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Competition Policy Agendas for Industrializing Countries

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1. Introduction

Recent decades have witnessed a trend of privatization, deregulation and liberalization – and not only in industrialized countries but also in many countries that used to be called developing and that have more actively pursued the path of a market-economy-based industrialization. There is a dominant consensus among economists that market economies require an effective competition policy regime in order to protect competition against its self-eroding tendencies: next to being successful by a welfare-increasing competition on the merits, companies may experience incentives to secure rents by engaging in anticompetitive strategies and arrangements. Consequently, the number of (more or less) active competition policy regimes has significantly increased, in particular throughout the 2000s (Budzinski 2013a).

While the predominantly beneficial character of this development is hardly in doubt, the question what kind of competition policy is adequate for industrializing countries is much more controversial. On the one hand, transplanting institutions and agendas from successful competition policy regimes like the US or the EU represents a strategy that is both advocated and also what many industrializing countries have actually attempted to do. However, it implicitly assumes that there is a 'one-size-fits-all' competition policy, i.e. one 'right' competition policy that is optimal irrespective of a countries' economic and social characteristics. In this chapter, we argue from an economics perspective that this is not the case. Instead, the relevant economic problems of industrializing countries – being in the process of establishing a competitive market economy – and industrialized countries – having a long tradition of a workable competitive market economy – differ to a significant extent. While the competition policy agenda of a long-established market economy is characterized by the target to protect the existing and well-functioning competition as well as to reap marginal efficiencies that are still available in an otherwise comparatively efficient economy, the urgent problem of many industrializing countries is to generate effective competition in the first place. 'Protecting what we have' will often imply to prolong and conserve anticompetitive structures. When combined with privatization and liberalization, this may abet a pure transfer of public economic power into private economic power – without generating competition. Therefore, many industrializing countries need a competition policy agenda that differs from those of industrialized countries in the sense that it focuses more on the active generation of competition and so much constrain itself to the protection of a well-working system. In a way, an appropriate competition policy may resemble more the ones that the now industrialized countries employed when they started to seriously care about competition.

In this chapter, we attempt to sketch a competition policy agenda for industrializing countries that meet or come close to meeting several typical characteristics. Section 2 outlines these characteristics and thus specifies the addressees of our paper. Thereafter, section 3 discusses fundamental principles of a competition policy agenda for industrializing countries, in particular a focus on a rule-based approach, the special role of guidance, fairness considerations and the spirit of competition as well as the need for setting priorities. Section 4 exemplifies more specifically what these principles imply for the actual competition policy agenda.

2. Competition and Competition Policy in Industrialized and in Industrializing Countries: Exploring the Difference

It is impossible to characterize the economies of 'the' developing countries by a precise set of stylized facts. The economic systems and structures of countries on the brink of industrialization and in different stages of development are considerably heterogeneous and what is true for one country can be completely wrong for another one. Still, this fact should not lead economic analysis to limit itself to country studies and relinquish any more general considerations. Although country studies are highly valuable (because it is the only way to consider the important country-specific features and circumstances), it is also valuable to discuss some more general economic aspects that are relevant for many (even though certainly not all) countries. In this spirit we highlight some rather general economic features and characteristics in this section that are quite typical for industrializing countries (without claiming that they are relevant for each and every country). These economic features and characteristics are related to discussion in the following sections in the way that the more a country meets the described characteristics, the better suited is our reasoning. If a country does not meet the general characteristics outlined in this section, then our competition policy recommendations should be viewed with caution for this case.

Many industrializing countries have undergone reforms that contributed to the liberalization of the economy in recent decades, albeit often from the starting point of a predominantly state-organized and centrally-planned economy and with varying degrees of intensity. Still, liberalization often entailed technological, ideological, social and economic changes (Singh 2006). Liberalization embraces free trade and free markets on local, national, regional and international levels. Free markets with free trade, in turn, lead to the existence of certain characteristics of economic interactions, one of the more important ones being competition. However, in particular in societies where competition has no tradition of representing the dominant economic coordination mechanism, there are different points of views and understandings about the nature of competitive markets (Singh 2006). Liberalizing economic and social reforms do not automatically establish an understanding of the nature of competition and the acceptance of competitive markets and their outcomes as a superior way of organizing the economy. It is somewhat puzzling that even economists often tend to overlook this fact since the way towards established and accepted market economy structures has been long and painful in so-called "Western" countries (in Europe and North-America) as well. The path from Adam Smith's (1776) landmark conceptual contribution – highlighting the welfare effects of individualistic economies based upon institutionally-safeguarded competitive markets – to the emergence of sustainable competitive market as the dominant coordination mechanism in the late 19th and mid-20th century was a long and stony road with many obstacles (Gerber 1998). At the end of the day, liberalizing reforms succeeded in establishing sustainable competitive markets when they were accompanied by the acceptance and internalization of a "spirit of competition" (Hoppmann 1967, 1968) by the market participants (companies as well as consumers and public authorities).

Furthermore, one must be careful not to forget that economics is a social science that consists of differing concepts and paradigms as well. The term competition has evolved through different understandings in economic thinking as well and some previously popular concepts like the (misleadingly) 'perfect competition' labeled homogeneous polypoly paragon are widely believed to be outdated today. Even today there is not one single 'true' theory of competition (Budzinski 2008). Instead, modern oligopoly theory, modern institutional economics as well as dynamic innovation economics tackle different aspects of competition as a decentralized coordination mechanism with different models and concepts (Budzinski 2008, 2011).

However, back to the industrializing countries introducing competition into their economies (or increasing the role of it): the meaning of free markets with free trade is not given. Instead, it is shaped by a combination of external explanation (the import of the institution competition) and internal prejudice (which is shaped by the local and regional context). For a long time, the external explanation has been dominated by the so-called "Washington Consensus" and liberalization policy often followed an extreme interpretation of it (Fox 2012: 276-277). In terms of antitrust this extreme interpretation implies a focus on avoiding and deterring government interventions and putting (short-term) efficiency on top of everything: more competition equals more welfare and more competition automatically follows free markets. However, the empirical record of the Washington consensus is assessed to be not convincing by prominent economists (inter alia, Rodrik 2006). Probably one of the more important reasons is that it neglected the anticompetitive effects of private (business) market power that not seldom merely replaced the previous administrative stranglehold on the economy (Fox 2012: 276).[1] This is actually a pattern that resembles some of the stones in the pathway of developing market economies in Western Europe in the 20th century. And it motivated the emergence of so-called ordoliberal thinking in Germany focusing on how to establish working, sustainable and accepted competitive markets instead of focusing on reaping marginal efficiencies (Eucken 1952, 2006; Budzinski 2008: 305-308). While this kind of

[1] This is supported by economic evidence that a workable competition policy regime promotes welfare and development (Aghion & Shankerman 2004; Voigt 2009).

thinking has been widely criticized recently regarding its role in ongoing today's well-established market economies like in the European Union, it may very well have a point when it comes to creating a market economy (instead of 'just' preserving or optimizing it).

Competitive markets require a competition regime which consists of policies and laws, defining and enforcing the rules of the game. This includes rules against anticompetitive actions and arrangements, i.e. against actions and arrangements which impede (or even destroy) existing competition in markets. In industrialized countries all these considerations stand in line with political and cultural facts. Having democratic political systems under the 'rule of law' and having the social acceptance of 'private property' may be sufficient to lead to acceptance of having competition as the dominant (economic) coordination mechanism in such jurisdictions. This acceptance in turn has been the fundament for having relaxed rules to start new businesses (fewer barriers to entry and lower ratios of concentration). In summary: sustainable competitive markets exist and 'just' need to be preserved or optimized. However, this is the focal point of difference between industrialized and industrializing countries: while the former target an optimization of a working and accepted market economy (protecting competition), the latter aim to establish working and accepted competitive markets (generating competition). [2] From an economic perspective, this important difference in phenomenon requires different recipes in policy.

Many industrializing countries, in particular those who used to (or are still having) have political systems like the ones in communist countries, do not have a tradition of accepting "private property" as a general rule. So there may be persistent skepticism towards the idea that competition and individualistic trade will lead to more social welfare. In particular, as soon as some sort of crisis surfaces (which hits any type of economic systems from time to time), this skepticism may quickly gain decisive momentum. Also, in many industrializing countries the main players in the

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[2] Note that distinguishing generating competition from protecting competition follows a didactical purpose. Of course, generating competition will always include the immediate protection of the generated competition – however, by other means as if protection of existing competition is the main task.

economy are the ones with political power. Therefore and despite some limited liberalization progress, there is no belief in "privatization", or more specifically in decentralizing economic power. As a consequence, in many countries centralized economic power is maintained through the liberalization process by transferring public authority power into private hands but without de-concentrating markets.[3] Additionally, strict regulations for starting a business as well as serious barriers to entry and to expansion frustrate effective competition and protect noncompetitive structures. Many developing countries suffer from having a dual characteristic economy (Singh 2006). One major *traditional* part which has arisen based on roots like religion, culture, political regimes and so on as well as one minor or middle *modern* part which has been created in response to globalization and trade. In many developing countries these two parts are not performing in coordination which makes setting a comprehensive competition policy rather more difficult since they may display very different levels and characteristics of concentration, competition and cooperation. Quite in contrast, aggressive "competition" strategies by powerful incumbent companies (the not de-concentrated successors of former public monopolies), like predatory pricing, deterrence, foreclosure and raising rivals' costs strategies, may erode any profit opportunities for upcoming businesses and such from the more traditional sector and, as such, diminish incentives for further investment from both sides (Singh 2006). In the face of imperfect and deficient capital markets and without an existing reservoir of potential competitors, (in particular!) including entrepreneurial competences and experience, competition may quickly be perceived as an instrument to protect existing privileges rather than creating efficiency and welfare. While in a long-established, comprehensive market economy the emergence of private market power through competition may be viewed as ambivalent (reaping efficiencies versus being abused for monopolization), in economies where competition is not well-established and represents the exception rather than the rule, prevalent private market power positions are means of income distribution – towards the privileged and away from the others. Not accidentally, the German ordoliberal economists viewed the power-

[3] The private hands may be those of former or current government officials or such of influential families or leading societal groups close to the government.

eroding force of competition to be an important element of generating (more) competition in a hybrid economy.[4] However, this requires a strict policy against any private attempts to undermine this power-eroding effect, for instance also by empowering emerging competitors. Again, different economic structures require different rules of the game.

In summary, there are fundamental differences between industrialized and industrializing countries in regard of the organization of the economy. Thus, there is no 'one size fits all' in regard to competition rules and policy. Different economic situations require different economic policy answers. Competition policy is not an isolated concept; it needs to be effective in respect to the context of the society where it is implemented. To be able to achieve such effectiveness, a common notion of "competition" and its role for the society is required. The insight that competition is the best available coordination mechanism for organizing the economy because it tends towards (i) an efficient allocation of production factors (labor, capital and resources), (ii) provides incentives for business performance, efficiency and customer focus, (iii) creates incentives for innovation and technological as well as organizational progress, and (iv) improves the adaptive efficiency and robustness of an economy by keeping business in the practice of acting and reacting to competitive forces (instead of relying on privileged positions or remaining in agony about powerless positions) is not a necessarily a fast-selling item.[5] Next to these purely economic effects, maximizing in tendency the material welfare of a society, competition provides a liberty and a participation effect. Freedom of choice on the consumers' side combined with freedom of production on the sellers' side of a market create competition and competition is an expression of this economic liberty. Moreover, competitive markets provide participatory liberty since they are open and everyone can inject her creativity and be successful. Thus,

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4 Fox (2012: 277-278) interprets the so-called Spence report (2008; chaired by economics Nobel prize laureate Mike Spence), calling for inclusive growth matters (i.e. distribution counts, especially an equal distribution of opportunity), in a way that would make it compatible with this kind of thinking.

5 These effects are well-known and uncontroversial among economists. However, they are not necessarily that well known outside the economist's world. Unfortunately, economists tend to forget that and often neglect to emphasize the importance of these well-known effects of competition again and again instead of immediately entering into more technical debates.

competition offers opportunities.[6] However, competition requires that the market participants share a certain spirit of competition which may be viewed in analogy to sportsmanship[7]: it is a common mentality to inject skills, competences, will and creativity into a contest for the best – but only 'winning' on the merits counts; it is frowned upon and not acceptable to 'win' by handicapping others. Just like in sports, rules are required to frustrate the odd 'cheating' attempt. However, just like in sports, rules cannot work if the mindset of a majority does not value the rules and its underlying mentality: if nobody follows the rules, rule-enforcement becomes impossible.[8] In brief, a certain *spirit of competition* is a precondition for a working, sustainable and accepted competitive market economy. It is an important point that we want to make that generating competition *requires* an active promotion of such a spirit of competition. Consequently, competition policies in societies without a distinct spirit of competition require different competition rules and policies than societies which enjoy this spirit of competition.

In the following sections we sketch such a competition policy focusing on generating competition. Its fit to any given society depends on the features and characteristics of this society. The better the following stylized facts describe an economy, the higher is the fit of our competition policy concept:[9]

- dominance of state-owned firms and their privileged successors; dominating state-owned or formerly state-owned incumbents including parastatal ownership, leading families ownership (oligarchic structures) and privileged privatized business,
- highly concentrated markets and/or sclerotic markets,
- poorly working or deficient capital markets,
- scarce human and financial capital,

6 As Fox (2012: 275) puts it, competition empowers people to do what they can do for themselves.

7 To some degree, Adam Smith (1776) originally 'borrowed' the concept of competition from sports.

8 The need for respective values in order to make competition work was already present in the work of Adam Smith (1759).

9 According to our preceding paragraphs as well as according to, inter alia, Khemani (2007) and Fox (2012: 280-281) these stylized facts fit well to numerous industrializing and developing countries.

- high barriers to business creation and expansion as well as market entry (and exit),
- significant amount of (regulatory) capture and corruption,
- extensive informal economy
- social ties favoring collusion and discouraging its detection,
- barriers to mobility due to sclerotic society structures (like rigid caste systems); marginalized groups (or even marginalized majority) deterred from participation in the economic life of the community,
- lack of (local) competition culture; lack of a spirit of competition.

From these stylized factors it should be clear that countries, who do not have established market economy institutions at all (or even represent so-called failing states), do not represent the addressees of our paper. Instead, we address countries that are already progressing on their way to becoming an industrialized market economy but are still suffer from transformation issues and problems tracing back to pre-market economy structures.

3. A Policy for Generating Competition: Fundamentals and Principles

3.1 Institutional Framework Conditions

Implementing a workable and effective competition policy regime is a multidimensional task. While we focus in this contribution on the competition policy strategy, another important area is the fundamental set-up of the competition policy: the institutional framework conditions. Important ingredients include an independent competition authority, trustworthy institutions, judicial review and an advocacy role for the authority (inter alia, Kovacic 2001; World Bank Report 2002; Fox 2007, 2012; UNCTAD 2010; Kovacic & Hyman 2012). Independence of the competition authority refers to being independent from non-competition influences by the government or lobby groups (Vickers 2010; Jenny 2012; Budzinski 2013b). In order to establish an effective competition regime, the authority must be able to focus on competition matters only and with the same stance towards all participants of the economy. This requires a certain protection of the competition authority against deviating (vested) interests by powerful and privileged groups and (their influences on) the government. Only if the competition authority can act independently, the competition institutions can become trustworthy in the sense that they follow the rule of law. The possibility of the norm addressees to go for a judicial review of the competition authority procedures and decisions (requiring independent and trustworthy courts) further improves the rule of law. Altogether, these institutional framework conditions must serve to create a reputation of the competition regime and its authorities to act as an impartial referee on market competition. If this reputation is established, an advocacy role of the competition authority in the sense of advocating competition-friendly laws and regulations in all areas of the economy may prove to be valuable to fuel the processes of privatization, deregulation as well as the elimination of other restrictions to competition in the course of time.

Even though the importance of these institutional framework conditions cannot be emphasized enough, our chapter turns the focus to a perspective that has been somewhat neglected in the literature so far: the competition policy strategy, i.e. we focus more on the agenda instead of the framework. Obviously, there are certain overlaps and interfaces between framework and agenda and the next section addresses the – for our purposes – most important of these interfaces.

3.2 Rule-Based instead of Case-by-Case Approach

A fundamental decision about the agenda of competition policy that interfaces with the institutional framework is whether competition policy should be rule-based or follow a case-by-case approach. A rule-based competition policy implies that if any specific business strategy *typically* (i.e. more often than not) violates competition, then it is *always* prohibited. In contrast, a case-by-case approach implies to analyze each single case on its own merits without prejudice about its pro- or anticompetitive effects. Thus, the main difference is whether a given case is decided upon typical effects of that type of strategy or arrangement or solely upon the effects of the case-specific shape of the strategy or arrangement in question.[10]

[10] This discussion somewhat resembles the controversy about per se-rules vs. rule of reason, however, in a more differentiated way, paying respect to the fact that the extreme points of this discussion (like a strict per se-rule) are not the typical phenomenon in competition policy anyway. See Christiansen & Kerber (2006).

The competition policies of many industrialized countries used to be predominantly rule-based. However, recent trends have moved them considerably more towards a case-by-case approach (labeled, for instance, as an effects-based approach).[11]
The focus on rule-based or case-by-case competition policy may reflect in the codified competition rules, i.e. the law or the institutions. However, more often than not, the written rules allow for some scope for interpretation, so that the location of a specific competition policy on the continuum rule-based ↔ case-by-case is also a matter of agenda (for instance, expressed in guidelines) and not only of the institutional framework.

The reason for the European and North-American shift towards a case-by-case approach is the error cost that comes along with a rule-based policy. If, for example, typically 80 per cent of a certain type of strategy or arrangement harm competition, then a rule-based competition policy gets 80 per cent of those cases right - but at the same time it gets the 20 per cent that display untypical characteristics wrong. On the other hand, a case-by-case approach individually analyzes each case without prejudice, heralding that many business strategies can display positive and negative effects of their own on competition (e.g. R&D cooperation, vertical agreements, mergers, etc.). In a case-by-case analysis, the aim is to balance pro- and anticompetitive effects of the specific case in question and, thus, to decide every case on its own merit. Consequently, in a perfect world, a case-by-case approach would minimize the number of erroneous decisions towards zero whereas a rule-based approach always includes a certain rate of errors. Thus, the recent trends in North-American and European competition policy towards embracing case-by-case approaches can be viewed as an attempt to fine-tune these far developed and experienced competition policy regimes.

Again, in a perfect world with perfect knowledge, the case-by-case approach will be superior to the rule-based approach because the perfect knowledge will lead the single-case analysis to a clear and correct conclusion without ambiguity. However, in an imperfect world with imperfect knowledge, a case-by-case approach also involves decision errors because the facts and effects of a given case cannot be

[11] See, inter alia, Baker (1999), Neven (2006), Röller & Stehmann (2006) and the literature quoted therein.

perfectly investigated. In this case, there is – a priori – no clear superiority of either concept. It depends on what kind of knowledge is better available (and less distorted): single-case knowledge or knowledge about typical effects. For instance, if reality is well described by the availability of satisfying knowledge about average/typical effects of a type of strategy or arrangement but there is insufficient knowledge about single-case effects, then the rule-based approach is superior. This is so because the rule-based approach gets the majority of cases right – at least.
Regarding the question what kind of strategy is best for industrializing countries, it becomes important what kind of knowledge is available at what costs.

- Knowledge about typical effects is an output of science (theory-driven assessment of types of strategies and arrangements) as well as of past experience. The first is generally well available although there might be barriers to accessibility (i.e. some expertise is required). The second is obviously not directly available for comparatively new and inexperienced regimes. However, academic empirical studies summarize past experience and are similarly available like the theory output.
- Single-case knowledge is not available. It must be generated case by case. This requires comprehensive and sophisticated case analyses including expensive instruments like tailor-made models and advanced econometrics and simulations. Furthermore, it also requires staff-intensive investigation at a high frequency of comprehensive analyses and advanced economic expert competences.

In summary, the agency costs of the case-by-case approach by far exceed the ones of a rule-based approach. The same is true for sophisticated and advanced experts' competencies. If it shall be successful in terms of minimizing decision errors, then the case-by-case approach requires a well-developed, well-financed and experienced competition regime. This may be appropriate if a long-run, well-equipped and well-established regime in a fully industrialized market economy with a developed competition culture shall be fine-tuned in order to reap remaining marginal benefits and efficiencies from improving an already high level of competition policy enforcement.[12] However, it is highly doubtful if the resources on a case-by-case agenda are well-spent for a regime in an industrializing economy where competition must be rather generated than protected and a spirit of competition has yet to be established.[13]

Moreover, there is some likelihood that a case-by-case approach is more prone to non-competition influences from governments or lobby groups as well as more prone to corruption. Applying a rule offers less scope for injecting all sorts of non-competition arguments than an open balancing of case-specific and singular effects. "Special circumstances" exempting the privileged economic agents from competition rule enforcement can be easier argued and is more difficult to be detected if each case gets assessed on its own without attaching the enforcement to a rule. In that sense, accountability and liability of manipulated decisions is lower in a case-by-case approach compared to a rule-based approach. A rule-based approach does not exclude corruption but it limits the scope for it since competition policy decisions violating the announced rules will cause considerable costs for the decision-makers in terms of reputation losses.

3.3 Guidance, the Spirit of Competition and the Role of Fairness Considerations

As it has been argued in section 2, one of the major differences between the needs for competition policy regimes in industrializing countries in contrast to such in fully industrialized countries refers to a lack of a spirit of competition or a comprehensive competition culture. Consequently, competition policy in industrializing countries needs to work on generating and promoting competition (whereas competition policy in industrialized countries may focus more on protecting the comprehensively existing and predominantly well-working

[12] And even for the European Union and the U.S., the empirical record of moving away from a rule-based and towards a case-by-case approach is not necessarily convincing (Budzinski 2010; Budzinski & Kuchinke 2012). As far as it can be said today, the number of decision errors has not been decreased at all.

[13] "[P]er se rules may be easier and less costly to enforce than 'rule of reason' judgments, which require careful balancing of costs and benefits of certain potentially anti-competitive practices" (Stiglitz & Charlton 2005: 272).

competition). Next to intensively discussed issues like privatization and liberalization, the development of a competition culture and a spirit of competition belong to the important ingredients of comprehensive market competition. However, its role and importance is often neglected in the literature. Thus, the question what kind of competition policy fuels the emergence of a spirit of competition and a competition culture is rarely addressed.

We argue that guidance and fairness represent two important pillars of a spirit-of-competition-promoting competition policy agenda. Business companies need guidance by the competition policy. Lacking a spirit of competition implies that a considerable part of the competitors in the markets are insecure or ignorant about how to behave in competition and compete on the merits. This implies, for instance, that companies may find it more natural to go for anticompetitive cooperation arrangements than to compete on innovation and performance. Or incumbents may find it absolutely justified to preserve their privileged position (formerly guaranteed by public authorities) in the course of liberalization by anticompetitive deterring and foreclosure strategies instead of adjusting their products and services according to the preferences of the consumers. In other words, business companies need guidance as to what is procompetitive behavior and what represents unacceptable anticompetitive behavior.

Whether guidance is provided by competition policy also depends on the approach of the competition authority. A case-by-case approach, for instance, expects the norm addressees to have considerable expertise and experience on competition rules at their command. It requires comprehensive self-assessment of strategy options by business companies in order to anticipate whether a specific strategy or arrangement is in line with the competition rules. Since the effects-based outcome of the case-individualistic analysis is open, companies are expected to self-assess all relevant pro- and anticompetitive effects and balance them. And only if the majority of market participants choose procompetitive strategies, any competition authority will stand a chance to effectively govern competitive markets. In a world consisting predominantly of anticompetitively behaving companies, any authority will be overburdened with competition policy enforcement and fail. Thus, considerable compliance is a precondition for successful competition policy. Now, if business companies lack experience with competition policy and also lack a spirit of competition, then a case-by-case approach is likely to fail to provide the necessary guidance to build-up and develop a workable competition culture. In contrast, a rule-based approach provides significantly more guidance for business regarding what is within the competition and what is outside. It also includes better anticipation of competition authority decisions. Clear and unambiguous rules offer better learning opportunities for business companies. They learn how to comply with competition rules and so they are increasingly deterred from anticompetitive behavior which in turns leads to promotion of a competition culture. In other words, this approach displays a considerably stronger guidance effect.

Another issue stressed in section 2 was that competition as the major coordination device needs to receive acceptance by the market participants (and by society in general), which represents another dimension of developing a spirit of competition. If acceptance of competition is not so deeply anchored in the society (in industrializing countries), it becomes important that people perceive competition as something positive that is improving their life and welfare. If competition and outcomes of competitive markets are perceived to be unfair by a large number of market participants and people, then the acceptance of competition as the primary economic coordination mechanism will not grow and/or be eroded. Even though this is basically true also for industrialized countries with an established competition culture, it is considerably more important in economies without a well-established and robust competition culture.[14]

The acceptance issue represents an important issue for the competition policy agenda because fairness and efficiency may be at crossroads at times. For instance, if a dominating incumbent deters or squeezes fringe competitors, this might actually be efficient under some circumstances (in the short run) even if it uses methods that violate the fairness standards of the people. The latter means that instead of directly outperforming the fringe competitor, the dominant incumbent speeds up that process by, for instance, raising-rivals'-cost or foreclosure strategies (i.e. preventing the fringe from performing). While in former times, fairness

[14] However, the chapters in Theurl (2013) as well as Budzinski (2013c) emphasize that acceptance levels and competition culture may not be that robust in industrialized economies as well.

considerations played a role in European and North-American competition policy, the modern interpretation is that efficiency considerations should trump fairness considerations whenever they stand in conflict with each other (Kaplan & Shavell 2006; Ahlborn & Padilla 2008). However, if acceptance levels of competition are low and competition culture is underdeveloped, then a different assessment is necessary from an economic perspective: fairness considerations should outplay efficiency considerations if

- the fairness considerations have the potential to influence the development and robustness of the competition culture (for instance, have the potential to significantly influence acceptance levels), and
- the efficiencies in question are marginal (either per se or because comparable efficiency levels can be reaped by alternative strategies involving fair behavior).

Notwithstanding the importance of fairness considerations for competition policy in industrializing countries, a note of caution must be issued: fairness is a concept that may be difficult to exactly delineate. Thus, there is a permanent danger that vested interests (for instance, by privileged groups) try to sail under the label 'fairness' even though they actually attempt to update unfair advantages. Therefore, the concept of fairness is not very well suited to be embraced as part of a case-specific analysis of pros and cons. It rather be employed in the codification of clear rules generally outlawing modes of behavior that are perceived to be unfair in the sense of contrasting moral norms and values of a large part of society. Section 4.4 will explain a bit closer how this may work.

3.4 Setting Priorities

Another common feature of competition policy regimes in industrializing countries is the necessity to deal with limited capacities, experiences and budgets. If the budget is considerably limited, industrializing jurisdictions should start creating the competition regime by setting rules against the most destructive actions which have been integrated into the structure of the markets during years. The authorities should find out what anticompetitive actions they need to fight first, because they cause exceptional damage or represent the main hurdles against the emergence of sustainable competition. This consideration should definitely be taken based on the trade-off between the proportion of the budget which is needed to conduct this agenda and the percentage of the destructive anticompetitive actions which can be diminished. In general, cases with (i) a high damage potential, (ii) a comparably clear-cut and unambiguous anticompetitive character, and (iii) a high probability of enforcement success should be treated with priority. Second and third priorities belong to cases which satisfy either of the criteria above. It seems sensible to give no priority to cases which are complex, require lots of resources but promise only little gain in terms of generating competition ("marginal cases"). Without prioritization, competition policies in developing countries will simply lack practicality.

4. A Policy for Generating Competition: Agendas for Relevant Antitrust Topics

After section 3 has outlined more general characteristics of an adequate competition policy agenda for industrializing countries resembling the stylized facts as discussed in section 2, this section offers some more detailed thoughts on the traditional fields of competition policy: anti-cartel policy, merger control, abuse control, and policy against unfair competition.

4.1 Cartels and Anticompetitive Agreements

Hardcore cartels (i.e. price-fixing, quantity-allocating, quota, market division) are among the business arrangements that most seriously violate competition and, therefore, combating them should definitely be one of the priorities on the competition policy agenda of industrializing countries. Other cartels and cooperative agreements like R&D-cooperation, marketing cartels, terms and condition agreements, etc., may cause anticompetitive effects or not depending on their structure and extent. Thus, a general prohibition of a set of clearly defined types of cartels (hardcore cartels) without exemption represents a priority. This is also where scarce resources should be focused on: the detection and prosecution of these hardcore cartels.

The case of the remaining types of intercompany agreements is more difficult. Even though each case may involve pro- and anticompetitive effects here, we do not recommend a (resource-intensive) balancing of single-agreement effects – due to the reasons discussed in section 3. Furthermore, if market participants need to learn to focus on procompetitive strategies and need to unlearn favoring collusive arrangements over performance (i.e. if a spirit of competition needs to develop), then it is recommendable to prohibit these types of cartels as well, possibly complemented by clearly and unambiguously defined exemptions. Regarding the latter, it is important to base the exemptions on a small set of clear-cut and (comparatively) easily assessable criteria in order to provide guidance and avoid gateways for the injection of non-competition influences and interests into the competition policy process. In economies that resemble the characteristics outlined in section 2, we recommend a cautious approach towards exemptions. In these industrializing economies, the harm to welfare of prohibiting some efficient arrangements is considerably less than the harm to welfare from continuing, consolidating and further reinforcing anticompetitive practices, traditions and (business) cultures.

4.2 Merger Control

There has been vast numbers of economic studies which have focused on pro- and anticompetitive impacts of mergers. Treatment of mergers in contrary to cartels is not that straightforward (sophisticated in practice). Mergers have their *good* effects (promoting efficiency and welfare) and *bad* effects (reducing competition and welfare) but of course not all mergers are welfare-enhancing and not all of them welfare-reducing. In case of mergers, sketching a sharp border between pro- and anticompetitive is not trivial. However, notwithstanding this, merger control is a necessary ingredient for an industrializing country competition policy agenda for two reasons:

- firstly, mergers can be used as a strategy to circumvent anti-cartel policy, i.e. if market-wide hardcore cartels come under the attack of the competition authority, the cartelizing companies may just revert to merge and form a monopoly.
- secondly, merger control is necessary in order to prevent the genesis of too many dominant firms (which are expensive and difficult to control afterwards, see section 4.3) or even outright monopolies.

Due to the complex economic effects, merger control in industrialized countries typically involves sophisticated and rather expansive economic case analysis with advanced instruments like merger simulation, structural modeling and sophisticated econometric analysis based upon large and extensive data sets (Budzinski & Ruhmer 2010; Rubinfeld 2010, 2011). Since this advanced and resource-intensive approach may be inappropriate for many competition policy regimes in industrializing countries, they need to take a less ambitious approach and accept some compromise between practicability and economic accuracy. For instance, merger prohibitions could be related to a single criterion like market shares (according to a standardized market definition procedure): a merger is prohibited if it leads to a market share of more than x per cent in one of the relevant markets.[15] Admitted, this is a rather crude rule from an economic point of view that will lead to blocking some innocuous mergers. However, it is superior to (i) having no merger control at all as well as to (ii) fail to enforce merger control because the complex balancing of effects overstrains the competition authority capabilities and resources – or those of other elements of the competition policy regime (law courts, etc.)[16].

The simple market share-based prohibition rule may be supplemented by granting an exception if the merging companies can prove sufficiently large positive merger effects. It is important, however, that the burden to prove the positive effects falls on the merging companies, so that the competition authority and/or the courts

[15] Without going into detail, Vietnam has a comparable rule that prohibits mergers leading to market shares of more than 50 per cent.

[16] Budzinski (2010) - and the literature quoted therein - offers some insight into how even far developed and experienced competition policy regimes may be overstrained.

play more the role of an inspector or examiner of the reasons for seeking an exception – instead of having to produce and present sophisticated evidence themselves. Beyond this, we do not think that it is recommendable to engage in cases where the economics are most complex and the effects – compared to monopoly or dominance cases – rather small, like unilateral effects in pre- and post-merger oligopolistic markets.

From an economic point of view, we recommend a merger control that is considerably stricter towards monopoly and dominance cases but more lenient towards oligopolistic cases than can typically be observed in industrialized economies. The reason for this recommendation again refers to the need for guidance and promotion of a spirit of competition. Furthermore, a priority on generating competition often demands deconcentrating markets rather than preventing an excessive concentration process. A comparatively restrictive merger control is a helpful tool for achieving this goal. A rather harsh instrument of merger control would be to include the option of forced unbundling of dominant companies or groups (trust busting). This can only be recommended if many markets suffer from quasi-monopolistic incumbents that are de facto incontestable and maybe intertwined with privileged families or groups. An independent competition authority may then be an appropriate means to erode this competition-blocking power in the course of time.

4.3 Abuse Control

Similarly to merger control, controlling the economic behavior of market-dominating companies quickly becomes a complex and sophisticated business if competition authorities target an optimal policy according to modern industrial economics insight here. However, again, it is questionable whether it fits to the prior-ranking economic problems of industrializing countries to target the final percentages of marginal efficiencies from fine-tuning the abuse control of companies that achieved a dominant position by performance in competition and are surrounded by well-established competitive market structures and processes. In contrast, the characteristics outlined in section 2 imply that in many industrializing economies dominant companies are incumbents who used to enjoy all kinds of privileges and may be intertwined with politics and/or influential families. Quite naturally, competing on the merits is far away from the mindset and experience of these former monopolists and, at the same time, they often still enjoy market power, superior financial means and connections to other incumbents. "Just" privatizing and (institutionally) liberalizing may not suffice to generate competition in such markets because the natural reaction of the incumbents will be to target any type of protection against upcoming competitive forces in order to avoid being pulled into a competitive environment and to prolong their anticompetitive rents into and through the era of privatization and liberalization.

If these are the relevant problems, then a competition authority does not need to worry whether abuse control may constrain (comparatively[17]) marginal efficiency gains by the incumbent. Instead, the task at hand is to generate competition in the first place and to educate the incumbent to play in a procompetitive way. Thus, we consider it useful to focus on avoiding the most harmful practices by implementing per se prohibitions of a limited number of particularly harmful practices for dominant companies. This may well include practices that are viewed to be not that harmful in well-developed market economies like, for instance, resale price maintenance, predatory pricing, special types of price discrimination, exclusive dealing, etc. Doing so serves two purposes:

- educating business to focus on unambiguously procompetitive strategies and thus providing guidance as well as building a spirit of competition,
- protecting fringe entrants into the incumbent-dominated markets in order to generate future competition.

In particular the latter may cause industrial economists specialized in the competition policy of fully-industrialized countries to frown because 'protecting competition instead of protecting competitors' has been one of the buzzwords of recent reform trends in most major competition regimes of the industrialized

[17] Here, "comparatively" refers to a comparison to competition generating policies targeting the competitive revival of sclerotic 'markets'.

world.[18] However, keep in mind that the task at hand differs in the industrializing world: instead of protecting a well-working and fully-developed market competition, a competitive environment needs to be generated in the face of non-competitive structures, traditions and mindsets. Therefore, newly-emerging competitors need to be protected against squeezing and deterrence strategies that factually rest upon the anticompetitively accomplished market power by the incumbents – irrespective of whether it can be proven that the new competitors are already more efficient than the incumbent or not. First of all, the emerging business needs to get a real chance of demonstrating their abilities! In contrast to many industrialized countries, this chance of opportunity may not exist without an abuse control disciplining the incumbents and forcing (and educating) them to strictly compete on the merits only.

4.4 Unfair Competition

The latter is closely related to the different role that fairness considerations should play in industrializing countries (of the type specified in section 2) compared to long-established market economies. According to the reasoning of section 3.3, the competition policy agenda of industrializing countries benefits from including a policy against unfair competition which is not limited to dominant companies. In order to educate business to behave competitively as well as in order to promote a competition culture in business and society (promoting the spirit of competition), a clearly defined set of business strategies and arrangements should be per se prohibited that are (more or less) consensually deemed to be unfair in society. Examples may include boycotts and discrimination, misleading or untrue advertisement, defamation of competitors (through advertisement or otherwise), espionage and sabotage, etc. Furthermore, due to the importance of guidance and promoting a competition culture, the intent to behave anticompetitively may justify intervention irrespective of the effects. In contrast, in the U.S., for instance, effects appear to dominate intent, i.e. even if there is anticompetitive intent, if the result is

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18 See the reflective analysis of Fox (2003).

efficiency-increasing then it is considered not to be a problem.[19] If business must learn competition to begin with, however, such a policy would significantly erode educating signals and damage the acceptance of competition in society.

5. Conclusion

Developing countries are subjected to different especial economic characteristics which should be undoubtedly considered when competition policy is getting formed. We look at some typical characteristics of industrializing countries (section 2) in order to describe how an appropriate competition policy agenda for countries that come close to resembling those characteristics may look like. In terms of general principles (section 3), a case-by-case approach may be superior if knowledge about individual case effects are available, competition agency is well-equipped with staff, resources and (economic) expertise, business is experienced with market competition and competition rules, guidance is less important than fine-tuning and competition culture is well established. However, these conditions are certainly rather met by fully industrialized countries. A rule-based approach, on the other hand, is superior if knowledge about average effects is significantly better available than knowledge about individual case effects, the agency faces limitations in budget, there is lack of expertise on sophisticated economic methods and instruments, business needs guidance in order to learn procompetitive strategies and competition culture is not well established yet. Thus, the current state of many industrializing countries fits better with the characteristics featuring a rule-based approach. Therefore, the balance between these two approaches should be more shifted towards general rules for industrializing jurisdictions than in high-profile competition regimes (section 3.2).

Another difference refers to the role of guidance and fairness considerations (section 3.3). They are considerably more important in industrializing countries than in long- and well-established market economies. It seems like the spirit of

[19] For instance, evidence of anticompetitive intent was dismissed to be relevant in (parts of) the U.S. proceedings against Microsoft and or the Whole Foods/Wild Oats-merger (see Budzinski 2010: 461 and the literature quoted there).

competition has not been in line with societal facts in many industrializing countries. Therefore, building a competition culture is necessary in order to breathe life into competitive markets created by institutional framework conditions (liberalization, privatization) but that remain inanimate due to the lack of a spirit of competition by local business. Furthermore, many industrializing countries face limitations in budget in implementing a comprehensive competition policy so they should allocate budget to treat strategies based on priorities otherwise execution of an optimal policy is not practical (section 3.4).

In summary, there is no one size-fits-all competition policy agenda. Instead, different economic needs and characteristics require different antitrust answers. For industrializing countries that are well described by the characteristics set out in section 2 of this paper, *generating* competition is the more relevant task than purely protecting already existing and well-functioning competition. This requires a different emphasis (section 4). Combating the most severe anticompetitive practices and arrangements is the obvious priority. However, there are some implications that are often overlooked. In particular, the more important role of guidance, the promotion of a competition culture and acceptance as well as fairness considerations imply a comparatively restrictive abuse and merger control (the latter focusing on dominance and monopoly cases) as well as a strict policy against unfair competition including anticompetitive intent.

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