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ANTITRUST AND DEVELOPING AND EMERGING ECONOMIES

NEW ISSUES IN CARTELS AND CORRUPTION, BIG DATA, AND THE PUBLIC INTEREST

Conference materials

Antitrust and Developing and Emerging Economies

November 1, 2019, NYU School of Law

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Interview with Pinelopi Koujianou Goldberg
Chief Economist, The World Bank Group, Washington, DC | Elihu Professor of Economics, Yale University

Pinelopi Koujianou Goldberg (Chief Economist, The World Bank Group, Washington, DC | Elihu Professor of Economics, Yale University) has been interviewed by **Eleanor Fox** (Professor, New York University School of Law) in view of her keynote speech **"Firms, Competition & Market Power in Developing Countries"**.

They joined the **Antitrust and Developing and Emerging Economies Conference** that took place in New York City on November 1, 2019 at the New York University School of Law.

Dr. Goldberg, we are honored to have you as our keynote speaker and are excited to profit from your experiences as Chief Economist of the World Bank Group following your years of research as a distinguished Yale economics professor examining some of the most daunting questions facing developing countries. May we ask you:
In antitrust we are constantly asking: Does this firm have market power, and is it abusing its power to the harm of the people, usually as consumers? Do those questions have different meanings or implications, or do they invoke different problems, in developing countries?

Let me start with an important qualifier that applies to everything I will say in this interview or the keynote speech at the conference: The term "developing countries" refers to a large set of heterogeneous countries, each of which faces its own problems and challenges. So there is a risk of oversimplification when one tries to make general statements. With this qualifier in mind, I would say that *in principle* the issues in developing countries are the same as in advanced countries, the emphasis here being on the words "in principle". But the reality on the ground is very different.

The reality in many developing countries, especially the low-income ones, is that market power and antitrust are an afterthought at best. This is partly due to the fact that a salient feature of developing countries is the absence of big domestic firms. Most domestic firms are small, informal and inefficient. The primary concern is how to help these firms grow, be profitable, and generate good jobs, not how to contain their market power. Hence, antitrust is nearly absent in the developing world.

However, this state of affairs misses the fact that market power is in fact present in many settings and competition is severely constrained in important sectors of the economy, from food, to fertilizer, to cement, to telecommunications. The service sector is dominated by state monopolies. The result is high prices, limited variety, and low quality. Inadequate transportation infrastructure, lack of competition in the transport sector, and low connectivity in general, keep markets segmented, especially in countries in Sub-Saharan Africa, contributing to the emergence of local market power. Even in sectors like agriculture, that serve as the prototype of perfect competition in Economics textbooks, farmers are often at the mercy of intermediaries; these are too small themselves to be on the radar of policy makers or the international community, yet they may be able to exercise significant market power in local settings due to market segmentation.

As Chief Economist for the World Bank Group, are there insights you have gained about firms and market power in developing countries that would not have been obvious to you as a professor? Could you say a few words about this?

The perhaps most surprising insight I have gained since joining the World Bank is how little attention the issue of "market power" receives at the Bank. There are hardly any Industrial Organization economists in the institution, and even though the Bank has research in almost every area of Economics, work on competition, market power, and antitrust in nearly absent. The term "competition" is almost always interpreted as "international competition". There is a strong belief, not only in the World Bank, but in all multilateral institutions, that the best way to promote competition is to open up to international trade and investment. Free (international) trade is the de facto competition policy advocated by these institutions.

As an academic economist, I've always had one foot in Trade and one foot in Industrial Organization and thought that the interpretation of international trade as competition policy was naïve at best and seriously misplaced at worst. However, during the last few months, I have become more sympathetic to this view. The reason is that once you are confronted with the institutional reality in many low-income countries, you realize that there is no hope for

competition policy. In many countries, antitrust laws do not even exist. In cases where they do exist, there are hardly any authorities that can enforce them. And even when antitrust authorities exist, they are seriously underfunded and ineffective. So, in such environments, there is often no other hope than to import competition, with all associated caveats (most importantly the caveat that exporting firms may have considerable market power themselves).

Are developing countries more vulnerable to market power coming from outside their country (e.g., multinationals) or market power from within, including by state owned enterprises? If so, could you explain?

This is a very interesting question and related to the issue I mentioned above regarding the role of international trade. A unique feature of developing countries is that often market power from outside the country (i.e. multinationals) is viewed as the solution to the problems associated with market power from within (i.e. state monopolies).

The concern with multinationals is more pronounced in advanced economies than in developing countries. If you talk to people in developing countries (from policy makers to private citizens), they complain about state monopolies, especially in the service sector, that result in high prices and low quality. They complain about high prices for food and inputs to agriculture (e.g. fertilizer) due to local cartels. Farmers complain about intermediaries that leave them with very little once costs are paid. These local players are too small to be on the radar of the international community, yet they have a significant impact on the livelihoods and welfare of households in low-income countries.

In comparison, empirical studies have shown that multinationals have a good track record in developing countries. They tend to pay higher wages, employ more women, have higher labor standards, and use green technologies. It is hard for multinationals to misbehave today – they are under constant scrutiny. And, most importantly, they bring jobs to the host countries.

So, all things considered, to the extent that countries need to choose between internal and external market power (and as argued earlier, such a dilemma does exist in many developing countries given the absence or powerlessness of antitrust), on balance the evidence favors external market power. At least in the short run. In the long run, the question is of course if domestic firms can successfully compete with large multinationals. And if multinationals are consistent with sustained, inclusive growth. But these are questions outside the scope of antitrust.

Link: https://interview-pinelopi-koujianou-goldberg.eventbrite.com

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Interview with Gönenç Gürkaynak Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Gönenç Gürkaynak (Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul) has been interviewed by **David Lewis** (Executive Director, Corruption Watch, Johannesburg) in view of their panel **"Rooting out Cartels and Corruption: Where are the synergies?"**.

They joined the **Antitrust and Developing and Emerging Economies Conference** that took place in New York City on November 1, 2019 at the New York University School of Law.

In your practice, where do you find the synergies between cartel law and corruption?

These fields are both regulatory compliance areas with similar social aims. From an economic perspective, both competition law and anti-corruption law seem to share the same fundamental purpose; namely, to maximize market efficiency and boost economic growth. In that context, both anti-corruption law and competition law aim to create a level playing field, and are complementary to each other in support of this aim. In a free market economy, competition promotes welfare, economic growth, and productivity. However, corruption undermines these efforts by distorting the level (i.e., fairness) of the playing field.[1] Thus, in order to ensure a society that can achieve and rely on institutional and market integrity, both policies need to go hand-in-hand.[2]

Both corrupt and anti-competitive behaviors necessitate secretive and unethical environments in which they can prosper. Since a democratic system cannot be both corrupt and competitive, and since the underlying unethical culture that enables these violations causes these problems to foster and exacerbate each other, these areas need to be fought simultaneously and conjointly,[3] and it should be realized by enforcement authorities that there is actually one type of integrated violation that must be addressed.

In practice, as is often seen in internal investigations, a competition law violation is frequently accompanied by an anti-corruption law violation. Therefore, at the macro level, the competent authorities should adopt and implement a holistic approach regarding these areas, and competition law and anti-corruption law should be subject to a unified legal enforcement policy with regard to interacting compliance programs. In fact, on a macro level, when making policy suggestions to governments, international organizations such as the International Chamber of Commerce[4] and the OECD,[5] establish a working link between anti-corruption policies and competition law regulations, and even emphasize this connection as crucial to the maintenance of a well-functioning free market.[6]

On a more practical (i.e., micro) level, the specific tools, methods and aspects of dealing with these two areas differ from one another. For example, from the perspective of competition law, employees will need to be educated about concepts relating to cartels and resale price maintenance practices, whereas, on the anti-corruption side, employees will have to grasp the meaning and implications of various concepts, such as "conflict of interest" and "providing benefit." However, in both fields, the crooked company culture is the essential underlying reason for these violations.[7] Therefore, at the micro level, synergies between competition law and anti-corruption efforts can be established through the implementation of a unified compliance program.

How does the Turkish competition authority deal with a cartel or bid-rigging case in which there is probably a corrupt official greasing the wheels? Does the competition authority coordinate with the prosecutor?

In Turkish law, the sanctions that may be imposed under competition law rules are administrative in nature. Therefore, the Law No. 4054 on the Protection of Competition ("*Law No. 4054*") leads to administrative fines (and civil liability), but not to criminal sanctions. On the other hand, unlike competition law, corruption is almost always regarded as a matter of criminal law. However, if a particular cartel activity amounts to a criminally prosecutable act (such as bid-rigging in public tenders), it may separately be adjudicated and prosecuted by the Turkish criminal courts and public prosecutors under the Turkish Criminal Code. In this respect, the main legislation applying to suspected acts of corruption is the Turkish Criminal Code, which prohibits bribery, malversation, malfeasance, and embezzlement. Similar to the sanctions that may be imposed under competition law rules, the Law on Misdemeanors ("*Law No. 5326*") also leads to administrative fines that can be imposed on companies for committing crimes listed thereunder, such as bribery, fraud, bid-rigging or money laundering through their corporate bodies or representatives.

Although agencies with specialized mandates, such as the Financial Crimes Investigation Board, the Prime Ministry Inspection Board, the Public Procurement Authority and the Competition Authority, may investigate real and legal persons' actions falling within the scope of their mandates, the responsibility and authority for the prosecution of corporate or business fraud and money laundering activities ultimately rests with the public prosecutors.[8]

There is no specific government agency that is responsible for enforcing bribery laws in Turkey. In other words, the judiciary has full powers to apply the provisions stipulated under the laws, although it should be noted that we have not come across an instance in which the Competition

Authority coordinated with the prosecutor. However, in cases where it is reasonably certain that the bid-rigging activity has occurred in the context of a competitive purchase process organized by a state-owned or state-controlled entity, a criminal investigation can be triggered, either upon the complaint of the Board or by public prosecutors *sua sponte*. Indeed, there have been several cases in Turkey where the Authority referred a potential/suspected bid-rigging activity to a public prosecutor for a criminal investigation, either during or after the competition law investigation (*see e.g.*, *12Banks*, 11-13/243-78, 7.3.2011; *Medical Consumables*, 10-63/1325-497, 7.10.2010; *Medical Consumables and Laboratory Equipment*, 08-74/1180-455, 19.12.2008).

Do you counsel your clients on the interface between competition and corruption? What compliance advice do you give?

We advise our clients both on competition law compliance and anti-corruption compliance matters. We encourage companies to develop comprehensive and systematic compliance programs that extend beyond mere legal compliance and additionally address potentially problematic conduct, and also assist them in identifying, implementing and accumulating best practices over the years. We believe that anti-corruption and competition law compliance programs should be considered and treated as a combined policy within a company and advise our clients that a unified response to the challenges posed by competition and anti-corruption issues should be integrated into the culture of the company.

Comprehensive compliance programs safeguard companies from multimillion-dollar fines that might arise from competition law and anti-corruption law violations, as well as reputational losses. It can be observed that the number of companies that design their corporate governance policies and compliance programs to cover both anti-corruption and competition law matters from a holistic perspective, has increased significantly over the years.[9]

In addition, the competent enforcement authorities around the world continuously provide guidelines for companies on how to establish their anti-corruption and competition law compliance programs. These guidance documents also indicate that effective compliance programs for both areas should include essentially similar elements.

Link: https://interview-gonenc-gurkaynak.eventbrite.com

Footnotes:

[1] William Danvers, Deputy Secretary-General of OECD, Keynote Address at the 13th Global Forum on Competition, Paris (February 27, 2014), available at http://www.oecd.org/competition/globalforum/GFC2014_SpeechbyW.Danvers.pdf (last visited August 15, 2019).
[2] Gönenç Gürkaynak Esq., Ç. Olgu Kama, Ceren Özkanlı, Burcu Ergün, *Call For Unified Anti-Corruption Law And Competition Law Compliance Programme: Why Compliance Programmes Should Be Viewed As a Mitigating Factor,* Journal Of Business Compliance

01-02/2016 – Special Issue, *Baltzer Science Publishers - Erich Schmidt Verlag,* at 3 [Gönenç Gürkaynak et al.].
[3] *Ibid.*
[4] International Chamber of Commerce [ICC], *ICC Antitrust Compliance Toolkit*, at 7 (April 22, 2013), available at https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf (last visited August 15, 2019).
[5] The Organization for Economic Co-operation and Development [OECD], *Fighting Corruption and Promoting Competition*, OECD doc. DAF/COMP/GF(2014)13/Final (November 20, 2014), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en (last visited August 15, 2019).
[6] *Id.*, at 3.
[7] *Gönenç Gürkaynak et al.*, *supra* note 2.
[8] Gönenç Gürkaynak, Esq. and Ceren Yıldız, *Getting the Deal Through, Anti-Corruption Regulation 2019,* Law Business Research, at 123, (January 2019), available at https://www.gurkaynak.av.tr/docs/c1677-turkey.pdf (last visited August 8, 2019).
[9] *Gönenç Gürkaynak et al.*, *supra* note 2.

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Interview with Marcio de Oliveira Jr Chief Economist, Senior Consultant, Charles River Associates, São Paulo

Marcio de Oliveira Jr (Chief Economist, Senior Consultant, Charles River Associates, São Paulo) has been interviewed by **Daniel Rubinfeld** (Professor, New York University School of Law) in view of their panel "Mergers and Economic Development: What can developing countries expect?"

They joined the **Antitrust and Developing and Emerging Economies Conference** that took place in New York City on November 1, 2019 at the New York University School of Law.

How, if at all, has Brazil's (CADE's) treatment of high-technology firms changed in light of recent U.S. and E.U. enforcement decisions?

It has not changed so far. CADE has had three cases against Google.All of these three cases have been acquitted by CADE. There is also an investigation going on. It is quite similar to the complaint filed by Yelp against Google in the EU. A few weeks ago, CADE decided to proceed with this investigation, but there is not a final decision yet.

Nevertheless, I understand that the recent US and EU enforcement decisions will influence CADE. The current General Superintendent (chief investigator) has been demanding a high standard of proof to suggest the conviction of Google in Brazil. His decisions have been followed by the President of CADE's Tribunal and by some commissioners, which has resulted in Google's acquittal. The General Superintend's term ends in October and he may not be

reappointed. Additionally, four new Commissioners will be appointed soon. Therefore, CADE's perspective and actions regarding high tech firms can change, mainly when one has in mind the recent US and EU decisions.

Can you give us an update on recent developments with respect to the BRICS group?

There has been active cooperation among the BRICS countries' competition agencies. For example, CADE has held a conference ("Designing Antitrust for the Digital Era") about two weeks ago to discuss how to adapt Brazilian competition policy to digital markets. The conference was organized by CADE's Economic Unit and representatives of the BRICS countries competition agencies provided the participants with an overview of their policies regarding digital markets and antitrust. Also, in 2016 the BRICS countries competition authorities signed an MoU which is a legal framework for further cooperation. Since then, there have been three BRICS Competition Conferences. The fourth one will be held in Moscow next month and during this conference the authorities will probably decide in which areas there will be more in-depth cooperation.

What pharma enforcement activities has CADE been involved in? What is the importance of pharma to the Brazilian economy?

Although pharma is an important industry in Brazil, there are not many conduct cases involving pharmaceutical companies in our market. Brazil has a universal public health service (SUS - similar to the NHS in the UK) and, due to such a service, the public sector procures a wide range of medications. I have not heard of pharma companies colluding in those procurement ran by the government. CADE has a sophisticated screening software to detect collusion in public procurements called "brain project". As far as I know, it has not detected evidence of collusion among pharma companies. Brazil passed a so-called "generics law" back in the 1990's which made the market quite competitive. Perhaps that is the reason why there are not many competition cases involving pharmaceutical companies in Brazil. Nevertheless, recently public prosecutors and the Federal Court of Audits (TCU, responsible for auditing public expending), have challenged a partnership between Roche and a Brazilian generics company called Tecpar regarding trastuzumabe (Herceptin, a medication for breast cancer). Roche was a monopolist in Brazil until 2017 (the medication was imported). After that, Roche partnered with two Brazilian companies – Tecpar and Axis – to locally produce Herceptin. This partnership involves technology transfer. In return, Roche would supply 40% of SUS's demand for Herceptin. Such a partnership is part of a program called Partnership for Productive Development (PDP). With two entrants, trastuzumabe's price was expected to fall. However, the price has risen approximately 40% per capsule. Such a price increase led TCU and the public prosecutor to file a complaint against Roche, accusing the giant pharma company of harming the public sector, which is the

main buyer of the medication for breast cancer. Even though this is not a competition case, it is important for us to considerwhether the “Generics Law” is still able to foster competition amongst pharma companies. Should it not be able to do so, CADE has to start paying more attention to this industry.

Link: https://interview-marcio-oliveira-jr.eventbrite.com

CLE Materials:

PANEL 1

1. Gönenç Gürkaynak, Ç. Olgu Kama, Ceren Özkanl, Burcu Ergün, Call for a unified anti-corruption and competition law compliance programme: Why compliance programmes should be viewed as a mitigating factor
2. David Lewis, Rent: the interface of corruption and competition
3. Gönenç Gürkaynak, Esra Uçtu, Onur Özgümüş, Turkish Antitrust: An overview of Turkish competition law, 5 September 2019, e-Competitions Bulletin Turkish Antitrust, Art. N° 91450
4. Clara Ingen-Housz, Rooting out Cartels and Corruption A corporate perspective
5. Joseph E. Stiglitz, Eleanor M. Fox, Joseph STIGLITZ (Columbia University): Competition policy, the need for a more nuanced view, May 2019, Concurrences Review N° 2-2019, Art. N° 88870, pp. 16-17
6. Victor Oliveira Fernandes, Brazil: Compliance programs and abuse of dominance practices under Brazilian competition law – A roadmap for compliance monitors, September 2019, Concurrences Review N° 3-2019, Art. N° 90987, pp. 216-227
7. Ian McEwin, Why Economists Should Design and Enforce Competition Laws in Developing Countries, Frédéric Jenny Libre Amicorum, January 1 2019, Chapter 17, pp. 171 ff.
8. Emmanuelle Auriol, Erling Hjelmeng, Tina Søreide, Deterring corruption and cartels: In search of a coherent approach, February 2017, Concurrences Review N° 1-2017, Art. N° 82670,

PANEL 2:

1. Cristina Caffarra, "Follow the Money" - Mapping issues with digital platforms into actionable theories of harm, 29 August 2019, e-Competitions Bulletin Platforms, Art. N° 91579
2. Christian Bergqvist, Jonathan Rubin, Google and the trans-Atlantic antitrust abyss, September 2019, Concurrences Review N° 3-2019, Art. N° 90985,
3. Charl van der Merwe, The South African Competition Tribunal fines an undertaking in the ticketing services market for abuse of dominance (Computicket), 21 January 2019, e-Competitions Bulletin January 2019, Art. N° 89215

PANEL 3:

1. Cristianne Zarzur and Marcos Garrido, Brazil, Part 1: Merger Control and the "Standstill Obligation", Gun Jumping in Merger Control: A Jurisdictional Guide, Catriona Hatton, Yves Comtois & Andrea Hamilton (Editors), September 6, 2019, Chapter 9, pp. 61 ff.

2. Cristianne Zarzur and Marcos Garrido, Brazil, Part 2: Substantive Antitrust Law in an M&A Context, Gun Jumping in Merger Control: A Jurisdictional Guide, Catriona Hatton, Yves Comtois & Andrea Hamilton (Editors), September 6, 2019, Chapter 9, pp. 69 ff.
3. Julie Tirtiaux, South Africa: Competition Amendment Act - A risk or a boon for South Africa's economy?, May 2019, Concurrences Review N° 2-2019, Art. N° 90198, pp. 214-222
4. Jean Meijer and Sandhya Foster,South Africa, Part 1: Merger Control and the "Standstill Obligation", Gun Jumping in Merger Control: A Jurisdictional Guide, Catriona Hatton, Yves Comtois & Andrea Hamilton (Editors), September 6, 2019, Chapter 9, pp. 311 ff.
5. Jean Meijer and Sandhya Foster,South Africa, Part 2: Substantive Antitrust Law in an M&A Context, Gun Jumping in Merger Control: A Jurisdictional Guide, Catriona Hatton, Yves Comtois & Andrea Hamilton (Editors), September 6, 2019, Chapter 22, pp. 321 ff.

PANEL 4:

1. Philippine Competition Commission, The Philippine Competition Commission files suits against company against a mass housing developer for abuse of dominance (Condo developer), 27 March 2019, e-Competitions Bulletin March 2019, Art. N° 91323
2. Lerisha Naidu, Nxumalo Sphesihle, The South African Government publishes a notice bringing into force some of the provisions of the amendment act of competition law, 12 July 2019, e-Competitions Bulletin July 2019, Art. N° 91549
3. Charl van der Merwe, The South African Competition Commission publishes grocery retail market inquiry preliminary report, 29 May 2019, e-Competitions Bulletin May 2019, Art. N° 90701
4. Michael-James Currie, The South African Government publishes draft Regulations in relation to the South African Competition Amendment Act which seeks to clarify price discrimination prohibition and buyer power provisions, 13 February 2019, e-Competitions Bulletin February 2019, Art. N° 89281
5. Benjamin Gomez, The Chilean National Antitrust Prosecutor files a claim against the three major supermarket companies of the country for coordinating a cartel in a market where they reach a combined market share of over 90% (Walmart / Cencosud / SMU), 6 January 2016, e-Competitions Bulletin January 2016, Art. N° 78008
6. Pablo Trevisan, Due Process and Competition Law: Global Principles, Local Challenges, An Argentine Perspective, Frédéric Jenny Libre Amicorum, January 1 2019, Chapter 10, pp. 55 ff.
7. Pablo Trevisan, Rebuilding the Argentine Antitrust House While Living in It: A View from the Trenches, Douglas H. Ginsburg Liber Amicorum, Volume I, 1 March 2018, Chapter 28, pp. 561 ff.
8. Randolph Tritell, Elizabeth Kraus, The Federal Trade Commission's International Antitrust Program, October 2019