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Antitrust and Developing Economies in an Era of Crises

Webinar #3: Gouging, Opportunism, Access, Industrial Policy, and the Challenge to First Principles of Competition

Webinar - 30 October 2020*

This webinar was organized as part of the 7th Annual Antitrust in Emerging Countries Conference Series by Concurrences.

Panel Discussion

The moderator, **Professor Eleanor Fox** (NYU), introduced the panelists and allotted time for each of them to speak about competition issues in their respective countries.

Ms. Mondo Mazwai (Competition Tribunal of South Africa) spoke about price gouging cases that arose during the pandemic in South Africa. Ms. Mazwai explained that in March 2020, the South African Government passed a specific Covid-19 Excessive Pricing Regulations, which prohibits dominant firms from charging excessive prices for essential goods and services. The Regulations stipulated that a relevant factor in assessing whether the price charged is fair or excessive is the average net margin or markup in the three months prior to March 1, 2020. Price is excessive if a firm with market power raises its price to an unreasonable level. The burden is on the firm to show that the price is reasonable.

During the wake of the pandemic, the Competition Tribunal of South Africa found both Babelegi, a face mask reseller, and Dis-Chem, the country's leading retail pharmacy group, liable under the Competition Act. Babelegi raised its price for face masks by 592 percent in February and 987 percent in March, without any valid justification, while Dis-Chem's products surged by 261 percent in March 2020. She noted that the Tribunal based its claims on the Act rather than the Regulations because the Regulations had not come into effect yet.

Although the two firms were not presumed to be dominant since their respective market shares were less than 45 percent, the Tribunal found that the firms had market power, defined as "the power of a firm to control prices or to act independently of its competitors, customers, or suppliers." It found in both cases, that the disruption to the supply chain conferred market power on the firms as they had stocks of masks during a period of serious supply shortages. This allowed the parties to charge prices unconstrained by competitive market forces. To determine the appropriate

benchmark for a competitive price, the Tribunal relied on the firms' own prevailing prices immediately before the market turned dysfunctional. Ms. Mazwai thought South Africa struck a fair balance in weighing the interest of the consumers and the interest of the firms in applying the law.

Mr. Babatunde Irukera (Nigerian Federal Competition and Consumer Protection Commission) noted the challenges the Nigerian FCCPC faced as a budding agency, transitioning from consumer protection work into broad competition work, especially during the pandemic. He observed that the Covid-19 crisis challenged traditional notions of dominance. He thought that market power may not necessarily be a large factor in dominance issues. With respect to

price gouging, he observed an intersection between consumer protection and competition. He explained that under consumer protection laws for price gouging, regulators must intervene when there is "unreasonable, exploita-

"SOUTH AFRICA APPLIED ITS LAW TO A FAIR BALANCE: ON THE ONE HAND, CONSUMERS ARE PROTECTED FROM EXPLOITATION; AND, ON THE OTHER HAND, FIRMS ARE CLEARLY ABLE TO IDENTIFY WHEN THEY HAVE MARKET POWER AND WHEN THEY ARE CHARGING AN EXCESSIVE PRICE."

MONDO MAZWAI



tive or manifestly unjust contract terms, including price." He stated that even a small player, acting unilaterally in a dysfunctional market, could engage in anticompetitive behaviors due to demand. In one particular investigation, the Commission discovered that a retailer that had a certain inventory of hand sanitizers from 2018 increased their prices successively between 8 a.m. and 5 p.m., ultimately increasing the price up to 820 percent over the period of those few hours. It occurred the very next day after the Covid-19 index case in Nigeria was discovered.

Another theory under consideration by the Commission deals with broader conspiracy issues in which firms that do not coordinate to be part of a conspiracy or a cartel, get looped in as a result of prevailing circumstances.

The FCCPC is also prosecuting a case involving a pharmacy that withdrew some of their hand sanitizers from the shelf in order to control price, where they had not coordinated their conduct with others.

Additionally, Nigeria is struggling to provide Internet access to its residents, as most services have moved online due to the pandemic. Mr. Irukera questioned whether a global framework, like the EU General Data Protection Regulation (GDPR) would be appropriate for every country. With respect to data and the new digital economy, Mr. Irukera said that Nigeria as well as the rest of Africa, are determined not to become extraction points, and will work to promote a framework that captures their interests.

Professor Philip Marsden (College of Europe) compared the tech giants to babies that constantly need our attention. He emphasized that it is up to the regulators to ensure that these firms do not misbehave.

He thought that the existing legal framework has adequate tools to regulate big tech firms, though it could evolve to handle new harms. He also suggested that enforcers must detect and act on such harms quicker, otherwise another regulator might step in and chill any growth or innovation of such firms.

The professor stated that enforcers have a duty to balance the platforms' power with the responsibility that they have to act appropriately.

Mr. Marcio de Oliveira (Charles River Associates) provided a brief overview of the challenges to the Brazilian

competition policy brought by the pandemic.

He mentioned that rival companies submitted cooperation agreements to the Brazilian Competition Authority (CADE), to share

"I THINK THE PANDEMIC IS A FLAG FOR THE REST OF THE WORLD TO REALIZE THAT IT IS BETTER THAT WE ALL COME TOGETHER TO PROMOTE A FRAMEWORK THAT IS JUST, FAIR, AND TRANSPARENT."

BABATUNDE IRUKERA



distribution networks, which raised concerns that the cooperation could outlive the pandemic and then subsequently facilitate coordination. To prevent per se anticompetitive conduct, CADE released a document containing guidelines with which rival firms must comply when drafting their agreement. In particular, firms are prohibited from exchanging confidential information. CADE has clearly stated that it may authorize agreements on a provisional basis and scrutinize them further in the future. Contrary to his expectations, Mr. Oliveira said that not many joint ventures or mergers took place during the pandemic.


As for price gouging, several Congressmen proposed bills that would impose price caps on all medication to prevent price gouging during the pandemic, but these bills were never passed. However, the consumer protection agency fined companies that engaged in price gouging.

Mr. Oliveira thought that the challenges to the first principles did not materialize to the extent that the Brazilian antitrust community expected at the start of the pandemic, perhaps because the recession was not as deep severe than what most Brazilian economists expected.

Mr. **Thando Vilakazi** (CCRED) commented that the competition authorities of developing jurisdictions could teach the world about aligning competition law more closely with economic development priorities, which he believes is a priority.

He thought that the markets have failed tremendously in the last fifteen years and that Covid-19 presents a moment to reflect on the standards and principles that underpin the logic of competition enforcement efforts. He suggested we rethink certain standards in competition law and its enforcement, and urged competition authorities to scrutinize efficiency claims more closely. The stakes are high because the damage in the long term is significant and in many cases irreversible. Mr. Vilakazi stated that poorly informed decisions that fail to consider developmental outcomes have a direct and indirect link to poverty. He supported competition policies that consider a development agenda that is appropriate for the respective society, which the South African Act does. He thought that highly skilled institutions, such as the competition authorities in South Africa, could do more heavy lifting on other pro-developmental goals.

Professor Fox commented that competition law could be more robust to catch classical restraints, but asked whether it should take into account distribution issues to correct the imbalances. She thought that competition law could be stronger, especially in developing countries where barriers are high and government cronyism is prevalent. She then welcomed the panelists to comment on each others' remarks.



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PHILIP MARSDEN

Ms. Mazwai did not think that concurrency of jurisdiction is an unusual phenomenon. She mentioned that in South Africa, the Competition Commission cooperated with the National Consumer Commission

to investigate cases, including price gouging complaints, during the pandemic. The cases that came before the Tribunal were cases that met the additional turnover or asset building for dominance. **Mr. Oliveira** agreed with Ms. Mazwai, and he stated that when the price mechanism collapses and resources are not properly allocated, it is up to the competition authorities to intervene.

Professor Fox asked, whether competition law should look to the Sustainable Development Goals (SDG) in order to make competition law and policy friendlier to those who have been left out, to give them better access. She also asked the panelists for their thoughts on a global framework, given that some of the competition issues span the world.

“THE MOST RELEVANT CHALLENGES TO THE FIRST PRINCIPLES IN BRAZIL RELY ON THE USE OF COMPETITION POLICY TO TACKLE PROBLEMS, SUCH AS THE IMBALANCE OF POWER CAUSED BY TECH PLATFORMS.”

MARCIO DE OLIVEIRA JR



As to the first question, **Professor Marsden** welcomed initiatives by competition authorities to ensure that competition law does not stand in the way of companies collaborating with each other to facilitate SDGs certain countries want to

through research and development. As for a global framework for Big Tech, he thought that if

come up with a rule through the World Trade Organization or an International Competition Network, they should feel free to do so, but he cautioned that competition authorities around the world should not wait for such a framework to prosecute cases that warrant immediate attention.


Mr. Vilakazi added that regional competition authorities could play an important role in navigating through regional dynamics, taking bold steps on issues such as market power in digital markets. **Mr. Oliveira** agreed that the other countries may provide the world with good examples, but each country should adapt them to their own reality.

Professor Fox asked a follow up question on how developing countries, particularly those in Africa, would be able to reap the benefits of good rules, assuming that they are good, when they face exit threats by Big Tech companies.

Professor Marsden replied that although small economies may lack bargaining power, they are still governments and states and can enact regulations if they wanted to. If a business does not like those rules, then they could leave. **Mr. Irukera** added that perhaps a coordinated action of a few states might be what some developing countries need to increase their leverage against Big Tech companies. **Ms. Mazwai** agreed that competition authorities of developing countries should look into coordination amongst themselves in terms of Big Data and digital economies.

Questions and Answers

One attendee asked how competition authorities should tackle issues of unilateral conduct by small firms, and whether there needs to be a change in the theory of market power. **Professor Marsden** explained that the U.K.'s Furman Report tries to tackle the issue by including firms that have strategic market status (an intervention threshold below dominance). He also pointed out that Germany relies more on a leveraging theory to address this issue. However, he stated that if a firm is able to act unilaterally in price gouging, or any other temporary exertion of market power, it possess market power to a certain degree.



“I THINK THAT IT IS ALSO A VERY EXCITING TIME FOR US TO CHALLENGE EXISTING THEORIES AND IDEAS AND TO CREATE NEW KNOWLEDGE, NEW RESEARCH, AND NEW THINKING, NEW CASE STUDIES, AND NEW EMPIRICS THAT SUPPORT A DIFFERENT VIEW OF HOW OUR COMPETITION POLICIES CAN PLAY A MUCH GREATER ROLE IN THE BROADER DEVELOPMENTAL PROJECT.”

THANDO VILLAKAZI

Professor Fox followed up and asked whether it would be unfair or inappropriate to use antitrust laws against a small mom-and-pop shop that happens to find itself in the situation of having all these masks on hand, and can sell them for hundreds of percentages more than it

used to. **Mr. Vilakazi** replied that when thinking about these types of cases, we should consider the overall objectives and spirit of the law in that country. The South African Competition Act addresses marginalized groups in society, smaller firms, citizens, harms to consumers, etc. He implied that firms should not be allowed to engage in excessive pricing on essential goods just because the theory does not allow for such prosecution.

Another attendee asked Mr. Vilakazi how competition policy can be more pro-development and whether it can support industrial policy. **Mr. Vilakazi** replied that any policy regulation, intervention or incentive program touches on industrial policy when it seeks to shape the way in which markets evolve and has the potential to impact the development of industries, whether in terms of entrants or the growth of insiders. He observed that competition law does this all the time in dealing with issues of entry, and thought that the principles embedded in many of the competition policies allow for a natural and less uncomfortable marriage between industrial policies and competition policies. As an example, he mentioned how Lafarge, a leading regional cement firm in Southern Africa cornered the Central, Eastern, and Southern African markets in terms of cement supply and production through various mergers that were allowed. In effect, this raised cement prices in certain countries, such as Zambia. Here, there was a market failure and there were no new entrants for a long time. Mr. Vilakazi explained that it took a combination of entry policy interventions in Zambia to allow the entry of Dangote Cement as an outsider firm to take on Lafarge. During that process, there were competition law proceedings that penalized Lafarge for excessive pricing. This removed the strategic barrier and opened up the market.

A third attendee asked how other countries tackled the problem of the shortfall in demand once it intervened in price gouging practices. **Mr. Irukera** replied that there may not be a quick fix, but that there could be progressive fixes through broader economic policies by the federal government, including stimulating importation and the local production.