

2021 FAIR PRICING FORUM

Using Competition Law to Promote Affordable Access to Health Technologies in Low- and Middle-Income Countries

20 April 2021

Fair Pricing in times of public health emergency
and to accelerate achievements of Sustainable
Development Goals health targets

World Health Organization
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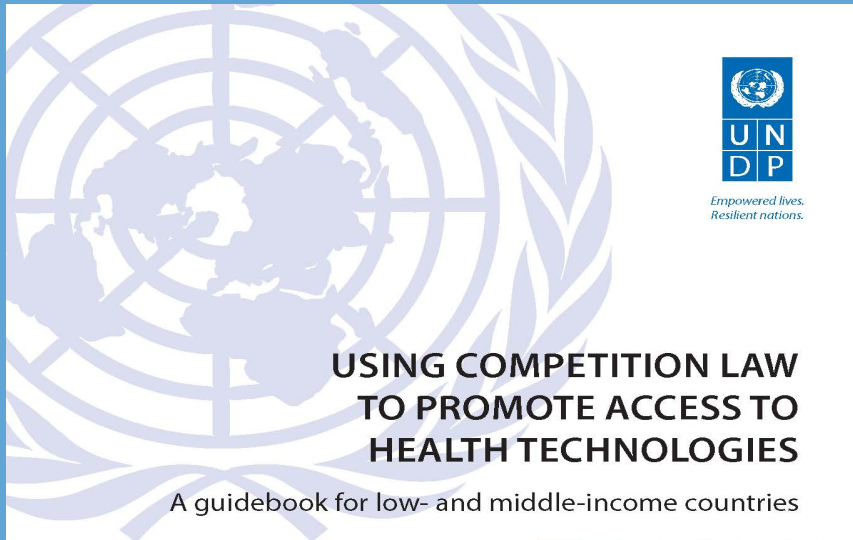
Prof. Frederick Abbott
UNDP Consultant
Florida State University College of Law
USA

The Role of Competition Law

- **Competition law serves multiple purposes**
- **Tracing back to the late 19th century USA – when the Sherman Antitrust Act was adopted -- the objective was to protect the public against the consequences of abusive business practices (and the term “antitrust” was born)**
- **By the 1980s, through the influence of Chicago-school economics the focus shifted to protecting the efficient functioning of the market**
 - **The theory is that if businesses compete unhindered by abusive practices the consumer will benefit as competition among suppliers will drive down costs and consumer prices**
 - **The cornerstone is the self-correcting nature of markets**

Competition Law in LMICs

- **Up until the early 2000's, the development and enforcement of competition law largely took place within high-income countries (HICs)**
- **There has been a significant shift as largely middle-income country competition authorities are today much more active**
 - **See the UNDP 2014 Guidebook and forthcoming 2021 Supplement**
 - **Cases from Brazil, China, Chile, Colombia, Mexico, South Africa and others**
 - **“Sector studies” are an important tool**
- **Competition enforcement for LMICs tilts toward middle-income because of resource requirements (budget and personnel)**



[UNDP Guidebook](#) (2014) and Supplement (2021 forthcoming)



UNDP Competition and Health Consultation for Latin America - 2017

Excessive Pricing

- **Excessive pricing may be used in a non-technical sense, for the layperson meaning that prices are too high -- raising issues of affordability**
- **“Excessive pricing” is a competition law term of art with a specialized jurisprudence -- developed largely in Europe**
 - **Charging an excessive price *is* the abuse of dominant position “as such”. It injures the consumer (whether an individual patient, a government health program, etc.)**
 - **Jurisprudence of the Court of Justice of the European Union (CJEU) is (unnecessarily) complicated, leading to extended enforcement proceedings**

The Process

- **Competition enforcement proceedings are typically undertaken by a national (or regional) competition authority (though private actions are common in USA)**
- **There are multiple stages**
 - **Identification of a potential concern**
 - **Informal investigation**
 - **Formal investigation often including compelled production of evidence, including search and seizure (e.g., dawn raids)**
 - **Potential for settlement (e.g., consent agreement and order)**
 - **Initiation of administrative or judicial proceeding**
 - **Decision(s) by administrative and/or judicial authority**
 - **Imposition of remedy (injunction, fine, criminal penalties, supervision)**

Other Regulatory Approaches

- **Price controls and other forms of direct market regulation are alternatives to competition law enforcement**
- **The imposition of price controls is more governance-efficient than case-by-case competition law proceedings**
 - **Competition authority “sector study” may be a predicate to a more general imposition of controls**
- **Price controls are a more substantial intervention in the market and in some cases have had “unintended consequences”; e.g., India’s experience with under-investment in its generics sector leading to relaxation of controls; China’s decision to relax controls in some market segments**

LMIC Cooperation

- **While each national (and regional) market is different, the global market for pharmaceuticals largely involves the same products**
- **There is much opportunity for cooperation among LMIC competition authorities in comparing prices and marketing practices, and undertaking economic analysis**
- **This is hindered by lack of transparency, including through producer invocation of “trade secret” protection of pricing data**
- **Investigation and prosecution should be undertaken cooperatively, recognizing that certain types of information-sharing may be restricted by national rules**
- **The public benefits when protected by the enforcement of competition law against abusive practices in the pharmaceutical sector**