around the world, is regularly revised and updated based on inputs and contributions from member States and academia. These revised commentaries have been presented at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) and at the five-yearly United Nations Conference to Review All Aspects of the Set (Review Conference).

A significant increase in the adoption of competition law around the world occurred in the late 1980s and early 1990s. In 2022, about 140 jurisdictions across all continents, including developing countries and least-developed countries, have adopted competition laws and established competition authorities. In addition, an increasing number of regional economic organisations, in particular among developing countries, have been acquiring competences over competition law and policy and expanding and strengthening their mandates in the field.

In the meantime, digitalization, sustainability and emerging challenges in the global economy have significantly impacted the competition environment, leading competition authorities to reconsider or adjust their competition laws, policies and enforcement as well as resort to combine other instruments to more effectively and efficiently deal with these competition concerns.

It is timely that this publication revisits the Model Law from different angles; the origin and history of the Model Law, as well as its negotiation are discussed. Testimonials from young competition authorities from developing countries share the relevance of the Model Law in the drafting of their own competition laws and refer to the implications of the Model Law to developing countries. Also, a few specific chapters of the Model Law are examined in light of current economic trends, with proposals for improving UNCTAD's

¹ Report of the United Nations Conference on Trade and Development on its third session, 73 (III), para.

² *Ibid.*, para. 4.

³ A/RES/35/63.

work on the Model Law and exploring other instruments to further assist less experienced competition authorities in developing countries.

Considering that UNCTAD is the focal point for competition law and policy within the United Nations system as the guardian of the Set adopted 43 years ago, it is important to remember one of its achievements in this field as UNCTAD celebrates its 60th anniversary in 2024.

Competition legislation of economies and regional organizations (as of 2023)

Africa	Asia and Pacific	Europe	Latin America and Caribbean	OECD ⁴ Countries
Algeria (1995, last rev. 2010)	Afghanistan (2010)	Albania (1995, last rev. 2010)	Argentina (1980, last rev. 2018)	Australia (1974 last rev. 2021)
Angola (2018)	Armenia (2000, last rev. 2021)	Andorra (2013)	Barbados (2002, last rev. 2020)	Austria (1988, last rev. 2021)
Botswana (2009, last rev. 2018)	Azerbaijan (1993, last rev. 2020)	Belarus (1992, last rev. 2013)	Bolivarian Republic of Venezuela (1992)	Belgium (1991, last rev. 2022)
Burkina Faso (1994 last rev. 2017).	Bahrain (2018)	Bosnia and Herzegovina (2005, last rev. 2009)	Brazil (1994, last rev. 2022)	Canada (1889, last rev. 2022)
Burundi (2010)	Bangladesh (1970, last rev. 2012)	Bulgaria (1991, last rev. 2021)	Dominican Republic (2008)	Chile (1973, last rev. 2016)
Cabo Verde (2003, last rev. 2022)	Brunei Darussalam (2015)	Croatia (2003, last rev. 2021)	Ecuador (2011, last rev. 2023)	Colombia (1959, last rev. 2016)
Cameroon (1998)	Cambodia (2021)	Iceland (1993, last rev. 2011)	El Salvador (2006, last rev. 2021)	Costa Rica (1994, last rev. 2019)
Comoros (2013)	China (1993, last rev. 2023)	Liechtenstein (1996)	Guyana (2006)	Czechia (1991, last rev. 2021)
Côte D'Ivoire (1978, last rev. 2019)	Cyprus (1989, last rev. 2022)	Malta (1994, last rev. 2021)	Honduras (2006, last rev. 2015)	Denmark (1997, last rev. 2021)
Democratic Republic of the Congo (2019)	Fiji (1992 last rev. 2010)	Montenegro (1996, last rev. 2021)	Jamaica (1993, last rev. 2001)	Estonia (1993, last rev. 2018)
Djibouti (2008)	Georgia (1992, last rev. 2020)	North Macedonia (1999, last rev. 2018)	Nicaragua (2006, last rev. 2014)	Finland (1992 last rev. 2017)
Egypt (2005, last rev. 2022)	India (1969, last rev. 2011)	Republic of Moldova (1992, last rev. 2012)	Panama (1996, last rev. 2018)	France (1977, last rev. 2021)
Eswatini (2007)	Indonesia (1999)	Romania (1996, last rev. 2022)	Paraguay (2013)	Germany (1957, last rev. 2022)
Ethiopia (2003, last rev. 2013)	Islamic Republic of Iran (2008)	Russian Federation (1991, last rev. 2020)	Peru (1990, last rev. 2021)	Greece (1977, last rev. 2022)
Gabon (1998, last rev. 2019)	Iraq (2010)	Serbia (1996, last rev. 2013)	Trinidad and Tobago (2006)	Hungary (1984, last rev. 2023)
Gambia (2007)	Jordan (2004, last rev. 2011)	Ukraine (1992, last rev. 2019)	Uruguay (2007, last rev. 2019)	Ireland (1953, last rev. 2022)
Kenya (1988, last rev. 2019)	Kazakhstan (1991, Last 2022)	EEU ⁵ (2015)		Israel (1988, last rev. 2023)
Liberia (2016)	Kuwait (2007, last rev. 2020)			Italy (1990, last rev. 2022)
Madagascar (2005, last rev. 2018)	Kyrgyzstan (1994, last rev. 2017)			Japan (1947, last rev. 2020)
Malawi (1998, last rev. 2003)	Lao People's Democratic Republic (1994, last rev. 2015)			Latvia (2002, last rev. 2022)
Mali (1998, last rev. 2016)	Lebanon (2022)			Lithuania (1992, last rev. 2023)
	Malaysia (2010, last rev. 2016)			Luxembourg (1970, last rev. 2022)

⁴ Organisation for Economic Co-operation and Development.

⁵ Eurasian Economic Commission. Armenia, Belarus, Kazakhstan, Kyrgyzstan, and the Russian Federation.

Africa	Asia and Pacific	Europe	Latin America and Caribbean	OECD Countries
Mauritania (2023)	Maldives (2020)			Mexico (1993, last rev. 2021)
Mauritius (2003, last rev. 2019)	Mongolia (1993, last rev. 2010)			Netherlands (1956, last rev. 2023)
Morocco (1999, last rev. 2014)	Myanmar (1947, last rev. 2015)			New Zealand (1986 last rev. 2022)
Mozambique (2013)	Nepal (2007)			Norway (1993, last rev. 2023)
Namibia (1955, last rev. 2003)	Oman (2014, last rev. 2018)			Poland (1990, last rev. 2017)
Nigeria (2018)	Pakistan (1970, last rev. 2010)			Portugal (2003, last rev. 2022)
Senegal (1965, last rev. 1994)	Papua New Guinea (2002, last rev. 2018)			Republic of Korea (1980, last rev. 2023)
Seychelles (2009, last rev. 2022)	Philippines (2015)			Slovakia (1994, last rev. 2021)
South Africa (1955, last rev. 2021)	Qatar (2006)			Slovenia (1993, last rev. 2022)
Sudan (2009)	Samoa (1998, last rev. 2016)			Spain (1989, last rev. 2023)
Togo (1999)	Saudi Arabia (2004, last rev. 2019)			Sweden (1993 last rev. 2021)
Tunisia (1991, last rev. 2015)	Singapore (2004, last rev. 2018)			Switzerland (1962, rev. 1995, last rev. 2022)
United Republic of Tanzania (1994, last rev. 2021)	Sri Lanka (1987, 2003)			Turkey (1994, last rev. 2020)
United Republic of Zambia (1994, last rev. 2013)	Syrian Arab Republic (2008)			United Kingdom (1998 & 2002)
Zimbabwe (1996, last rev. 2006)	Taiwan, Province of China (1991, last rev. 2017)			United States (1890, last rev. 1976)
	Tajikistan (1993, last rev. 2023)			
	Thailand (1979, last rev. 2017)			EFTA ⁶ (1994)
CEMAC ⁷ (1999, last rev. 2019)	Tonga (2002, last rev. 2020)			European Union (1957, last rev. 2009)
COMESA ⁸ (2004)	Turkmenistan (1993)			
EAC ⁹ (2006)	United Arab Emirates (2012)			

⁶ European Free Trade Association. Iceland, Liechtenstein, Norway and Switzerland.

⁷ Economic and Monetary Community of Central Africa. Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, and Republic of the Congo.

⁸ Common Market for Eastern and Southern Africa. Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.

⁹ East African Community. Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania, and Uganda.

Africa	Asia and Pacific	Europe	Latin America and Caribbean	OECD Countries
ECOWAS ¹⁰ (2008, last rev. 2013)	Uzbekistan (1992, last rev. 2023)			
WAEMU ¹¹ (1994, last rev. 2002)	Viet Nam (2004, last rev. 2018)			
	Yemen (1999)			
	CAN ¹² (2005)			
	CARICOM ¹³ (2001)			
	MERCOSUR ¹⁴ (1996)			

Source: UNCTAD research

¹⁰ Economic Community of West African States. Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

¹¹ West African Economic and Monetary Union. Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

¹² Andean Community. Plurinational State of Bolivia, Colombia, Ecuador, and Peru.

¹³ Caribbean Community. Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago.

¹⁴ Southern Common Market. Argentina, Brazil, Paraguay, Uruguay, and Bolivarian Republic of Venezuela.

THE UNCTAD MODEL LAW ON COMPETITION: HISTORICAL PERSPECTIVE AND WAY FORWARD

This article traces the history of why and how work on the Model Law was started by UNCTAD in the 1970s, the directions this work took, and the evolution in the UNCTAD Model Law on Competition (Model Law)'s nature and approach. An account is provided of the discussions regarding the inclusion of a development criterion in specifying the objectives or purposes of a competition law, and how this issue was resolved and agreement reached regarding the Model Law. The subsequent changes made to the Model Law's format and content are described. The Model Law's relevance in light of current trends towards consideration of broad public policy objectives in the application of competition law and policy context is explained, and suggestions are made regarding how to enhance the Model Law's usefulness to developing countries in determining how to shape their competition regimes in this connection.

Introduction

In principle, a model law is a centrally drafted and suggested example of a law pertaining to a specific subject, recommended for enactment verbatim or after minor modification by law-making bodies – but it may also just constitute a general guide on that subject. Over half a century ago, discussions were initiated within UNCTAD on the elaboration and adoption of a Model Law on Competition.

Part I of this article describes the background and context within which this idea came up, and how the discussions evolved until the watershed moment when the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set, United Nations General Assembly (UNGA), 1980) was adopted by the UNGA. Space considerations have ruled out description of the Model Law discussions over such issues as: definitions and scope of application; restrictive agreements or arrangements, abuses of dominance, and degree of reliance upon prohibition in principle approach; treatment of parent-subsidiary relationships; inclusion of consumer protection; regulatory requirements upon enterprises for notifications, approvals or exemptions; competence and discretion of administrative authorities; and provision for private damages actions. Instead, the focus has been upon the controversy over the inclusion of the development criteria within the objectives or purposes of a competition law specified in Model Law Article 1 – given that such objectives necessarily determine a law's content and implementation.

Part II describes how this controversy continued after the Set's adoption. It explains how the Set's provisions influenced those of the Model Law and how, in the light of the Set's influence and other factors, agreement on the Model Law became possible based on fundamental changes in the Model Law's nature and approach in the run-up to the Third Review Conference on the Set in 1995. Part III then reviews the main post-1995 changes to the Model Law's format, presentation and content.

Finally, Part IV suggests how the Model Law and its history continue to be relevant today, in the light of current shifts in competition policy doctrines to consider broad public policy objectives. Considering the Model Law's unique character, this Part suggests how to enhance its usefulness to developing countries in determining how to shape their competition regimes, within the overall context of UNCTAD's work on competition law and policy.

Genesis and early progress

A. Background and setting

UNCTAD's work on competition law and policy started in the late 1960s. This was at a time when, while the general philosophy behind the introduction of legislation to control restrictive business practices (RBPs) was broadly similar among developed market-economy countries, most of these countries (such as Denmark, France, Norway or Sweden) saw such legislation as only one element of government action to influence and even determine the course of a country's economic and social development, prohibited few practices outright, and often granted exemptions (Thompson, 1980, UNCTAD, 1974). However, developed market-economy countries' competition laws would progressively move towards consumer welfare and economic efficiency standards as the UNCTAD discussions advanced, necessarily impacting upon these discussions.

Among developing countries, only a few (such as Brazil, India, or Pakistan) had introduced RBP legislation, primarily out of concern about the structure of economic power in these countries, or the ability of enterprises with dominant power to use this to the detriment of national interest, for example through charging excessive prices and controlling the production, marketing and distribution of goods. However, given the adversarial climate of the late 1960s and the 1970s, developing countries started to see the adoption of international norms as a means of minimizing the effects of RBPs emanating from developed countries upon their trade and development, and of controlling the activities of transnational corporations operating on their national territories, thus providing market opportunities for vulnerable developing country enterprises (Greenhill, 1978).

It was within this context that, despite the failure of earlier efforts to adopt a multilateral agreement on RBPs (starting from the abortive Havana Charter), a fresh effort on competition law and policy was launched under UNCTAD's aegis at the initiative of developing countries. While their main efforts were directed towards the adoption of multilateral norms, it was recognized early on that complementary national legislation by developing countries would be needed to undertake effective action and that a model law or laws on RBP control could provide them with guidance in this unfamiliar area (Thompson, 1980).

B. Origins and first steps of Model Law work

The launch of UNCTAD's work in this area was through voted resolutions with most developed market-economy countries opposing or abstaining - first by UNCTAD II deciding that a study be carried out on RBPs by private enterprises of developed countries, with special references to the effects of such practices on the export interests of developing countries, especially on the relatively less developed (UNCTAD, 1968), and then by the UNGA's International Development Strategy for the Second United Nations Development Decade providing that RBPs particularly affecting the trade and development of developing countries would be identified with the consideration of appropriate remedial measures (UNGA, 1970).

However, UNCTAD III was able to adopt a consensus resolution recognizing the desirability of action by developing countries at national, sub-regional, regional, or other multilateral levels to take appropriate remedial measures for RBPs adversely affecting their economies, calling upon the UNCTAD secretariat to give urgent consideration to formulating the elements of a model law or laws for developing countries in regard to RBPs, and deciding that an Ad Hoc Group of Experts on Restrictive Business Practices should be set up (UNCTAD, 1972). The reference to a model law or laws reflected the understanding that it might not be possible to formulate a single model valid for all developing countries.

The report prepared by the Ad Hoc Group (AHG) stated that many experts considered that the control of RBPs should be in effect under specific legislation but, in developing countries, the actual method or methods for controlling RBPs could well vary, depending upon the level of economic development and

social, economic and even political objectives (UNCTAD, 1974). In consequence, this AHG agreed that no one approach could be recommended for controlling RBPs.

However, this report was not endorsed by the Trade and Development Board, which directed that a Second AHG of Experts on Restrictive Business Practices be set up.

C. Second AHG and follow-up

In contrast to the previous AHG, the Second AHG agreed over two sessions that the formulation of a model law or laws could assist developing countries in devising ways to achieve improved control over RBPs at national levels (UNCTAD, 1976a). It identified considerations that any model law for developing countries should consider (level of economic development, industrial structure, social, judicial and political structures, external economic relations, systems of control used by countries with previous experience). It listed among the purposes of drafting the Model Law: improved control of RBPs affecting trade and development of developing countries; harmonization of national laws affecting RBPs as well as various laws within a country on as extensive a basis as possible; and technical assistance to developing countries to establish or strengthen existing legal frameworks on RBPs.

Its report listed a large range of some possible objectives of RBP legislation, including: the attainment of greater economic efficiency, for example through the maintenance of competition and control of concentration of economic power; the more equitable distribution of wealth; control of prices, profits and inflation; consumer protection; assistance to small and medium sized enterprises; increased employment; and best use of local resources. It stated that it would be for each country to choose all or a combination of any of the above or other possible objectives and to determine the particular objectives, and the balancing or reconciliation of such objectives to be determined by each government according to its priorities.

However, some experts from developed market economy countries expressed the view that several of these possible objectives were not primary objectives of RBP laws and could be better accomplished by other types of legislation. In contrast, experts from developing countries considered that the characterization of primary or secondary objectives would be determined by governments according to their own socio-economic objectives, and it was sometimes necessary and desirable to have a spectrum of objectives simultaneously for their effective achievement.

UNCTAD IV then decided that action should be taken at the international level, particularly within the UNCTAD framework, including the elaboration of a model law or laws on RBPs accounting for the principles examined by the Second AHG, in order to assist developing countries in devising appropriate legislation, and further AHG meetings should be convened (UNCTAD, 1976b).

D. Third AHG and follow-up

The Third AHG, which held six sessions, worked on the Model Law based on a first draft prepared by the secretariat taking into account the negotiations on the Set (UNCTAD, 1978). This draft suggested alternative formulations of several sections, and a commentary explained the subject matters in question, providing selected examples from existing laws and experience of developing and developed countries.

With respect to Article 1, Alternative 1's stated objective was to prevent, eliminate or control RBPs which may adversely affect the trade and development of the State. Alternative 2 reiterated this objective as a means to the end of attaining greater efficiency in trade and development in accordance with the aims of national economic and social development policies, listed several such policies (including those mentioned by the Second AHG), and further provided as objectives the protection and promotion of social welfare and the interests of consumer in particular, and ensuring that RBPs did not impede or negate the fulfilment of the commercial policies of the State and of the regional group of which the State was a member. The commentary stated that one reason for providing objectives was that they could provide guidance for the decisions or recommendations of the authorities administering the law, the listing in Alternative 2 did not

indicate any order of importance and was not intended to be exhaustive, and countries might wish to exclude from or add to it.

Some member States criticised the draft, considering that the criteria for decisions should not include objectives of society other than control of RBPs, and the draft suggested burdensome regulation of ordinary business decisions, which would be very difficult to administer, possibly anticompetitive, and beyond the scope of competition regulation (UNCTAD, 1979a). These member States expressed concern that undue diversity in legal approaches would hamper international collaboration or create confusion and uncertainty in international trade and investment.

UNCTAD V continued the mandate with respect to the Model Law in essentially the same terms as UNCTAD IV, while it was understood that continuation of this work depended upon the outcome of the negotiations on the Set (UNCTAD, 1979b).

Impact of Set's adoption upon elaboration of Model Law

A. Relevant provisions of the Set

All the Set's provisions are relevant to the Model Law. Some particularly relevant here are mentioned here. In the list of the Set's objectives in paragraph A, paragraph A.2 includes as one objective: "To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures" and the examples provided in this paragraph refer not only to competition and to innovation, but also to control of the concentration of capital and/or economic power. One of the general principles listed in para. C includes, under para. C(i), "...appropriate action ... in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal, with restrictive business practices ...". Paragraph E.1 provides that: "States should, at the national level or through regional groupings adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices...". Paragraph E.2 provides that "States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development...". Section F lists international measures r, including: "continued work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation..." (paragraph F.5); "work aimed at achieving common approaches in national RBP policies relating to restrictive business practices compatible with the Set" (paragraph F.1) and, under paragraph F.6, technical assistance, particularly for developing countries (including through compilation of a handbook on RBPs legislation).

B. First discussions after the Set's adoption

Once the Set was adopted, its language would indeed be followed in Part I of the Model Law – but not speedily or wholly, given divergences regarding how the Set should be interpreted and implemented. In fact, the Set's adoption was seen by American business as an argument for discontinuing work on the Model Law, on the grounds that it provided for controls over economic activities going far beyond the Set's provisions and was inconsistent with the Set's objectives and scope, and the Set itself should provide a sufficient guideline for any national legislation (Atkeson and Gill, 1981a).

The post-adoption discussions on the Model Law launched off based on a secretariat report examining the bearing of various Set provisions upon the Model Law's form, scope and content (UNCTAD, 1981b). At the Intergovernmental Group of Experts on Restrictive Business Practices (IGERBP)'s first session, the Group of 77 (G77) emphasized the importance it attached to the Model Law, which would be an effective policy instrument for States to give effect to the Set at national and regional levels - developing

countries needed a Model Law if they were to comply with Set paragraph E.1 (UNCTAD, 1981c). The G77 considered that the Set provided for a Model Law addressed to both developing and developed countries and regional groupings as an instrument for implementation of the Set and, in the light of para. F.1, an effort by all countries to harmonize and strengthen their legislation in a mutually reinforcing manner was called for.

However, other member States stated that paragraph F.5 clearly envisaged the production of a document that would be of maximum assistance to developing countries wishing to introduce RBP laws, rather than a document instructing countries to follow a particular course of action, further repeating its concerns about avoiding burdensome regulation. The session requested that a revised draft of the Model Law be prepared in accordance with the Set's provisions.

In the revised draft prepared, the Article 1 provision specified as the objective or purpose of the law to prevent, eliminate and/or control RBPs which may adversely affect the economic development of developing countries, and a detailed commentary illustrated the issues dealt with, citing legislation, case law and experience of States in applying their RBP legislation, taking into account contemporaneous trends (UNCTAD, 1983a).

However, at the second IGERBP session, some member States thought that a reference to RBPs might adversely affect the economic development of the State, and the use of the development criteria for examining acts or behaviour as an alternative to the competition criterion, conflicted with the Set – which included the effects upon development only as a necessary consequence of RBPs, and not as a separate and independent basis for action (UNCTAD, 1983b).

In contrast, other member States considered the draft to be in line with the Set, which recognized that the creation, encouragement and protection of competition was one means to achieve greater efficiency in international trade and development, and not an end in itself. And that it was important that the stated objective in the Model Law be in terms of controlling the adverse effects of RBPs on the trade and economic development of the country in question.

C. Continuing impasse

The revised draft prepared by the secretariat (UNCTAD, 1984a) was similarly criticised, albeit less strongly because of the subsequent changes (UNCTAD, 1984b). While some States called for further revision of the commentary to the Model Law, others stated that it could not accept a continual process of amendments to the Model Law at each session and instead called for work on the Model Law to focus on the compilation of the handbook on RBPs legislation (Handbook), with copies and descriptions of such legislation supplied by the States concerned. The shifted emphasis to the Handbook intended to use it as a guidance without discussion or value judgment by UNCTAD.

The session's Agreed Conclusions requested the secretariat to continue work on the Model Law, considering comments made and the importance that the IGERBP attached to the preparation of the Handbook. This linkage of the Model Law with the Handbook would continue to be made in the Agreed Conclusions adopted over many years, since the two instruments were seen as complementing each other (UNCTAD, 2009, 2012). However, the Handbook was discontinued several years ago.

Comments made on the Model Law at the fifth and sixth IGERBP sessions reiterated substantially similar arguments as those made at the third session (UNCTAD, 1988a), and the impasse continued for some years. A revised Model Law version submitted to the IGERBP's tenth session suggested as possible elements for Article 1 «to control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic markets or international trade or economic development» (UNCTAD, 1991a). The commentary stated that this article had been framed in accordance with paragraph E.2 of the Set, which set out the primary principle upon which States should

base their RBP legislation and, as in section A of the Set, States might wish to indicate other specific objectives of the law, taking into account the impact of RBPs on their trade and development. Examples were provided of the stated objectives in several competition laws. Group B again reiterated its complaints regarding the inclusion of an economic development test for assessing RBPs (UNCTAD, 1991b).

D. Breakthrough on nature and elaboration of Model Law

However, there was a turnaround - the Agreed Conclusions adopted by the IGERBP's eleventh session accepted that the secretariat should continue elaborating the commentary to the Model Law with the draft possible elements for Articles contained in Part I A to be kept unchanged, on the understanding that the Model Law contained the main elements of a typical RBP law based upon the terminology agreed upon in the Set, and with Part I A to be considered in conjunction with a new Part II, containing a commentary specific to each element of Part I (UNCTAD, 1993a).

A version of the Model Law following these directives was duly prepared by the secretariat (UNCTAD, 1993b). While its Article 1 maintained the reference to economic development and its commentary repeated the relevant text in (UNCTAD, 1991a), the commentary also listed objectives taken from paragraph A of the Set that States might wish to indicate in their laws, such as the creation, encouragement and protection of competition, control of the concentration of capital and/or economic power, encouragement of innovation, protection and promotion of social welfare and in particular the interests of consumers, before mentioning that States might wish to take into account the impact of RPPs on their trade and development. Since then, Model Law Article 1 and this part of the commentary on it have stayed unchanged.

This approach was cemented by the Third Review Conference, whose resolution took note of the Model Law and its commentary as a guide to the competition approaches followed on various points by different countries (UNCTAD, 1995). The resolution specified that the Model Law and its commentary did not affect the discretion of countries to choose policies considered appropriate for themselves, and that they should be periodically reviewed in the light of reforms and trends at the national and regional levels. The secretariat was requested to revise periodically the commentary to the Model Law in the light of legislative developments and comments made by member States for consideration by future IGE sessions, and to disseminate widely the Model Law and its commentary as revised.

Similar provisions regarding the Model Law were adopted by the Fourth and the Fifth Review Conference resolutions (UNCTAD, 2000a, 2005). However, the resolutions adopted by the Sixth, Seventh and Eighth Review Conference, while adopting substantially similar wording, modified it to take note of the revised Model Law and its commentary as a very important guide to the economic development and competition approaches followed by different countries on various points (UNCTAD, 2010, 2015a, 2020). Thus, it may be said that the ghost of the development test indirectly came back.

Basically, the issue relating to the objects and purposes of a competition law, and all the other Model Law issues, were resolved by tacitly dropping the idea that UNCTAD member States would eventually finalise, formally adopt, and recommend the Model Law for enactment by developing countries. Instead, it was accepted that the Model Law would never be formally adopted, and would continue to be a recurrent document prepared by the secretariat on its own responsibility, with an unchanged Part I identifying the main elements of a typical RBP law based upon the Set's terminology (but with no expectation that this specific wording would be adopted in national laws), and a periodically revised and updated Part II commentary reviewing selected countries' legislation on each of these elements. It would be Part II more than Part I which would guide developing countries adopting or revising competition legislation. The first AHG's scepticism about the possibility of elaborating a Model Law in the traditional sense had turned out to be justified, but UNCTAD member States had found a creative way of working around the difficulties.

For this agreement over the Model Law's approach and content to be possible, it was necessary to have the agreed language of the Set (including its references to development) available to use for Part I. Another

favourable factor may have been Group B's satisfaction at the strong and continuing trend towards the adoption of competition laws and policies by more developing countries and by countries in transition (reflected in Model Law Part II), linked to enhanced IGE participation by new competition authorities and their adhesion to competition principles.

Changes to content, format and use

This agreement led to less sustained attention on the Model Law by UNCTAD intergovernmental bodies. The Model Law explicitly became a non-sessional document, while often provided as background documentation for IGECLP or Review Conference sessions. There has often been a nominal reference to the Model Law on the agendas of these sessions but, in most meetings, the Model Law has not been discussed – there has usually just been a request to the secretariat to further revise and update Model Law versions in the light of comments received from member States. However, Review Conferences and the IGECLP have sometimes refocused upon the Model Law to instruct or approve significant changes to its format or content, or to use it to support consultations on specific issues.

The main changes in content have been the Model Law's departure from or adding to the Set's provisions, and the inclusion of an analysis of the laws reviewed and of comparative information in tabular form in Part II. From the start, given that it was to be administered at the national level, there were some provisions in the different Model Law drafts which were not in the Set, including on authorization of practices, aspects of consumer protection, notification, the administering authority and its organisation, functions and powers of the administering authority, sanctions, appeals and actions for damages (UNCTAD, 1983a). Because of Group B's objections, the provision on consumer protection was drastically curtailed.

However, once agreement on the Model Law was reached, there was an increase in provisions departing from or covering matters not included in the Set to reflect trends in competition laws, despite this sometimes-involving amendments to Part I. Thus, in the Model Law version made available to the Fourth Review Conference, Part I included possible elements for articles on the control of mergers and acquisitions (Possible Elements for Article 5) despite merger control being dealt with in the Set under the abuse of dominance provisions, Part II included commentaries regarding provisions on the control of mergers and acquisitions in competition laws, and there were Annexes containing titles of laws and details of worldwide merger notification systems (UNCTAD, 2000b).

This Review Conference's resolution requested the secretariat to prepare a new chapter of the Model Law on the relationship between a competition authority and regulatory bodies, including sectoral regulators, again not covered by the Set (UNCTAD, 2000a). The revised Model Law covered both the relationship between competition policy and regulation under a new Article 5 and the questions of notification, investigation and prohibition of mergers affecting concentrated markets under a new Article 6, both with commentaries reflecting recent developments (UNCTAD, 2002a). This was used to support consultations on the interface between competition authorities and regulatory bodies held during the fourth IGECLP session (UNCTAD, 2002b).

The last full-scale stand-alone version of the Model Law underlined that, in their comments on the Model Law, Peru had highlighted the similarities between the Model Law and Peruvian legislation with respect to several areas, while Serbia had stated that the Model Law might be considered a comprehensive and successful model as it had managed to reconcile all suggestions and recommendations made by experts from developed countries and countries in transition, as well as those countries, regardless of the phase of their development, in which the concept and awareness of the need to protect competition was in its initial stages (UNCTAD, 2007). Serbia had suggested that special importance should be attached to relations between regulatory bodies (including sectoral regulators) and competition authorities, the advocacy role of competition authorities, and the detailed definition of regulation, as well as provisions relating to recovery of damages in suits before the courts. The European Commission and Hungary had suggested that an assessment be undertaken of the Model Law updating/amending process.

In response to the tenth IGECLP session's request that the secretariat redesign the format of the Model Law presentation and its updates (UNCTAD, 2009), the 2007 version was combined with a loose collection presenting chapter-by-chapter commentaries on each Model Law provision, with an introduction to each chapter summarizing and analysing the main findings from the country examples and referring to work by International Competition Network (ICN) and Organisation for Economic Co-operation and Development (OECD) where appropriate, followed by country overview tables reviewing alternative approaches in legislation worldwide (UNCTAD, 2010a). Regarding Chapter 1, this provision stayed unchanged in Part I of the Model Law, but the commentary in Part II, while maintaining the standard wording used for many years, went on to analyse the purposes of competition laws, breaking them down into consumer welfare, efficiency, maintaining the competitive process and other considerations such as fair competition, national economic development or other industrial policy goals, or public interest (UNCTAD, 2010b). A table was provided reproducing the wording used to describe the objective or purpose of competition laws of countries from different regions.

This redesigned Model Law version was made available to the Sixth Review Conference which, after holding consultations on the Model Law, resolved that future revisions should be carried out in stages so as to allow adequate time for the secretariat to update the relevant chapters and for in-depth consultations among member States (UNCTAD, 2010c).

Updated commentaries on Model Law chapters IX (the Administering Authority and its Organization) and X (Functions and Powers of the Administering Authority) were duly made available to the eleventh IGECLP session to support its consultations on the "Foundations of Agency Effectiveness" (UNCTAD 2011). Updated chapters III (anticompetitive agreements) and VIII (Some possible aspects of consumer protection) were issued in 2012. Revised chapters I (UNCTAD, 2015b) - which did not make substantial changes to (UNCTAD, 2010b) - IV (abuse of a dominant position), VIII, XI (sanctions and relief) and XIII (actions for damages) were made available to the Seventh Review Conference. Updated versions of chapters II (definitions and scope of application) and VII (relationship between competition authority and regulatory bodies, including sectoral regulators) were issued in 2017, V (notification) and VI in 2018, IX and X in 2019, and III and IV in 2020. At the eighteenth IGECLP session, one delegate proposed that all of the contributions from member States be collected and reflected in the secretariat document on the revision of the relevant chapters (UNCTAD, 2019). The nineteenth IGECLP session requested the secretariat to rethink the status of the commentaries of the Model Law based on submissions to be received from member States (UNCTAD, 2021).

Assessment and possible way forward

The Model Law has come a long way from the initial idea of a model or models which UNCTAD member States would adopt, thus providing an UN-endorsed template for developing countries formulating laws in this unfamiliar area to tackle RBPs adversely affecting their development. Instead, it is a permanent work-in-progress by the secretariat and, while Part I provides a useful reminder of the matters to be covered in a typical competition law, it is Part II which is a reference point for countries legislating in this area, providing pertinent information and analysis regarding how other countries are addressing specific aspects of competition law.

Part II's periodic revision enables countries to keep up to date with trends with respect to different elements of different competition laws and individually determine what they might follow - thus tending to promote «soft» convergence among national competition laws and their implementation without derogating from countries' sovereign right to choose what is appropriate for themselves. The Model Law's relevance and the signal achievement it represents are evidenced by the comments made by Peru and Serbia referred to above, and in the chapters of this publication.

The setting has now changed out of all recognition compared to what it was at the start of the Model Law exercise. There is a wealth of easily accessible informative and analytical material regarding the

content and formulation of national laws, and on specific competition issues, available from UNCTAD itself, OECD, ICN and national and regional sources. This is backed by significant technical assistance and international meetings. Virtually all countries have competition laws, while there is sometimes a gap in implementation. Even though many competition laws provide for factors other than competition to consider, most developing countries usually implement their laws on the basis of the well-trodden path of standard competition law and policy approaches, perhaps because of belief in these approaches' validity, and their inherent flexibility; the difficulties of elaborating coherent alternative approaches, and doubts about how far these would lead to different decisions; and concerns that any such alternative approaches would discourage foreign trade and investment, lead to pressures from other Governments, and hamper cooperation in cross-border cases.

Yet this has not made the Model Law redundant. On the contrary, given the current uncertainties and controversies regarding what should be competition policy's fundamental goals, how it should try achieving them, and how to balance, trade-off and implement different goals in practice, the Model Law and its history are now more relevant than ever.

As highlighted in (UNCTAD, 2023), economic changes over the last decade, including digitalization, sustainable development and the global economic downturn, have sharpened tensions between competition and industrial policies, while there is also potential for synergies. This raises issues regarding the role competition authorities can play for Governments to better deal with recent economic changes, the challenges in applying competition policies to industrial policies, and the interaction frameworks and mechanisms between competition authorities and industrial policymakers.

Significant ideas have been suggested regarding how competition enforcement could reduce economic inequality (Ezrachi, A and ors., 2022), and regarding the impact of increasing political, business and technological complexity on competition law enforcement and institutions, particularly regarding sustainable development, the emergence of new fields of competition such as ecosystems, and the challenges of computational competition law and economics (Lianos, I., 2022). However, concerns have been expressed about the abuse of competition policy as a barrier to foreign direct investment (Marriotti, S 2023), and it has been suggested that new regulatory proposals aimed at platform markets may be failing to respect competition principles, and competition officials should insist that competition-related regulatory proposals fully respect fundamental principles before endorsing proposals that advance political, social engineering or industrial policy objectives (Ohlhausen, M and Taladay, J, 2022).

The overall message from the 2022 OECD Global Forum on Competition is that most jurisdictions have embraced some form of the consumer welfare standard to achieve the basic goals of competition, and some also consider competition policy as a tool to contribute to a number of other objectives (pluralism, decentralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity, and other socio-political values) which vary across jurisdictions and over time, reflecting the changing nature and adaptability of competition policy to address current concerns of society such as sustainability, while remaining steadfast to the basic objectives (OECD, 2022). An OECD note comparing the relative advantages and disadvantages of the consumer welfare, total welfare, citizen's welfare and protecting competition standards accepts that there is no "one-size fits all" solution, different jurisdictions may choose to weigh attributes differently, and many competition laws do take into account distributional and broad societal concerns and public interest considerations, while many of the outcomes from competition enforcement would still be the same (OECD, 2023).

Thus, ironically, over a generation after Group B had objected to a development test and insisted upon a purist competition approach in specifying the objectives or purpose of competition law, OECD countries are now signalling greater flexibility regarding the consideration of broader public policy objectives. Given the rapid pace of current changes, it is yet too early to tell whether there has been a paradigm shift, but countries need to keep abreast of what specific changes other countries are making regarding different aspects of competition law and policy before they can take informed decisions regarding which options to

choose. The availability of such information may help to identify opportunities for advancing development objectives without creating undue controversy – taking into account the history of the discussions on the development test. At the same time, it would tend to promote greater uniformity and enhance predictability, lessening the risk that uncertainty and too much divergence chill business operations and hamper trade, investment, and international cooperation in competition law enforcement.

Given its unique nature, the Model Law could provide a first port of call to a developing country competition authority assessing whether or how to change or apply its national competition law and policy regarding any specific matter, in the light of this new thinking. There is no equivalent OECD or ICN recurrent publication providing such a non-prescriptive running review and analysis, linked to the provisions of a typical competition law, of how a wide range of countries address different competition law and policy matters, which is supported by a UNGA instrument like the Set, an organization like UNCTAD enjoying the confidence of developing countries, a standing group of experts from all regions, and a secretariat. More in-depth analysis can always be sought elsewhere if required.

To enhance the Model Law's relevance in this regard, member States might discuss the status of the commentaries of the Model Law in the light of submissions from member States (as requested by the nineteenth IGECLP session), including whether or how the Model Law's coverage might be expanded in the same manner as done in the past, and accounting for the timing of past revisions of Model Law chapters. Possible issues which might be covered include those identified in P. Brusick's contribution in this publication, during the twenty-first IGECLP session, or by the Research Partnership Platform, i.e. competition law and policy's interaction with: industrial policies, including cooperation with ministries of industry and economy and other authorities; the cost-of-living crisis; digital markets and ecosystems; sustainable development; poverty reduction; exemptions for state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies; abuse of economic dependence; abuse of monopsony power; State aids and subsidies; public procurement; postal, telecommunications and other similar services; anti-dumping; relationships between regional and national competition authorities; novel sanctions such as director disqualifications; compliance programmes; leniency mechanisms; enforcement against cross-border cartels; bid rigging; merger control standards; and advisory and advocacy functions, including use of competition impact assessments. To better cover changes made by countries regarding treatment of such issues, part 2 of the Model Law might enhance coverage of relevant policy statements, enforcement guidelines and cases.

It might also be discussed: how the Model Law's format could be made more user-friendly; how it might be more closely integrated into UNCTAD's other competition law and policy work, including its studies and technical assistance, and as background material for IGECLP consultations and comparisons during peer reviews; whether contributions from member States upon individual chapters might be reproduced, enhancing transparency and better understanding; and whether publication of the Handbook might be revived, to complement the Model Law and better enable countries to publicize and explain their competition laws.

Every effort could be made to further publicize and disseminate the Model Law and seek feedback on it from different quarters. None of the above need involve any major resource implications if undertaken step-by-step based on priorities identified by member States.

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A BRIEF NOTE ON THE UNCTAD MODEL LAW ON COMPETITION

The UNCTAD Model Law on Competition (Model Law) was launched as one of the provisions of the United Nations Set of Principles and Rules on Restrictive Business Practices (Set) adopted under General Assembly resolution 35/63 of 5 December 1980. Provision F International measures, paragraph 5 of the Set provides: “5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection”. The aim at the time was to help all countries to adopt competition laws, based on the prohibition of horizontal and vertical price-fixing agreements, abuse of dominant market power by large firms, and control of any attempt to by-pass these prohibitions through mergers and acquisitions (concentrations) and to establish effective competition authorities, having sufficient powers and independence from central government, to make appropriate decisions to ensure “free competition”.

For decades, UNCTAD’s priorities included capacity building and technical assistance to help developing countries and economies in transition from centrally planned economies to market economies. The “model laws” at the time concentrated on United States antitrust laws (Sherman Act and Clayton Act) and European legislation, including the European Community rules on competition, which largely excluded agriculture. With time, however, a growing number of countries adopted competition laws, with specificities and exclusions, but the trend was to follow the principles agreed in the Set. One of such principles is that Competition laws should cover all enterprises, including state owned enterprises (SOEs). While this principle is enshrined in most national laws, in practice, exceptions and exemptions are often still the rule.

The Intergovernmental Group of Experts on Competition Law and Policy (IGE)¹⁵ requests the UNCTAD secretariat to continue its work, covering new laws, as they are adopted in the developed and developing world.

To understand unique competition regimes, it is important to understand where they align and where they are different. Notable differences include, for example, the notion of “abuse of economic dependence,” meaning that one party abuses the economic power it has relative to a bargaining partner, which derives from European laws, and was included in most developing countries’ laws following the European models. Other cases concern the inclusion or not of provisions related to “unfair competition,” such as disparaging and parasitism of a competitor.

Another major difference was the inclusion of state aid as a responsibility of the European Commission along its major competition responsibilities. The fact that subsidies may distort competition within the member States of the European Union, gave the European Commission an important responsibility to control state aid, in addition to its general action against horizontal and vertical anti-competitive agreements, abuses of dominance and concentrations. Hence, while national competition laws do not cover state aid or subsidies, regional agreements such as the European Union and many other regional trade agreements (RTAs) and free trade agreements (FTAs), which were created in Africa, the Americas, and other regions, included control of competition distortions affecting trade among member States. Numerous RTAs and FTAs around the world (for example, Caribbean Community, Common Market for Eastern and Southern Africa, Economic Community of West African States, West African Economic and Monetary Union and others) all contain competition rules and have established regional competition authorities which responsibility includes merger control and review of state subsidies distorting competition among member States.

¹⁵ <https://unctad.org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-competition-law-and-policy>.

The United States-Mexico-Canada Agreement (USMCA)¹⁶ contains chapters on competition policy, SOEs and designated monopolies, as well as provisions on competitive standards that must be respected in specific services, such as telecommunications. In recent years, the European Union has negotiated economic partnership agreements (EPAs) with most countries and regional groupings of States, in most regions of the World, including Asia, Africa, the Caribbean and so-called “neighboring countries.” Such EPAs and/or deep and comprehensive FTAs have one trend in common with respect to Competition law: they cover three major Chapters, dealing with (i) antitrust or competition law; (ii) subsidies and (iii) treatment of SOEs, enterprises granted special rights or privileges, and designated monopolies. The main objective being to avoid distortions of competition that might arise from favouring such enterprises and monopolies. Non-discrimination in the application of competition law must include private and public firms.

Another trend, which is referred to above in the USMCA, is the inclusion of competition provisions in services and investment chapters to such agreements. Postal services, as well as telecommunications and other services are covered by such efforts to ensure that competition is not distorted by universal obligations of services and that sectoral regulators respect non-discrimination principles in their decision-making. This trend was initiated earlier, when the World Trade Organisation (WTO) dealt with competition issues in its services agreement’s annex on telecommunications.

It is also important to note the interconnection between competition laws and rules on Government procurement, whereby distortions to competition by procuring agencies should be strictly regulated and transparent.

In the European Union, Services of General Economic Interest¹⁷ are exempt from state aid/competition rules on the condition that compensation received from the State is strictly applied to the costs resulting from universal service obligations and hence enable such services to respond to the needs without distorting competition.

While distortions to competition internally, that is within a country or a regional free trade area, are covered by internal or regional competition rules, under the responsibility of the national or regional competition authority, most often this responsibility is given to a specified focal point of the ministry of economics, trade and industry. With respect to competition-distortions resulting from subsidies and dumping originating outside the national territory or outside the regional trade area, the traditional trade defense remedies (anti-dumping and countervail measures) as prescribed by the WTO antidumping and subsidies and countervailing measures agreements apply. They are not covered by competition rules.

As can be seen from the important developments listed above, it is increasingly necessary to take a holistic approach with respect to the competition principles and rules. Accordingly, the overall coverage of the Model Law would need to be enlarged, to include all the important topics that all States, RTAs and FTAs are faced with. It is no more possible to deal with “traditional” antitrust or competition law covering horizontal and vertical agreements, abuses of dominance and concentrations, without referring to the competition related matters at national, but also regional levels listed above.

¹⁶ Which entered into force on 1 July 2020. See <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

¹⁷ These are “... commercial services of general economic utility subject to public-service obligations”, subject to the European competition rules if they do not prevent the companies providing these services from performing their tasks. See <https://eur-lex.europa.eu/EN/legal-content/glossary/services-of-general-economic-interest.html>.

OBJECTIVES OF COMPETITION LAW AND POLICY

The UNCTAD Model Law on Competition (Model Law) under Chapter 1 defines the objectives and purpose of competition law as “to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominate positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development”.¹⁸ The foregoing definition has been incorporated in many countries’ domestic laws in several ways.

When drafting a competition law for a developing country, especially in Africa, we always encounter difficulties in articulating or explaining the purpose or objective of a competition law. This difficulty always arises at the stage of drafting and enforcement of a competition law or explaining what it is to third parties and justifying its purpose.

As memorialised by Robert Bork in his book ‘The Antitrust Paradox’ (1978), *“antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide a case where a conflict of value arises? Only when the issue of goal has been settled is it possible to frame a coherent body of substantive rules”*.

To understand the objectives of competition law in relation to developing countries, we have always found it important to refer to the historical social-economic background of a given country, appreciating why the concept of economic efficiency and competitive process does not meet the desired standards for developing countries, and more importantly appreciating the role of public interest in constructing the objectives of competition laws.

Historical context of African countries

Most developing countries, especially in Africa, started the adoption of national competition laws in the early 1990’s. The process was spearheaded by the World Bank’s market economic reforms which made the adoption of a national competition law as one of the pre-conditions to access the Bank’s structural adjustment program, which promised a financial bail-out facility for most developing countries. As a result, the introduction of competition legislation in most developing countries was one of such laws which did not receive the necessary support from both the government and the stakeholders namely, the business community and to a greater extent the non-governmental organisations.

Most developing countries’ economies at the time were run on socialised principles, a model in which the government played a very important role running the economy. In such a system, the objectives of competition law had to reflect the socialist economic system. The State, through state business corporations (known as Parastatal corporations), played a pivotal role in the economic governance of the country. During this time, the concept of competition law was non-existent in the national economic model.

Some competition laws are still being negotiated and drafted in an environment where socialist principles have greater support from the political policymakers. The acceptance and support of competition laws in most developing countries is still lukewarm. It has been treated as a capitalist concept or creature which was only good for the western economies.

¹⁸ UNCTAD Model Law on Competition, page 9. Accessed at: https://unctad.org/system/files/official-document/tdrbpconf5d7rev3_en.pdf.

The lack of competition law culture in African countries has become and continues to be a central impediment in the drafting the objectives of competition law, particularly in reaching the necessary consensus with the recipient countries. In the authors' opinion, there continues to be slow acceptance of a new competition regimes in the economic management of our respective societies, and the acceptance of the market economy model remains at theory level and is still far-fetched.

Socio-economic vs economic efficiency objectives

In developed countries, the situation concerning the objectives of competition law is somehow different from the developing countries. The basic objective of competition laws is the promotion and protection of the competitive process and attaining greater economic efficiency. There is a tendency among the developed countries to eliminate broad public interest goals and political override mechanism, however, such provisions are quite common among developing countries in Africa.

The economic and institutional situation in most developing countries in Africa call for different rules of thumb and justifications. We are compelled to consider factors that go beyond the generally accepted core goals of protecting the competitive process and promoting economic efficiency. For example, in most African countries, where market economic principles are not fully developed and are weaker, and significant portions of the population can be said to live in poverty, there are more situations in which the enforcement of competition law by the competition authority may consider it necessary to intervene to prevent short term hardship even though in some situations this may delay the transition to an efficient market economy.

The experience in developing countries is that the application of the objectives of competition law cannot operate in a political vacuum. Thus, the apparent purity of economic efficiency will be compromised by the need to relate the stated objectives of competition law to other broader government policies. The current context is invariably one of multiple crises, with increasing poverty and inequality compounded by the effects of the COVID-19 pandemic, the Ukraine-Russia war, climate change, etc. As markets have been undergoing extreme changes over the past decades, competition law has been repeatedly called to respond to market problems that have been encountered along the way. But before it can be engaged, it must first be established that competition law is the right tool for the job; in other words, whether the call for help falls within the goals and purposes of what competition law has been tasked to achieve. One must simply recall the temporal misplacement of competition law during the European financial crisis to understand the significance of linking the goals of competition law with the actions used to enforce it.

Whereas the objective of economic efficiency is likely to be more pronounced in a fully-grown market economy, it should be accepted that the competition law of a developing country needs to consider its historical legacy, including historic ties between industry and government. It has been difficult for most developing countries to attain the market economy status at a faster rate. The social costs of transition to a market economy, and particularly the potential for very high poverty and unemployment levels have tended to bar expeditious reform. The national economic landscape still remains distorted and unbalanced in favour of multinational enterprises. As a result, most African countries' markets should be opened gradually to provide local firms an opportunity to make necessary investments and other adjustments.

The socialist sentiments by most developing countries are greatly supported by the need to achieve or preserve a number of other public interest objectives as well: pluralism, de-centralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values. These "supplementary" objectives tend to vary across jurisdictions and over time.¹⁹ The latter reflects the changing nature and adaptability of competition policy to address current concerns of society while remaining steadfast to the basic objectives.

¹⁹ Organisation for Economic Co-operation and Development (OECD) (2003) The objectives of competition law and policy, Global Forum on Competition, paragraph 3. Accessed at: <https://www.oecd.org/daf/competition/2486329.pdf>.

It is worth noting that social considerations are not peculiar to the African continent. The Lisbon Treaty (Article 3 of the Treaty on the Functioning of the European Union (TFEU)) calls for a ‘highly competitive social market economy, aiming at full employment and social progress’.²⁰ Pennings (2019) observes that “the reconciliation of social and economic values had already been mentioned as an objective for the Community/Union in preceding Treaties, but social market economy was a new term, combining the social and economic dimensions of European values in one and the same noun phrase. Its inclusion in the Lisbon Treaty raised expectations for a stronger emphasis on the social dimension of the internal market”.²¹

Similar to European case law, the balance between social progress and economic efficiency has shaped the scope of the application of competition laws, even though the consideration of social factors does not feature prominently in competition assessments. In *Albany*,²² the Court held that it was beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers; however, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 101(1) TFEU when seeking to adopt measures to improve conditions of work and employment. As a result, agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives are, by virtue of their nature and purpose, regarded as falling outside the scope of Article Art. 101(1) TFEU. A similar situation pertains in COMESA where arrangements for collective bargaining on behalf employers and employees for purpose of fixing terms and conditions of employment and activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members, have been excluded from the application of the regional competition law.

Competition laws can thus be seen as a catch-all tool for the supervision of markets that expresses multifarious social, political, and economic considerations. For some, they are viewed as the last line of defence against that harm consumers, businesses, or the very fabric of economic life when sectoral regulation is missing, and they can therefore be tasked with a list of goals and purposes.

The objectives of competition law and policy can have an important bearing on the optimal design of a competition institution. The design influences the desired and required qualifications and experiences of the decision-makers. It affects the effectiveness of the competition law itself. If the objectives of the law are not stated clearly, then the enforcement of such a law will be weaker. Hence, the objectives of the competition law should be aligned with other laws for the desired enforcement outputs. The objectives of competition law should avoid contradictions to minimise regulatory confusion and uncertainty.

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008M003>.

²¹ Frans Pennings (2019). ‘The Relevance of the Concept of the Social Market Economy’, *Utrecht law Review* Vol 15(2). <https://utrechtlawreview.org/articles/10.18352/ulr.513>.

²² Case C-67/96, *Albany*, ECLI:EU:C:1999:430.

Consideration of public interest objectives

A significant number of developing countries, in particular on the African continent (such as South Africa, Botswana, Zambia, United Republic of Tanzania, Kenya, Malawi) have embraced public interest objectives in their decision-making process.²³ This is because of the economic and political situations in most of those countries. It is now accepted by most countries that competition policy should not ignore the social needs of the people and that competition is not a value in its own right but only in so far as it meets socially desirable objectives. Consequently, in addition to the key competition objectives of 'economic efficiency', it is recommended that the law should include the objectives like consumer welfare, employment, protection of small and medium sized enterprises (SMEs).²⁴

Consultations with the different lobby groups during the drafting stage of the objectives of competition law has always raised concerns that require the attention of the policymakers in government.²⁵ For example, there is a strong fear in many developing countries that unemployment figures and the poverty levels are getting higher.²⁶ There is also greater concern in the countries in southern Africa about the ever-increasing dominance of South African enterprises which have been accused of suffocating the growth of local entrepreneurship.²⁷ The effect of competition on small-scale sector is of greater concern to developing countries, hence, should also be addressed when formulating the objectives of competition law.²⁸ Consequently, in addition to the generally accepted competition policy objectives of promoting and protecting the competitive process and attaining greater economic efficiency (the core competition objectives), countries should in general establish broader objectives to address:

- Protection of consumer welfare
- Promoting trade integration in the Southern African Development Community and Southern African Customs Union markets
- Facilitating trade liberalisation
- Protecting and promoting small and medium sized businesses
- Enhancement of employment
- Poverty eradication

The inclusion of objectives to protect the public interest allows for a wider range of interest groups to claim ownership of the competition law. More importantly, the inclusion of the public interest objectives, gives the new institution the kind of legitimacy and popular support that enables it to be far more and effective enforcer of competition policy.

As acknowledged in the Model Law, insufficient attention to institutional, operational, and cultural aspects could result in a poor performing antitrust regime. A society's wishes, culture, history, institutions, and perception of itself, cannot and should not be ignored in competition law enforcement.²⁹ The Model Law guides the objectives or purpose of the law as the control or elimination of restrictive agreements or arrangements among enterprises, or mergers and acquisitions, or abuse of dominant positions of

²³ Africa: The increasing focus on public interest concerns in competition policy". Accessed at: https://www.globalcompliancenews.com/2023/06/02/https-insightplus-bakermckenzie-com-bm-antitrust-competition_1-africa-the-increasing-focus-on-public-interest-concerns-in-competition-policy_05302023/.

²⁴ P. S. Mehta, 2012, Evolution of Competition Laws and Their Enforcement: A Political Economy Perspective

²⁵ Consultations carried out with various member States including Madagascar, Comoros, Djibouti, Mauritius, Seychelles, Rwanda, Sudan, Uganda, Zambia, and Zimbabwe, as well as South Africa and the United Republic of Tanzania. The concerns identified were raised in almost all countries visited.

²⁶ Consultations with labour unions, consumer associations, and the Church, in Zambia, Malawi, Zimbabwe, and South Africa.

²⁷ Concerns were raised in relation to the expansion of South Africa franchised shops in other countries (Malawi, Mozambique and Zambia).

²⁸ Consultations held with the associations of SMEs, national chambers of commerce, national cooperatives, and manufacturing associations in Kenya, Malawi, Mauritius, Seychelles, the United Republic of Tanzania, Uganda, and Zambia.

²⁹ A Framework for the design and implementation of competition law and policy, chapter 1 objectives of competition policy. Accessed at: <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/27122227.pdf>.

market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

It is common to most competition legislation to find that they either articulate specific non-competition goals or contain provisions that permit anti-competitive conduct, or forbid pro-competitive practices, on public interest grounds. The former consists primarily of specific references to such objectives as the promotion of employment, regional development, national champions, national ownership, and economic stability. The latter are more often expressed simply in terms of ‘public interest’ or in provisions that allow a political decision maker to make the ultimate determination or to over-ride the determination by the competition authority.

Further, attempts to consider multiple objectives can result in inconsistent application of the competition law. In addition, certain public interest considerations such as inclusiveness, fairness, equity cannot be quantified easily or defined. As a result, the COMESA Competition Regulations has embodied in its law a clear guidance on the type and weight of public interest factors that would be considered in the assessment of a merger or restrictive or unfair business practice, and to guide on the specific and limited circumstances in which public interest justifications may prevail over the competitive assessment.

It is important also to take note of problems with public interest objectives resulting from their inherent ambiguity. In young democracies, they are distorted by the politically strongest private interest to justify decisions that protect their interest at the expense of society as a whole. These self-centred interests have become a stumbling block in appreciating the objectives of competition law.

A 2003 OECD report found that among OECD countries, there is a shift away from use of competition laws to promote what might be characterised as broad public interest objectives. The gradual shift away from use of competition laws in OECD countries to promote public interest objectives suggests that a consensus may be emerging that it is sub-optimal, at least once a country has reached a certain level of development, to use competition law and policy to promote such goals.³⁰ On the other hand, public interest objectives continue to be embraced on a fairly widespread basis by developing and transitioning countries, particularly in the area of merger control. Possible explanations include greater influence of vested business interests in such countries and a more pressing need to promote one or more public interest objectives given the stage of economic development in such countries.³¹

The competition law and policy objectives in virtually all of the jurisdictions responding to the OECD questionnaire include core competition objectives of (i) promoting and protecting the competitive process resulting in competitive prices and product choices, and (ii) attaining greater economic efficiency or economic welfare. Few people dispute that the core mission of antitrust is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.³²

In addition to the core competition objectives, approximately two thirds of respondents (23), mostly whom were from transitioning or developing countries (16), stated that the competition law and policy objectives in their jurisdiction included one or more public interest objectives. In developed economy jurisdictions, these public interest objectives took the form of either a general “public interest” test in an authorisation procedure for anti-competitive mergers or restrictive trade practices (Australia and New Zealand), a general “public interest” ministerial over-ride (Norway), a general “public interest” ministerial over-ride limited to mergers (Netherlands, Switzerland), or just media mergers (Ireland), and a general “public interest” ministerial over-ride for mergers and cartels (Germany). By comparison, in transitioning and developing countries, public interest objectives are considered in the first instance by the competition authority, although the ultimate determination is made by a political decision-maker in most of these jurisdictions.

³⁰ Supra note 22.

³¹ Ibid.

³² Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 1 (2005).

African countries are compelled to consider public interest objectives when drafting their competition law. However, they should be wary of the potential adverse effect on competition of conflicting objectives and is perhaps clearest when public interest grounds may be used to authorise an anti-competitive merger or to prohibit one that is pro-competitive.

Market integration objective

Economic integration is also an important objective in competition law. However, objectives targeting national development and competitiveness of local firms may conflict with a regional integration objective.³³ For example, a country's intent on making its industry competitive internationally via domestic production may restrict imports – a move that is against regional integration.

The European Community competition policy long relied on competition to promote market integration and good market performance, the two objectives being largely compatible.³⁴ Whereas, the US antitrust policy developed first a reliance on competition to promote good market performance and has lately moved to explicit welfare evaluation in an economic sense, as a policy standard.³⁵

The basic objective of the COMESA Competition Policy can be derived from the Treaty's overall objective of the attainment of regional integration. The policy should be seen to be in datum with the objectives of the Treaty. The preamble to the Treaty fundamentally provides for the strengthening and achieving convergence of their economies through the attainment of a full market integration.

Competition policy should aim to improve market access for foreign goods, services, and investments through ensuring open conditions of competition. The improvement of market access will, in turn, enhance expansion of markets such that goods and services could be traded across national borders. This entails removing anti-competitive practices, both private (through competition law) and government supported. Article 2 of the Regulations provides that the purpose of the Regulations 'is to promote and encourage competition by perverting restrictive business practices and other restrictions that deter the efficient operations of the markets, thereby enhancing the welfare of the consumers in the Common Market and to protect consumers against offensive conduct by market actors.

From the foregoing, the objective of the Regulations was therefore, apart from enhancing regional integration, to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operations of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors. In order to safeguard the consumers in the Common Market against exploitation through misleading conduct and other sharp selling practices, and preventing unethical business from gaining an unfair advantage over their rivals.

The second objective of the COMESA competition provisions is to create a regional competition regime and the institution that seeks greater level of integration to form a Common Market. In seeking an integrated Common Market, it is important to guard against anti-competitive business practices that may frustrate the 'single market imperative'. With the opening up of domestic markets to foreign competition, there is need to protect the markets of the member States from the possible anti-competitive practices by the foreign firm penetrating the Common Market.

The *raison-d'être* of any law or regulation often manifests itself in the form of its objectives. This applies to competition law as well. However, the objectives of competition law are sometimes not explicitly stated either in the law. Table below provides a summary of the objectives of competition law across various

³³ C. Lee and Y. Fukunaga (2013), ASEAN Regional Cooperation on Competition Policy, Discussion Paper Series ASEAN Regional Cooperation on Competition Policy. Accessed at: <https://www.eria.org/ERIA-DP-2013-03.pdf>.

³⁴ Stephen Martin, 'The Goals of Antitrust and Competition Policy', Krannert School of Management, Purdue University.

³⁵ *Ibid.*

African³⁶ and Arab countries. As can be seen, there is diversity in the stated objectives of competition law. A number of competition laws in these countries emphasize welfare (consumer and/or public), prevention of monopolies, promoting competitiveness of SMEs free, and economic development.

Table below and other legislations in the region illustrate how the social policy objectives have been included in the objectives of the various competition legislations. A good example is the ‘black empowerment’ of the disadvantaged black people under the South Africa Competition Legislation. Similarly, the Economic Reports in other countries such as Djibouti, Zambia, Zimbabwe, Botswana, and many others also recommend that competition policy needs to address existing policies aiming at citizens empowerment such as reservation policy and positive discrimination to a class of citizens.

Objectives of competition law in African and Arab countries

Country	Objective/ Purpose of Competition Law
Nigeria	The objectives of this Act are to: <ol style="list-style-type: none"> a) Promote and maintain competitive markets in the Nigerian economy b) Promote economic efficiency c) Promote and protect the interest and welfare of consumers by providing consumers with wider variety of quality products at competitive prices, d) Prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria; and e) Contribute to the sustainable development of the Nigerian economy.
United Republic of Tanzania	The object of this Act is to enhance the welfare of the people of United Republic of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to: <ol style="list-style-type: none"> (a) increase efficiency in the production, distribution and supply of goods and services; (b) promote innovation; (c) maximise the efficient allocation of resources; and (d) protect consumers.
The Gambia	An Act to promote competition in the supply of goods and services by establishing a Commission, by prohibiting collusive agreements and bid rigging, by providing for investigation and control of other types of restrictive agreements and of monopoly and merger situations, by promoting understanding of the benefits of competition and to provide for other connected matters.
Zimbabwe	An Act to promote and maintain competition in the economy of Zimbabwe; to establish a Competition and Tariff Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.
Kenya	The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to– <ol style="list-style-type: none"> (a) increase efficiency in the production, distribution and supply of goods and services; (b) promote innovation; (c) maximize the efficient allocation of resources; (d) protect consumers; (e) create an environment conducive for investment, both foreign and local; (f) capture national obligations in competition matters with respect to regional integration initiatives; (g) bring national competition law, policy and practice in line with best international practices; and (h) promote the competitiveness of national undertakings in world markets.
Rwanda	This Law aims at encouraging competition in the economy by prohibiting practices that undermine the normal and fair course of competition practices in commercial matters. It also aims at ensuring consumer’s interests promotion and protection.

³⁶ In Southern Africa, the early countries to enact modern Competition laws were Zambia, Zimbabwe, Malawi and South Africa.

Country	Objective/ Purpose of Competition Law
Tunisia	<p>The law herein aims at fixing the provisions ruling on free prices setting up the rules ruling on free competition in order to guarantee the general balance of the market, the economic efficiency and the well-being of the consumer.</p> <p>It fixes for this purpose the duties entrusted to the producers, tradesmen, service providers and intermediaries, and tends at ensuring transparency of prices, to stop the restrictive trade practices and prevents any anti-competitive practices including the practice and agreements created abroad and having damaging impact on the internal market. It also aims at monitoring the economic concentration operations.</p>
Malawi	<p>An Act to encourage competition in the economy by prohibiting anti-competitive trade practices; to establish the Competition and Fair Trading Commission; to regulate and monitor monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade; to facilitate the expansion of the base of entrepreneurship and to provide for matters incidental thereto or connected therewith</p>
Saudi Arabia	<p>The Law aims to protect and encourage fair competition and to combat and prevent monopolistic practices that affect lawful competition or consumer interest; leading to improved market environment and economic development.</p>

Conclusion

In conclusion, arguments exist in favour of having a single objective or multiple objectives. It would be wrong to be overly prescriptive in suggesting that either model is better. Experience of many economies suggests that the culture and legal forms of each individual economy will determine the institutions and institutional structure that work best in each case. A key issue is that the objectives, however defined, are pursued in an open and transparent manner and thus subject to the normal checks and balances inherent within the political and legal structure of the economy in question. Introducing excessive uncertainty in the assessment of competition cases will be counterproductive. It is also important to recognise that there will inevitably be a trade-off between pure economic objectives and broader policy objectives.

WHY A CHAPTER VII OF THE UNCTAD MODEL LAW ON COMPETITION AND POTENTIAL FUTURE DEVELOPMENTS

“The importance of competition stems to a large extent from its being a basic and fundamental element of competitiveness. An adequate internal competition framework is indeed a necessary input into the development of a competitive market within an economy. Export performance is also boosted by a well-functioning competition framework. But competition has another dimension, the importance of which is increasingly recognized: I refer to that of consumer protection. If we want to shape the economy in such a way as to ensure a relatively high level of both competitiveness and consumer protection, then we need to formulate solid norms of competition.”

Rubens Ricupero, Secretary-General of UNCTAD, São Paulo, 23 - 25 April 2003

Chapter VII of the UNCTAD Model Law on Competition (Model Law) was developed twenty-three years ago in the context of the development of a global move to regenerate the international law of economic relations that had been created in the wake of the Bretton Woods agreements in 1944 and the aborted Havana Charter of 1948. The Havana Charter comprised for the first time a set or chapter of international competition rules against international restrictive business practices or “RBPs” affecting international trade.³⁷ With the technological revolution materialized by the emergence of the internet fuelling the process of globalisation of economic and financial activities in the early 1990s, several factors were identified at the time suggesting that the globalization of markets should lead to a globalization of markets regulation, in particular concerning globalized firms’ behaviours. This led to numerous books, reports, studies and papers that questioned the usefulness or even necessity to create a working group on competition issues at the World Trade Organisation (WTO).³⁸

³⁷ The concept of RBPs at the time designed anticompetitive behaviors and was used at UNCTAD up to the end of the 1990s.

³⁸ F. Souty, “Is there a Need for Additional WTO Competition Rules Promoting Non-discriminatory Competition Laws and Competition Institutions in WTO Members?”, p. 171-183 in Ernst-Ulrich Petersmann (ed.), James Harrison, *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, Oxford, Oxford University Press, 2005 592 p. See also F. Souty, “From the Hall of Geneva to the Shores of the Low Countries: the Origins of the International Competition Network”, p. 39 - 50, in Paul Lugard, *The International Competition Network at Ten. Origins, Accomplishments and Aspirations*, Cambridge, Intersentia, 2011, xv-422 p. See also F. Souty, “Les défis de la mondialisation pour les pays développés en matière de concurrence”, *Revue Economique et Sociale*, Fribourg, mars 2006 (1), p. 27-38. See notably F. M. Scherer, *Competition policies for an integrated world economy*, Washington, Brookings Institution, 1994, xxii-133 p. He explored the three-way interaction among competition policy, national trading and investment strategies, and international trade policies. Focusing on four nations - the United States, the United Kingdom, Germany, and Japan - he surveyed the evolution over two centuries of national trading and competition policies and the points at which they come in conflict. Attempts to harmonize them through multilateral institutions, such as the European Union, are examined. In a study of principal intersections between competition and trade policies it was shown how export and import cartels have effects similar to traditional tariff barriers and how restraints implemented to settle trade disputes induce cartelization. Finally, the author did propose recommendations for substantive and procedural improvements at the interface between trade and competition policies, with a new set of international competition policy institutions that combat avoidable restraints while respecting the need for national sovereignty.

The move forward of international antitrust in the 1990s at the WTO and UNCTAD

In the wake of these works, a Singapore Ministerial Declaration in 1996 mandated the establishment of working groups to analyze issues related to investment, competition policy and transparency in government procurement. It also directed the Council for Trade in Goods to “undertake exploratory and analytical work [...] on the simplification of trade procedures in order to assess the scope for WTO rules in this area.” When the WTO Working Group to study the Interrelation between Trade and Competition Policy was constituted in 1997 to fulfil a Singapore Declaration, initial discussions were shaped by two reference studies that were stimulated by the identification of “Globalization” in the earlier 1990s: the so-called Draft International Antitrust Code elaborated by a group of private scholars from the European Union³⁹ and the United States, and the Report of the so-called “Van Miert Expert Group” established by the EC then Commissioner in charge of Competition Policy Karel Van Miert.⁴⁰

The first study resulted, among others, in a detailed Code modelled after the experience of the most advanced economies, to be incorporated into WTO Law and to be administered by an “International Antitrust Authority” vested with, *inter alia*, a “right to ask for actions in individual antitrust cases or groups of cases to be initiated by a national antitrust authority” and a right to bring actions against national antitrust authorities in individual cases or groups of cases before national law courts, whenever a national antitrust authority refuses to take appropriate measures against individual restraints of competition (Article 19:2).

The second study drew on the experience gained by the European Commission in its tackling of global anti-competitive behaviours in differentiated situations including international cartels (1989-1991 Wood pulp case), abuses of dominance on several major markets (1994 Microsoft), anti-competitive effects of vertical restraints (1994 Kodak-Fuji case) and global mega-mergers (1991 Aerospatiale – Alenia – De Havilland and 1995 Mc Donnell – Douglas cases). This study focused on “competition problems that transcend national boundaries: international cartels, export cartels, restrictive practices in fields which are international by nature (such as air and sea transport).” It identified problems arising chiefly on the part of American businesses but not exclusively (the 1991 prohibition of the Aerospatiale – Alenia Merger case concerned French, Italian and Canadian firms, and the 1994 Kodak – Fuji also involved a Japanese firm) and focused on diverging views about enforcing competition laws on both sides of the Atlantic (e.g., the unilateral extra-territorial enforcement of United States Antitrust and Trade Laws vis-à-vis foreign anti-competitive practices leading to international conflicts of laws on jurisdictions, unilateral sanctions and counter-measures and enforcement problems such as information-gathering abroad and foreign “blocking statutes”).

Even though the second study touched on the developing countries’ situation, the developing countries were only considered as being subject to some types of anti-competitive practices (e.g., use of intellectual property rights for limiting domestic competition) and “extraterritorial application of other countries’ competition laws” (i.e., chiefly the laws of the United States and of the European Union). Other studies have

³⁹ H. Hauser and E. U. Petersmann (eds.), “International Competition Rules in the GATT / WTO System,” *Swiss Review of International Economic Relations*, 1994, p. 169-424 (see in particular p. 310-325). A further edition of the Draft International Antitrust Code which was presented at the Organisation for Economic Cooperation and Development (OECD) Committee on Competition Law and Policy was published by W. Fikentscher and U. Immenga (eds.), *Draft International Antitrust Code*, 1995. See also E. U. Petersmann, *The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System*, Geneva, PSIO Occasional Papers, WTO Series No. 3, 1996, 43 p.

⁴⁰ European Commission, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, Brussels, Luxemburg, 1995.

been conducted in the same decade.⁴¹ UNCTAD carried on its yearly sessions of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) following instructions of the agreed conclusions adopted every five years at a ministerial conference to review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Set) that had been adopted as a resolution in 1980 by the United Nations Conference on Restrictive Business Practices.⁴²

Eventually, at the Doha WTO Ministerial Conference in 2003, the mandate of the working group on the so-called Singapore issues was extended up to the Cancun Ministerial Conference in 2004 with most developing countries unconvinced of the necessity or value of negotiating multilateral rules on these issues, which they see as being of advantage only to developed countries.⁴³

In that context, over a period that elapsed between 1997 and 2004, the UNCTAD secretariat took several initiatives that contributed to strengthening the United Nations non-binding recommendation instruments related to competition law and policy, namely the Set and the Model Law. These were not only annually updated and completed by the regular annual sessions of the IGE, but some member States insisted to develop reference instruments in competition law at UNCTAD. This happened especially at the Marrakech Ninth Ministerial Meeting of the Group of 77 (G77) and China in September 1999, which declared “UNCTAD has a vital role to play in shedding light on emerging trends and shaping policies in the areas of trade, competition, investment, technology, electronic commerce, environment and finance for development.”⁴⁴ Those G77 reflections were notably incorporated in the Plan of Action adopted by the UNCTAD X held in Bangkok in February 2000. The Bangkok Plan of Action insisted in particular that “there is a need to prevent enterprises from re-establishing market barriers where governmental controls have been removed”⁴⁵ and that UNCTAD should “expand its help to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy”.⁴⁶ The Plan of Action was followed by the Fourth Conference of Review of the Set organized at Geneva which recommended importantly “to the General Assembly of the United Nations of 2000 to subtitle the Set for Reference as UN Set of principles and rules on Competition” and requested “the secretariat to prepare for the Intergovernmental Group of Experts on Competition Law and Policy in 2001 a new chapter of the

⁴¹ Regarding developing countries interests, Ajit Singh offered a very good synthesis from the perspective of developing countries scholars. See, among others, A. Singh, *Competition and Competition Policy in emerging Markets: International and Developmental Dimensions*, UNCTAD G24 Discussion Paper Series n° 18, September 2002, 33 p. This was also particularly the case in the United States as well. global competition studies and multilateral projects emanated only from Europe. For instance, the ABA international antitrust proposal was one of the first and most prominent of these studies a decade ago. As early as 1991, a Special Committee on International Antitrust, chaired by Prof. Barry Hawk, of the Section of Antitrust Law of the American Bar Association issued a report in which, among others, it recommended that “all countries should enter into an agreement to repeal their statutes granting immunity to export cartels at least to the extent that the statutes allow conduct in or into foreign markets that would be unlawful in their domestic markets”; that “a mechanism should be developed to resolve international disputes regarding conduct by export cartels that is alleged to have effects solely in foreign markets”; and that “alternative methods of resolving international conflicts over the behavior of export ventures include the formation of a multinational tribunal to make findings or to recommend resolutions to such disputes, or to establish a system of binding arbitration.” Barry, A. Hawk, *Report of the Special Committee on International Antitrust*, [Chicago, Ill. : ABA, 1991], 2 vol. v-299 p and 242 p. Furthermore, Prof. Scherer made the insightful proposal, similarly to the Munich Group’s recommendation, providing for a gradual, phased approach over approximately seven years to allow all signatory nations to comply with the full set of commitments. His book proposed to create an “International Competition Policy Office (ICPO)” that would be situated “within the ambit of the new World Trade Organization” and would “have both investigative and (in a second stage) enforcement responsibilities.” This ICPO would at first be an information-gathering agency, thereby following the model of the United States Federal Trade Commission that was initially developed under leadership of President Woodrow Wilson in the U.S. in 1914. This scheme would also follow the British model that was developed in the late 1940s and in the 1950s and which developed Competition authorities essentially vested with registration powers in their initial stages of functioning. Furthermore, one year after a new international competition policy agreement has been ratified, all substantial single-nation export and import cartels and all cartels operating across national boundaries should be registered, and the mechanism of their operations should be documented, with the ICPO. See above F.M. Scherer, *opt. cit.* at note 3.

⁴² D/RBP/CONF/10/Rev.2.

⁴³ For an account of the standing of International Competition discussions after the 2004 Cancun WTO Ministerial, see Frederic Jenny, “Competition policy and trade: the WTO after the Cancun Meeting”, p.9-36 in Colin Robertson, *Governments, Competition and Utility Regulation*, Cheltenham, United Kingdom, xvii-240 p.

⁴⁴ *Marrakech G77 Ministerial Declaration*, United Nations, 13-16 September 1999, Doc. TDB 390, p. 80, pt. 33.

⁴⁵ UNCTAD X, *Bangkok Plan of Action*, 18 February 2000, TD/386, pt. 70, p. 22.

⁴⁶ *Report of UNCTAD in its tenth session held in Bangkok from 12 to 19 September 2000*, 21 September 2000, TD/390, pt. 140, p. 47.

model Law on the relationship between a competition authority and regulatory bodies including sectoral regulators".⁴⁷

Chapter VII was consequently drafted and adopted in the subsequent version of the Model Law that was edited in 2004 after presentation during informal sessions of the IGE in 2001 and 2002 and that new version of the Model Law was endorsed by the Fifth United Nations Conference to review all aspects of the Set at Antalya, Turkey from 14 to 18 November 2005. This Antalya Review conference was presented in particular with the *"updated version of the Model Law, taking into account recent trends in competition legislation and its enforcement"*.⁴⁸

All in all, the elaboration and adoption of Chapter VII had been the result of an international process of almost six years driven by the UNCTAD secretariat in the critical period between 1999 and 2005 in the history of international competition law development.

The substance of Chapter VII

Chapter VII of the Model Law was entirely new and inspired by several works undertaken at the OECD Competition Committee and conducted on the interrelationship between authorities vested with the enforcement of competition laws and sectoral regulations in several member States of the United Nations. The provisions of the chapter read as follows:

The relationship between competition authority and regulatory bodies, including sectoral regulators

I. Advocacy role of competition authorities with regard to regulation and regulatory reform.

An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies enjoying a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. Such should in particular be the case if this regulation limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens. In particular, regulatory barriers to competition incorporated in the economic and administrative regulation, should be assessed by competition authorities from an economic perspective, including for general-interest reasons.

II. Definition of regulation.

The term "regulation" refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.

III. Definition of regulatory barriers to competition.

As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by nongovernmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations. IV. Protection of general interest Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms

⁴⁷ *Resolution of the Review of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as adopted at the final closing plenary on Friday 29 September 2000, TD/RBP/CONF.5/15, 4 October 2000, respectively at pt. 1, p. 2 and pt. 11, p. 4.*

⁴⁸ *Agenda of the Fifth Review Conference of the Set, TD/RBP/CONF.6/1, pt13(e), p. 5.*

can be considered by Governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner. The relationship between competition authority and regulatory bodies, including sectoral regulators

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Related issues of Chapter VII: services of general interest, competitive neutrality and state owned enterprises

As noted in Section IV, Chapter VII addresses the “Protection of general interest,” setting out that: “Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by Governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner”.

A. Services of general interest and Services of General Economic Interest

The European Union goes further and identifies Services of General Economic Interest (SGEI). The status of SGEI is recognized by Article 36 of the European Charter of Fundamental Rights: “The Union recognizes and respects access to services of general economic interest as provided for in national law and practices, in accordance with the Treaty (...) in order to promote the social and territorial cohesion of the Union.”

The concept of general interest operates in both the European Union and in the Model Law as a kind of regulatory bargain in which selected sectors and /or companies (typically the incumbents) undertake certain obligations such as universal service, including responsibility for the most marginalized consumers, and in return are exempted from certain aspects of competition law. A box hereafter summarizes the conditions on which exceptions to the rules of competition law apply to services of general economic interests. The commentaries to Chapter VII already developed a point IV on the protection of general interests (para 130 to 142).

Though neither the Chapter VII nor the commentaries addressed the specific issue and concept of services of general economic interest, the principles of regulation to be applied to such services was already incorporating the development dimension and peculiarities of such services: *“Governments tend to develop extensive and comprehensive sectoral rules applying in particular to major infrastructure service industries. Such industries, also referred to as “public utilities” or “public services”, include activities where consumption is indispensable for the development of modern ways of life or which provide essential inputs to many parts of a nation’s economy, such as electricity, gas, water production and distribution, solid waste management, telecommunications, cable television, mail distribution and public transportation (by air, road or rail)”*.⁴⁹

The understanding of ways to preserve services of general economic interest of bare enforcement of Competition Law has further progressed since 2004. One should consider in this regard that, as stated in the 2004 commentaries, “developing countries’ concerns are indeed very close to those of developed countries” with regard to competitive efficiencies and inefficiencies to be observed in regulated sectors that often provide services of general economic interest. Indeed, as the commentaries to the Model Law went on *“efficient regulation in developed countries traditionally distinguishes between network segments which are non-potentially competitive and segments of production and retailing which are generally considered to be natural monopolies and non-potentially competitive. Potentially competitive segments comprise, for instance, long distance in telecommunications, generation in electricity and transportation in railways. Non-potentially competitive segments include the transmission grid in electricity, the tracks in railways and the local loop in telecom communications; they often remain regulated after competition of the regulatory reform process. It is clear that the lack of effective separation gives market power to firms operating network infrastructures. Such power, exercised at the expense of other operators and consumers, should be kept under control”*.⁵⁰

An update of the Model Law could possibly gain more interest in more carefully studying the issues related to the regulation of SGEI and how to best propose provisions on the interrelationship between competition law and regulated sectors regarding associated efficiencies and inefficiencies.

SGEI in the European Union

European Union law provides an exception for the rules of competition law for Services of General Economic Interest (SGEIs) if those rules would obstruct the performance, in law or in fact, of the particular tasks assigned to them by the state.⁵¹ Examples of SGEI’s would include matters such as public transport, and postal services, but has also been found to include more unconventional monopolies such as pharmacy monopolies and job seeking services.⁵²

This exception from competition rules is interpreted widely, for example, SGEI’s operating in a loss-making area can run the risk vis à vis regulators to “cross-subsidise” their losses by also being

⁴⁹ Commentaries to the Model Law, op.cit., 2004 edition, point 134, p. 56.

⁵⁰ Ibid. point 142, p. 58.

⁵¹ Article 106(2) TFEU.

⁵² See for example *AG Léger* in Case C-438/02 *Krister Hanner* [2005] ECR I-04551 and Case C-41/90 *Höfner* [1991] ECR I-1979.

granted special rights in a profitable industry which is, in principle, prohibited. This issue is complex and is still being debated in Courts. It justifies important assessment and monitoring activities by the Competition Authorities and by the European Commission. The Court of Justice of the European Union (CJEU), for example, found that an ambulance provider providing unprofitable emergency patient deliveries could also legitimately have a monopoly over more profitable non-urgent patient deliveries to subsidise its losses.⁵³ While the purpose of such cross subsidisation is to avoid the state having to give aid to the company operating the SGEI to cover its losses, state aid can also be given directly to the SGEI, so long as the aid is necessary to cover the losses incurred by the company in providing those services, along with a reasonable profit for its activities.⁵⁴

As the member States, rather than the European Union define what is or is not a service of general economic interest, the European Commission has limited its review of whether a general economic interest chosen by a State was based on a manifest error.⁵⁵ This reflects the obligation in the TFEU that European Union law respects the role of SGEI's as a shared value of the Union and its member States, and their role in promoting social and territorial cohesion in member States,⁵⁶ and the necessity recognised by European Union law to guarantee a high level of quality, security, accessibility, equality of treatment and universal access to public services and the network industries established for their provision.

This limited review notwithstanding, some European Union criteria are emerging: the service should be universal, compulsory, and provided for general, and not private, interest. Additionally, Article 106(2) TFEU requires that undertakings performing an SGEI have been entrusted with this role by the state, through public law or by contract, that the resulting restriction of competition was necessary to allow the service to be provided under economically acceptable conditions, and that the restriction of competition does not affect trade between member States to the point that it is contrary to the interests of the Union.

The principles governing SGEIs also allow for compensation mechanisms for states to recognize financially or through other means, such as privileged market access or dominance, the central role played by the service providers. 54 Article 3 of the European Union Directive 2009/72/EC, concerning common rules for the internal market in electricity, sets out the obligation of universal service: “member States shall ensure that all household customers (...) enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. To ensure the provision of universal service, member States may appoint a supplier as a last resort. Member States shall impose on distribution companies an obligation to connect customers to their network.”

B. Regulation of Competitive Neutrality

At the time of drafting the new Chapter VII and subsequent endorsement by the Third United Nations Ministerial Review Conference of the Set, between 2000 and 2004, there were no references to the concept of competitive neutrality, which was being developed by the OECD Competition Committee with strong input from the Directorate-General for Competition of European Commission in the context of European Union enlargement and approximation of national Law by a set of formerly centralized

⁵³ Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para 57; in *Ambulanz Glockner* para 57 “The Court has held that the starting point in making that determination must be the premiss that the obligation, on the part of the undertaking entrusted with such a task, to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings in economically profitable sectors”. In this case the unprofitable emergency patient delivery service could be somewhat cross subsidized/offset by also having a monopoly over non-emergency transfers of patients.

⁵⁴ Case C-280/00 *Altmark* [2003] ECLI:EU:C:2003:415, para 95.

⁵⁵ Case T-17/02 *Fred Olsen v Commission* [2005] ECLI:EU:T:2005:218, para 216.

⁵⁶ Article 14 TFEU and Protocol 26 of the TFEU on SGEI.

economies of Central Europe. At UNCTAD, the concept of competitive neutrality was studied ten years after the Model Law Chapter VII notably via a Research Partnership Platform Project led by the Australian Professor Deborah Healey.⁵⁷

The concept of competitive neutrality stems from the idea that gained ground in the 1990s that Governments have a substantial impact on markets. Laws and regulations designed to promote important public policy goals may, for example, distort markets and affect competition. Government bodies competing with private companies have advantages because of their government links even when competition laws apply, leading to pricing which does not fully reflect the cost of resources. This distorts decisions about production, consumption and investment by government bodies, private competitors and potential competitors. There are a number of ways in which these issues can be addressed, and approaches differ between jurisdictions. As far as anti-competitive regulation is concerned, there are usually a number of ways to achieve a policy goal. As consumers are generally better off when markets are more competitive, rules and regulations should be assessed for their impact on competition. Choices that minimize anti-competitive outcomes clearly assist efficiency and competitive markets.

Competitive neutrality policy initiatives directly address the market advantage of government businesses. Competition neutrality policy recognizes that government business activities that are in competition with the private sector should not have a competitive advantage merely by virtue of government ownership and control. Market advantages in this context manifest in several ways. Distortions by advantaged government business enterprises may be direct and clear-cut or more subtle. As noted by the Austrian Competition Authority in a paper at an 8th Review Conference,⁵⁸ within the last two decades, the notion of competitive neutrality has been intensely promoted by various international competition fora, such as UNCTAD, OECD and ICN. Many projects, such as the UNCTAD's "Report on Competitive Neutrality Strategies to Enhance Synergies Between Industrial and Competition Policies in the MENA Region", have been set up to successfully implement competitive neutrality into national competition laws and policies in developing countries. These discussions devoted much room to the analysis of state owned enterprises (SOEs) and made clear that SOEs often face advantages but considerable disadvantages as well. Advantages may include direct subsidies, regulatory advantages, favourable taxation or borrowing arrangements.⁵⁹

In December 2021, OECD released a background note for the audience of its Global Forum on Competition, which gathered a number of authorities developing countries and summarized a number of points to be taken into account when enforcing cooperation between Competition Authorities and other regulatory authorities in which it insisted that "*Competitive Neutrality is defined as a 'principle according to which all enterprises are provided a level playing field with respect to a state's (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market.'* State

⁵⁷ Healey, Deborah, "Competitive Neutrality: The Concept" (January 1, 2014), in D.J. Healey (ed), Competitive Neutrality and its Application in Selected Developing Countries, UNCTAD Research Partnership Platform Publication Series (United Nations, Geneva, 2014), Available at SSRN: <https://ssrn.com/abstract=3705824> or <http://dx.doi.org/10.2139/ssrn.3705824>.

⁵⁸ Contribution of the Federal Competition Authority of Austria, "Competitive Neutrality: the Way Forward After COVID-19", *Round Table - Competitive Neutrality, 8th United Nations Review Conference on Competition and Consumer Protection*, 19-23 October 2020, Room XIX, Palais des Nations, Geneva, 23 October 2020.

⁵⁹ See, inter alia,

- <https://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/TheState.aspx>;
- <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>;
- <https://www.oecd.org/daf/competition/competitive-neutrality.htm>;
- [https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf);
- <https://centrocedec.files.wordpress.com/2015/07/soe-and-competition2014.pdf>;
- https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/07/UCWG_RP_SCMonopolies;
- <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>;
- Capobianco, A. and H. Christiansen (2011), *Competitive Neutrality and State-Owned Enterprises: Challenges & Policy Options*, OECD Corporate Governance Working Papers, No. 1, OECD Publishing.

actions that benefit some enterprises over others may distort competition and undermine fair and open markets.”

The note also referred to an OECD Recommendation on competitive neutrality that was adopted on 31 May 2021,⁶⁰ which establishes a set of principles that promote a level-playing field among competitors and prevent situations where the state grants advantages to certain entities selectively, distorting competition within a market. Very interestingly, in connection with the developments and the calendar remembered at the beginning of the present paper, this 2021 Recommendation resulted from significant analysis and discussions of the OECD Competition Committee since 2004. More specifically, in the context of the Global Forum on Competition, the note observed that particular aspects of competitive neutrality have been addressed on three occasions: *“in 2018, in the roundtable on ‘Competition Law and State-Owned Enterprises;’ in 2010, in the roundtable on ‘Competition, State Aids and Subsidies;’ and in 2009, in the roundtable on ‘Competition Policy, Industrial Policy and National Champions.’ Furthermore, the OECD Competition Committee and its Working Party no. 2 have discussed aspects of competitive neutrality on several occasions, including a 2015 roundtable on the subject, as well as a 2020 session on ‘The Role of Competition Policy in Promoting Economic Recovery.’*⁶¹

The 2021 OECD Recommendation encourages Adherents to:

- Ensure that the legal framework applicable to markets in which enterprises currently or potentially compete is neutral and that competition is not unduly prevented, restricted or distorted. This includes having a competitively neutral competition law, maintaining competitive neutrality in the enforcement of competition law, bankruptcy law, and the regulatory environment, and establishing open, fair, non-discriminatory, and transparent conditions of competition in public procurement.
- Preserve competitive neutrality when designing measures that may enhance enterprises’ market performance and distort competition. This includes avoiding offering undue advantages that distort competition and selectively benefit some enterprises over others, limiting compensation for any public service obligation placed upon an enterprise so that it is appropriate and proportionate to the value of the services, and adopting structural and governance rules for state owned enterprises that do not provide them with an undue advantage that distorts competition.

In short, the Recommendation summarizes that *“all competitors should be subject to the same rules and state actions should not give selected enterprises a competitive advantage over others. Competitive neutrality is essential for countries to ensure the effective use of their resources and to reap the benefits of competition. This includes the entry and expansion of more productive firms and exit of inefficient firms, leading to lower prices, more choice, better quality products and services and ultimately economic growth and development”*.⁶²

C. Competition regulation and SOEs

This point relates further to the competition law interaction with the provisions of services of general economic interest mentioned above. According to the development of competition law enforcement in the last two decades, three basic aspects to determine the principles may be put forward to better define how to best apply competition law principles to SOEs. From both the development perspective and international market integration perspectives, one may take the European Union’s development as

⁶⁰ See OECD, *Recommendation of the Council on Competitive Neutrality* [OECD/LEGAL/2021]. This Recommendation resulted from significant analyses and discussions of the OECD Competition Committee since 2004. In the context of the Global Forum on Competition, particular aspects of competitive neutrality have been addressed on three occasions: in 2018, in the roundtable on ‘Competition Law and State-Owned Enterprises;’ in 2010, in the roundtable on ‘Competition, State Aids and Subsidies;’ and in 2009, in the roundtable on ‘Competition Policy, Industrial Policy and National Champions’. Furthermore, the OECD Competition Committee and its Working Party no. 2 have discussed aspects of competitive neutrality on several occasions, including a 2015 roundtable on the subject, as well as a 2020 session on ‘the Role of Competition Policy in Promoting Economic Recovery’.

⁶¹ OECD Global Forum on Competition, *Background note on the Promotion of Competitive Neutrality by Competition Authorities*, 8 December 2021, 60 p.

⁶² 2021 *OECD Recommendation on Competitive Neutrality*.

a starting point. Within the UNCTAD wide membership context this starting point of reflection should be further refined, accounting for, the specific development considerations and priorities. One may recall that three basic principles determine the enforcement of competition law to SOEs in the European Union: free and undistorted competition (a principle that is well developed in the Model Law but could be further revisited), the institutional nature of competition law (this should possibly be further reflected in the Model Law), the functional definition of the concept of enterprise (this could also be further reflected in a potential update of the Chapter VII of the Model Law).⁶³

- *Free and undistorted competition.* In the context of international market integration, the European Union case is worth studying, with member States of highly differentiated levels of development as experienced by the European Union over the 1990s and 2000s with Central European States integration through a sharp economic transition from centrally planned economies to liberalized market economies. Thus, according to Article 3(3) of the Treaty on the European Union (TEU) establishing an internal market based on a “highly competitive social market economy” is considered one of the objectives of the European Union. In this light, Article 3(b) TFEU grants exclusive competence onto the European Union to ensure that competition is “free on the internal market” through the establishment and enforcement of competition law rules.⁶⁴ Hence, the European Commission has a dual function ensuring the achievement as well as the functioning of a highly competitive internal market in which goods, services, people, and capital can freely circulate. The balance between economic and non-economic objectives is repeated throughout the treaties when conferring competition law competencies to the European Union, with for example, state aid of a social character granted to individuals being compatible with the internal market while other forms of state aid may not be,⁶⁵ or competition rules as a whole may not apply to undertakings performing services of general economic interest where they would obstruct the performance of the tasks assigned to them.⁶⁶ To this end, the TFEU thus contains rules that aim to prevent restrictions on and distortions of competition in the internal market, which will be explored below.

- *The Institutional nature of Competition Law.* As the previous section has shown, the maintenance of a highly competitive social market is a key objective of the European Union. To achieve this goal, the tools to support this policy are included in its constitutive document, the TFEU. Broadly speaking, the European Union competition policy toolbox includes rules on antitrust (cartels and abuse of dominance),⁶⁷ merger control,⁶⁸ state aid,⁶⁹ and provisions concerning the application of those rules to SGEIs.⁷⁰

These tools can also be broadly categorized into restorative and preventative branches. The antitrust branch aims at restoring competitive conditions after improper behaviour by undertakings, such as the formation of cartels or an abuse of their dominant position which causes distortions of competition. On the other hand, merger control and state aid rules are intended to prevent future distortions of competition. The purpose of merger control is to pre-empt potential distortions of competition by assessing in advance whether a potential merger or acquisition could have an anti-competitive impact on the market, while state

⁶³ Of course, a major difference does exist and would necessarily remain when making parallels between the European Union rule of Law which impose binding consequences on its member States and the UNCTAD nonbinding legal principles.

⁶⁴ Art 3 of the TFEU: “(b) *the establishing of the competition rules necessary for the functioning of the internal market*”. It should be noted that the Commission has an exclusive competence on the establishment of competition rules necessary for the functioning of the internal market, but not on enforcement as evidenced by the ECN for instance. National enforcement is conducted under supervision of National Courts in most cases. The achievement of this internal market and well-functioning of competition is thus an objective of the European Union and the TFEU. It is by nature an institutional objective.

⁶⁵ Article 107(2)(a) TFEU.

⁶⁶ Article 106(2) TFEU.

⁶⁷ Article 101 TFEU and Article 102 TFEU respectively.

⁶⁸ *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.*

⁶⁹ Article 107 TFEU.

⁷⁰ Article 106(2) TFEU.

aid rules aim to prevent undue state intervention wherever preferential treatment of given undertakings or sectors distorts or is likely to distort competition and adversely affects trade between member States.⁷¹

- *The functional notion of enterprise.* The functional notion of enterprise is suggested by the Model Law but could be further detailed, especially with regard to the economic nature of the firm under consideration. European Union Competition rules notably apply to “undertakings” (“enterprises” in American English). While “undertakings” is not defined in the TFEU, its meaning has been defined by the CJEU in the *Höfner & Elser* case as *every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.*⁷² This test contains two elements, that there be an “entity” and that that entity be engaged in an “economic activity.” The language is objective and reflects economic rather than legal realities. Therefore, to determine whether an entity qualifies as an undertaking or not depends entirely on the (economic or not) nature of its activities. According to the caselaw of *Hofner & Elser* the key element to determine whether the entity is an undertaking is the fact that a certain activity can be carried out by other entities on the same market. In case of SOEs, they cannot be excluded from the qualification of undertaking only by the fact that the State reserves a single activity for one undertaking. The fact that third parties are not allowed to provide a given service, does not mean that there has been no economic activity. It is possible to demonstrate the existence of an economic activity when other economic operators are able to provide the same service to the market in question. An entity for the purpose of defining an undertaking is defined as the unitary organization of personnel, with both tangible and intangible elements, and can apply to more than one legal entity or to a larger group where each member has no true autonomy due to it not taking separate financial risk or having a high degree of independence from the other members of the group. The test for defining an undertaking, therefore, ignores whether the company(s) involved are state or privately controlled, but only whether they act as one economic actor.

The second part of the test, that the entity be engaged in economic activity has led to diverging case law by the CJEU. While some cases have suggested that certain sectors such as healthcare and welfare benefits should always be considered an economic activity, other case law has followed the approach that any service, even if public should be considered an economic activity if it is “capable of being carried on, at least in principle, by a private undertaking with a view to profit”.⁷³ In this light the CJEU has for example found that ambulance services can be an economic activity.⁷⁴ An important distinction in European Union competition law is that competition does not apply to economic entities only, but to any entity engaged in an economic activity. The CJEU has found that various activities of an entity must be viewed separately by the court and the treatment of some, or almost all of an entities activities as powers of a public authority does not mean that other activities may be economic.⁷⁵ In this manner, organizations which are not typically engaged in economic activity may be covered for other activities by competition rules, even if those economic activities are ancillary to its non-economic functions.⁷⁶

The difficulty in distinguishing the economic (i.e., submitted to competition law) and non-economic activities (i.e., not submitted to competition law) of SOE’s activities was perhaps most visible in the *Eurocontrol* cases. *Eurocontrol* is an entity created by member States of the European Union for the purpose of establishing navigational safety and managing the airspace of Europe. While the CJEU initially found that charging fees for these activities did not amount to an economic activity,⁷⁷

⁷¹ In detail, all articles and Protocols include the following: articles 101 to 109 TFEU and Protocol No 27 on the internal market and competition, which make clear that a system of fair competition forms an integral part of the internal market, as set out in Article 3(3) of the Treaty on European Union. This also includes the Merger Regulation (*Council Regulation (EC) No 139/2004*) and its implementing rules (*Commission Regulation (EC) No 802/2004*).

⁷² Case C-41/90 *Klaus Höfner and Fritz Elser V. Macrotron GmbH*, [1991], ECLI:EU:C:1991:161, para 21.

⁷³ Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43 para 9.

⁷⁴ Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001], ECLI:EU:C:2001:577.

⁷⁵ Case C-82/01 *P Aéroports de Paris v Commission of the European Communities* [2002] ECR I-9297.

⁷⁶ For an overview of ECJ jurisprudence in this area see Case C/74/16 *Congregacion de Escuelas Pias Provincia Betania v Ayuntamiento de Gatafe*, para 41-50.

⁷⁷ Case C-364/92, *SAT Fluggesellschaft mbH v Eurocontrol*, [1994] ECR I-43.

in a subsequent case the General Court found that some specific activities such as providing technical assistance to national authorities was, in fact, economic.⁷⁸ This was however, overturned on appeal by the CJEU,⁷⁹ showing that distinguishing between economic and non-economic activities will both require a close examination of each activity performed by an entity and that the individual definition of each activity as economic or non-economic will itself also require a close analysis.

- *Similar application of competition law both to private enterprises and SOEs.* Competition law applies to firms, regardless of the public or private law status of the parties involved: sovereign immunity cannot be invoked by the public entity in question if the conduct criticized is related to the supply of products or services in a market. On the other hand, when implementing the prerogatives of a public authority, states, public bodies, or local authorities are not undertakings within the meaning of competition law. As we have seen, the same applies to social security bodies whose purpose is not economic, but which perform a function of an exclusively social nature, carry out an activity based on the principle of national solidarity, without any profit motive, and pay out statutory benefits independent of the amount of contributions. On the other hand, a non-profit organization managing a retirement insurance scheme intended to supplement the compulsory basic scheme or a pension fund, which itself determines the number of contributions and benefits and operates according to the principle of capitalization, would be considered an undertaking within the meaning of competition law (see above on the *Höfner* case).⁸⁰

Conclusion

2024 will mark the twentieth anniversary of the renovated Model Law and the existence of its Chapter VII. After two decades, it could be desirable to revisit the Model Law and its commentaries. This contribution has aimed at showing some directions for further discussions and updates regarding enhanced definitions of competitive neutrality, services of general economic interest, and better competition regulation criteria to be applied to SOEs, especially in consideration of the provision of services of general economic interest. On all these aspects in the UNCTAD context, member States and especially developing economies remain fully sovereign and all principles developed remain non-binding.

⁷⁸ Case T-155/04. *Selex Sistemi Integrati SpA. v Commission of the European Communities, European Organisation for the Safety of Air Navigation (Eurocontrol)*, [2006], ECLI:EU:T:2006:387.

⁷⁹ Case C-113/07, *Selex Sistemi Integrati SpA. v Commission of the European Communities, European Organisation for the Safety of Air Navigation (Eurocontrol)*, [2009], ECLI:EU:C:2009:191.

⁸⁰ See András Tóth, *Public Services and EU Competition Law*, Károli University Faculty of Law Research Centre for Regulated and Network Industries; Károli University Faculty of Law ICT Law Department, 2017.

THE UNCTAD MODEL LAW ON COMPETITION BENEFITS: THE ZIMBABWEAN EXPERIENCE

Introduction

The emergence and rapid development of competition regimes in developing countries testify to the virtues of competition policies and laws in the economic development process. As observed by Bakhoun (2011), most competition laws in developing countries were adopted in the 1990s.⁸¹ Bakhoun however noted that despite the plurality of competition policies in developing countries, the countries are still struggling to find their competition policy model, with the policies at times having overlapping objectives. Enforcement of competition laws in developing countries is thus still generally weak and requires technical assistance in capacity building from advanced organisations with competition mandates like UNCTAD.

In Southern Africa,⁸² the development of competition policy and law was phenomenal. Only three Southern African countries had operational competition regimes in 2000 (South Africa, Zambia and Zimbabwe), but virtually all the thirteen countries in the sub-region now have formally adopted competition policies and laws.⁸³ The enforcement of competition law in Southern Africa was a daunting task to the inexperienced competition practitioners, with the possible exception of the more advanced competition authority of South Africa. The predicament was worsened by the lack of information and appreciation of competition by the business community and other stakeholders.

The technical cooperation activities of UNCTAD in developing countries in the field of competition law and policy therefore came as a panacea. In particular, the drafting and dissemination of the UNCTAD Model Law on Competition (Model Law) was most welcomed not only by nascent competition authorities but also by governmental policy makers.

The experience of Zimbabwe is illustrative of the role played by the Model Law in the development of competition policy and law in a developing country. The Zimbabwean experience is characteristic of most other countries in Southern Africa.

The Model Law

The Model Law has proved to be a very useful guide not only to drafters of new competition legislation but also to enforcers of already enacted competition law. The Model Law was developed from practical experiences in the implementation and enforcement of competition policy and law in both developed and developing countries from consultations held in the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (IGE). The Model Law document is, therefore, highly user-friendly.

The Model Law document is in two Parts. The first Part contains the substantive possible elements for a competition law in thirteen chapters, which provide a best practice conceptual framework for the effective operation of a competition regime. The thirteen Chapters of the Model Law cover areas such as the major concerns of competition law (that is, anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions), competition investigations and remedies, some possible aspects

⁸¹ Bakhoun M (2011). African Perspectives on Competition Law in the OHADA Region. *Revue Internationale de Droit Economique*, Issue 3, 2011: 351-378.

⁸² Countries commonly included in Southern Africa include Angola, Botswana, the Comoros, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe.

⁸³ The Competition Bill of Lesotho was before Parliament for enactment into law at the time of the writing of this testimonial paper.

of consumer protection, and institutional arrangements. The second Part contains commentaries on the Chapters suggested in the first Part and gives alternative approaches in existing legislation.

The 2010 consolidated version of the Model Law document incorporates reports to the Sixth United Nations Conference on Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices that was held in Geneva, Switzerland, in November 2010. The incorporated reports contained detailed Chapter-by-Chapter commentaries on the Model Law, including best practice approaches in various countries, both developed and developing. The Annexes cover useful relevant information, such as: (i) names of competition laws around the world; (ii) worldwide antitrust notification systems; (iii) a selection of merger control systems; and (iv) countries with mandatory pre-closing notification system.

The Model Law, as the name implores, is basically a template which could be used in the enactment and/or revision of a country's competition legislation based on the country's peculiar competition policy and other socio-economic policies and requirements.

Zimbabwean Experience

Competition policy and law was formalised in Zimbabwe in 1996 with the enactment of the Competition Act, 1996 (No.7 of 1996), which effectively came into force in 1998. The administering authority of the legislation was also established in 1998 as the Industry and Trade Competition Commission (ITCC). In enacting competition legislation and establishing an authority to enforce the law, Zimbabwe became the third country in Southern Africa to have a functional competition regime, after South Africa (1998)⁸⁴ and Zambia (1994).

The need for a competition regime in Zimbabwe arose from the country's implementation of its Economic Structural Adjustment Programme (ESAP), and was identified in a study funded by United States Agency for International Development on monopolies and competition policy in Zimbabwe⁸⁵ that had been undertaken in January-March 1992 by a team of eminent competition experts.⁸⁶ The objectives of the study were as follows: (i) to assess and analyse industrial concentration, restrictive business practices (RBPs) and regulation in Zimbabwe, and the impact of ESAP on restrictive business practices and their regulation; (ii) to identify and analyse worldwide experiences with regulating RBPs, especially within the context of simultaneously introducing structural adjustment programs, so as to draw implications for Zimbabwe; and (iii) to recommend policy actions and institutional legislative and procedural options to regulate market power and RBPs in Zimbabwe.

The process of drafting the competition legislation involved wide consultations with operational competition authorities in countries with advanced competition regimes, as well as those in East and Southern Africa with such regimes. The enacted competition legislation met the basic requirements recognised by the Organisation for Economic Cooperation and Development (OECD) in that the law contained abuse of dominance, merger control and cartel enforcement, and also established an institutional mechanism for enforcing the law defining the powers of the authority and the procedures for implementing the law.⁸⁷

The establishment of the competition regime in Zimbabwe coincided with the holding in December 1998 of the World Bank's *First International Training Program on Competition Policy*, which was attended by

⁸⁴ Although a competition statute had been in existence in South Africa since 1979 (the Maintenance and Promotion of Competition Act, 1979), the formal powers of the enforcement agency, the Competition Board, were for the most part limited to advising the Government. South Africa's more elaborate competition legislation was the Competition Act No. 89 of 1998.

⁸⁵ IPC (1992). *Study of Monopolies and Competition Policy in Zimbabwe: Final Report*. Implementing Policy Change (IPC). Harare.

⁸⁶ The study team was comprised of: (i) Mr. Anthony Davis, Competition Specialist/Team Leader (Abt Associates); (ii) Dr. Clive Gray, Restrictive Business Practices Regulation Specialist (Harvard Institute for International Development); (iii) Dr. David Gordon, Political Economist (Abt Associates); (iv) Mr. William Kovacic, Legal/Judicial Specialist (George Mason University School of Law); and (v) Dr. Eugenia West, Business Economist (consultant).

⁸⁷ OECD (2014). *Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings*. Organisation for Economic Co-operation and Development. OECD/LEGAL/0408. Paris.

the management and Board of the country's competition authority, the Industry and Trade Competition Commission (ITCC). The international training program provided the ITCC with its very first exposure to competition training.⁸⁸ The recently established Zimbabwean competition authority also begun benefitting from UNCTAD's technical cooperation and capacity building programme, involving regional training workshops and documentation on competition policy and law, including attendance and participation at the annual sessions of the IGE which, *inter alia*, was reviewing the Model Law.

The World Bank and UNCTAD training programs highlighted the competition law enforcement shortcomings that were intrinsic in Zimbabwe's competition legislation, the Competition Act, 1996 (No. 7 of 1996). While the gazetted Competition Act covered the three major competition concerns of anti-competitive agreements, monopolisation, and anti-competitive mergers and acquisitions, the coverage was not systematic. The operational provisions on the competition concerns were scattered in various Parts and Sections of the Act, requiring a highly experienced competition practitioner to decipher them. For instance, anti-competitive practices were not specifically prohibited in the Act and their prohibition was implied in the provisions dealing with sanctions and remedies. As observed by an UNCTAD peer reviewer in 2012, "while the Zimbabwe Competition Act distinguishes between various forms of objectionable conduct, namely unfair business practices, restrictive agreements and unfair trade practices, it does not contain a provision for general prohibition of anticompetitive agreements".⁸⁹

The major shortcoming of the Competition Act was that the Act did not go into detail on the object and effects of serious anti-competitive practices such as dominance and its abuse, and hard-core cartels. The term 'abuse of dominance' was not specifically defined in the Act,⁹⁰ with practices commonly associated with abuse of dominance included in the definition of the term 'restrictive practice'. The defined 'restrictive practice' meant "(a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons; or (b) any business practice or method of trading; or (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or (d) any situation arising out of the activities of any person or class of persons"⁹¹ which restricted competition to a material degree in that it had specified anti-competitive effects, including: "(i) restricting the production or distribution of any commodity or service; (ii) limiting the facilities available for the production or distribution of any commodity or service; (iii) enhancing or maintaining the price of any commodity or service; (iv) preventing the production or distribution of any commodity or service by the most efficient or economical means; (v) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service; or (vi) preventing or restricting the expansion of the existing market for any commodity or service or the development of new markets therefor".⁹²

The 'dominance test' in the Act was provided for in the meaning of the term 'substantial market control' as follows: "A person has substantial market control over a commodity or service if: (a) being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection profitably to rise or maintain the price of the commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe, (b) being a purchaser or user of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to lower or maintain the price of the commodity or service below competitive levels for a substantial time

⁸⁸ The training program was organised by the Regulatory Reform and Private Enterprise Division of the Economic Development Institute (EDI) of the World Bank, and held in Washington D.C., United States of America, during the period 13-18 December 1998.

⁸⁹ UNCTAD (2012). *Voluntary Peer Review of Competition Law and Policy: Zimbabwe Overview*. (United Nations publications. UNCTAD/DITC/CLP/2012/1 (OVERVIEW) ZIMBABWE. New York and Geneva).

⁹⁰ The term 'monopoly situation' as defined in the Act however refers to monopolisation.

⁹¹ Section 2(1) of the Competition Act, 1996 (No.7 of 1996).

⁹² *Ibid.*

within Zimbabwe or any substantial part of Zimbabwe.”⁹³ The dominance test in the Act was therefore subjective and gave wide discretion to the competition authority in determining dominance.⁹⁴

The prohibition of abusive practices of firms in dominant positions was only provided for in the Act as follows: “the Commission shall regard a restrictive practice as contrary to the public interest if it is engaged in by a person with substantial market control over the commodity or service to which the practice relates”.⁹⁵

The term ‘anti-competitive agreement’ was also not defined or otherwise expounded in the Act. In the effective enforcement of competition law, anti-competitive agreements are normally divided into horizontal agreements and vertical agreements for the purposes of identifying the associated restrictive practices and assessing their competitive effects and harm. That was not done in the Zimbabwean competition legislation, thereby confusing the treatment of these different types of agreements in the Act. Also not specifically provided for in the Act, but only inferred, were the concepts of *per se* prohibition⁹⁶ and rule-of-reason consideration.⁹⁷ The Act did not therefore categorically state that hard-core cartel agreements such as price-fixing, market-sharing, bid-rigging and output-restriction are *per se* prohibited, as in line with international best practice.

By implication, restrictive practices termed ‘unfair trade practices’ in the Act were *per se* prohibited by virtue of the fact that the practices “shall be void”⁹⁸ and “shall be deemed ... to be absolutely contrary to the public interest”.⁹⁹ Unfair trade practices in the Act however not only referred to ‘bid-rigging’ and ‘collusive arrangements between competitors’ (referring to market-sharing, price-fixing and production-limitation, which are common hard-core cartel activities, but also to the abuse of dominance activity of ‘undue refusal to distribute commodities or services’, and some unfair consumer practices (‘misleading advertising’, ‘false bargains’ and ‘distribution of commodities or services above advertised price’). That rather confused the application of the *per se* prohibition and rule-of-reason concepts on the treatment of ‘unfair trade practices’.

In the area of merger control, the definition of the term ‘merger’ was restricted to only refer to horizontal mergers and vertical mergers. The term was defined as to mean “(a) the acquisition of a controlling interest in: (i) an undertaking involved in the production or distribution of any commodity or service; or (ii) an asset which is or may be utilised for or in connection with the production or distribution of any commodity; where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same commodity or service; or (b) the acquisition of a controlling interest in an undertaking whose business consists wholly or substantially in: (i) supplying a commodity or service to the person who acquires the controlling interest; or (ii) distributing a commodity or service produced by the person who acquires the controlling interest”.¹⁰⁰

Furthermore, the term ‘relevant market’ was not defined in the competition legislation so as to demonstrate the importance of market definition in the investigation and assessment of competition cases involving abuse of dominance and mergers and acquisitions.

⁹³ Section 2(2) of the Competition Act, 1996 (No.7 of 1996).

⁹⁴ A more objective determination of dominance is suggested in the Model Law as follows: “When a firm holds market shares of 40 per cent or more, it is usually a dominant firm which can raise competition concerns when it has the capacity to set prices independently and abuse its market power”.

⁹⁵ Section 32(2) of the Competition Act, 1996 (No. 7 of 1996).

⁹⁶ *Per se* prohibition is related to agreements and other restrictive practices that are so inherently anti-competitive that there is no need to show and prove that competition has been harmed.

⁹⁷ Rule-of-reason consideration is related to agreements and other restrictive practices that might have efficiency or pro-competitive features that need to be evaluated against their anti-competitive effects.

⁹⁸ Section 43 of the Competition Act, 1996 (No. 7 of 1996).

⁹⁹ Section 32(4) of the Competition Act, 1996 (No. 7 of 1996).

¹⁰⁰ Section 2(1) of the Competition Act, 1996 (No.7 of 1996).

The above shortcomings in the Competition Act, 1996 of Zimbabwe made the handling of competition cases by the ITCC a daunting task right from the beginning. The very first case handled by the Commission in 1998 involved “allegations of restrictive and unfair business practices in the cement industry”. The actual practices investigated were those of the country’s two dominant cement companies in respect of the following: (i) vertically restraining cement deliveries to customers through the cement companies’ preferred transport companies; (ii) discriminatory distribution of cement in favour of certain customers; (iii) bundling/tying cement sales to the supplier’s transport services; (iv) refusal to deal with minor competitors and raising the rivals’ costs; and (v) collusive and cartel-like behaviour between the cement companies.

The investigated competition concerns were therefore related to monopolisation (abuse of dominance) and cartelisation, which were only inferred as prohibited in the Competition Act, 1996 with no legislative guidelines on their treatment. The Commission therefore had to base its investigation and evaluation of the concerns on international best practices espoused by the World Bank and UNCTAD. In that regard, the Model Law was extensively used in deciphering the best practice intentions of the Zimbabwean competition legislation in the determination of dominance and its abuse. Evidence gathered during the investigation confirmed that the cement companies were engaged in serious restrictive practices such as: (i) restricting the distribution of cement (ii) enhancing or maintaining the price of cement; and (iii) supporting or promoting the discriminatory distribution of cement. No evidence was found to support the allegations of collusive arrangements between the cement producers. Cease and desist orders were issued against the cement companies, and advocacy recommendations made on the removal of entry barriers into the cement industry.

In merger control, the major shortcoming of the Competition Act, 1996 was the limitation of notifiable mergers to only horizontal and vertical mergers, while in the Model Law, it is suggested that the definition of ‘mergers and acquisitions’ should also cover conglomerate mergers and “include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates”. Conglomerate mergers were prevalent in Zimbabwe with adverse effects to the affected relevant markets. Also prevalent were anti-competitive joint ventures and cross directorships. Merger notification was also voluntary.

The shortcomings of the Competition Act of 1996 prompted the ITCC to seek amendments to the Act, and the Model Law was extensively used in the drafting of the amendments. The first major amendments to the Act came into effect in 2001 through the Competition Amendment Act, 2001 (No. 29 of 2001). The definition of the term ‘merger’ was amended to cover all possible combinations.¹⁰¹ New merger notification provisions, covering pre-merger notification, were introduced in line with international best practice, as well as provisions on factors considered in assessing the determination of the merger control substantive test of substantial prevention or lessening of competition.

In line with the Model Law, the application provisions of the Act were amended to provide that the Act “applies to all economic activities within or having an effect within the Republic of Zimbabwe”. That important attestation was originally not made in the Act with serious implications on the handling of anti-competitive practices by non-resident undertakings. The relationship between the competition authority and sector regulatory bodies was also clarified, with the competition authority given supremacy over the determination of mergers and acquisitions.

The Competition Amendment Act, 2001 also gave the competition authority the additional trade policy functions of assisting local industry through the import tariff system. That resulted in the changing of the authority’s name from the Industry and Trade Competition Commission (ITCC) to the Competition and Tariff Commission (CTC). The title of the Act was also subsequently re-worded Competition Act [*Chapter 14:28*].

¹⁰¹ The term ‘merger’ was amended to mean “the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of: (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person; (b) the amalgamation or combination with a competitor, supplier, customer or other person, or (c) any means other than as specified in paragraph (a) or (b)”.

Operational shortcomings of the Competition Act continued to be identified by the CTC from the practical enforcement of the law. Shortcomings related to the form and treatment of anti-competitive agreements and abuse of dominance have already been alluded to, and those that were not addressed in the Competition Amendment Act, 2001 continued to constrain the enforcement activities of the Commission. Other shortcomings were identified, including those related to the separation of the Commission's investigative and adjudicative functions. The Act gave the Commission both investigative and adjudicative functions. In the Act, the term 'Commission' can refer to both the body corporate and members of the Board of Commissioners. The Director of the Commission is only statutorily "responsible for administering the Commission's affairs, funds and property and for performing any other functions that may be conferred or imposed upon him by or under this Act or that the Commission may delegate or assign to him".

The non-separation of the Commission's investigative and adjudicative functions in the Act had the real possibility of adversely affecting the competition authority's operations from the likelihood of non-adherence to the principles of natural justice and due process in the handling of competition cases. The Commission's Board of Commissioners therefore had to create a 'Chinese wall'¹⁰² in the Commission between its investigative and adjudicative functions by passing a resolution delegating the Commission's investigative functions to the Director and leaving the adjudicative functions to the Board. The Competition Amendment Act, 2001 also provided for the undertaking of preliminary investigations by investigation officers of the Commission's Secretariat for adjudication by the Commission's Board of Commissioners. The need however remained for provisions in the Act that formally separate the Commission's investigative and adjudicative functions.

The voluntary peer review of Zimbabwe's competition law and policy that was undertaken in 2012 under the auspices of UNCTAD had specific terms of reference (ToRs) that stipulated that the review should be in line with the Model Law. The report on the peer review accordingly assessed the various provisions of Zimbabwe's Competition Act [*Chapter 14:28*] against the Model Law and made appropriate recommendations, as summarised in the table below:¹⁰³

¹⁰² The adage 'Chinese wall' is a term for a virtual or ethical barrier that blocks the exchange of information between different groups or departments. It is meant to prevent conflicts of interest, ethical or legal violations, or intellectual property infringement. The term is used in various contexts, including law.

¹⁰³ UNCTAD (2012). *Voluntary Peer Review of Competition Law and Policy: Zimbabwe Overview*. (United Nations publications. UNCTAD/DITC/CLP/2012/1 (OVERVIEW) ZIMBABWE. New York and Geneva).

Assessment of Zimbabwean competition legislation against the Model Law

The Model Law Provision	Provision in Competition Act	Shortcomings	Recommendations
Objective or Purpose of the Law	Preamble	No stand-alone Section for this important part of the law.	Include a section providing for the objective or purpose of the law.
Definitions	Section 2 (Interpretation)	The language used providing for some definitions are not in concurrence with commonly used 'competition language' and are used interchangeably and therefore confusing.	<p>Those definitions that are generally part of substantive rule, e.g., the prohibition of restrictive practices, should be shifted from Section 2 to the part of the Act that contains the respective substantive provision.</p> <p>Clearer definitions and use of important common competition language for terminologies should be introduced to avoid mix ups which may open unnecessary arguments.</p> <p>Guidelines to be adopted by the CTC to explain core competition law concepts, such as the definition of the 'relevant market'.</p>
Scope of Application	Section 3 (Application of Act)	Economy wide with no limitations that provide for concurrent jurisdictions with sectoral regulators.	Clear separation of jurisdiction over competition issues in regulated sectors should be introduced in the Law.
Anti-competitive agreements	Section 2 (Interpretation) First Schedule	<p>No clear line of demarcation of anti-competitive agreements (between horizontal and vertical agreements), the abuse of market power and acts of unfair competition.</p> <p>Absence of a general prohibition of anti-competitive agreements and abuse of dominance.</p> <p>Abuse of dominant position practices are provided for under Section 2 in the definition of 'restrictive practices', which indirectly deal with Rule of Reason prohibitions.</p> <p>Those restrictive practices which are provided under the First Schedule to the Act are called 'unfair business practices and are per se prohibited.</p>	<p>Introduce a general prohibition of anti-competitive agreements and concerted practices, followed by a non-exhaustive list of examples.</p> <p>Clearly distinguish between agreements that are per se prohibited and those that fall under the Rule of Reason rule.</p> <p>The conducts listed in the First Schedule should be moved to the parts of the Act where they relate (i.e., anti-competitive agreements, or acts of unfair competition).</p> <p>No mix of specific types of anti-competitive agreements with acts of unfair competition.</p>
Acts or behaviours constituting an abuse of dominant position of market power	Section 2 (Interpretation)	(As above)	<p>Introduce a general prohibition of the abuse of a dominant position, followed by a non-exhaustive list of examples.</p> <p>The language used in defining dominance should be consistent with common competition language that is simply understood by users.</p> <p>To be considered whether a rebuttable presumption of dominance based on a specific market share should be introduced.</p>

The Model Law Provision	Provision in Competition Act	Shortcomings	Recommendations
Notification, investigation, and control of mergers	Section 34 and 34A (Notification of proposed merger)	Investigation procedure, in particular timelines, not specified in the Act. Joint ventures and pure conglomerate mergers are not captured by the definition of a merger. Substantive merger control test spread over several provisions.	Introduce a binding time frame for the review of mergers. Include the establishment of full-function joint venture and pure conglomerate mergers in the definition of mergers. Provide for substantive merger control test in a single provision.
Authorisation or exemption	Sections 35-39 (Authorisation of restrictive practices, mergers, and other conduct)	Investigation procedure with particular timelines not specified.	Include a binding time frame for the review of agreements.
Some possible aspects of consumer protection	First Schedule (Unfair business practices)	There is no clear demarcation of provisions to deal with competition and those that deal with consumer protection, both are categorised under the First Schedule to the Act.	Based on the finding that the Consumer Protection Bill will be administered by a different body, consumer protection aspects can be dropped from the competition legislation, but only after the consumer protection legislation is out so as not to create a gap that will expose consumers to exploiters. Alternatively, a remedy can be by drawing a line of demarcation between the two.
Investigation Procedure	Section 34C (Investigations by Commission)	Lack of express provision on leniency programme for cartel members.	Introduce express provision on leniency programme for cartel members.
Relationship between competition authorities and sector regulators	Section 3 (Application of Act)	Not provided for specifically, although one regulatory authority has specific provisions on how competition matters should be referred to CTC.	The competition law should acknowledge the existence of sectoral regulators and limit itself accordingly. Section 59 of the Electricity Act should be strengthened and used as a model for interactions between sectoral regulators and CTC.
Establishment, functions, and powers of the administering authority.	Second Schedule (Powers of Commission)	Too much power is vested in the Minister responsible for CTC and Minister for Finance, which poses a threat to the independence of the Commission. Section 6 of the Act unclear as to who is vested with the power to appoint Commissioners, the Minister, or the President. Tenure of office of Commissioners of a period of three years too short to allow for the Commissioners to acquire required competition law expertise and build up an institutional memory.	Minister(s) should be stripped of some powers to ensure that Commissioners have a better security of tenure for them to function more efficiently. Clarify that the Minister in consultation with the President shall appoint the Commissioners. Tenure of Commissioners to be extended to 5 to 7 years.

The Model Law Provision	Provision in Competition Act	Shortcomings	Recommendations
Powers of enforcement	Section 30-32 (Orders by Commission)	The actual enforcement of Commission orders is done by courts. This may create multiplicity of procedures and may cause unnecessary delays in delivery of justice.	CTC should assume some powers of actual enforcement and state those that the courts should deal with, mostly the criminal sanctions, particularly imprisonment.
Sanctions and remedies (actions for damages)	Sections 31, 44 and 45 (Injunctions, etc.)	Provided in using a general and wide benchmark as a result there is not enough deterrence to offenders. Omission of some offences such as breach of merger condition following conditional approval of a merger.	Provide Act specific sanctions to bring about deterrence to offenders. Provide for the identified omitted offense in the Act.
Appeals	Section 40 (Appeals)	Judicial review can be exercised by the High Court and the Administrative Court	Only one court should have jurisdiction over competition cases. Competition cases should be heard by specialised judges.

Source: UNCTAD

The drafting of a new competition law for Zimbabwe taking into considerations the findings and recommendations in the peer review report was therefore strongly recommended. It was also recommended that the drafting of the new law should be preceded by the preparation of a comprehensive competition policy for Zimbabwe. The recommendations were accepted by both the CTC and the Government of Zimbabwe.

The comprehensive competition policy for Zimbabwe was accordingly prepared, and officially launched in December 2017 as the National Competition Policy.¹⁰⁴ The new competition law for Zimbabwe was also drafted as massive amendments to the Competition Act [Chapter 14:28] addressing all the identified shortfalls and incorporating other best practice provisions. The relevant Competition Amendment Bill, 2022, is presently before Parliament for debate and adoption.

The Memorandum to Parliament on the Competition Amendment Bill, 2022 states that “this Bill will amend the Competition Act [Chapter 14:28] ... the amendments are being made to align the Act with the National Competition Policy as well as international best practice”. The fact that the Zimbabwean competition legislation was not in line with international best practice had been recognised and documented. In his comparison of the competition legislations of the United Republic of Tanzania, Zambia and Zimbabwe, Alberto Heimler as an UNCTAD peer reviewer noted the following: “In all three jurisdictions, the law addresses anticompetitive agreements and abuses of a dominant position, as well as merger control. All economic activities are within the scope of the law and exceptions are limited. However, while the laws of the United Republic of Tanzania, and Zambia are nearly fully in line with international best practices, the Zimbabwe Competition Act requires substantive revision”.¹⁰⁵

The Competition Amendment Bill, 2022 of Zimbabwe is comprehensive and addresses all the identified shortcomings of the Competition Act [Chapter 14:28] in line with best practice competition principles and elements of the Model Law. The individual clauses of the Bill are explained in the Memorandum to Parliament as follows in the Box below:

¹⁰⁴ Ministry of Industry and Commerce (2017). *Competition Policy for Zimbabwe*. Government Printer. Harare. (can be downloaded from <https://www.competition.co.zw/download/competition-policy-for-zimbabwe>)

¹⁰⁵ UNCTAD (2012). *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe Comparative Assessment Overview* (United Nations publication. UNCTAD/DITC/CLP/2012/1 (OVERVIEW) COMPARATIVE ASSESSMENT. New York and Geneva).

Clause Explanations of Competition Amendment Bill, 2022

Clause 1

This clause sets out the Bill's short title.

Clause 2

This clause provides for the addition of new definitions to section 2 of the Act. Presently the Act does not define terms such as “dominance” and it is important to define this term as it will be used in determining whether an undertaking has abused its dominant position in the market or not. Another new term that has been introduced by this Bill is that of “market power” which was not previously dealt with in the current Act.

Clause 3

This clause provides that this Act shall prevail in situations pertaining to competition where there with any other piece of legislation. This comes as a result of conflicting application of the law by several regulating bodies that may have cases adversely affecting competition in their sector. This clause does not preclude other regulators from looking into competition matters in their various sectors; however, it ensures that the Commission will be the final authority to deal with all competition issues in the country.

Clause 4

This clause provides for the membership of the Commission, and more specifically provides that members should be appointed for their knowledge and expertise in competition related disciplines. Currently the Act is not specific to include these disciplines and it is proposed that such an addition will be beneficial to the fulfilment of the Commission's mandate if members of the Commission have knowledge or expertise in competition and other related disciplines.

Clause 5

This clause increases the term of office for members of the Commission to 4 years. The Act currently sets the limit of term of office to 3 years, and this amendment is in line with the spirit of the Public Entities Corporate Governance Act.

Clause 6

This clause provides for the power of the Commission to seek assistance from and cooperation with other national, regional, and international bodies. The current Act does not empower the Commission to have agreements or seek assistance from other bodies be it national, regional, or international. This cooperation is critical for effective implementation of competition law and policy and for example, where the Commission may need information concerning an undertaking operating in a certain sector regulated by another regulator or concerning an undertaking operating in another country whose operations have a bearing on competition in Zimbabwe.

Clause 7

This clause amends section 26 in several respects mainly to ensure that the appointment of an Auditor is done not by the Minister as is currently reflecting in section 26, but rather in line with the Public Finance Management Act as well as the Public Accountants and Auditors Act.

Clauses 8 and 9

This clause provides clear distinction between the processes for investigation of restrictive practices and the assessment of mergers. Presently, the provisions of investigation of restrictive practices and mergers are combined whereas in practice there are not handled in exactly the same way. This new Part also introduces civil penalties for undertakings that engage in restrictive practices, which are not

currently provided for in the Act. Having more punitive measures to deal with restrictive practices will serve as a beneficial deterrent and ultimately promote effective competition.

Clause 10

This clause provides for the Commission to undertake market inquiries in any sector, to determine if there exists any agreement or practice that is distorting, restricting or preventing competition. Presently the Act only provides for the power to conduct investigations where there is a suspected or actual infringement of the Act. However, there are instances where the Commission may need to conduct market surveillance in order to assess effectiveness of competition in a certain sector.

Clause 11

This clause provides for the Commission to exempt certain practices or agreements upon application. This also includes some practices by professional bodies and associations that may be deemed restrictive practices in nature. Presently, professional associations are not required to apply for such an exemption.

Clause 12

This clause provides for the appointment of assessors to the Administrative Court who have experience of knowledge in competition law, trade law and economics among other disciplines relevant to the application of the Act. This new addition will result in better administrative justice if the assessors are knowledgeable in the subject matter as it tends to be technical in nature.

Clauses 13 and 14

These clauses repeal sections 42 and 43 of the Act respectively. This repeal is due to the fact that unfair trade practices as provided for in section 42 are now dealt with more appropriately in the Consumer Protection Act, and the invalidity of agreements that in contravention with the Act as provided for in section 43 has been dealt with in more appropriate Parts of the Act.

Clause 15

This clause enables the Commission to request necessary information pertaining to an investigation from any undertaking.

Clause 16

This clause provides for the power of Commission to engage the services of experts in various fields during the investigation carried out in terms of the Act. Presently the Act only empowers investigators who are employees of the Commission to undertake investigations; however, the Commission encounters cases that may need the assistance of experts that may not be in the employ of the Commission.

Clause 17

This clause enables the Commission to seek assistance of police officers during investigations, as well as to apply for warrants to enter search and seize premises the Commission intends to investigate. The current Act gives the investigators the right to enter and search any premise where the owner consents to such entry, or if there is no consent, the investigators may enter if there is a reasonable suspicion that a contravention of the Act has occurred and without that imminent search, the evidence would be lost. This new addition for the Commission to apply for a warrant serves to strengthen the powers of search and entry and clarify the instances where the Commission need to use a warrant or not.

The assistance from police officers during investigations is mainly for instances where violence or resistance is anticipated, and the Commission may not have the qualified personnel to handle such instances.

Clause 18

This clause provides for the powers any investigator or police officer may have when entering and searching any premise. There is also a guideline of the expected conduct of investigating officers and police officers during such entry and search procedures. This proposed amendment shall strike a balance between the need to protect the fundamental rights of a person to privacy, dignity, liberty, security, and property enshrined in the Constitution on the one hand, and the powers of the Commission in enforcing the Act.

Clause 19

This clause allows for the registration of orders by the Commission with the High Court so that they may have the effect of a civil judgement of the High Court. Although this is not a new concept to the Act, it is better placed in the general part of the Act applying to all orders by the Commission.

Clause 20

This clause repeals the First Schedule to the Act, which provides for examples of unfair business practices. It is proposed that these be left under the jurisdiction of Consumer Protection Act as they deal more with consumer related issues between consumer and service provider. Where there is an overlap into competition issues, the Act has already provided for them in other Parts dealing with restrictive practices.

Clause 21

This clause inserts a new Schedule to the Act providing for matters relating to civil penalty orders.

Clause 22

This clause makes provision for such minor amendments as are necessary to the Act.

Source: Competition and Tariff Commission, Zimbabwe

Of particular importance to the effective and efficient handling of competition cases, the Competition Amendment Bill, 2022 specifically prohibits cartelisation and monopolisation. *Per se* prohibited horizontal agreements are identified as ‘bid rigging’, ‘customer allocation’. ‘Commercial boycotts’ and ‘price fixing’. The operation of a leniency programme is provided for to assist in the detection of cartel cases. The prohibition of vertical agreements is subject to rule-of-reason consideration. The determination of dominance is clearly provided for, so is the abuse of dominance and buyer power and the assessment of abuse of dominance cases. In the case of mergers and acquisitions, time frames for the assessment of mergers are provided for, together with the assessment of mergers.

The Model Law has, therefore, greatly assisted in the revision of Zimbabwe’s competition legislation and its transformation into an effective piece of legislation in line with international best practice.

Besides Zimbabwe, a number of other countries in the East and Southern African region have also benefitted from the Model Law through the undertaking of voluntary peer reviews of their respective competition laws and policies.¹⁰⁶ The writer provided consultancy services in the peer reviews of Seychelles,

¹⁰⁶ The East and Southern African countries that have had their competition laws and policies peer reviewed under the auspices of UNCTAD include Kenya, Seychelles, United Republic of Tanzania, Namibia and Zambia.

¹⁰⁷ Namibia¹⁰⁸ and Zambia,¹⁰⁹ under which these countries' competition legislations were assessed against the Model Law and improvement recommendations accordingly made and implemented.

Conclusion

The Model Law has over the years provided useful guidelines to competition authorities in developing countries, not only in the enactment and/or amendment of competition legislations but also in the enforcement of the enacted competition laws. For Zimbabwe, the Model Law was instrumental in the transformation of the country's Competition Act into a modern piece of legislation in line with international best practice.

¹⁰⁷ UNCTAD (2014). *Voluntary Peer Review of Competition Law and Policy: Seychelles* (United Nations publication. UNCTAD/DITC/CLP/2014/2. New York and Geneva).

¹⁰⁸ UNCTAD (2014). *Voluntary Peer Review of Competition Law and Policy: Namibia* (United Nations publication. UNCTAD/DITC/CLP/2014/3. New York and Geneva).

¹⁰⁹ UNCTAD (2012). *Voluntary Peer Review of Competition Law and Policy: Zambia Overview* (United Nations publication. UNCTAD/DITC/CLP/2012/1 (OVERVIEW) ZAMBIA. New York and Geneva).

LA LEY TIPO DE DEFENSA DE LA COMPETENCIA DE LA UNCTAD Y SU INCIDENCIA EN LA LEGISLACIÓN DE COMPETENCIA DEL PARAGUAY

Executive summary by UNCTAD secretariat

Competition policy is an instrument to contribute to a country's economic development, since, on the one hand, it is aimed at prohibiting and repressing acts and conducts that threaten free competition, as well as introducing control and surveillance measures on certain economic concentration operations that could affect the free play of competition; on the other hand, it is also aimed at promoting competitiveness in the markets through actions aimed at the public and private sector, as well as at raising awareness among citizens in general about the importance of free competition and the benefits it entails.

UNCTAD, through the UNCTAD Model Law on Competition (Model Law), provided a general framework with the necessary elements to be observed by member States to contribute to their fight against restrictive business practices. This instrument gathers the possible substantive elements that a competition law should contain, which makes the document an obligatory tool to consult if one wishes to incorporate competition policies into a country's positive legal system.

In drafting its law, Paraguay used the Model Law as a basis and, in turn, was assisted by UNCTAD consultants to incorporate several elements not only from the Model Law, but also from international best practices in competition matters, which has allowed the competition regulatory framework to be established with an appropriate standard for the country's economy. Indeed, in 2013 the text of the legislation currently in force was approved, Law No. 4.956/2.013 "Defence of Competition" (hereinafter Paraguayan competition law), which included most of the substantive elements contained in the Model Law.

In the scope of application, the text addresses, on the one hand, the most frequent anti-competitive practices: agreements restricting competition and abuse of dominant position. On the other hand, it also provides for the control and surveillance of economic concentrations. It also provides for the possibility for the competition agency to issue recommendations to regulators.

On the institutional side, the National Competition Commission (CONACOM) is established as an entity with organic and functional autonomy, with its own independent patrimony.

The main objectives of the law are: to defend and promote free competition, by establishing prohibited conduct and mechanisms and sanctions foreseen in the Paraguayan competition law to correct or punish them.

The Paraguayan legislation is partially inspired by the Model Law as regards definitions (acts, undertakings, abuse of dominant position, agreements and arrangements) and the material scope of application.

With regard to the identification of types of agreements and the terminology used by the Paraguayan competition law, we see that the Paraguayan competition law outlines the following: "Any agreement, decision or concerted or consciously parallel agreement, decision or practice is prohibited".

It is also established that in order to determine whether collusive practices should be sanctioned or not, possible efficiency gains derived from such conducts should be analysed, on which it could be said that the rule requires the analysis under the rule of reason. However, in the Voluntary Peer Review of Competition Law and Policy of Paraguay in 2023, it was observed that “this analysis should not be performed in the case of hard-core cartels, which should be analysed under the per se rule, that is, be sanctioned regardless of the effects they produce in the market”.

With respect to the abuse of dominant position, Paraguayan legislation does not expressly include the definition given by the Model Law. However, it has included the possibility of the abuse occurring individually or jointly, which was indicated in the Model Law.

Regarding practices that may constitute an abuse, the Voluntary Peer Review of Competition Law and Policy of Paraguay indicated that it was not clear whether the list was exhaustive or merely enunciativa, so it was recommended to clarify that the list was merely indicative in a future legislative reform. It was also recommended that the element of intent should be eliminated, which would entail an additional effort on the part of the competition authority in the sense that it adds another element that must be proven.

On another note, but still within the framework relating to abusive conduct, it is important to mention that the Paraguayan competition law devotes special articles to the abuse of dominant position through predatory pricing (article 10) and abusive consideration (article 11).

Regarding the chapter related to the notification of economic concentration operations, it is worth noting that, in general, we notice that its principles have been incorporated into the Paraguayan competition law. In that order, we see that the Paraguayan competition law establishes that “concentrations that do not pose a significant obstacle to effective competition by not creating or strengthening a dominant position in the national market or in a substantial part of it” are compatible with it.

The above-mentioned Voluntary Peer Review recommended leaving only the standard -significant impediment to effective competition-, leaving it to the authority’s discretion to determine when this is the case.

With respect to the relationship between the competition authority and the regulators, it should be noted that the elements of the model law were not transposed into Paraguayan legislation. Indeed, although it is suggested that there is a need to establish a procedure whereby all regulatory proposals must be subject to a transparent review by the competition authorities, in the case of Paraguay, the legislation only establishes the possibility for the competition authority to issue opinions on draft regulations with possible implications for competition.

With regard to the law enforcement agency and its organisation, the relevant chapter of the Model Law was taken into consideration by the Paraguayan legislator, in the creation of the agency, its name, its organisational composition, both with regard to the technical body and the decision-making body, the modes of appointment of these and the entity in charge of appointing them. The duration of the terms of office and the grounds for dismissal, among others, are also contemplated. With regard to the functions and powers of the body in charge of enforcing the law, the chapter of the model law was taken up in its entirety by the Paraguayan legislator, since Article 29 of the Paraguayan competition law sets out the powers and attributions of the enforcement authority.

It should also be noted that the Paraguayan legislation has taken up the elements of the model law related to the confidentiality of information, sanctions, appeals before the judicial authority and actions for damages.

In conclusion, the Model Law published by UNCTAD has been an invaluable vehicle that greatly facilitated the passage of the different projects that followed until the enactment, ten years ago, of the Paraguayan competition law.

Las políticas de defensa y promoción de la competencia constituyen instrumentos con los cuales contribuir al desarrollo económico de un país, ya que, por un lado, se orientan a prohibir y reprimir los actos y conductas que atentan contra la libre competencia, como también a introducir medidas de control y vigilancia sobre determinadas operaciones de concentración económica que podrían afectar al libre juego de la competencia y; por otro lado, también se encuentran encaminadas a promover la competitividad en los mercados mediante actuaciones dirigidas al sector público y privado, así como a la concientización de la ciudadanía en general sobre la importancia de la libre competencia y los beneficios que esta conlleva.

Dichas políticas buscan garantizar una mejor asignación de los recursos y a la vez, el acceso a una mayor diversidad de bienes y servicios, los cuales se traducen en beneficios para los consumidores. En concordancia con lo expuesto, se ha señalado que “la defensa de la competencia no sólo es clave para preservar la competencia como eje de la economía de mercado, sino también para defender la democracia como principio rector de la vida política y social”.¹¹⁰ En efecto, bajo estas consideraciones podemos decir que las políticas de competencia no solo resultan primordiales para contribuir con el desarrollo económico de un país, sino que también son necesarias para preservar otras libertades.

En virtud de la importancia que reviste la promoción y defensa de la competencia, además de la incidencia de esta, no solo a nivel estatal sino también a nivel interestatal debido a la multiplicidad de agentes que operan en los mercados internacionales, resulta necesario contar con instrumentos normativos sistematizados.

Así es que la Conferencia de las Naciones Unidas sobre Comercio y Desarrollo (por sus siglas en inglés, UNCTAD) se convierte en un colaborador preponderante para lograr alcanzar dichos objetivos, pues mediante la *Ley Tipo de Defensa de la Competencia* (en adelante, *Ley tipo*) ofreció un marco general con los elementos necesarios a ser observados por los Estados para contribuir en su lucha contra las prácticas comerciales restrictivas.¹¹¹

Este instrumento recoge los posibles elementos sustantivos que debe contener una ley de defensa de la competencia, lo que hace que el documento se constituya en una herramienta de consulta obligada si se desea incorporar políticas de defensa de la competencia dentro del ordenamiento jurídico positivo de un país.

Tal es el caso de Paraguay, que teniendo como base la *Ley tipo* y, a su vez, siendo asistida por consultores de la UNCTAD logró incorporar a su ordenamiento positivo nacional varios elementos no solo de la *Ley tipo*, sino también de las mejores prácticas internacionales en materia de competencia, lo que ha permitido que el marco normativo de competencia se instale con un estándar apropiado para la economía del país.

Es importante mencionar que el Paraguay es uno de los últimos países en la región en incorporar a su ordenamiento positivo una ley de defensa de la competencia. Así también, resulta necesario indicar que el proceso de aprobación de la ley estuvo marcado por el paso del tiempo y varios anteproyectos en su haber, ya que previamente fueron analizados tres (3) anteproyectos (presentados en los años 2006, 2010 y 2012¹¹²) para que finalmente en el año 2013 se apruebe el texto de la legislación hoy vigente, la Ley N° 4.956/2.013 “*Defensa de la Competencia*” (en adelante ley paraguaya de competencia).

¹¹⁰ Gómez Segade J (2012). Concepto e finalidades do dereito de defensa da competencia: Especial referencia á promoción da competencia en tempos de crise. En: Vaquez Pena, M, ed. El derecho de la libre competencia como instrumento de progreso económico a favor de las empresas y de los consumidores. Tirant Lo Blanch, Valencia: 15 (la traducción es propia). Disponible en: <https://palestra.tirantonline.com/cloudLibrary/ebook/info/9788490049600>.

¹¹¹ UNCTAD (2000). Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el control de las Prácticas Comerciales Restrictivas. UNCTAD/RBP/CONF/10/Rev.2 Ginebra.

¹¹² Sistema de información Legislativa. Véase <http://silpy.congreso.gov.py/>.

Cabe resaltar que para los dos últimos anteproyectos se contó con el acompañamiento de una delegación de expertos en la materia de la UNCTAD, el Tribunal Vasco de Defensa de la Competencia,¹¹³ entre otras agencias, cuya asistencia técnica fue esencial para el proceso ya que se trataban de proyectos que fueron cuidadosamente examinados por el sector público y más especialmente por el sector privado.

No está demás mencionar que, pese a las dudas que se suscitaban en ambos sectores sobre los anteproyectos de ley presentados, afortunadamente el texto de la ley paraguaya de competencia recogió la mayoría de los elementos sustantivos contenidos en la *Ley tipo*.

En esa línea, si hacemos un repaso general de algunos de los elementos que fueron incorporados a la ley paraguaya de competencia podemos ver que esta se ocupa de establecer el objeto de la ley, los principios rectores y su ámbito de aplicación; además de incorporar artículos que se encargan de definir qué es la libre competencia y mercado relevante.

En el aspecto de defensa de la competencia aborda, por una parte, las prácticas anticompetitivas más frecuentes: acuerdos restrictivos de la competencia, así como las conductas de abuso de posición de dominio. Por otra parte, también prevé el control y vigilancia de las concentraciones económicas.

En lo concerniente a las relaciones entre la autoridad de defensa de la competencia y los organismos reguladores, se debe precisar que la legislación paraguaya contempla la posibilidad de que la agencia de competencia emita recomendaciones a las entidades reguladoras.

En lo relativo al aspecto institucional, por imperio de la ley paraguaya de competencia se crea la Comisión Nacional de la Competencia (CONACOM) la cual se erige como una entidad con autonomía orgánica y funcional, con patrimonio propio e independiente. En cuanto a su composición, la ley paraguaya de competencia adoptó el modelo de agencia integrada, cuenta con dos órganos: el área técnica ejecutiva, a cargo de un Director de Investigación y, el órgano decisor que se instituye como la Máxima Autoridad Institucional, el Directorio.

Habiendo realizado el repaso general de algunos elementos que fueron incorporados, a continuación, ahondaremos en ellos, siguiendo la estructura de la *Ley Tipo*.

En primer término, hacemos referencia a los Objetivos que persigue la legislación paraguaya, la cual en el artículo 1° establece: “La presente Ley tiene por objeto defender y promover la libre competencia en los mercados. Los actos contra la libre competencia quedan prohibidos y serán corregidos o castigados, mediante los mecanismos y sanciones previstas en esta Ley”. Como se puede ver, los dos objetivos principales de la ley son: defender y promover la libre competencia,¹¹⁴ mediante el establecimiento de conductas prohibidas y de mecanismos y sanciones previstas en la Ley para corregirlas o castigarlas.

Al respecto, podemos decir que, si bien la redacción empleada en el texto de la norma podría considerarse imprecisa dada la utilización del vocablo “actos”, este precepto debe ser interpretado a la luz de lo dispuesto en el artículo 2° (Principios) en el cual se prohíbe de manera tajante el “abuso de posición dominante, así como todas las prácticas, conductas o recomendaciones individuales o concertadas...”. En esa tesitura, podemos decir que la legislación paraguaya, siguiendo a la *Ley Tipo*, se orienta a prohibir las prácticas comerciales contrarias a la competencia.

Seguidamente, vemos que la *Ley tipo* dedica un capítulo a las definiciones y el ámbito de aplicación de la ley (capítulo II), respecto de las cuales, advertimos que la ley paraguaya de competencia no sigue íntegramente. No obstante, la legislación paraguaya prevé en su artículo 6° una definición de mercado relevante próxima a los criterios de la *Ley tipo*. Por otra parte, la ley de competencia incorpora un artículo

¹¹³ Gobierno Vasco. Disponible en: https://www.euskadi.eus/gobiernovasco/contenidos/informacion/audiencias_y_visitas/es_audivisi/adjuntos/NOTICIA%20PARAGUAY.pdf.

¹¹⁴ Objetivos orientados a países en desarrollo, conforme con la sección a), numeral 2) del Conjunto de Principios y Normas Equitativos Convenidos Multilateralmente para el control de las Prácticas Comerciales Restrictivas. UNCTAD (2000). UNCTAD/RBP/CONF/10/Rev.2 Ginebra.

que se encarga de definir lo que debe entenderse por la libre competencia,¹¹⁵ definición no contemplada en la *Ley tipo*. Asimismo, si bien la ley de competencia señala algunas características constitutivas relativas a los términos “posición dominante” y “fusiones y adquisiciones”, no las define. Finalmente, cabe mencionar que en la ley de competencia se echa en falta una definición de “empresa”, sí contemplada en la *Ley tipo*.

Pasando al ámbito de aplicación de la ley, tenemos que la ley paraguaya de competencia en su artículo 3° indica que esta “es aplicable a todos los actos, prácticas o acuerdos llevados a cabo por personas físicas o jurídicas...”

De lo transcrito arriba, se evidencia que la norma paraguaya no emplea el término “empresa” para referirse a los sujetos alcanzados por la norma limitándose a identificarlos como “persona física o jurídica o cualesquiera entidades que desarrollen actividades económicas”; con independencia de que sean de “derecho público o privado”. Aclara a su vez, que quedan incluidas entre las personas jurídicas señaladas las entidades del gobierno central y entes descentralizados que ejercen monopolio estatal.

Así también, se encuentran dentro del ámbito de aplicación de la ley paraguaya de competencia quienes desarrollen actividades económicas fuera del país y las personas físicas que ejerzan la representación de las personas jurídicas cuando hubieran participado de la realización de actos prohibidos por la ley.¹¹⁶

De lo señalado se advierte que el apartado relativo al ámbito de aplicación de la *Ley tipo* fue acogido parcialmente por la legislación paraguaya; lo que, sin embargo, no ha generado hasta el momento mayores inconvenientes.

Siguiendo con el orden de la *Ley tipo*, nos ocupamos a continuación de los Convenios o acuerdos. Sobre estos debemos partir diciendo que en general, la ley paraguaya de competencia se inspira y recoge gran parte del enfoque de la *Ley tipo*. No obstante, existen algunas particularidades en la legislación nacional y su reglamentación que merecen ser consideradas. Para empezar, el texto del artículo 8 de la ley de competencia reza lo siguiente:

Se prohíbe todo acuerdo, decisión o práctica concertada o conscientemente paralela, independientemente de que sean escritos o verbales, formales o informales que tenga por objeto, produzca o pueda producir el efecto de impedir, restringir o falsear la competencia en todo o parte del mercado nacional

De la revisión del precepto enunciado, se desprende que la ley paraguaya de competencia adoptó una prohibición general sobre los acuerdos, en el sentido de que abarca tanto los acuerdos horizontales como verticales, pero desafortunadamente, la reglamentación –el *Decreto N° 1.490/2.014*–, lo limitó a una sola categoría de acuerdos: la de tipo horizontal, ya que la definición empleada en el reglamento circunscribió el análisis y sanción solamente a este tipo de acuerdos.¹¹⁷

Afortunadamente, unos años más tarde a instancias de la CONACOM, dicha disposición fue derogada,¹¹⁸ quedando nuevamente la prohibición general, es decir, abierta a la posibilidad de analizar y sancionar los acuerdos restrictivos de la competencia de tipo horizontal y vertical, como se estableció originalmente.

¹¹⁵ Artículo 4° de la Ley N° 4.956/2.013.

¹¹⁶ Artículo 3° de la Ley N° 4.956/2.013.

¹¹⁷ El artículo 4° del Decreto Reglamentario N° 1490/2014 determinó lo siguiente: *Se entiende por acuerdos restrictivos de la competencia a los acuerdos, decisiones o prácticas concertadas o conscientemente paralelas desarrollados entre personas físicas o jurídicas que compitan entre sí, enumeradas en el Artículo 8° de la Ley, así como cualquier otro que tenga el efecto de impedir, restringir o falsear la competencia en todo o en parte del mercado nacional.*

¹¹⁸ Derogado por el artículo 1° del Decreto N° 3488/2020.

En lo referente a la identificación de los tipos de acuerdos y la terminología empleada por la ley paraguaya de competencia, vemos que esta esboza lo siguiente: “Se prohíbe todo acuerdo, decisión o práctica concertada o conscientemente paralela”.¹¹⁹

Conforme se verifica, el texto de la norma no distingue las prácticas concertadas de las prácticas conscientemente paralelas, lo cual fue advertido y observado¹²⁰ en el *Examen voluntario entre homólogos del derecho y la política de competencia: Paraguay* que señala:

la Ley no diferencia la práctica concertada de la práctica conscientemente paralela, lo que debería enmendarse. Las prácticas concertadas indudablemente constituyen una conducta contraria a la libre competencia porque, de algún modo, se elimina la incertidumbre propia de un mercado competitivo... Las conductas conscientemente paralelas o el paralelismo, en cambio, son aquellas que adoptan racionalmente los agentes económicos en un mercado oligopólico, en el que sus decisiones son interdependientes; es decir, se adoptan tomando en cuenta la conducta esperada o la reacción probable de sus competidores. Por esta razón, a nivel comparado no se sancionan, aunque produzca resultados similares a los de una colusión

En virtud de la observación realizada, aunaremos esfuerzos para que la nueva legislación adopte los términos y el enfoque correcto, lo que nos permitirá cumplir de manera más efectiva con la política de defensa de la competencia en el país.

Ahora, en lo que respecta a las formas en las que pueden materializarse los acuerdos prohibidos, la ley de competencia contempla que estos pueden ser “escritos o verbales, formales o informales”, con lo cual se evidencia una clara influencia de la *Ley tipo*.

Adentrándonos a la lista de los actos que podrían configurar un acuerdo restrictivo de la competencia, la legislación paraguaya incorporó un listado no taxativo de las posibles conductas, pues la legislación se encuentra redactada conforme con los siguientes términos: “*las que consistan en las siguientes conductas, entre otras*”, para luego enunciar algunas de ellas. En lo que respecta a este punto, cabe señalar que el carácter enunciativo permite mayor flexibilidad al momento de analizar estas conductas.

Finalmente, revisando ya la última parte del artículo en cuestión tenemos que este cuenta con una característica especial digna de ser mencionada, pues se establece que para determinar si las prácticas a las que se refiere el artículo deben ser sancionadas o no, deberán analizarse eventuales ganancias de eficiencia derivadas de tales conductas, sobre la cual podría decirse que la norma exige el análisis bajo la mirada de la regla la razón; respecto de la cual sin embargo, en el *Examen voluntario entre homólogos del derecho y la política de competencia: Paraguay* se observó que “este análisis no se debe realizar en el caso de los carteles duros, que deberían analizarse bajo la regla *per se*, es decir, ser sancionados independientemente de los efectos que produzcan en el mercado”.¹²¹

Siguiendo el orden señalado por la *Ley tipo*, a continuación, nos ocupamos de los Actos que constituyen abuso de posición dominante. Al respecto, se observa que el artículo 9° de la ley paraguaya de competencia ofrece orientaciones sobre la posición de dominio, así como también los elementos o factores que deben ser tenidos en cuenta para determinar si un agente ostenta o no dicha posición, en ese sentido la norma indica:

una persona física o jurídica goza de posición dominante, cuando para un determinado producto o servicio no está expuesta a una competencia efectiva y sustancial.

Se presume que no existe exposición a una competencia efectiva y sustancial cuando, conforme a criterios de razonabilidad fundados en los parámetros citados en el inciso b) de este artículo

¹¹⁹ Artículo 8°, Ley N° 4956/2013.

¹²⁰ Numeral 47, UNCTAD/DITC/CLP/2023/4.

¹²¹ Numeral 48, UNCTAD/DITC/CLP/2023/4.

aplicables al mercado relevante investigado, se determine que los principios de la libre competencia establecidos en la presente Ley podrían verse afectados.

Respecto de lo señalado, tenemos que la legislación paraguaya se aparta de la definición dada por la *Ley tipo*. Por otro lado, la ley paraguaya de competencia sí ha recogido de la *Ley tipo* la posibilidad de que el abuso se diera de forma individual o conjunta.

Con relación a la lista de posibles conductas que podrían ser consideradas abusivas, se enuncian las siguientes:

1. La imposición, de forma directa o indirecta, de precios u otras condiciones comerciales, o de servicios no equitativos;
2. La limitación de la producción, la distribución o el desarrollo técnico en perjuicio injustificado de los competidores o de los consumidores;
3. La negativa injustificada a satisfacer las demandas de compra de productos o de prestación de servicios;
4. La aplicación injustificada, en las relaciones comerciales o de servicio, de condiciones desiguales para prestaciones equivalentes, que coloquen a unos competidores en situación desventajosa frente a otros;
5. La subordinación de la celebración de contratos a la aceptación de prestaciones suplementarias que, por su naturaleza o con arreglo a los usos de comercio, no guarden relación con el objeto de tales contratos; y,
6. Obtener o intentar obtener, bajo la amenaza de ruptura de las relaciones comerciales, precios, condiciones de pago, modalidades de venta, pago de cargos adicionales y otras condiciones de cooperación comercial no recogidas en las condiciones generales de venta que se hayan pactado.

En lo atinente al listado, se ha señalado en el *Examen voluntario entre homólogos del derecho y la política de competencia: Paraguay*, que no queda claro si el listado es de enumeración taxativa o meramente enunciativa, además, se advirtió que, en virtud de las diversas formas en las que se puede materializar un abuso de posición de dominio unilateral, se recomienda aclarar esta disposición.¹²² Asimismo, se ha señalado que en el listado se “extrañan figuras tales como las ventas atadas, imposición de barreras artificiales a la entrada o el ejercicio abusivo de acciones judiciales y administrativas”; no obstante, se ha referido que esto podría solucionarse si se aclara que la lista es meramente enunciativa.¹²³ Al respecto, todo lo dicho por los expertos evaluadores de la UNCTAD debería tomarse en cuenta a la hora de analizar una reforma de la Ley.

¹²² Numeral 53, UNCTAD/DITC/CLP/2023/4.

¹²³ Numeral 54, UNCTAD/DITC/CLP/2023/4.

Finalmente, en lo que respecta a la última parte del precepto normativo sobre abuso de posición de dominio (artículo 9°) se encuentra el siguiente texto:

Los que detenten una posición dominante de mercado no serán pasibles, por esa sola circunstancia, de sanciones establecidas en la presente Ley, a no ser que se compruebe por medio de procedimientos administrativos que las mismas han realizado alguna de las actividades prohibidas por la presente Ley, con el fin de obtener ventajas indebidas y causar perjuicio a otros, lo que no hubiera sido posible de no existir tal posición de dominio

Hacemos especial énfasis en el apartado que introduce el elemento de intencionalidad, que conllevaría un esfuerzo adicional por parte de la autoridad de competencia en el sentido de que se suma un elemento más que debe ser probado, esto también fue mencionado en el *Examen voluntario entre homólogos del derecho y la política de competencia: Paraguay* que ha dicho que la inclusión de dicho elemento “podría implicar una carga probatoria adicional para el órgano persecutor al tener que acreditar no solamente la dominancia y la conducta, sino también si esta última se realizó ‘con el fin de obtener ventajas indebidas y causar perjuicio a otro’”.¹²⁴ Desde luego, este elemento particular introducido por la ley paraguaya de competencia también debería ser objeto de revisión y modificación para una eventual reforma legislativa.

En otro orden, pero siguiendo dentro del marco relativo a las conductas abusivas, es importante mencionar que la ley paraguaya de competencia dedica artículos especiales para el abuso de posición dominante mediante la práctica de precios predatorios (artículo 10) y contrapartidas abusivas (artículo 11).

En lo que respecta al primero de ellos, cabe indicar que la ley paraguaya de competencia se ocupa de dar algunas orientaciones sobre lo que se entiende por precio efectivo de adquisición, descuentos y margen de utilidad. A su vez, establece que no constituirá abuso de posición de dominio mediante la práctica de precios predatorios cuando se configuren determinadas circunstancias, tales como liquidación efectiva de stock, que los productos se encuentren amenazados por deterioro rápido, entre otras.

En cuanto al abuso por contrapartidas abusivas, es importante precisar que esta última figura ya fue mencionada en el listado del artículo 9; no obstante, en el artículo 11 se hace especial referencia a que estos tengan por objeto o produzcan efectos de explotación o de exclusión.

Respecto de la posibilidad de notificar eventuales conductas restrictivas que se encuentran dentro de las exenciones contempladas en la *Ley tipo*, podemos señalar que tal posibilidad no ha sido incorporada a la legislación paraguaya.

Por otra parte, en lo que respecta al capítulo relacionado con la Notificación de las operaciones de concentración económica, cabe destacar que, en general, notamos que sus principios han sido incorporados en la ley paraguaya de competencia. En ese orden, vemos que la ley de competencia establece que son compatibles con ella “las operaciones de concentración que no supongan un obstáculo significativo para una competencia efectiva, al no crear ni reforzar posición dominante alguna en el mercado nacional o en una parte substancial del mismo”.¹²⁵ Por tanto, esta prevé que: “la autoridad de aplicación podrá rechazar las operaciones de concentración que supongan un obstáculo significativo para una competencia efectiva, al crear o reforzar una posición dominante en el mercado nacional o en una parte sustancial del mismo...”.

¹²⁴ Numeral 52, UNCTAD/DITC/CLP/2023/4.

¹²⁵ Artículo 13, Ley N° 4956/2013.

En este sesgo, resulta oportuno remarcar lo señalado en el *Examen voluntario entre homólogos del derecho y la política de competencia: Paraguay*, respecto de que:

llama la atención que el estándar de prohibición persigue evitar que se cree o refuerce una posición dominante en el mercado, lo que pareciera revelar que se privilegia en el análisis de riesgos a los efectos unilaterales sobre los coordinados. En este sentido, es más sensato dejar solo el estándar -obstáculo significativo para una competencia efectiva-, dejando a criterio de la autoridad determinar cuándo se da ese supuesto. La mera creación o reforzamiento de una posición dominante puede, en muchos casos, no ser suficiente para rechazar una operación de concentración.¹²⁶

En lo que respecta a los demás elementos relativos al análisis de operaciones de concentración, vemos que estos han sido incorporados, ya que la ley paraguaya de competencia prevé determinados plazos para que la autoridad de aplicación analice la operación de concentración y resuelva el rechazo de la operación, la autorización simple o, en su caso, la autorización sujeta a determinados condicionamientos.

Avanzando con el análisis y en atención a la estructura propuesta por la *Ley tipo*, nos ocupamos ahora del capítulo que aborda las Relaciones entre la autoridad de competencia y los organismos reguladores; respecto del cual, cabe indicar que los elementos del mismo no fueron transpuestos a la legislación paraguaya de la manera propuesta en la *Ley tipo*.

De manera a comprender lo señalado, debemos recordar que la *Ley tipo* establece que:

Toda regulación económica y administrativa por parte del poder ejecutivo central o local o de entidades que gozan de delegación gubernamental, especialmente cuando esa regulación se refiera a sectores en que se prestan servicios de infraestructura, debería someterse a un proceso de examen transparente por los organismos de defensa de la competencia antes de aprobarse. Esto tendría sobre todo que ser así cuando la regulación limite la independencia y la libertad de actuación de los agentes económicos...

La literalidad del texto transcrito parece sugerir la necesidad de instalar un procedimiento que contemple, de modo imperativo, que toda propuesta de regulación deba someterse a un examen transparente por parte de las autoridades de competencia, en particular cuando dicha regulación se refiera a sectores que prestan servicios de infraestructura.

A este respecto, el espíritu de la *Ley tipo* se orienta hacia el establecimiento de un procedimiento de análisis previo y transparente por parte de la autoridad de competencia respecto de cualquier regulación que pudiera limitar “la independencia y la libertad de actuación de los agentes económicos, crear condiciones, bien discriminatorias, bien por el contrario favorables para la actividad de determinadas empresas -públicas o privadas- y dé o pueda dar lugar a una restricción de la competencia o vulnere los intereses de compañías o ciudadanos”.

Finalmente, si bien la *Ley tipo* no indica que el resultado de dicha evaluación deba ser vinculante, parece sugerir que, en cualquier caso, debe existir y ser previa a la aprobación de la regulación. Incluso pareciera que dicha evaluación podría instituirse en una especie de consulta previa necesaria que, en todos los casos, deberían hacer los reguladores.

Esto tiene sentido debido a que las autoridades de competencia son las más aptas para identificar posibles barreras o factores que podrían afectar al mercado. Recordemos aquí que el establecimiento de barreras o factores que afecten los mercados derivados de la emisión instrumentos regulatorios no siempre será negativo; pues dichas barreras o factores podrían encontrarse debidamente justificados y responder a intereses generales atendibles. Por esto mismo es que, como lo señala la *Ley tipo*, “los obstáculos a la competencia que figuren en la regulación económica y administrativa deberían evaluarse

¹²⁶ Numeral 62, UNCTAD/DITC/CLP/2023/4.

por las autoridades de defensa de la competencia desde una perspectiva económica, incluidas las razones de interés general”.

En el caso de Paraguay, si bien la legislación establece la posibilidad de que la autoridad de competencia emita opiniones sobre los anteproyectos normativos con posibles implicancias en la competencia, a esta no se otorga el carácter previo y necesario que propone la *Ley tipo*, lo cual, a nuestro criterio, es una materia pendiente para incluir en una eventual propuesta de modificación de la legislación vigente.

Con relación a la Protección al consumidor que recoge la *Ley tipo*, cabe destacar que, en Paraguay esta materia cuenta con una legislación independiente de la norma de competencia.

Pasando al siguiente capítulo de la *Ley tipo*, tenemos el dedicado al Organismo encargado de la aplicación de la ley y su organización. Este capítulo, que se limita a exponer algunas directrices relativas a los aspectos que deberían tenerse presente a la hora de promulgar una ley de competencia, en la generalidad fue tomado en consideración por el legislador paraguayo, pues en la ley de competencia se contempla la creación del organismo encargado de la aplicación de la ley, su denominación, su composición organizativa, tanto respecto del órgano técnico como del órgano decisor, los modos de designación de estos y la entidad encargada de nombrarlos; también se contempla la duración de los mandatos y los motivos de destitución, entre otros.

Sobre el punto, como hemos señalado, si bien se adopta la generalidad de las disposiciones contenidas en la *Ley tipo*, la legislación paraguaya cuenta con una organismo particular que se encuentra involucrado en el proceso de designación del Director de Investigación y de los Miembros del Directorio (Máxima Autoridad Institucional): la Junta de Calificaciones, un órgano integrado por cuatro (4) representantes del sector privado, los cuales serán designados por la Feprinco (Federación de la Producción, Industria y Comercio) y por cuatro (4) representantes del sector público.

Esta Junta de Calificaciones es la encargada de elaborar las ternas de los candidatos a ocupar los cargos de Miembros del Directorio y de la Dirección de Investigación para luego elevarla a consideración del Poder Ejecutivo, a quien finalmente corresponde la designación. En nuestro entendimiento, esta figura es novedosa si se compara con las legislaciones de otras jurisdicciones.

A continuación, pasamos a abordar el capítulo de las Funciones y facultades del organismo encargado de la aplicación de la ley. Este capítulo en general fue recogido en su totalidad por el legislador paraguayo, pues, en el artículo 29 de la ley de competencia, se enuncian las facultades y atribuciones de la autoridad de aplicación.

También, cabe precisar que la legislación paraguaya igualmente ha recogido el elemento relacionado con la confidencialidad de la información que es puesta a disposición de la autoridad de aplicación y, en tal sentido se ha ocupado de ofrecer las garantías correspondientes para que las informaciones comerciales sensibles se mantengan confidenciales.

Por otra parte, ya pasando al capítulo relativo a las sanciones, se debe precisar que las sanciones son de orden administrativo: apercibimientos y multas. En lo que respecta a las medidas de reparación, la ley paraguaya de competencia recoge las figuras de medidas correctivas y ordenes de cesación. Así también, se encuentran previstas las medidas preventivas y la terminación convencional.

En lo relacionado a los recursos que caben contra las resoluciones dictadas por el órgano de aplicación (capítulo XII), la ley paraguaya de competencia ha adoptado el recurso ante la propia administración o, en su caso, ante la autoridad judicial.

Por último, en cuanto a las acciones de resarcimiento de daños y perjuicios, estas se encuentran recogidas en la legislación paraguaya, en el artículo 64 de la ley de competencia, siguiendo los criterios señalados en la *Ley tipo*.

Conclusiones

No podemos negar que la *Ley tipo de Defensa de la Competencia*, publicada por la UNCTAD sobre temas relacionados con el derecho y la política de la competencia ha sido un vehículo de inestimable valor que facilitó, en gran medida, el tránsito de los diferentes proyectos que se sucedieron hasta la promulgación, hace diez años, de la *Ley N° 4.956/2.013 de Defensa de la Competencia* de Paraguay. Dicho instrumento normativo nutrió a los proyectistas, legisladores, gremios, asociaciones y ciudadanía en general, partidarios y detractores, de los insumos necesarios para desarrollar un debate amplio, crítico y participativo, que concluyó con una ley, que si bien puede ser enriquecida, hoy se constituye en un instrumento que recoge los principios y criterios más modernos en la materia y ayudó a que el Paraguay se aleje del desfase normativo en que se encontraba con relación a otras jurisdicciones que contaban con normas de defensa de la competencia.

La *Ley tipo*, sin lugar a duda, se erige como un instrumento elemental y de referencia obligada a la hora de encarar un proceso legislativo en materia de derecho y política de competencia. Como ha señalado en su momento la representación Serbia:

La Ley tipo puede ser considerada un modelo general y adecuado, ya que ha logrado conciliar todas las sugerencias y recomendaciones formuladas por expertos de países desarrollados y países en transición, así como de países (independientemente de la etapa de su desarrollo) en que la idea de proteger la competencia y la sensibilización al respecto han comenzado a desarrollarse.¹²⁷

A diez años de la promulgación de la legislación paraguaya en materia de competencia, podemos afirmar que la contribución de la *Ley tipo* ha sido fundamental, no solo durante el proceso de análisis de los diferentes proyectos de ley hasta la promulgación de la actual ley paraguaya de competencia, sino también para su correcta aplicación sobre la base de los principios que se derivan de aquella.

Con un lenguaje claro y simple, pero a la vez profundo, la *Ley tipo*, mediante un método más bien directivo, con la flexibilidad que esto supone, ha facilitado las herramientas necesarias, no solo para la redacción de los artículos de la ley paraguaya de competencia, sino también para enriquecer el debate necesario previo a su promulgación.

Junto al invaluable aporte de la *Ley tipo*, no podemos dejar de mencionar, finalmente, la inestimable cooperación recibida desde del equipo del *Servicio de Política de Competencia y de Protección del Consumidor de UNCTAD*, sin cuyo apoyo, con toda seguridad, el tránsito hasta promulgación de una ley de defensa de la competencia para Paraguay hubiera sido mucho más duro del que fue.

¹²⁷ UNCTAD (2007). *Ley Tipo de Defensa de la Competencia*. TD/RBP/CONF.5/7/Rev.3. Nueva York y Ginebra.

THE UNCTAD MODEL LAW ON COMPETITION: VIEW FROM WAEMU COMPETITION AUTHORITY

Introduction

The West African Economic and Monetary Union (WAEMU) was created on January 10, 1994, in Dakar, Senegal. Its essential objective is the construction, in West Africa, of a harmonized and integrated economic space, within which total freedom of movement of persons, capital, goods, services, and factors of production, as well as the effective enjoyment of the right of exercise and establishment for the liberal professions, of residence for citizens throughout the Community territory are enjoyed.

WAEMU currently groups eight member States: Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo. It covers an area of 3,506,126 km² with more than 120 million inhabitants and is made up of countries with different levels of development, seven least developed countries (LDCs),¹²⁸ and a developing country, Côte d'Ivoire. These countries have in common cultural traditions and a single currency, the CFA Franc managed by the Central Bank of West African States (BCEAO). They are all members of the Economic Community of West African States (ECOWAS) which brings together fifteen States.

To realize this integrated space between coastal and Sahelian countries, the WAEMU Treaty specifies, in its article 4, that the Union pursues the achievement of several objectives. Among these, the strengthening of **"the competitiveness of the economic and financial activities of the member States within the framework of an open and competitive market and a rationalized and harmonized legal environment"**¹²⁹ figure prominently. This objective reveals the liberal option adopted by the founding fathers of the Union who, in doing so, unequivocally affirm their ambition to make the Union a market that is not only open, but also competitive.

To this end, Article 76 of the WAEMU Treaty expressly provides for **the institution of common rules of competition applicable to public and private enterprises** as well as to public aid. These rules are enacted by Articles 88, 89, and 90 of the WAEMU Treaty. These provide the basis for future legislation with the enunciation of prohibited anti-competitive practices, the fixing of normative competence, and the enforcement structures in competition matters.

The above-mentioned WAEMU competition policy objectives already indicate that they are based on the UNCTAD Model Law on Competition (Model Law). Indeed, the law's purpose is to control or eliminate restrictive agreements or arrangements among enterprises, mergers, and acquisitions, or abuse of dominant positions of market power, which limits access to markets or otherwise unduly restrains competition, adversely affecting domestic or international trade or economic development.¹³⁰ Thus, the legal architecture of the WAEMU Treaty, which enshrines the establishment of a common market and above all the implementation of a competition policy, draws heavily on the Model Law and the Treaty of the European Union.

The major characteristic of these rules derived from the WAEMU Treaty is the affirmation of a centralized institutional approach with almost exclusive competence of the community bodies, namely the Commission and the WAEMU Court of Justice to implement a community competition policy. The institutional framework thus defined for implementation follows a centralized approach around the WAEMU Commission, combined with close cooperation between the Commission and the national competition

¹²⁸ Benin, Burkina Faso, Guinea Bissau, Mali, Niger, Senegal, and Togo.

¹²⁹ Art 4 - a of the WAEMU Treaty (emphasis added).

¹³⁰ UNCTAD Model Law on Competition, chapter 1- Objectives or purpose of the law.

structures (NCS). Therefore, this option of primary law aimed at making the common market an open and competitive space is the fabric of the secondary law materialized by three regulations and two directives adopted by the Council of Ministers of WAEMU on May 23, 2002.

Then, in the context of the reflections on the Model Law, it is necessary to assess the influence of this Model Law on WAEMU legislation in terms of the elaboration of substantive and procedural rules but also to assess the level of implementation to be able to judge the impact of this Model Law on the process of WAEMU integration.

Thus, twenty years after the adoption of the implementing texts of the WAEMU Treaty on competition (2002), it is appropriate to take stock of the implementation of these community rules in the West African sub-region. What has been done based on the Model Law? Have the initial objectives been achieved? What has been the contribution of competition to the construction of the common market of the Union, to the competitiveness of companies, to sectoral liberalization, and the strengthening of regional integration? Can we consider that this policy has played its role as a lever of competitiveness for companies in the Union? In short, is competition policy in WAEMU simply a myth or a reality?

This contribution will address the anti-competitive agreements and abuses of dominance in the WAEMU common market, and the Model Law. Thus, we will make an overview of the material and procedural law of WAEMU competition law. This will allow us to better understand the link between the guiding principles of this legislation and the Model Law. Then, after more than twenty years, we will evaluate the implementation of these rules to assess their contribution to the WAEMU integration process and propose some recommendations to ensure better implementation of the community competition policy of the WAEMU.

Material and procedural Rules are almost compliant with international standards and the Model Law

The material and procedural rules of WAEMU competition law are strongly inspired by the European Union competition rules, both from the point of view of the legal and institutional framework. They are therefore guided by the Model Law framework. However, they differ on specific aspects to consider the socioeconomic doubts of WAEMU member States. The presentation of the legal (A) and institutional framework (B) and procedural rules (C) are, therefore, based on a comparative approach, emphasizing the specificities of WAEMU law.

A. Material rules: elimination or control of restrictive business practices

As with international practice, the WAEMU competition rules were not adopted *ex-nihilo*. They result from concepts enshrined in international law and practice. These rules are described in the form of a prohibition, an obligation not to do, and relate to the three classic types of practice, namely anti-competitive agreements, abuse of a dominant position, and public aid likely to affect the proper functioning of the common market. In short, WAEMU competition law is distinguished by its almost quadrupedal character resulting from four major prohibitions, which are:

- anti-competitive agreements;
- abuse of dominant position including merger regulation;
- state aid which affects the proper functioning of the WAEMU Common Market;
- and anti-competitive practices attributable to member States, for non-financial measures by member States liable to compromise the proper functioning of the common market.

1. Anti-competitive agreements: fight against collusion between companies likely to distort competition

Anti-competitive cartel practices¹³¹ are governed by the provisions of Article 88 (a) of the Treaty. Under the terms of this provision, the following are automatically prohibited: “agreements, associations and concerted practices between undertakings, the object or effect of which is to restrict or distort competition within the Union”. The principle of automatic prohibition of anti-competitive agreements, enshrined in the Treaty, is taken up and better explained in Regulation 2/2002/CM/UEMOA of 23 May 2002 relating to anti-competitive practices within WAEMU. Indeed, this implementing text of the Treaty provides in article 3 that “are incompatible with the common market, and prohibited, all agreements between companies, decisions of associations of companies and concerted practices between companies.

It is not superfluous to mention that, from the point of view of WAEMU competition law and the Model Law, the prohibition of cartels is not absolute. The legislation recognizes or even encourages certain agreements for their beneficial effects on the market.¹³² Thus, Article 89 of the Treaty gives the possibility for the Council of Ministers to provide for limited exceptions to the prohibitions of Article 88. In addition, Regulation No. 02/2002/UEMOA establishes a system of exemption for some agreements, decisions of business associations, and concerted practices. This orientation is in line with the Model Law (Chapter III-II, the authorization or exemption). These practices are exhaustively listed by WAEMU Regulation and must ‘...contribute to improving the production or distribution of products or to promoting technical or economic progress, while reserving for users an equitable share of the resulting profit, and without (a) imposing on the undertakings concerned restrictions that are not essential to achieve these objectives; (b) give undertakings the possibility, for a substantial part of the products in question, of eliminating competition.’¹³³

2. Abuse of a dominant position and merger affecting concentrated markets: fight against the practices of a dominant operator who abuses this position to distort competition

Like anti-competitive agreements, Article 88 (b) of the Treaty lays down the principle of prohibition of practices comparable to the abuse of a dominant position. Article 7 of Regulation 2/2002/UEMOA explains this prohibition in these terms: ‘Is incompatible with the common market and prohibited, the fact for one or more companies or groups of companies to abuse a dominant position on the common market or a significant part of it.’ This definition identifies the acts or behaviour constituting an abuse of the dominant position of market power (Chapter IV) of the Model Law. In WAEMU Regulation, two conditions are required for the dominant position to be sanctioned: the company must have a dominant position in the relevant market and must abuse this position.

We can also mention the ambiguous nature of the WAEMU concentration regulation mechanism. Economic concentration is the legal transaction generally resulting from an agreement between two or more undertakings or between groups of undertakings which, either by way of merger, through the control exercised by some of their managers, or even through the acquisition of holdings in their respective capital or by the creation of a company or a common group or in any other way, manage to control all or part of all of these companies and therefore the economic activities they carry out.

As curious as it may seem, business merger operations are not subject to special regulations in the WAEMU mechanism on the competition. Instead, they are apprehended within the framework of abuses of a dominant position and are prohibited when they create or strengthen a dominant position if they significantly impede competition in the common market.¹³⁴ This choice to regulate concentrations within

¹³¹ These practices are illegal horizontal agreements between market players to fix prices, limit output or share markets or customers.

¹³² Art. 7, Regulation 3/2002/UEMOA.

¹³³ Art. 7, Regulation 2/2002/UEMOA.

¹³⁴ Art. 4.1, s. 2, regulation 2/2002/UEMOA.

the framework of the control of abuse of a dominant position is not in line with international standards specifically with UNCTAD Competition Law Model.

3. Anti-competitive practices attributable to member States: fight against measures or preferential treatment without financial impact by the State which distort competition on the national or Community market

Anti-competitive practices attributable to member States are regulated in Article 6 of Regulation 2/2002/CM/UEMOA. This text imposes on member States an obligation to abstain from any measure likely to obstruct the application of community texts prohibiting anti-competitive practices.¹³⁵ The concept of "anti-competitive practices attributable to States" is getting closer to Model Law's definition of regulatory barrier to competition (Chapter VII, "The relationship between competition authority and regulatory bodies, including sectoral regulators").

We can easily understand the objectives of such regulations because of the administration's involvement in market function in member States. Indeed, most WAEMU countries have developed their industrial sectors by implementing import substitution policy backed by a strong system of protection of the production apparatus through tariff and non-tariff barriers. With the liberalization of trade, competition between similar or identical products benefiting from Community origin has intensified. To maintain their privileges, companies in a situation of high concentration of market power in various countries continue to use administrative measures such as standards, ex-ante import controls, or the setting of quotas, to limit or even prevent the penetration of competing products. So, most of the litigation cases submitted to the Commission relate to these practices.

B. Institutional and procedural framework: cooperation between the commission and authorities of member States

The provisions of the WAEMU Treaty are not explicit in terms of competencies between community and national bodies. The question of these shared competencies by the competition structures of the WAEMU member States has been the subject of two opinions of the WAEMU Court of Justice. Indeed, opinions No. 003/2000 of 20 July 2000¹³⁶ and opinion No. 01/2020 of 7 July 2020¹³⁷ of the Court of Justice, issued in response to the problem of coexistence between national legislation and Community competition law, indicate that the provisions of Articles 88, 89, and 90 of the WAEMU Constitutive Treaty fall within the exclusive competence of the Union and that, consequently, the member States cannot exercise part of the competence in this area of competition. From this Opinion, it appears that the Union alone exercises legislative power in the areas referred to in Article 88 of the Treaty and the application of the rules resulting from the exercise of this power falls within the exclusive competence of the Commission under the control of the Court of Justice.

This centralization has aroused great interest both in the member States and in the scientific world. Tim Bütthe and Vellah Kedogo Kigwiru have mentioned that, "WAEMU is the only RCR [regional competition regimes] in the world that has established a centralized, hierarchical model, under which its competition rules enjoy supremacy and direct effect, and the member State agencies (NCAs) play a subordinate role in the enforcement of those rules, primarily assisting the WAEMU Competition Commission in its

¹³⁵ This encompasses any non-financial measure by a public person or vested with prerogatives of public power that restricts competition in a market or limits intra-Community trade. For example, subsidies, exclusive licenses, or those relating to the setting of quotas, quotas, discriminatory standards, authorization, or declaration before import, etc. This is also the case for measures favouring anti-competitive behaviour by private companies like administrative approval of tariffs set by associations of private companies.

¹³⁶ Opinion No 003/2000 of 27 June 2000 on the interpretation of Articles 88, 89, and 90 of the Treaty on the rules on competition in the Union.

¹³⁷ Opinion No. 01/2020 of 7 July 2020 on the preliminary draft Regulation on the sharing of powers and cooperation between the WAEMU Commission and the national competition authorities of member States for the application of Articles 88, 89, and 90 of the WAEMU Treaty.

investigations and inquiries.”¹³⁸ WAEMU’s competition institutional and procedural framework is a unique model that takes into account the particular context linked to the strong economic presence of the State and government interventions that distort competition. The legislators certainly wanted to give more powers to the WAEMU to fight more effectively against anti-competitive practices.

The Directive No. 02/2002/CM/UEMOA of May 23, 2002, operates a division of competence between the community and national competition authorities. The provisions reconcile both the exclusive competence of the Commission and the need to allow effective market surveillance by national authorities. The division of powers is based fundamentally on the functions of investigation, investigation, and decision-making which constitute the main stages in the procedure for handling a case under Community competition law. Thus, the mission of the national authorities, whether administrative or sectoral, is limited to the investigative function, which consists of collecting information, processing it, and producing reports. These investigations can be carried out and closed according to the procedures of national law, notwithstanding Community law.

Similarly, the Commission may initiate and conduct investigations in all the areas covered by Articles 88 and 89 of the Treaty and has exclusive competence to decide on abuses of dominant positions and anti-competitive agreements. The legislator probably wanted to avoid cases where the decisions of the national authorities might be biased by the specific issues of the case. These are investigations relating to anti-competitive practices likely to influence trade between member States of the Union, state aid, and practices attributable to member States.

Insofar as the decision-making function falls within the competence of the Commission, it follows that the investigative function, the report of which substantially guides the decision, remains the exclusive domain of the Commission. The cooperation scheme put in place is only operational during the investigations and the decision-making procedure. Investigation procedures are carried out in close and constant liaison with the competent authorities of the member States, which are authorized to make observations on these procedures. These collaborations are about either information or assistance.

Finally, the Advisory Committee on Competition created by Article 28 Paragraph 3 of Regulation No. 03/2002/CM/UEMOA of 23 May 2002 ensures the representation of member States in the decision-making process. It is made up of sixteen members, two per member state. This Committee must be consulted before any decision to prohibit, issue negative clearance, or grant an exemption. The consultation takes place during a joint meeting at the invitation of the Commission and at the earliest fourteen days after the dispatch of the invitation. Attached to this is a statement of the case with an indication of the most important documents and a preliminary draft decision for each case to be examined.

In conclusion, the strengthening of cooperation with the structures involved in all stages of investigation, prosecution, and decision-making has significantly increased the level of implementation of the WAEMU competition law.

Review and prospects

Having competition rules in line with international standards would be useless if they were not implemented. It will therefore be necessary to assess the WAEMU competition policy implementation. In this context, the market regulation decisions and actions, and their effects will be highlighted. The challenge will be to assess whether the UNCTAD Competition Law Model used by WAEMU has been implemented and produced results for regional integration.

¹³⁸ African Journal Of international economic law - volume 1 (Fall 2020): “The Spread of Competition Law and Policy in Africa: A Research Agenda”, Tim Bütte, Technical University of Munich (TUM) and Duke University, and Velloh Kedogo Kigwiru, Technical University of Munich (TUM) and MPI for Innovation and Competition.

A. Assessment of the WAEMU Commission's Interventions in competition

1. Global report (2003-2023)

After twenty years of implementation the Union's competition litigation shows that sixty-two disputes were formally referred to the Commission or were referred to it.

WAEMU Commission's competition interventions: Global report (April 2023)

Member state	Numbers of cases	Cases handled	Cases in process	Ranked and prescribed cases
Benin	6	4	2	0
Burkina Faso	13	11	1	1
Côte d'Ivoire	15	12	3	0
Guinée-Bissau	2	0	2	0
Mali	7	5	1	1
Niger	3	2	0	1
Sénégal	10	8	1	1
Togo	6	4	0	2
TOTAL	62	46 (74,19%)	10 (16,12%)	6 (9,67%)

Out of a total of sixty-two cases investigated by the Commission, forty-six cases have been dealt with (decision rendered or draft decision submitted to the College of Commissioners), ten are in the process of being processed and 6 have been ranked.

The WAEMU Commission's caseload, as has been pointed out in UNCTAD's Preparatory report for the post-review of the competition policy of the West African Economic and Monetary Union,¹³⁹ is characterized by the large percentage of cases that relate to government measures and sometimes by the slow pace of the Commission's decision-making process. In addition, many of the Commission's decisions have focused on State aid and anti-competitive practices by the member States. This direction is the result of the strong involvement of the member State's governments in economic activity. However, in recent years (2016-2022), the Commission has investigated several cases involving corporate practices, either for abuse of dominance or for anti-competitive agreements.

In addition, the decision-making process by the WAEMU College of Commissioners has improved significantly in recent years. Thus, in 2022, 8 decisions were adopted, including 3 relating to mergers and 4 relating to practices of abuse of dominant position in the sectors of Brewing in Benin, funeral services, and airport services in Côte d'Ivoire and sugar in Mali. Three of the four decisions on abuse of dominance have been appealed to the WAEMU Court of Justice. The decision-making process continued in 2023 with the adoption of 9 decisions in March 2023 by the College of Commissioners. The Commission has taken cross-cutting and multisector action in the field of Competition. More than twenty sectors of activity were covered, including telecommunications, cement, brewing, funeral services, airport services, brewing, port handling, flour, textiles and sugar, textiles, port handling, foundry, etc.

All WAEMU member States are involved in competition disputes. Burkina Faso (the country with the headquarters of the Commission) and the two most economically advanced countries, namely Côte d'Ivoire and Senegal, have the largest number of cases. On the other hand, Guinea Bissau, which does not yet have competition legislation and institutional framework has only 2 cases being processed. The member States are the first to use the service of the Community competition authority. They are followed by businesses and consumer associations.

¹³⁹ Preparatory report for the post review of the competition policy of the West African Economic and Monetary Union, UNCTAD (UNCTAD/DITC/CLP/2020/2).

2. Impact or effects of WAEMU competition decisions on the common market

The Commission's decisions have made it possible to implement certain projects of Community interest by authorizing aid measures which are considered compatible with the common market. For example, in the GAZODUC case,¹⁴⁰ the Commission authorized the implementation of fiscal measures taken by Togo and Benin. It considered that: "the West African Gas Pipeline is an infrastructure project which helps to meet the energy needs of the states concerned for their economic and social development without affecting trade between the states of the Union and jeopardizing the integration objectives as referred to in article 4 of the WAEMU Treaty."

In many cases, the Commission has ordered certain member States to withdraw the measures taken in favour of certain undertakings that were liable to distort the Competition. For instance, in the ASKY case,¹⁴¹ the Commission also declared certain provisions of the headquarters agreement between that company and the Togolese government incompatible with the Community competition rules.

The actions of the Commission also have an impact during the investigation phase. Indeed, during the investigation stage of the procedure, the member States and the undertakings concerned generally adjust their conduct to the practice in question. For example, the investigation into the cement industry in Benin enabled the Beninese government to adjust the exemptions granted to one of the players in the sector¹⁴². Otherwise, in the airport ground handling case, at Abidjan airport, following the investigations, the Ivorian authorities reduced 30% of the cost of the concession holder's services,¹⁴³ and the service dealer reimbursed its contractors the amounts wrongly received. These cases demonstrate that the Commission does not always need to impose sanctions. Its rules and investigations provide member States with sufficient guidance, such that they can take active steps with the Commission in mind.

Over the past three years, five abuse of dominant position cases have been decided. Indeed, recently the Commission imposed fines on SONABHY, a Burkinabe state company, for abuse of a dominant position. The Commission imposed a fine of 50 million CFA francs on the enterprise SONABHY for discriminating in favour of SODIGAZ APC in the liquefied petroleum gas market.¹⁴⁴ The same fine was imposed on SOBEBRA¹⁴⁵ in Benin for abuse of dominating position in the brewing sector. Three other decisions with fines and sanctions have been appealed to the WAEMU Court of Justice. These various Commission actions have made it possible to improve the functioning of the market and to ensure consumer protection.

Finally, the effectiveness of the implementation of Community competition law is no longer to be demonstrated. The competition rules are in place, they are being implemented and they have an impact at the national and regional level. Better still, WAEMU is one of the most dynamic regional economic communities in implementing competition rules. Despite these advances, many constraints limit the effectiveness of Community competition policy. To this end, WAEMU's experience in terms of appropriation of the Model Law and its implementation by a young competition authority can be presented as a success story due to the impacts of competition actions in terms of development and regional integration. Despite these advances, many challenges remain.

¹⁴⁰ Decision No. 002/2005/COM/UEMOA du of 21 January 2005 in Natural gas pipeline sector.

¹⁴¹ Decision No. 002/2011/COM/UEMOA of 29 August 2011 in Civil aviation.

¹⁴² <https://levenementprecis.com/2019/11/15/affaire-nocibe-pourquoi-le-gouvernement-a-decide-de-revoir-le-contrat/>.

¹⁴³ <https://news.abidjan.net/articles/638103/reduction-de-30-du-cout-du-service-dassistance-en-escale-a-laeroport-de-port-bouet-gouvernement>.

¹⁴⁴ Decision No. 08/2019/COM/UEMOA of 5 November 2019 in the gas sector in Burkina Faso.

¹⁴⁵ Decision No. 08/2022/COM/UEMOA of 21 June 2022 in the Brewing sector.

B. Constraints, challenges and prospects: conditions for a more efficient and effective implementation of community competition policy

The design of the institutional framework has consequences for the effectiveness of Community law. In the context of collaboration with UNCTAD, the main challenges below have been identified:

1. The strong centralization of substantive law and the exclusive competence of the Commission does not allow all cases to be dealt with, whether those affecting trade between the member States or affecting national markets.
2. To avoid confusion in the current framework, the adoption of separate regulation of concentrations, detached from that relating to the control of abuse of dominant position, is necessary. This approach would give more visibility and clarity to the texts and would make it possible to exercise a priori control of concentrations likely to affect competition in a substantial part of the common market. Finally, the establishment of a new framework for the control of concentrations could make it possible to provide for the payment of fees to be borne by companies to cover the significant costs that the regional authority incurs to analyse the projects submitted to it. In the area of merger control, free procedures are not appropriate.
3. The limited cooperation of national competition structures, the absence or weakness of the autonomous national competition institutions, and the insufficient resources of those institutions.
4. The slow decision-making process and the insufficient human and material capacity of the WAEMU Competition Directorate.

To deal with these difficulties, the WAEMU Commission must:

1. Resolve the question of the division of powers definitively by revising the WAEMU Treaty, as stressed in the last opinion of the Court of Justice of the WAEMU.
2. Reinforce capacity building at the Community and national level and establish a regional network of competition authorities to promote Competition.
3. Establish, in the context of regional cooperation, a framework for collaboration with the ECOWAS Competition Authority to avoid jurisdictional conflicts in the same area and to enhance the negotiating positions within the framework of the AfCFTA competition rules. As regards the relationship with ECOWAS, a draft cooperation agreement between WAEMU and ECOWAS project has been prepared for the implementation of competition rules in West Africa with the main objective to define the criteria for sharing jurisdiction between the two Authorities.

Conclusion

The WAEMU competition policy is, from the point of view of material and procedural law, in conformity with international standards, with certain specificities relating to the Control of concentrations, the establishment of a special category of anti-competitive practices attributable to States, and, above all, a centralized institutional approach with almost exclusive competence of the Community bodies. Its architecture, as has already shown, results essentially from the Model Law adapted to the specific context of West African regional integration with coastal and Sahelian countries.

After twenty years (2003-2023) of implementation, WAEMU's competition policy has therefore contributed to the consolidation of the Customs Union, the free movement of goods, and liberalization in several sectors of activity (telecommunications, communication, energy, etc.). Moreover, it has become an essential tool for promoting regional economic integration in the Union and for the economic and social development of the member States.

Admittedly, there are still big challenges to be met and reforms are underway to ensure greater involvement of national structures in the implementation of WAEMU competition policy. These reforms will also ensure better control of mergers and the introduction of a leniency system to detect cartels more easily.

All these actions, which will be carried out within the framework of the privileged partnership with UNCTAD, will undoubtedly enhance the development dimension of WAEMU competition policy for the sustainable development of WAEMU member States.

CONTRIBUTION OF THE EURASIAN ECONOMIC COMMISSION FOR THE PUBLICATION OF UNCTAD MODEL LAW ON COMPETITION

Over the years the UNCTAD Model Law on Competition (Model Law) has played a significant role in promoting and protecting competition, thus contributing to the creation of an equitable global trade environment. It serves as a valuable framework for countries seeking to establish or enhance their competition policies and laws. By providing a comprehensive set of guidelines and best practices, the Model Law helps countries foster fair competition, encourage economic development, and promote consumer welfare.

The Model Law is a non-binding template designed to assist countries in developing or reforming their competition policies and legislation. It provides a comprehensive framework that covers all aspects of competition law, including anticompetitive practices, merger control, abuse of dominance, and competition advocacy. Every year the Model Law is being improved at the suggestion of United Nations countries, thus remaining the source of best international experience to date.

In this note we will explore how the Eurasian Economic Union (EAEU) has benefited from the Model Law on and we will highlight some of the instruments that assisted the EAEU in effectively adopting and enforcing competition laws and their correlation with the Model Law.

The EAEU is a regional integration initiative comprising Armenia, Belarus, Kazakhstan, Kyrgyzstan, and the Russian Federation. Its objective is to create a common market within the Eurasian region, foster economic cooperation, and enhance competitiveness. The Eurasian Economic Commission (EEC) is the permanent executive body of the EAEU responsible for managing the day-to-day operations of the EAEU, ensuring the functioning and development of the EAEU.

The development of competition law in the EAEU has been influenced by various factors, including the need for harmonization, regional integration, and the adoption of international best practices. While the EAEU has not implemented the Model Law partially or directly, there are elements within the EAEU competition law framework that align with the principles and recommendations set forth in the Model Law.

EAEU competition law framework: harmonization and alignment with international standards

A well-drafted competition law is the cornerstone of effective implementation. The Model Law provides a common framework for competition policy among United Nations participating countries. Countries can use the Model Law as a basis for developing their legislation, tailoring it to their specific needs and legal systems.

The Model Law provides guidelines and best practices that can serve as a common foundation for competition laws and regulations and can contribute to the development of a robust competition framework. It supports the prohibition of anticompetitive practices, competition advocacy, facilitation of mergers, and collaboration among competition authorities.

This does not only relate to countries, but regional integration associations can also benefit from the use of the Model Law's principles and instruments.

By adopting the Model Law as a reference point regional organizations can establish a consistent and harmonized competition framework, ensure coherence and reduce regulatory barriers within the region. This harmonization promotes fair competition, prevents market distortions, and enhances economic integration.

The EAEU has developed a competition law framework to promote fair competition and prevent anticompetitive practices within the integrated market. The primary legal instrument is the Treaty on the Eurasian Economic Union, which establishes the general principles and objectives of competition policy among the member states. Additionally, the EAEU has adopted several regulations that provide detailed provisions on competition enforcement and other aspects of competition regulation.

While the EAEU competition law does not directly reference the Model Law, it shares common objectives and principles such as preventing anticompetitive practices, promoting fair competition, and ensuring consumer welfare. The EAEU competition law framework reflects a regional approach to competition policy, addressing the specific needs and challenges of the integrated market. It aims to harmonize competition rules among member states and align them with international standards. Among the best standards considered when developing the EAEU competition rules was the Model Law.

Today the Eurasian unified regional competition policy helps create a level playing field for businesses operating within the integrated region. By addressing anticompetitive practices such as cartels, abuse of dominance, and unfair trade practices, the regional competition policy promotes fair competition. A level playing field encourages fair market access, stimulates investment, and supports the growth of businesses across the region.

Cross-border collaboration and information exchange: cooperation with international organizations

The Model Law encourages countries to exchange experiences, share best practices, and collaborate on enforcement efforts. Such cooperation strengthens the institutional capacity of competition authorities, enhances their effectiveness in enforcing competition laws, and promotes a coordinated approach to competition policy.

Implementing the Model Law's principles enhances a country's ability to participate in international discussions and negotiations on competition policy. It aligns countries with international best practices, enabling them to engage in global dialogues on competition issues and benefit from knowledge-sharing and capacity-building initiatives.

The EAEU competition law framework emphasizes the importance of both cross-border and international collaboration and information exchange among competition authorities. The EAEU member states have established mechanisms for sharing information, coordinating enforcement actions, and addressing cross-border competition issues, supporting a more integrated and efficient regional market. This cooperation strengthens the institutional capacity of competition authorities within the EAEU and promotes effective enforcement of competition laws.

Similarly, the EAEU has engaged in cooperation and collaboration with foreign competition agencies, regional associations and international organizations, including UNCTAD, to enhance its competition law framework. The EAEU and UNCTAD have conducted joint activities and exchanges of experiences, providing a platform for knowledge-sharing and capacity-building in the field of competition policy. UNCTAD's expertise and guidance have positively influenced the development of competition law within the EAEU region.

Through the commitment to international cooperation, regular meetings of regional organizations having mandates in competition regulation was made possible. The meetings are arranged by the EEC with UNCTAD's support and to bring together organizations from all continents of the world to exchange ideas.

The international cooperation facilitation also was reflected in Part III of the Section F of the United Nations Set on Mutually Agreed Equitable Principles and Rules for the Control over Restrictive Business Practices, which the EEC employed when applying for the assistance of the UNCTAD Competition and Consumer Policies Branch in initiating contacts with foreign competition authorities and requesting information.

Focus on prohibition of anticompetitive practices

Regional integration often involves the removal of trade barriers and the establishment of a common market. However, without effective competition policies and laws, market distortions can arise, leading to monopolistic or collusive behaviour that undermines the benefits of integration. Thanks to the EAEU Treaty, countries within the Eurasian region can work together to ensure that competition is preserved, and markets remain open, transparent, and efficient.

Both the EAEU competition law and the Model Law emphasize the prohibition of anticompetitive practices. The EAEU's competition law addresses various forms of anticompetitive behaviour, including cartels, abuse of dominance, and unfair competition practices. This is particularly crucial in industries that are prone to anticompetitive behaviour, such as energy, telecommunications, and transportation. By effectively addressing anticompetitive practices, the EAEU can create a level playing field for businesses, enhance market efficiency, and protect consumer interests.

The Model Law also offers guidance on merger control procedures and best practices. In the context of regional integration, facilitating cross-border mergers and acquisitions is crucial to promoting investment and economic growth. Unfortunately, merger control is currently out of the Eurasian Commission's mandate. This was noted in the assessment of the EAEU competition rules and regulations done by UNCTAD in 2020. The experts suggest that the EEC should consider the adoption of a merger control regime based on a national case-studies.

In this context the Model Law serves as a reference point in a long-lasting discussion between the EEC and the EAEU member states on the necessity of transferring the relevant powers to the EEC. By adopting the relevant rules as recommended by the Model Law, countries could establish clear criteria and processes for assessing the impact of mergers and acquisitions on competition. This can enhance transparency, predictability, and efficiency in reviewing cross-border transactions, thus encouraging businesses to pursue opportunities for expansion and integration within the Eurasian region.

Competition authority

According to the Model Law establishing an independent and adequately empowered competition authority is crucial for effective enforcement. The authority should have investigative powers, the ability to impose penalties, and the resources needed to carry out its functions. The Model Law provides guidance on the institutional structure and functions of a competition authority.

The EEC operates as a supranational regional competition authority. In this role, the EEC works to ensure a level playing field for businesses within the EAEU by harmonizing regulations, enforcing antitrust laws, and discouraging unfair competition practices. It oversees cross-border issues that affect multiple member states. This includes the power to conduct investigations into potential antitrust violations, with the ability to sanction firms if necessary.

At the same time the EEC's large substantive competence is strictly circumscribed because of their division from national competition authorities. The EEC is only competent if a situation touches on cross-border markets, i.e., the relevant geographic market includes the territories of two or more member States and there are at least two economic entities involved in the alleged infringement registered in two different member States.

Furthermore, the EEC also lacks jurisdiction whenever a company under investigation is not registered in an EAEU country. In such cases, competence reverts to the national competition authority that can have extra-territorial jurisdiction. This means that the EEC cannot prosecute possible breaches of EAEU competition law where the potential infringer is registered in a third country, where the potential infringement could have similar effects in several or all member States.

The EEC is not authorized to carry out unannounced inspections; instead, it has a right to send a reasoned request for such actions to the national competition authorities. They must then execute the Commission's requests for procedural action in accordance with national legislation.

Though the Model Law does not cover all the described issues, the enforcement practice has proved that they limit the EEC from the effective full functioning. The debates with the EAEU member states on enlarging the EEC's powers continue to date.

Strengthening competition advocacy

The Model Law emphasizes the importance of competition advocacy, which involves promoting the benefits of competition and educating stakeholders about competition principles. This can include initiatives to raise awareness about the benefits of competition, provide guidance to businesses on competition compliance, and educate consumers about their rights.

The Model Law's attitudes to competition advocacy have helped the EAEU to enhance competition advocacy efforts across its member states. Strengthening competition advocacy contributes to the development of a competitive culture within the EAEU, supporting market efficiency and consumer welfare.

Given the EEC cross-border nature, its advocacy effort and strategies should have a cross-border dimension. They focus mainly on facilitating the development of competition in the Union's common territory and removing behind-the-border barriers to it.

This focus determines the choice of competition advocacy tools and planning.

To reach the EAEU member-states, the EEC engages in periodical consultations with them to discuss specific integration related issues.

As part of competition assessment of laws, the draft acts of the EEC are submitted for public consultation, posted on the official website of the EEC in order to allow interested parties to present their positions.

As for the other categories of stakeholders, the major instrument of outreach and communication is the EEC online Public Reception. The communication strategy is to arrange the meetings between the EEC officials and business community and other stakeholders from all member-states on topics of their concern. A suggestion for a topic to be considered may come from the EEC or the stakeholders. Depending on further consideration of the topic, the EEC can initiate one or more subsequent meetings.

This strategy proves to be an effective means of revealing and addressing behind-the-border barriers to competition during on-line discussion with the stakeholders. It raises the EEC awareness of the barriers and thereby facilitates the development of the EEC policies on their elimination.

The EEC is also engaged in various forms of dissemination of information on EAEU competition law in the business community, the general public, and media in all EAEU member States, in cooperation with national authorities. Officials and employees of the Commission's Competition Branch also give training lectures and seminars on EAEU competition law in all member States.

Assessment of the Eurasian Economic Union competition rules and regulations

UNCTAD facilitates Voluntary Peer Reviews of Competition Law and Policy by its member States' competition authorities.¹⁴⁶ At their request, it also conducts legal assessments of countries' competition rules and policies, evaluating the countries' legal and institutional framework for competition and provide recommendations for improvement. The assessments consider various factors, such as the effectiveness of competition authorities, the scope and coverage of competition rules, and the implementation of enforcement measures.

Such an assessment was conducted for the Eurasian Economic Union in 2020¹⁴⁷. It served as a recommendation and guidance to help the EEC improve its competition framework based on international experiences and standards and of course the Model Law. When conducting the assessment, UNCTAD experts referred to the provisions and principles outlined in the Model Law as a benchmark for evaluating the EAEU competition regime.

They concluded that the EAEU competition laws and policies are aligned with the Model Law and thus are in line with international best practices, the powers of the Commission, and the rules enhancing cooperation with and between the EAEU's member States' competition authorities, provide a sound framework for establishing efficient and consistent competition enforcement practices in the EAEU and its member States. But nevertheless, there are still issues that require improvement. The EEC received relevant recommendations as to how better enhance the Eurasian competition laws and policies, taking into account the specific needs and circumstances of the regional development and how the Model Law can assist in this regard.

For example, one of recommendation was to extend the powers of the EEC to prosecute economic entities that are not registered within the Eurasian region, that is to say, to allow the EEC to prosecute any foreign entity active in the Eurasian market, whose business activities impact the EAEU market and its territories, conferring extra-territorial powers to the EEC, in line with international best practices. Another recommendation was that horizontal cooperation of national competition authorities (NCA) and vertical cooperation between NCAs, and the EEC should be improved with expanded harmonization efforts. The report suggests that substantive harmonization should come from supranational law but also that procedural harmonization, which may be critical for effective law enforcement, may be pursued, facilitating horizontal coordination of competition authorities of the Union.

Conclusion

While there may not be a direct correlation between the EAEU competition law framework and the Model Law, the principles, objectives, and best practices highlighted in the Model Law have influenced the development of competition law within the EAEU region. The EAEU competition law framework demonstrates a commitment to promoting fair competition, preventing anticompetitive practices, and aligning with international standards, reflecting the broader global efforts to enhance competition policy and regulation.

From the regional organization's standpoint, by providing a comprehensive framework and promoting collaboration, the Model Law's principles and instruments facilitate regional integration by ensuring consistency, fostering fair competition, preventing market distortions, encouraging cross-border transactions, and promoting cooperation among competition authorities. These measures contribute to the development of a well-functioning integrated market that benefits businesses, consumers, and economies within the region.

The EEC is closely following the discussions on the development of the Model Law as a set of best international experience and will continue to use it to improve our regional competition regulation and enforcement.

¹⁴⁶ See <https://unctad.org/topic/competition-and-consumer-protection/voluntary-peer-review-of-competition-law-and-policy>.

¹⁴⁷ See https://unctad.org/system/files/official-document/ditccp2020d1_en.pdf.

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