

BRICS Competition Law and Policy Forum and Workshop

(June 22 – 23, 2015)
Saint-Petersburg, Russia

Co-organized by the

HSE-Skolkovo Institute for Law and Development, National Research University HSE
Centre for Law, Economics and Society, Faculty of Laws, UCL

Under the auspices of the

Federal Antimonopoly Service, Russian Federation

June 22, 2015 - The BRICS Competition Law and Policy Forum

General information

We aim to launch an annual BRICS Competition Law and Policy Workshop bringing together academics thinking critically about these areas of law and the heads of the competition authorities of the BRICS jurisdictions and heads/representatives of economic regulators (independent administrative authorities and ministerial departments), with representatives of the business community and consumer organizations to discuss competition policy and regulatory developments that are of particular importance for the BRICS economies. The intellectual ambition of the BRICS Competition Law and Policy Workshop is to

- Establish a high profile discussion forum for BRICS competition and economic regulation authorities to develop common thinking on issues of global competition law and policy and regulatory convergence for which they have a particular interest or for which their interests may converge
- Promote discussion on the role of competition law and policy in the BRICS economies by bringing together the BRICS competition authorities, economic regulators, business representatives, consumer associations and other actors involved in competition policy (e.g. IP authorities, courts)
- Critically reflect on the application of existing models of competition law to the BRICS jurisdictions, on the value of convergence and on the relations between competition law with economic regulation and the specific model of development followed in the BRICS jurisdictions
- Produce theoretical and practical knowledge that may be relevant for the enforcement of competition law in the BRICS jurisdictions and other jurisdictions with similar institutional structures
- Engage in the discussion academics from BRICS jurisdictions, as well as international experts in the field, in order to create a stronger academic community interested in competition law and economic regulation matters in the BRICS and to establish links between different research units in BRICS jurisdictions interested in competition law and policy and economic regulation.

Programme (June 22, 2015)

The Boris Yeltsin Presidential Library, St Petersburg

Nota bene: Each speaker will dispose of no more than **8 minutes** to make an initial statement in order to enable an interactive session with discussions among the panelists and between the panelists and the other participants, as well as eventually questions from the audience. Chairs should strictly implement this timing.

13.00 – 14.00 **Registration and welcoming coffee**

14.10 – 14.30 **Opening addresses:**

Igor Artemiev, Head, Federal Antimonopoly Service of the Russian Federation

Nurlan Aldabergenov, Member of the Board (the Minister) for Competition and Antitrust Regulation of the Eurasian Economic Commission

14.30 – 16.30 **Investigations and Prevention of International Cartels: Establishing International Legal Regime within BRICS and United Nations**

This session will discuss current efforts to cooperate between BRICS jurisdictions in order to investigate and prevent international cartels. The panel will examine common initiatives (among BRICS) to develop a coherent policy against international cartels and possibilities of cooperation in order to exchange information (including confidential information) and coordinate investigations against international cartels between BRICS competition authorities. Recent international cooperation agreements, such as the Agreement between the European Union and Switzerland (entered into force in 2014, see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.347.01.0003.01.ENG), include detailed provisions on exchange of information (including confidential information and even in the absence of agreement by the parties) between the competition authorities of the contracting parties. Can one expect that level of cooperation among BRICS jurisdictions? It is reminded that UNCTAD's Set Section F.4 includes provisions on consultations and that UNCTAD has launched a collaborative information platform in July 2013. The session will also reflect on the possible emergence of international norms against (international) cartels and how these should look like.

Chair

Frederic Jenny, Chairman of the OECD Competition Law and Policy Committee
OECD

Presentation (15 minutes)

Igor Artemiev, Head, Federal Antimonopoly Service of the Russian Federation

Panelists

Nurlan Aldabergenov, Member of the Board (the Minister) for Competition and Antitrust Regulation of the Eurasian Economic Commission

Dennis Davis, Judge of the High Court, Professor at the University of Cape Town

Seema Gaur, Advisor, Competition Commission of India

Norman Manoin, Chairman at Competition Tribunal of South Africa

Pradeep S Mehta, Secretary General, Consumer Unity and Trust Society (CUTS) International

Siphamandla Mkhwanazi, Competition Commission, South Africa

Victor Santos Rufino, Procurador-Chefe Conselho Administrativo de Defesa Econômica – Cade, Brazil

Zhu Zhongliang, NDRC Price Supervision and Anti-Monopoly Bureau, PP China (TBC)

16.30 – 17.00 **Coffee Break**

17.00 – 19.00 **Defining BRICS Approaches to Competition Policy in Pharmaceutical & Food Industries**

This session will delve into important economic sectors where some convergence or collaboration between BRICS authorities may occur in the future: in particular, the pharmaceutical and food industries. Is there enough common ground among BRICS jurisdictions in these areas of competition law and policy? Is the economic and legal reality similar? Are there similarities in the competitive structure of these industries and the types of anti-competitive conduct brought to the attention of competition authorities and courts similar? Is it possible to agree on some fundamental principles or directions of enforcement? What are the advantages and disadvantages of more cooperation and convergence between BRICS on the competition policy followed in the context of these industries? What should the BRICS response be to anticompetitive behavior in the pharmaceutical & food economic sectors in the BRICS markets? Is there any potential for a coordinated approach?

Chair

Alexey Ivanov, Director, Legal Policy and Social Development Department, Skolkovo Foundation, Head, HSE-Skolkovo Institute on Law and Development

Panelists

Nurlan Aldabergenov, Member of the Board (the Minister) for Competition and Antitrust Regulation of the Eurasian Economic Commission

Dennis Davis, Judge of the High Court, Professor at the University of Cape Town

Seema Gaur, Advisor, Competition Commission of India

Frederic Jenny, Chairman of the OECD Competition Law and Policy Committee
OECD

Norman Manoin, Chairman at Competition Tribunal of South Africa

Siphamandla Mkhwanazi, Competition Commission, South Africa

Victor Santos Rufino, Procurador-Chefe Conselho Administrativo de Defesa
Econômica – Cade, Brazil

Alexey Sushkevich, Head of Analytical Department at Federal Antimonopoly
Service, Russian Federation

Andrey Tsyganov, Deputy Head of Federal Antimonopoly Service, Russian
Federation

Cui Zhiyuan, Professor at Tsinghua University's School of Public Policy and
Management, Beijing

Zhu Zhongliang, NDRC Price Supervision and Anti-Monopoly Bureau, PP China
(TBC)

General information

Policy diffusion has been defined as “the process whereby policy choices in one unit are influenced by policy choices in other units”. Policy transfer consists in a form of policy diffusion and sometimes it is considered as a related concept.

One should distinguish diffusion from convergence, as the former concept pre-supposes the existence of interdependence, while convergence may be caused by interdependence but also by different factors, such as the fact that the specific units may react to similar, independent pressures. Hence, diffusion is a narrower concept than policy convergence.

The diffusion of competition law in different political settings and legal traditions illustrates its great malleability and the operation of various factors. The adoption and effective implementation of competition law is nevertheless characterized by a great degree of variability among jurisdictions, despite the considerable influence exercised by international actors aiming to generate different mechanisms of policy convergence: the ICN, UNCTAD, OECD, the EU and other regional integration models and the influence of common factors, such as the globalization of markets, the professionalization of economics, the development of technocratic government.

This diversity is not only reflected in the adoption of different models of competition law across the various jurisdictions examined, but also in the way this area of law is effectively implemented. The implementation of competition law varies of course within each jurisdiction through time and often depends on the specific institutions in place, their capabilities, but also the policy area in which it is intervening (e.g. energy, telecommunications, healthcare services etc). There might also be some dissonance between the intended enforcement of competition law, as this is proclaimed in the foundational texts, guidelines, legislation, constitutional (or other) provisions that have put it in place in each jurisdiction, and its day-to-day operation in the specific jurisdiction.

Factors explaining the diffusion of various types of competition law implemented in various jurisdictions include, among others, the patterns of diffusion from one country to another (that is the mechanisms of interdependence that lead to the adoption and implementation of a specific policy by another unit), but also factors, such as the interaction of politics with expert knowledge, the relations between government and business, the role of other societal groups (consumers, labor unions), and the role of domestic struggles of power and influence (palace wars) in the specific jurisdictions.

Diffusion consists of: (1) *adoption*, and (2) *implementation*. Adoption refers to the formal introduction of the competition law regime into the legal system. Implementation may be conceptualized as referring to the stages after the decisional point of adoption or more generally to the “depth of adoption”, in essence through direct practical experience with competition law indicated, among others, by the frequency of its use, the scope of impacts covered, the quality of assessment, its role in the policy-making process and eventually its institutionalization, the latter concept referring to its permanence within an organization,

enduring through elections and changes in government. The process of implementation of the competition law regime into a specific organizational and institutional context is prolonged and has several phases. It should not be excluded that the transplantation of the competition law in political and legal systems that do not present functional equivalents to the system where the transplant originated may produce completely different outcomes, leading to situations of diffusion without convergence.

Diffusion may be vertical, horizontal, or both. Vertical diffusion operates through higher levels of governance, for example through the influence of international organizations or the federal level, when exploring intra-state processes of diffusion. The most important of the former are international organizations (OECD, UNCTAD, EU), international networks (ICN), regional economic integration organizations (e.g. EU). Horizontal diffusion involves interconnectedness of governments when elites communicate and interact, exchanging ideas, solutions, and experiences. There are different *patterns of diffusion*:

- *learning* resulting from internal (e.g. the characteristics of public administration, legal and constitutional frameworks, administrative culture) or external (e.g. transnational institutional linkages, government decisional interdependence, epistemic communities) sources;
- *externalities*, providing incentives altering the cost-benefit ratios of domestic actors, such as *competition* among governments for “regulatory quality” (leading them to adopt and implement policy innovations),
- *coercion* (when the diffusion of the specific policy innovation results from the use of material or economic power, including asymmetric bargaining imposing conditionality for these reforms, or binding legal norms adopted by supranational institutions)/ Although some authors advance that coercion is not a proper form of diffusion as it results from the pressures imposed from above to the specific political unit, we consider that interdependence between units may take different forms, power being one of them and hence, coercion should be considered as a proper interdependence mechanism and a pattern of diffusion;
- *contractualization* (when diffusion results from some form of symmetric bargaining between states, or “soft” international organization influence);
- *socialization* among networks of experts and/or administrative elites leading to “the internalization of shared beliefs due to the interaction of actors”;
- *emulation* indicating the “desire (or need) of domestic actors to conform to internationally widespread norms” in order to “increase the legitimacy of policy choices”;

Some recent studies have focused on the micro-foundations of trans-border policy diffusion, advancing the importance of the electorate in pushing for the adoption of “successful” policy innovations developed elsewhere (the voter information model or the democratic foundations of diffusion).

These various patterns of diffusion alter the material incentives domestic actors face, for example through the mechanisms of conditionality and competition, and through the mechanisms of learning and emulation. In some cases various diffusion mechanisms work in parallel.

The workshop aims to explain the phenomenon of diffusion of competition law by exploring diffusion patterns not only in terms of the adoption and implementation of a competition law regime in the specific jurisdictions, but also in the development of *types/models* of competition law regimes that could inspire other jurisdictions. Our focus will be the BRICS jurisdictions.

The purpose of the workshop will be to map the patterns of diffusion of competition law in the BRICS and to reflect on commonalities and dissimilarities between the different regimes with the purpose to understand the interaction between patterns of diffusion (various mechanisms of interdependence) and independent factors that may have influenced the process of expansion of competition law. Should one expect that jurisdictions sharing a similar pattern of diffusion, or a similar combination of diffusion patterns will develop closely related models of competition law? What can diffusion literature offer to understand why competition laws converge in some aspects and diverge in others? Is it possible to measure diffusion? How is it possible to develop research designs tailored to the analysis of specific diffusion mechanisms in the context of competition law? What can diffusion literature offer to the study of comparative competition law institutions and policies?

Programme (June 23, 2015)

The Boris Yeltsin Presidential Library, St Petersburg

Nota bene: Each speaker will dispose of no more than **8 minutes** to make an initial statement in order to enable an interactive session with discussions among the panelists and between the panelists and the other participants, as well as eventually questions from the audience. Chairs should strictly implement this timing.

8.30 – 9.00

Welcoming Coffee

9.00 – 9.20

Welcome Addresses:

Ioannis Lianos, Professor of Global Competition Law and Public Policy, UCL, Director, Centre for Law, Economics and Society (CLES), UCL, Chief Researcher, HSE-Skolkovo Institute on Law and Development

Alexey Ivanov, Director, Legal Policy and Social Development Department, Skolkovo Foundation, Head, HSE-Skolkovo Institute on Law and Development

Gadis Gadgiev, Judge, Constitutional Court of the Russian Federation

9.20 – 11.00

Panel 1: Introducing Diffusion Theory and its relevance in the study of the emergence of the global competition law paradigm

Although the diffusion literature is quite rich in other areas of the law (e.g. investment treaties, environmental international cooperation, intellectual property) and many scholars have thoroughly examined diffusion as a mechanism, among others, of international policy coordination, there has not been any significant work so far in the area of competition law drawing on this literature. Current accounts of international and comparative competition law rely on classic comparative law studies (e.g. on legal transplants), or on economic analysis of law approaches (e.g. decision theory), sometimes also taking a law and development approach, or on transition economy or variety of capitalism approaches or on more historical accounts of the emergence of competition law in each jurisdiction. Diffusion theory may nevertheless provide a useful complement to these approaches and may also provide a more comprehensive picture of the global phenomenon of the multiplication of competition law regimes globally, the last two decades, and of the underlying mechanisms of diffusion of the competition law idea. It offers an important potential for theoretical and empirical research enabling us to develop a deep understanding of the processes at play and tools to measure/assess them. This session will explore the existing methodologies used in the literature on comparative and global antitrust, and what are their advantages/disadvantages in comparison to diffusion theory, before delving into the possibilities opened by diffusion theory. This will be done by looking to the way this literature has been applied so far in other policy areas, in particular investment treaties and international environmental policy coordination. The session will help us reflect on the potential and challenges of a research programme focusing on policy diffusion in the area of competition law.

Chair

Ioannis Lianos, Professor of Global Competition Law and Public Policy, UCL, Director, Centre for Law, Economics and Society (CLES), UCL, Chief Researcher, HSE-Skolkovo Institute on Law and Development

Panelists

Sergey Belov, Associate Professor of Constitutional and Administrative Law, Faculty of Law St. Petersburg State University

Per-Olof Busch, Research fellow at the Environmental Policy Research Centre, Freie Universität Berlin

Tony Freyer, University Research Professor Emerita of History and Law, University of Alabama, School of Law

Lauge Poulsen, Lecturer in International Political Economy, UCL School of Public Policy

George Priest, Edward J. Phelps Professor of Law and Economics and Kauffman Distinguished Research Scholar in Law, Economics, and Entrepreneurship at Yale Law School

Vladimir Sivitsky, Professor, HSE-National Research University, Constitutional Court, Russian Federation

Spencer Weber Waller, Professor, Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law

11.00 – 11.20 **Coffee Break**

11.20 – 13.00 **Panel 2: The adoption of competition law: patterns of diffusion**

This session will focus on the adoption of competition law and will reflect on the different patterns of diffusion one may observe in the various jurisdictions examined. The panelists will reflect on the patterns of diffusion of competition law in their respective jurisdiction, focusing in particular on the scope, goals and substance of competition law. How were the choices made? Did we witness a horizontal or a vertical pattern of diffusion? Which of the abovementioned patterns of diffusion describes better the process of adopting a competition law in their specific jurisdiction? What can one learn out of the initial process of adoption for the implementation of competition law? Can New Institutional Economics provide useful insights about these processes on the selection of reforms and the choice of areas to be included and excluded from the scope of competition law?

Chair

Andrey Tsyganov, Deputy Head of Federal Antimonopoly Service, Russian Federation

Panelists

Paulo Furquim de Azevedo, Professor, São Paulo, School of Economics, FGV, Senior Research Fellow at Insper Instituto de Ensino e Pesquisa, Centro de Estratégia
Karan Singh Chandhiok, Partner, Chandhiok & Associates, India
Barak Richman, Professor, Duke University School of Law
Andrey Shastitko, Professor, Lomonosov State University
Cui Zhiyuan, Professor at Tsinghua University's School of Public Policy and Management, Beijing

Introductory paper prepared by **Azza Raslan**, Research Fellow, CLES, UCL

13.00 – 14.00 **Lunch break**

14.00 – 15.10 **The Regulation of the food value chain project: presentation and discussion**

The panel will discuss the regulation of the food value chain project. The discussion will focus on the interaction between different types of regulation of the food value chain (e.g. competition law, consumer protection, unfair commercial practices, planning law, IP rights, which is increasingly transnational), the competition bottlenecks in the food value chain (is it only the retail sector (supermarkets)?), the role of IP rights and brands in particular following the development of GMOs organic natural food and agri-business, the relation between concentration, profitability and innovation, technological developments and their impact on competition (e.g. scanner data, big data, e-commerce, m-commerce).

Chair

Dennis Davis, Judge of the High Court, Professor at the University of Cape Town

Panelists

Thomas Cheng, Member, Competition Commission of Hong Kong, Chairman, Competition Policy Committee, Hong Kong Consumer Council, Associate professor, University of Hong Kong
Alexey Ivanov, Director, Legal Policy and Social Development Department, Skolkovo Foundation, Head, HSE-Skolkovo Institute on Law and Development
Rughvir Kumar (Shyam) Khemani, Special Advisor, SKP Group, formerly World Bank
Ioannis Lianos, Professor of Global Competition Law and Public Policy, UCL, Director, Centre for Law, Economics and Society (CLES), UCL, Chief Researcher, HSE-Skolkovo Institute on Law and Development

Introductory paper prepared by **Ioannis Lianos** and **Claudio Lombardi**, HSE-Skolkovo Institute on Law and Development

15.15 – 16.40

Panel 3: Implementing competition law: institutional stories

The panel will explore the development of institutions of enforcement of competition law in each jurisdiction and reflect on the role the choice of institutional architecture has impacted the development of the substance of competition law and the levels of enforcement more generally. The panelists will examine the way the institutional framework has functioned so far, possible reforms that have been introduced, noting any substantial differences between the current institutional framework and that at the time of the adoption of competition law. The interaction between competition authorities and courts, or between competition authorities and other government agencies/ministerial departments, will also be thoroughly explored. The choice of a specific institutional framework (a prosecutorial one or an integrated administrative agency one) will also be discussed.

Chair

Spencer Weber Waller, Professor, Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law

Panelists

Svetlana Avdasheva, Head and Professor, faculty of Economics, HSE-National Research University

Seema Gaur, Advisor, Competition Commission of India

Caio Mario da Silva Pereira Neto, Professor São Paulo Faculty of Law - FGV, Brazil

Thomas Cheng, Member, Competition Commission of Hong Kong, Chairman, Competition Policy Committee, Hong Kong Consumer Council, Associate professor, University of Hong Kong

Oleg Sviridenko, Chairman, Economic Collegium, Supreme Court, Russian Federation

Introductory paper prepared by **Amber Darr**, Research Fellow, CLES, UCL

16.40 – 17.00

Coffee Break

17.00 – 18.45

Panel 4: Regional models and the battle for international convergence: between the internationalization of palace wars and democratic diffusion?

The last panel of this conference will explore the possibilities of international convergence in the area of competition law. This is an area where vertical diffusion and international actors play an important role, sometimes exercising a lasting influence on the adoption of competition law and its implementation. One needs to include international organizations

active in the promotion of a competition law culture globally, such as UNCTAD, OECD, World Bank, ICN, the EU etc. The first part of the panel will examine the role of international organizations in the diffusion of competition law and the model of competition law they promote and how these efforts interact with the domestic politics of each jurisdiction. One may also remark horizontal diffusion processes in operation, in particular when elites communicate and interact, exchanging ideas, solutions, and experiences. Finally, some have advanced the importance of the electorate in pushing for the adoption of “successful” policy innovations developed elsewhere, or demanding the regulation of local and global capitalism, leading in some cases to the development of what has been framed as “populist” antitrust/competition law. Competition law is also an area in which actors having different disciplinary and professional backgrounds interact: lawyers and economists being obviously the two main groups. Exports of expertise and ideas is often related to the disciplinary background of the elites driving or implementing competition law in each jurisdiction, as Yves Dezalay and Bryant Gatt’s work on the Internationalization of Palace Wars and Globalization has aptly shown. During the first part of the discussion the panelists will address the role of vertical diffusion and international convergence. During the second part of the discussion the panelists will explore horizontal processes of diffusion, in particular the role of elites and that of the democratic electorate in the development of competition law, the technocratic nature of competition law and alternative accounts, the role of economists and economics and implications for international convergence in this area.

Chair

Victor Santos Rufino, Procurador-Chefe Conselho Administrativo de Defesa Econômica – Cade, Brazil

Panelists

Aditya Bhattacharjea, Professor & Head, Department of Economics, Delhi School of Economics, University of Delhi

Dennis Davis, Judge of the High Court, Professor at the University of Cape Town

Frederic Jenny, Chairman of the OECD Competition Law and Policy Committee

Rughvir Kumar (Shyam) Khemani, Special Advisor, SKP Group, formerly World Bank

Pradeep S Mehta, Secretary General, Consumer Unity and Trust Society (CUTS) International

George Priest, Edward J. Phelps Professor of Law and Economics and Kauffman Distinguished Research Scholar in Law, Economics, and Entrepreneurship at Yale Law School

Introductory paper prepared by **Andres Palacios Lleras**, Research fellow, CLES, UCL
