
Antitrust in Developing and Emerging Economies – 8th Edition

#1 Opening Keynote Discussion: Growth, Competition and Developing Economies

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Hassan Qaqaya has covered a range of issues relating to competition law in developing countries. The increasing adoption of competition policies around the world is one of the most significant developments in the current economy. For example, the latest UNCTAD report indicated that 145 countries have completed their competition laws.

The first question will address what can be considered appropriate competition law and policy for developing countries. To do this, it is necessary to draw on comparative law, and more specifically on legal transplants. They then adopt a so-called parallel approach that has provided a different explanation for why legal and institutional changes occur in the systems. Research into the origins of competition law in developing countries also focuses on legal origins as an alternative explanation and attempts to explain

the rise of competition law in developing countries to support the comparative law approach. Thus, the concept of the transplantation effect is what makes it possible to link the performance of a country's legal system to the process by which it was acquired. This approach described therefore allows countries to be classified according to whether they are receptive to legal transplantation, which amounts to determining whether they have the capacity to make sense of the imported law in their own legal system. First, in receptive transplants, foreign laws are adapted to the local conditions of the country concerned. The latter are indeed able to adapt the imported legal system to reflect economic and legal circumstances. On the contrary, unreceptive transplants are those where the foreign law has not been able to adapt to local conditions. To determine the appropriate competition law for a

developing country, it is necessary to define a competition system. A broad definition is used. It is a system that combines legislation, the organization that implements that legal system, the policy makers and the framework used for conduct and expected outcomes. This definition is used because it allows for multiple components and how they interact with each other. This definition also allows for the identification of exogenous factors, actors and institutions that may contribute to the relevant outcomes. Finally, it highlights that although the same law applies in different developing countries, this may lead to different outcomes. Thus, a competition regime rests on three pillars: the objectives of competition law and policy, the assessment and balancing exercise, and the command from the firm to the government. So, if you start with a generic law that is based on US or EU principles, when you reach the country that has transcribed and transplanted the law, you have a different implication.

The second issue Hassan addresses is what the more developed agencies should understand about the needs of developing countries. If we look at the traditional rules of competition in developing countries, we find that markets are more characterized by barriers to entry, inefficient infrastructure, economic vulnerability, and so on. Moreover, the economic, social, and political norms of these developing countries differ from those of the countries from which the law originates, for example the law applicable in the US or in the EU. Thus, the concept of competition itself differs among developing countries. The lack of receptivity of some developing countries to traditional competition law is often due to the distribution of the costs and benefits of free trade and competition in a global economy. Thus, the effective enforcement of competition in these countries is due to their competitive advantage that was

associated with unfair trade practices and historical positions that were not available to them.

The enforcement priorities of developing countries are firstly to focus on sectors related to the provision of basic goods and to sanction the most harmful practices. The second priority is that many agencies have considered that companies with relatively weaker shares could benefit from an advantageous position to act independently. Finally, pre-merger screening is also a high priority.

Technology and innovation are of course the engine of prosperity and advanced technologies can be very transformative for the achievement of the Sustainable Development Goals. This creates opportunities for developing countries to keep pace with economic growth, to fight poverty or to secure jobs.

Thus, one of the main problems of young competition systems in developing countries is that the concept of competition law changes regularly. This makes it more difficult for developing countries to apply it and to adapt to the global economy. Thus, the main challenges for developing countries are privatization, trade, and merger review.

As a conclusion of the conference, Hassan Qaqaya added that for several years now, there has been a significant evolution of the young competition authorities. The Covid-19 crisis has shown that the authorities have been able to adapt, to reform their institution to adapt their laws and procedures to this new situation. Innovation is one of the major points that allow developing countries to develop and prosper. The young competition authorities must therefore find a way to ensure a balance of net benefits/costs between a monopoly and a competition authority. ■