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Progressivity and Flexibility in Developing an Effective Competition Regime: Using Experiences of Poland, Ukraine, and South Africa for developing countries

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Abstract

The paper discusses the role of the concept of special and differential treatment in the framework of regional trade agreements for the development of a competition regime. After a discussion of the main characteristics and possible shortfalls of those concepts, three case countries are assessed in terms of their experience with progressivity, flexibility, and technical and financial assistance: Poland was led to align its competition laws to match the model of the EU. The Ukraine opted voluntarily for the European model, this despite its intense integration mainly with Russia. South Africa, a developing country that emerged from a highly segregated social fabric and an economy dominated by large conglomerates with concentrated ownership. All three countries enacted (or comprehensively reformed) their competition laws in an attempt to face the challenges of economic integration and catch up development on the one hand and particular social problems on the other. Hence, their experience may be pivotal for a variety of different developing countries who are in negotiations to include competition issues in regional trade agreements. The results suggest that the design of such competition issues have to reflect country-particularities to achieve an efficient competition regime.

Keywords: Special and differential treatment, progressivity, flexibility, competition law

JEL-classification: K20, K21, L40, L50, O20

Zusammenfassung

Die Studie diskutiert die Bedeutung von ‘special and differential treatment’ im Rahmen von Freihandelsabkommen für die Entwicklung eines Wettbewerbsregimes. Zunächst werden die Entstehung und die Hauptbestandteile dieses Konzeptes kurz diskutiert. Anschließend werden drei Länder – Polen, Ukraine und Südafrika – bezüglich dieses Konzeptes bewertet. Polen mußte im Rahmen der Beitrittsverhandlungen zur Europäischen Union das Wettbewerbsregime dem der Europäischen Union anpassen. Die Ukraine wählte freiwillig das Europäische Modell, trotz der engen Anbindung an Rußland. Mit Südafrika wird ein Entwicklungsland behandelt, dessen Gesellschaftssystem durch jahrzehntelange Rassentrennungspolitik beeinflußt wurde und heute noch durch eine hohe Konzentration der Wirtschaftsaktitivtät gekennzeichnet ist. Alle drei Länder haben jüngst ein Wettbewerbsgesetz eingeführt beziehungsweise reformiert, um den Herausforderungen zunehmender wirtschaftlicher Integration, nachholender Entwicklung und gesellschaftlicher Probleme zu begegnen. Die Erfahrungen dieser Länder können anderen Entwicklungsländern helfen, die angehalten sind, im Rahmen eines Freihandelsabkommens ein Wettbewerbsregime zu etablieren.

Schlagworte: Wettbewerbsgesetz, special and differential treatment, flexibility, progressivity

1 Introduction

Up to now around 102 countries in the world have a competition legislation to foster competition within the economy. Most of these competition legislations are relatively new. Around 66% of the national competition legislations have been introduced after 1990, whereby in particular transition and developing countries take the step to introduce their first competition legislation, whereas developed countries normally introduced their competition legislation much earlier (Kronthaler and Stephan 2005, pp. 3-5). These figures indicate that in particular since the 1990s, the number of countries that have a competition law increased considerably, but it also shows that there are numerous countries in the world that do not use this instrument to foster competition. Some of this proliferation of competition laws is related to regional bilateral and multilateral trade agreements with a view on securing the benefits from lower trade barriers and open borders which may potentially be undermined by anti-competitive practices with their possible knock-on effects in other jurisdictions (e.g. international cartels).

The second important empirical observation is that despite enactment, countries often fall short of implementing this law effectively for several reasons, e.g. lack of competition culture, scare resources, lack of experience, bureaucratic and political resistance, etc. In this respect CUTS states that "enacting a competition law may not necessarily translate into an effective competition regime. It came out very clearly in the 7-Up project that competition regimes in most of the countries selected therein are quite ineffective" (CUTS 2003b, p. 1). Furthermore, in a study by ICN, the point is made that "capacity building is a central challenge for the vast majority of the International Competition Network's (ICN) members" (ICN 2005, p. 1).

The objective of this paper is to examine how countries that participate in regional trade agreements with competition provisions can be assisted in enacting and in effectively implementing the competition provisions within agreements. Particular focus is placed in this respect to the role of the concepts of flexibility and progressivity and technical and financial assistance. Those concepts originate from Special and Differential Treatment provisions within WTO agreements and are designed to provide the necessary policy-space needed by less developed partners in bilateral or multilateral trade agreements with competition provisions. This study builds predominantly on case studies for Poland, South Africa and Ukraine which were conducted in an EU-funded research project on Competition Policy. On this basis, the particularly important points within the three case countries with respect to flexibility and progressivity are discussed. When examining assistance, the available information on the effectiveness of financial and technical assistance provided in particular by ICN, OECD, UNCTAD is used to analyse whether the received assistance by the case countries is well targeted or not.

The first part of the paper discusses the roots and concepts of flexibility and progressivity and technical assistance. The following section discusses what we can infer from the case study experiences in terms of the role of those concepts during the processes of enactment and revision of competition laws. A final section summarizes the findings and discusses political recommendations.

2 Discussion of special and differential treatment, and the design of technical and financial assistance

In this section, we describe the concepts of special and differential treatment and review the role that flexibility and progressivity, and technical and financial assistance can potentially play in the processes of enacting and more effectively enforcing competition regimes.

2.1 Special and differential treatment in building an effective competition regime: the concepts of flexibility and progressivity

The concepts of flexibility and progressivity, and technical and financial assistance form part of a larger set of provisions in the framework of foreign trade agreements, termed "special and differential treatment", and are in line with the so-called "preferential or differential treatment" in the UN Set of 1980.[1] The original concept of special and differential treatment was introduced within GATT in 1955 in the trade context to meet the concerns of developing countries, in particular that the core principles of non-discrimination and reciprocity do not correspond to their special needs for development. The rules aimed at enabling developing countries to become fully integrated in World trade. Up to the 1980s, the provisions on special and differential treatment were build around two core concepts: non-reciprocity and preferential market access. Non-reciprocity was designed to meet the needs of developing countries to protect domestic industries through establishing comparatively higher tariffs and trade barriers for imports into developing countries than for developed countries. Preferential market access should enable development countries to foster exports to developed countries.

However, in the 1980s, evidence increased that protection does not increase the competitiveness of protected industries and that preferential market access does not function well either. In general, it has been increasingly noticed that the provisions around non-reciprocity and preferential market access did not have the expected effect to foster development countries within the international trading system (OECD 2003a, p. 16). To take this into account, procedural measures which are designed to allow developing countries to fulfil WTO obligations in a smoother way, became more important.

Today, the WTO agreements comprise about 150 special and differential treatment provisions, which are classified by WTO in six main categories (WTO 2001a, pp. 4-5):

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1 In the following, the concepts of 'special and differential treatment' and 'flexibility and progressivity' with special regard to the competition concept are briefly discussed. For a more comprehensive discussion see e.g. *Nottage* (2003), *Pangestu* (2000), *OECD* (2001), *OECD* (2003a), *OECD* (2004), and *WTO* (2001a).

(i) provisions aimed at increasing trade opportunities of developing country Members,

(ii) provisions under which WTO Members should safeguard the interests of developing country Members,

(iii) flexibility of commitments, of action, and use of policy instruments,

(iv) transitional time periods,

(v) technical assistance,

(vi) provisions relating to least-developed country Members.

The first category consists of provisions which should increase the trade opportunities of developing countries. However, it is increasingly questioned whether these provisions in fact increase trade opportunities or not. The second class of provisions comprise actions by members to safeguard the interests of developing countries. Alike for the first category, it is questionable to which extent these provisions in fact fulfil the intended objectives. The provisions of the third group call for exemptions from commitments or a reduced level of commitments for developing country members to be accepted by developed members. This group allows in particular developing countries some flexibility in adopting agreements and in deciding which rules to apply. This proved to be especially important for facilitating the integration of trade policy in a wider range of developing interests. The fourth category includes time-restricted exceptions to facilitate the implementation and to take into account that the implementation of provisions needs time. The next set of provisions is designed to facilitate the implementation of agreements trough technical assistance, and is hence closely related to the fourth category of provisions. The last group consist of provisions applicable only for least-developed countries and includes all provisions from the five categories listed before (WTO 2001a, pp. 6-10).

Of the six types of provisions, the concepts of flexibility (type 3), transitional time periods (type 4), and technical assistance (type 5) have been considered as relevant within the trade and competition context, i.e. the context of considering competition issues within trade negotiations (OECD 2003a, p. 18).[2] Those types of special and differential treatment, when extended in competition clauses to less-developed partners of trade agreements, are duly acknowledged in the UN Set of 1980 and match the types of provisions that were included in specific Uruguay Round Agreements (Brusick and Clarke 2005, p. 162).

Within the trade and competition context, *flexibility* may be seen as a concept which grants developing countries the ability to adopt particular rules that address their spe-

2 Flexibility and transitional time periods (or in other words progressivity) are discussed as the most important provisions on special and differential treatment within the trade and competition context. Both terms (flexibility and progressivity) are often used similar or instead of the broader special and differential treatment term.

cific particularities and needs (OECD 2003a p. 18 and WTO 2001b, p. 11), and to implement exemptions and exclusions[3] (OECD 2003b, p. 3), when developing their own competition regimes. It is hence more targeted at those countries that have not yet enacted a competition law. The idea is that "there is no one size fits all competition law" and that "competition policy is not a stand alone policy" (Cuts 2003a, p. 9), rather country particularities necessitate a country-specific approach. Some particularities (as e.g. the country's development levels, market structures, openness to trade, smallness, weak competition culture, histories of state intervention, and the necessity of capacity building) suggest that not all provisions of a typical competition law of a mature market economy may be relevant or effective and that some may even contradict other policy priorities and developmental needs. Examples for country-specific rules include e.g. the case of South Africa, where the competition law contains special rules to overcome economic segregation from the former 'apartheid regime' (Hartzenberg 2004, p. 207), and examples for typical exclusions with a view on developmental priorities include regulated sectors, strategic sectors, cooperations to foster technological development, innovations and standardisation, agriculture, small and medium sized enterprises, and sports.[4] Further country-specific rules that the EU suggested to consider under the category of the flexibility concept include a focus on hard-core cartels (with less importance given to issues like the wider range of cartels, abuses of dominant position, monopolisation and merger control), sectoral exclusions but not regional approaches as substitutes, and in terms of institutionalisation of competition law, the possibility either to enforce by way of judicial means or administrative institutions (dedicated or agency with also other tasks), or both (WTO 2003).

It should be noted that both developed and developing countries use exclusions in their national competition legislation (see e.g. EU's block exemptions) and that this may not necessarily mean a weakening of competition law enforcement, rather they can be used to better target and design competition law and policies and to ensure legal certainty where the law leaves room for interpretation (Khemani 2002, p. 2; OECD 2003b, p. 3).

However, this concept also contains dangers, and in order to contain those, the EU suggests that three "principles" should be met when considering flexibility: transparency, non-discrimination (here understood as having no interference with the way individual decisions are taken), and procedural fairness (possibility of a judicial review of administrative decisions) (WTO 2003, for a discussion of these issues, see also Evenett and Clarke 2003, p. 102-108).

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3 In the following, we use the term exclusion. It should be noted that while the terms exemption and exclusion are often used as synonyms, exceptions have a slightly different meaning in the context of national legal systems. For more detailed information compare *Khemani* (2002) and *WTO* (2001c).

4 Compare e.g. *Khemani* (2002) and *OECD* (2003b). Both studies provide examples of possible exclusions. Additionally, for readers interested in this issue, *Khemani* (2002) discusses the main rationales behind exclusions.

The concept of *progressivity* in the trade and competition context addresses the time dimension and is considerate of the fact that the development of institutions is a gradual process (OECD 2003a, p. 18). It permits a gradual and selective implementation or deepening of measures against anti-competitive behaviour (WTO 2001b, p. 11). The idea is that a country without a competition regime or that does not effectively enforce its existing competition law may need time, and that a stepwise implementation may be more favourable in the context of a lack of experience[5], competition culture, and scare resources. Implementation may be seen as an evolutionary process, possibly starting with rules that are more important, easier to effectively enforce, or for which more acceptance can be expected from the public. By contrast, rules against collusion of multiple firms (cartels) are often not required as urgently in developing and transition countries. Furthermore, countries at least during the earlier stages of competition supervision, may want to shy away from dealing with the more time consuming and resource intensive issues of merger regulation (Kronthaler et al. 2005, p. 4). In the words of the EU, the concept should "allow reasonable and more individualised time-periods within which to adopt a domestic (or regional) competition law and establish an enforcement authority [...] according to the level of development, as well as to the wishes and needs of each country" (WTO 2003). This concept here is hence not only targeted at countries that have not yet enacted a competition law but also for those who still remain to effectively enforce.

The concept of progressivity is not a disputed issue by WTO members, rather, there seems to be a general agreement among WTO members that there is a need for granting trade agreement members (and possibly within a multilateral framework for competition policy) some extent of progressivity and individualised time-periods when adopting and implementing a competition law (OECD 2004, p. 12). The EU suggests in particular that countries without competition provisions might well be in the position to start with a ban on hard core cartels, regional approaches, and a judicial implementation by way of private actions by affected competitors before gradually increasing the depth and scope of its competition regime (WTO 2003). As is the case with flexibility, progressivity in establishing a competition regime also contains dangers, here the so-called 'implementation backloading', which as the EU suggests, can be contained by way of an indicative implementation plan (ibid.).

In that the time needed for a smooth adaptation path towards a fully-fledged and workable competition regime may significantly depend on the amount and time-frame of fi-

5 This includes two different aspects: first, "The greater the number of objectives or constraints that a competition authority is required to take into consideration, the higher the likelihood that the focus of enforcement efforts will not centre primarily on safeguarding the competitive process." (*Hoekman* and *Holmes* 1999, p. 884). Second, individuals and institutions involved in the process of developing a competition regime may need time to "ride the learning curve" (*WTO* 2001d, p. 2).

nancial and technical assistance received, the concept of progressivity is closely related to technical and financial assistance and capacity building.

2.2 Of particular interest: consistency and the concepts of progressivity and flexibility

When establishing a national competition law and enforcement system, a country will have to consider consistency of the new laws and regulations both with existing institutional arrangements and within the new system. Whilst it is certainly true that, for less developed or least developed countries, enacting and enforcing a fully-fletched competition regime will place an onerous burden, and that flexibility and progressivity are concepts that can make it easier for those countries, it is also true that the benefits of establishing a competition regime crucially depend on how well it is designed and integrated into the existing institutional fabric of the country involved.

Hence, there are mainly two important considerations: first, in particular flexibility allows countries to design a regime that is compatible with the existing national structures and peculiarities in general. This we may see exemplified not only in the case of South Africa of the three countries assessed here, but in many other cases as well; here, we refer to the very difficult and time-consuming nature of the 'translation' of the competition-related chapters of the *acquis communautaire* into national law in the case of EU accession countries - this despite the fact that those countries' institutional fabric was built more or less from scratch and less than a decade before. Second, applying either or both a flexible and a progressive approach to the establishment of a competition regime gives rise to the typical problem of inner consistency within the new regulations and institutions: the progressivity and flexibility approaches should not be misconceived as a *menu* to freely choose from according to own *gusto*[6]. Consider for example the enforcement of exclusively a ban on hard-core cartels without regulations concerning concentrations or merger control: this solution would all too easily give rise to adverse incentives by interfering in a discriminatory way with how individual decisions on behalf of enterprises are taken. Other examples include e.g. regional agreements without a national pendant, or a sectoral approach to exemptions and its sectoral reallocation effects.

Those examples should make clear that flexibility and progressivity may assist countries in the process of enacting and more effectively enforcing, they may additionally provide possibilities to tie national particularities and policy priorities into the venture of establishing a competition regime, but also that those concepts give rise to the danger of resulting in inconsistency.

6 For a negative example, see e.g. the communication by Trinidad and Tobago to the WTO Working Group on the Interaction between Trade and Competition Policy Competition Policy (*WTO* 2001d, p. 1).

2.3 Technical and financial assistance, capacity building

Technical assistance and capacity building are often used in exchangeable connotations when referring to assistance in considering, drafting, and implementing competition laws and other laws directly relevant to market competition (OECD 2002, p. 6). However, the terms have somewhat different meanings: capacity building refers to the more general process of implementing sustainable competition policy processes and frameworks at the national and regional level, whereas technical assistance refers to the transfer of skills and know how from organisations like WTO, UNCTAD, OECD and competition agencies to agencies and jurisdictions in need of support for implementing sustainable competition policies (ICN 2003, p. 46). In the following, we focus on the concept of technical assistance.

The main task of technical assistance is "to increase a beneficiary's ability to consider the desirability of adopting some form of competition law or policy, and to draft, enact, and implement a law or policy that is tailored to its particular needs" (OECD 2002, p. 6). General categories of technical assistance needed by beneficiaries are (i) legislative assistance, including the assessment of the desirability of a competition law, the drafting and amending of such a law, (ii) institutional and operational issues, including the building of a competition agency, the design and process of investigations, and the relationships to other government and non-government institutions, and (iii) law enforcement assistance (OECD 2002, p. 7).

In the discussion over technical and financial assistance, three major steps are identified to build an effective competition regime: first to create a competition culture, second to remediate institutional impediments and distortions, and third to build a regime which effectively deals with private anti-competitive conduct (OECD 2004, p. 13). Those steps respond to the fact that developing and transition countries often start the implementation of their competition legislation under unfavourable conditions that include scarce resources, a lack of professional expertise, inadequate jurisprudence, weak academic infrastructure, weak professional associations and consumer groups, excessive bureaucracy, high corruption, and possibly political and bureaucratic resistance to reform (CUTS 2003b, p. 1).

Instruments of technical assistance used by donors to assist countries in implementing an effective competition regime are (i) conferences and seminars, where experts discuss best practices, (ii) internship programmes, where competition agency staff from developing countries have the opportunity to work in more experienced competition agencies, (iii) long-term advisors, where experienced competition agency staff support the competition agency staff in less experienced agencies, (iv) short term interventions by experienced advisors in specific cases and problems, (v) publications, in which the benefits of

competition and the economic situation of a country is discussed, and (vi) assistance in the drafting of a competition legislation (ICN 2003, pp. 47-52, ICN 2005, p. 2).[7]

In general, developing and transition countries seem to be content with all types of technical assistance provided (ICN 2003, p. 56 and ICN 2005, p. 30). In this respect a study by UNCTAD suggests that there exists no general agreement that one form of technical assistance is more useful than another and that the type of technical assistance used should be based on a needs assessment (UNCTAD 2004, p. 1). However, the results of several other studies indicate that some forms of technical assistance might be more important than others: in particular in a study by OECD, it is suggested that amongst the instruments of technical assistance, conferences, seminars, internship programmes, and long-term advisors are the programmes which received the most attention by beneficiaries (OECD 2002, p. 8). Whilst a more recent study by ICN supports this view, this study also suggests that national and regional seminars, internship programmes, and long term advisors may have had the highest impact on the effectiveness of a competition agency (ICN 2005, pp. 36-37).

The opinion voiced about which form of technical assistance is most beneficial additionally seems to differ between the agency heads and the agency staff participating in technical assistance programmes. Whilst agency heads seem to favour assistance by procurement of e.g. high budget items, short term interventions, and conferences and seminars, agency staff find that seminars, long-term advisors, and internship programmes where most effective[8] (ICN 2005, pp. 15-17). Furthermore, it is suggested that the type of technical assistance favoured depends on budget constraints: competition agencies with stronger budget constraints place more emphasis on procurement and seminars, whereas agencies with lesser budget constraints place more importance on assistance that transfer knowledge (ICN 2005, pp. 18-19). Another issue raised, concerns the maturity of an agency which may influence the type of assistance needed (ICN 2005, p. 48). In this respect, a study by CUTS holds that within the suggested four stages of institutional development of competition regimes, the respective appropriate international cooperation matters change (compare table 1). In the first two stages, international cooperation should focus on drafting, training, and procedures in line with the due process, and in the third stage, when the implementation is well on track, cooperation in selected cases is more appropriate (CUTS 2003b, pp.2-3).

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7 All of these instruments have their own advantages and disadvantages. For a discussion of the pros and cons of these instruments, see e.g. *OECD* 2002.

8 However, in the study it is suggested that further research is necessary to determine which type of assistance is most beneficial (*ICN* 2005, p. 46).

Table 1:
Stages of Institutional Development of Competition Regimes and International Cooperation Matters

Stages of Institutional Development			
I. Start	II. Enhancement	III. Advancement	IV. Maturity
1. Competition advocacy + 2. Control of horizontal restraints + 3. Checking abuse of dominance	1-3 + 4. Merger control + 5. Control of vertical restraints + 6. Effects Doctrine	1-6 + 7. Regulation	1-7 + 8. Proactive competition advocacy
International cooperation matters: *			
Training and drafting of legislations and procedures in line with due process		Cooperation in selected cases with exchange of public information	Systematic cooperation with exchange of confidential information

Note: * Whilst the measures described from stage I to III could be regarded as technical assistance in the sense of assistance provided to develop a well functioning competition system, the point described in stage IV may be regarded as not constituting assistance in this sense.

Source: CUTS 2003b, pp. 2-3, modified.

A further result of the examination by ICN suggests that not only the type of assistance decides about the success of the technical assistance programme[9] provided, but also the competence of advisors, the quality of their teaching materials, and their ability to teach.[10] Moreover, the study indicates that the involvement of the beneficiaries in the design and the content of a technical assistance programme is a key determinant of the success of the project (ICN 2005, pp. 21-46). In this regard, a study by UNCTAD recommends that "the most effective form of capacity building and technical assistance activities are those which are integrated in the recipient country development strategy" (UNCTAD 2004, p. 1).

9 A technical assistance programme can include one or more types of technical assistance activities.

10 In this regard it is interesting to note that the advisors' familiarity with local particularities seems to be of relatively low importance (*ICN* 2005, p. 18 and 30).

3 Lessons drawn from experiences made in three case countries for other developing countries

Before considering the role of gradual approaches for the development of a comprehensive and effective competition regime within the three countries of South Africa, Poland, and Ukraine, it is important to bear in mind that those countries are at different stages in the process of implementing an effective competition regime. As indicators of the effectiveness of competition regimes show (compare table 2), none of the countries have reached the highest level of an effective competition regime. However, in particular South Africa seems to be well on track with substantial progress in the last years, whereas especially in Ukraine, little progress is observable.

Table 2:
Competition Policy Enforcement

Country	Competition Law Enactment[1]	Effectiveness Indicator	2000	2001	2002	2003	2004
Poland	2000	EBRD[2]	3	3	3	3	3
		WCR[3]	3.6	-	3.6	-	3.3
South Africa	1998	EBRD[2]	-	-	-	-	-
		WCR[3]	4.7	4.8	4.9	-	5.3
Ukraine	2001	EBRD[2]	2+	2+	2+	2+	2+
		WCR[3]	3.3	3.3	3.0	-	3.2

Note: [1] The year correspond to the adoption of the actual competition law in force. - [2] EBRD Competition Policy Indicator: ranked between 1 and 4+, 1 indicates that in the specific country exists no competition legislation and institution, 4+ indicates that the standards are equal to those of typical advanced economies. – [3] WCR Effectiveness of Antitrust Policy Indicator: ranked between 1 and 7; 1 indicates that anti-monopoly policy in the country is lax and not effective at promoting competition, 7 indicates that it effectively promotes competition.

Sources: IWH Database on Competition Law Enactment in Developing and Transition Countries; European Bank for Reconstruction and Development Transition Reports 2000-2004, World Competitiveness Report, published annually by World Economic Forum, various issues.

3.1 The role of flexibility and progressivity in South Africa, Poland, and Ukraine

The following chapters assess by use of case study material the role that flexibility and progressivity played for the timely development of comprehensive and effective competition regimes in South Africa, Poland, and Ukraine.

3.1.1 The case of South Africa

One important aspect before considering the implementation of the competition regime in South Africa in relation to progressivity and flexibility is that compared to many other developing and transition countries, South Africa has a long market economy tradition. Furthermore, its institutional setup is much more developed than that of many other developing and transition countries (Török 2005, p. 4). Compared to other developing and transition countries, the issue to develop an effective competition regime is therefore in many respects much less complex because workable institutions were always available.

South Africa has, as a former British dominion, a long tradition in competition legislation.[11] The first competition legislation was introduced in 1955 and was about 20 years in force. This law, however, has never been effectively enforced due to several inadequacies and the existing economic system governed by the state and a few influential industrial families.[12] In particular, only certain 'monopolistic conditions' were defined, *per se* prohibition did not exist, the executive arm was not independent from the government, and sanctions and remedies were ineffective and weak (Török 2005, p. 7-8). Furthermore, considering that the executive arm of the law was the Board of Trade and Industries (BTI), the close relationship between the government and the influential industrial families was not conducive to properly enforce the law.

The existing weaknesses of the 1955 competition law, in particular the weak enforcement system and the inability in dealing with mergers, led to an overhaul of the law in the seventies. An inquiry commission was established by the government in 1975 which recommend a complete reorganisation of the existing institutional settings. A 'tripartite' system was suggested, consisting of a supervising Ministry, a body for investigation and enforcement, and an independent competition tribunal (Török 2005, p. 8). However, only a few suggestions of the inquiry commission were implemented by the government in the 1979 'Maintenance and Promotion of Competition Act'. Merger control was explicitly included in the law, and 'monopoly situations' were also defined. Furthermore, with the creation of a competition board, one part of the suggested 'tripartite' system

11 However, compared to other former British colonies an explicit competition law was relatively late introduced (*Török* 2005, p. 7).

12 Only 18 investigations into uncompetitive behaviour have been carried out during the existence of the law (*Török* 2005, p. 7).

was established. However, several shortcomings remained. In particular, explicit prohibitions were not an integral part of the law, the benchmark for assessing the harm of anti-competitive behaviour was 'public interest' which is widely regarded as inadequate for this issue[13], the competition board was subordinated to the government, and an independent competition tribunal was not created (the executive power remained by the government) (Török 2005, p. 8-10).

In general, assessing the established competition regime until 1994 (when an ANC dominated government came into force), two major shortcomings could be identified. First, the content and the design of the competition legislation makes it difficult to investigate anti-competitive behaviour. Second, the institutional settings, explicitly the lack of political independence of the competition institutions, was created in such a way that the law "could be used rather by than against the government" to protect "the economic interests of the ruling political elite [...] Its overhaul became thus a political necessity after the change of political regime" (Török 2005, p. 10).

Four years after the change of the political regime, with a prehistory of about six years, a completely new competition legislation came into force: the Competition Act of 1998 (Török 2005, p. 22), which is widely recognised as a modern, state-of-the-art competition legislation (Török 2005, p. 40).

Maybe one of the most important features in regard to *progressivity* could be seen in the process of drafting the new legislation. The process started in 1992 with a policy document by ANC which includes elements of competition policy. Emphasis was laid especially on the role of competition policy in "correcting the concentration of economic power, and in lowering the level of economic domination by a minority within the white minority" (Török 2005, p. 22). However, the objectives changed in the following years: correcting historically developed economic structures became less important, whilst promoting competition within the domestic market (including the promotion of small and medium sized firms) and the control of anti-competitive conduct came to the fore (Török 2005, p. 23). This could be understood in the necessity to restructure the economy in such a way that historically disadvantaged people (mainly blacks) are able to successfully take part in economy activity, whilst economic development should not be hampered due to uncertainty about property rights. To solve this task and to ensure economic and political stability, the necessity was seen to mobilise the whole society to support such a law (Török 2005, p. 23). Steps in this process included to convince the society that the old law has to be replaced due to its shortcomings, and more importantly to include all different groups interested in the law in the drafting process (Török 2005,

13 In contrast to 'consumer welfare' or 'social welfare', there is no economic measure to quantify 'public interest', as it is not a pre-defined term and therefore open to many interpretations and individual interests (compare e.g. *Kirchner* 2004, p. 311, *Motta* 2004, p. 12).

p. 24).[14] Hence, the South African process of developing an significantly overhauled competition regime may be best described as a 'bottom-up approach'.

With respect to *progressivity* another issue is remarkable. In contrast to the often raised issue that merger regulation is a complex issue and may therefore not be enforced during the earlier stages of competition supervision, merger regulation is an important part from the beginning of the implementation of the 1998 Competition Act in South Africa. As a matter of fact, "the implementation of the 1998 Competition Act has been biased towards mergers" (Török 2005, p. 30). In this respect, a contribution from South Africa to the OECD Global Fora stated that "merger investigation and analysis has proved to be a powerful source of learning for the competition authorities" (Competition Tribunal of South Africa and Competition Commission of South Africa 2004, p. 2), that merger investigation is an important advocacy instrument and is important to ensure the competitive structure of markets (ibid, p. 3). This could be understood in particular in view of the highly concentrated market structure in South Africa which makes merger regulation an important issue within the country.

With respect to *flexibility*, the most important features of the South African competition law is that it went far beyond the scope of a typical competition law in mature countries in some important and clearly country-specific respects (compare Box 1): "The reasons of these differences can be linked to the strategic task of finding an optimal combination between the promotion of competition and development. The promotion of competition also helps development in a long-term approach, but the short-term requirements of finding the adequate balance between them may have a strong country-specific character. An interesting case of how this balance is being sought is South Africa" (Török 2005, p. 4).

14 "This broad scope of competition policy objectives met considerable discussion and criticism during the preparatory works of the law. It has to be seen, however, that the still quite fragile political and economic stability of South Africa made it necessary to prepare a competition law open to the greatest possible part of the business community and the society. The broad formulation of these policy objectives can be regarded as necessary for obtaining really wide political support for the law which was rightly regarded as one of the most important prerequisites for putting South Africa on a track of transition to becoming a modern market economy." (*Török* 2005, p. 26).

Box 1:
Objectives of the South African Competition Act of 1998

"The purpose of this Act is to promote and maintain competition in the Republic in order:

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

Source: CUTS 2002, p. 22.

Only the objectives (b) and (d) of the law described in Box 1 are directly linked to competition issues, all other objectives are rather specific to the particularities of the South African economy and society. Objective (a) and (c) are more general economic objectives. However, they are of particular interest with a view on economic and political stability of South Africa. Objective (f) is concerned with the issue to increase the participation of historically disadvantaged persons (mainly blacks). This aim has a strong political background within South Africa and is also supported by the Black Economic Empowerment (BEE) strategy of the government. Objective (e), although protection of small and medium-sized enterprise has a long international tradition within competition legislation, has a specific South African component, as many of the small and medium-sized enterprises are owned by historically disadvantaged people.[15]

With respect to *flexibility*, it is furthermore worth noting that, compared to other competition legislation e.g. in the EU, South Africa has no block exemptions. However, e-xemptions can be granted on request. This possibility was designed to allow for strategic objectives like export promotion, promotion of small businesses, to prevent the decline of an industry, and to improve the competitiveness of firms owned by historically disadvantage persons (Török 2005, p. 30).

15 "In fact, the playing field tilted in favour of certain groups of Whites had to be levelled in order to create markets with more or less equal chances for entrepreneurs belonging to different ethnic groups." (*Török* 2005, p. 10-11).

3.1.2 The case of Poland

In contrast to South Africa, the circumstances under which a competition legislation had to be established in Poland during and following the shift from a central planning system to a competitive market orientated economy were completely different. In particular not only a competition legislation had to be established but also all adjunct legislation, like most importantly a company law, as well as economic and democratic institutions.

Post second World War, Poland adopted its first competition legislation in 1987[16]: the 'Act on Combating Monopolistic Practices in the National Economy'.[17] This corresponded to the Polish strategy from the early 1980s to modify the central planning system by introducing some selected market mechanisms.[18] The drafting of the 1987 legislation started in 1982. It was mentioned as one of the free market mechanisms and as an instrument to control Polish enterprises, some of which at that time exhibited monopolistic practices with respect to price-setting (Cylwik et al. 2005, p. 19).[19] Whilst the list of prohibited practices in the Polish act were to some extent similar to those typically found in mature market economies, important differences existed which made the law largely ineffective: nearly all state-owned enterprises were excluded from the law and the anti-monopoly authority was closely tied to political control (Cylwik et al. 2005, p. 19-20). However, although the competition legislation was ill-designed and insufficiently implemented, the country was able to accumulate some experiences which proved useful for the preparation of a new act in 1990 (Cylwik et al. 2005, p. 29).

The systemic transformation, which may be considered to have taken off in 1989, included some aspects that are relevant to competition: the abolishment of the central planning system, privatisation of state-owned companies, de-regulation of amongst other things prices, liberalisation of most importantly domestic and foreign trade, i.e. the creation of internal and some extent of external competition by ensuring freedom of economic activity. In the course of the Polish transition process, the 1990 'Act on Combating Monopolist Practices' was enacted with its main objectives to ensure the development of competition, to prevent monopolistic practices, and to protect consumer in-

16 In fact, this is somewhat puzzling: an economic system governed by a plan is not only coherent without the criterion of competition, rather competition can be considered an inconsistency in this system: neither consumers nor companies are free to plan their own economic activity. In all countries with a planned economic system, however, markets did exist, and some freedom in economic activity was granted to agents.

17 Not accounting for the Act on Cartels of 1933 and the Antimonopoly Act of 1939.

18 However, during this period only cosmetic changes of the *central* planning system happened. Profound market mechanisms were only established in the late 1980s (*Cylwik* et al. 2005, p. 15-17).

19 In the 1970s the price system was de-centralised and governed by the associations of undertakings (*Cylwik* et al. 2005, p. 11). Socialist economic policies favoured vertical integration and the resulting state-created monopolies and their behaviour exemplifies the inconsistency of mixing criteria from opposing economic systems.

terests (Cylwik et al. 2005, p. 47). In terms of institutional development, this enactment was flanked by the establishment of an politically independent Anti-Monopoly Office with significant investigation competences and the right to comment on restructuring, deregulation, and privatization programmes. Furthermore, an Anti-Monopoly Court was established that was attached to Voivodship Civil Court in Warsaw and served as an appeal court (Cylwik et al. 2005, p. 48 and 54-55).

With respect to *progressivity*, it is of particular interest that the implementation of the law first focused on the removal of the causes of monopolistic practices, as this seemed to be more important for an economy in transition than combating anti-competitive conduct. In fact, in the first years of its existence, the Anti-Monopoly Office was mainly concerned with the development of competition and not with its protection: e.g. it was concerned with the changing of the ownership structure, the conditions necessary for developing new enterprises, and the restructuring of existing monopolies. Of particular importance was also the control of prices, as many markets had monopolistic structures (Cylwik et al. 2005, p. 66-68). However, in due course with the restructuring of these markets, the control of prices soon became less important and today this issue is of minor relevance (Cylwik et al. 2005, p. 79). Furthermore, many efforts were invested to establish the law within the society, the most important features of which were to build a positive competition culture and to inform the public about the functioning of the act (Cylwik et al. 2005, p. 71).

The issue of *flexibility* in the drafting and the process of enactment seemed to have been of less relevance - the law allowed little exemptions including only intellectual property rights, agreements in regard to employee rights, and rights from copyright law (Cylwik et al. 2005, p. 51). In 1995, the ‘Act on Combating Monopolist Practices’ was significantly amended. Most importantly, thresholds were established below which a merger was not subject to notification (*de minimis*), prior to this amendment, all mergers were controlled by the Anti-Monopoly Office. Furthermore, the list of conducts that were considered to fulfil the criterion of ‘abuse of dominant position’ was extended and a *de minimis* rule was introduced (Cylwik et al. 2005, p. 56). Two main incentives initiated this amendment. First, the law had to be adapted to the changes in the Polish economic environment following the first five years of systemic transition and economic catch-up development, and second the law had to meet the OECD requirements and had to be harmonised with the EU legislation as set out in the *acquis communautaire* with a view on EU membership (Cylwik et al. 2005, p. 56).

In 2000, yet again, the Polish competition legislation was amended: the ‘Act on Competition and Consumer Protection’ replaced the former ‘Act on Combating Monopolist Practices’ and the ‘Act on Conditions of Admissibility and Monitoring of State Aid granted to Undertakings’ was added. Whilst the adoption of the ‘Act on Competition and Consumer Protection’ does not provide significant new insights with respect to flexibility and progressivity, the adoption of the ‘Act on Conditions of Admissibility and

Monitoring of State Aid granted to Undertakings' is of more interest with respect to both issues: this act has four main objectives, including (i) ensuring transparency of the usage of state funds, (ii) defining the permitted share of state funds by financing investments, (iii) assessing the impact of state funds, and (iv) assessing the impact of state aid with regard to competition (Cylwik et al. 2005, p. 60).[20] It took over 8 years until the Act was finally adopted. The need to regulate state aid with respect to competition was defined already in the EU agreement from 1992, where in Article 63 it was stated that "any public aid which distorts or threatens to distort competition […] is incompatible with the proper functioning of the Agreement" (Cylwik et al. 2005, p. 61-62) and that transparency in regard to state aid is necessary. Poland, however, did not fulfil its obligations in this respect until the 2000 Act come into force. The reason for this was especially that state aid had a higher political priority in the transition process than the possibly negative impact on competition. Even by the time that systemic transformation could be considered almost complete, state aid remained an issue of controversial debate, as the discussion about the Act within the Polish parliament shows (compare Cylwik et al. 2005, p. 62-66). Assessing this from the point of view of the role of progressivity and flexibility for Polish competition law enactment, it could be argued that this process may have been seriously hampered if state aid would have been placed on the agenda right from the outset of the process in 1982 or 1990.

3.1.3 The case of Ukraine

Similarly to Poland, the evolution of competition legislation in Ukraine is closely linked to the transformation process. Here, however, additionally to the foundation of the state of Ukraine[21]. Decisions had to be taken about the characteristics of the political and economic systems, and all political and economic institutions had to be established from scratch. In this regard, it is important to bear in mind that the transition process from a state command system to a free market system in Ukraine has not been smooth and was time-consuming: nearly a whole decade passed until the state-owned sector was privatised to a substantial extent, until significant economic freedom was achieved, and sound macroeconomic policies were applied. All these issues affected seriously the process of implementing an effective competition policy in the Ukraine. In particular, during the first years of the transformation process, the conception of principles and foundations of a free market system was insufficient amongst political elites. Due to this and due to severe economic problems, steps towards reforms were accompanied by subsequent steps backwards (Jakubiak 2005, p. 4-6).

In Ukraine, the first competition legislation was adopted in 1992: the 'Law on Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activi-

20 In effect, this Act is targeted mainly at EU regional policy.

21 The country declared its independence in December 1991 from the Soviet Union.

ties'. This law seems to be of particular importance in Ukraine, as the central planned economy resulted in a situation where especially large state-owned enterprises dominated the economy. Conduct prohibited by the law include the abuse of dominant position, anti-competitive concerted actions, and discrimination of economic entities by central and local state bodies (Jakubiak 2005, p. 16-17). However, exemptions were allowed in order to ensure national security, defence, and other public interests (Jakubiak 2005, p. 18). In the law, it was furthermore specified that anti-monopoly control should be conducted by an Anti-Monopoly Committee. This committee was defined one year later by the 'Law on the Anti-Monopoly Committee of Ukraine' in 1993. The basic tasks of the Antimonopoly Committee of Ukraine (AMCU) were (i) the control over the observance of the anti-monopoly legislation, (ii) the protection of legitimate interests of entrepreneurs and consumers in relation to the anti-monopoly legislation, and (iii) to develop fair competition within the economy (Jakubiak 2005, p. 19). In terms of institutional setting, the AMCU was clearly dependent on the Ukrainian president and government (note that the position of the president in Ukraine is very strong). In 1996, a major amendment took place with the enactment of the 'Law on Protection against Unfair Competition'. It replaced norms of the 1992 law that relate to unfair competition (Jakubiak 2005, p. 20) and was aimed at strengthening the powers of AMCU, because in the absence of well functioning judiciary system, AMCU was the only body able to protect unfair competition (Stotyka, 2004, p. 13). Yet, the issue of political dependence seems to even have worsened. With this reformed law, the first phase of implementing competition legislation was completed which could be regarded as an important step in gaining experience with key principles of competition, and implementing competition legislation. However, it became increasingly obvious that the design of the law as well as the institutional setting were not conducive to the development and protection of competition in the Ukraine economy. Furthermore, the particularly slow speed of other market based reforms added to the problems: we know experience that a competition law is not a stand alone policy but is rather highly dependent on the speed of market-related institution-building, and those were beyond the influence of AMCU (apart from their right to recommend on reforms).

Those shortcomings prompted AMCU already in 1996, the year in which the major amendment came into force, to start an initiative to design a new law that enables the institutions to better concentrate and fulfil its obligations to develop and ensure competition (Jakubiak 2005, p. 29). The intention was to reform the national legislation with the help of international experience and to strengthen AMCU in its task to create a competitive environment in Ukraine. Already one year later, a draft legislation was presented. This draft was prepared with international expertise and was in line with the laws of OECD member countries, especially with those of the EU. In general, the law was considered a modern state-of-the-art competition legislation not only by AMCU but also from outside Ukraine (Jakubiak 2005, p. 29). However, it took about six years until this law came into force. The 'Law on the Protection of Economic Competition' was adopted in 2001 and replaced the former anti-monopoly legislations in 2002. Major

changes were, in particular, a clearer definition of monopolistic activities and a strengthening of the Anti-Monopoly Committee (Jakubiak 2005, p. 21).

With respect to *progressivity* and *flexibility* it is of particular interest why it took around six years until this legislation came into force, especially as it could be considered as properly designed, on the basis of international experience. The main reason may lie with the interests of the powerful Ukrainian business groups which were closely linked to the government, some even as members of parliament. Those interest-groups successfully hampered the introduction of the new competition legislation, because they considered it as potentially harmful to their individual interests (Jakubiak 2005, p. 29-30).[22] Only after it became impossible to refuse the law due to the re-opening of Ukraine after the financial crisis of 1998 (e.g. Cooperation Agreement between EU and Ukraine) and indirectly also due to membership-negotiations with the WTO, the law was finally able to pass the parliament (Jakubiak 2005, p. 30). However, the scope of possible exemptions from the 2001 Competition Law is considerable and includes in particular, practices that stimulate manufacturing, technological development, economic development, and small and medium enterprises. What is even more, the exemptions are open to interpretation: the Cabinet of Ministers can allow concerted actions which result in 'positive social effects'. Neither the term 'positive social effects' is exactly defined, nor the necessary investigations to determine 'positive social effects' (Jakubiak 2005, p. 24).

Assessing this with respect to using *flexibility* as a means to facilitate the drafting and adoption of a competition law, the path that the Ukraine took contradicts its intention: rather than to improve legal certainty (as suggested by Khemani 2002 and OECD 2003b), exemptions resulted in watering down the law. With respect to *progressivity*, it could be argued that it might have been better, if more time had been invested in the drafting process. Furthermore, it could have been preferential to actively involve all relevant interest groups into the process of drafting the law, not only international experience: this might have resulted in a much speeder process of adoption later-on, even though the drafting could have resulted in a much more weaker competition legislation. As we can see, even the 'hard approach' to the drafting process (by including foreign expertise and not considering national interest-groups to a substantial extent) resulted in a competition legislation with substantial and unclear exemptions.

With respect to *progressivity*, another feature is of relevance: it seems to be the case that after 2001, the effectiveness of the AMCU increased. In particular, the investigation duration decreased and the investigations seem to be better focused i.e. concentrated on

22 In this respect, Jakubiak stated that "[w]hile the laws are generally well drafted, on the basis of international experience, they can wait even for years in the Rada to be passed. The Competition Law of 2001 and the Law on State Aid currently waiting in the parliament are such examples. The "average" speed of passing this type of legislation, which is potentially harmful to big Ukrainian businesses, has not changed much over the last years" (*Jakubiak* 2005, p. 15).

fewer firms. In general, the regulatory burden inflicted by AMCU, as perceived by Ukraine businesses, decreased after 2001 (Palianytsia 2004). Furthermore, price regulation became less important from 1999: this could be due to the fact that markets became more competitive, or that AMCU focussed more on the causes of anti-competitive conduct. In the case of Ukraine, this could be regarded as a more effective strategy to ensure competition (Jakubiak 2005, p. 36).

There are two possible reasons for the increased effectiveness of the AMCU. First, the law which came into force in 2002 is better designed than its predecessor and the AMCU gained more independence. Second, the experience of AMCU in conducting cases increased, which probably shows in the decreasing investigation duration. With respect to progressivity, these two reasons indicate that in Ukraine, effectiveness improved with improved institutional setting for the competition agency and with its "riding the learning curve". During the earlier years, it might have been more appropriate to invest more resources on competition advocacy and on the causes of anti-competitive conduct rather than focussing too much on resource-intensive investigations.

3.2 Technical and financial assistance in the three case countries

All three countries have benefited from numerous programmes and activities related to technical and financial assistance from a variety of different sources (see table 3). Although of course a comparison of pure numbers of programmes and activities across those three countries is problematic (no further data was available that would have been comparable), all three countries enacted (or ventured a major overhaul of) their competition laws largely around the same time, and hence received the largest share of their technical assistance somewhere around 2000. We can hence assume that the design of those programmes and the philosophy behind them may have been sufficiently alike to warrant a comparison of programme numbers.

In terms of substantive areas, assistance was geared by large most frequently to the area of competition policy in general, followed by assistance to the institutional structure of the competition agency, and to the techniques of investigation. No emphasis was placed on consumer protection (like e.g. deceptive advertising) and -apart from the Ukraine- to the harmonisation of competition law and the judiciary on the one side and the legislative on the other. The Ukraine is also the country with the largest number of assistance programmes amongst the three countries in the ICN list.

Table 3: Technical Assistance Programmes in Poland, South Africa and the Ukraine

PROGRAMME INFORMATION				MODES OF ASSISTANCE								SUBSTANTIVE AREAS											
Recipient	Donor	Provider	Dates	Needs Assessment	Academic Studies	Drafting	Workshop/Seminar/Conference	In-country Consultation (STA)	Study Mission/Internship	Long Term Advisor	Other	Competition Policy	Economic Analysis	Mergers	Cartels & Restrictive Agreements	Abuse of Dominance	Advocacy	Regulated Sectors	Investigative Techniques	Agency/Institutional Structure	Consumer Protection	Legislative	Judiciary
Poland	UNCTAD	UNCTAD	2003								X												
Poland	USAID	US FTC and DOJ	1990-1995					X		X		X	X	X	X	X			X	X			
Poland	EU, Finnish C.A.	Finnish C.A.	1998						X														
Poland	EU, ADETEF	France	2002-2003				X	X	X			X											
Poland	EU	Swedish C.A., EU	on-going								X												
Poland	OECD	OECD	1992				X					X	X										
Poland and Russia	OECD	OECD	1995				X					X	X										
South Africa	AusAID	ACCC	1999							X		X											
South Africa	AusAID, ACCC	ACCC, SACC	1999-2000							X		X								X			
South Africa	USAID	US FTC and DOJ	2002					X	X			X	X	X	X	X	X	X	X	X			
South Africa	AusAID, ACCC	ACCC, SACC	1999					X				X											
South Africa	AusAID	ACCC	1999									X											
South Africa	AusAID, ACCC	ACCC, SACC	1999				X					X											
South Africa	South Africa	ACCC	2000									X						X					
South Africa	WTO	WTO	2002			X		X				X					X						
South Africa, Tanzania	EU, DFID	DFID	on-going	X			X					X											
Ukraine	EU, Germany	BKartA	2001						X			X								X			
Ukraine	EU	EU	1993-1996			X								X								X	
Ukraine	EU, BKartA	BKartA	2001						X			X								X			
Ukraine	USAID	US FTC and DOJ	1995-1998				X	X		X		X	X	X	X	X	X	X	X	X			
Ukraine	EU, Finnish C.A., HAUS, The Finnish Institute of Public Management, Ltd.	FCA	2001						X														
Ukraine	USAID	USA	2001-?								X					X		X				X	
Ukraine	EU	EU	2002-2003				X					X							X	X			X
Ukraine	USAID	US FTC and DOJ	2002-2003				X					X							X				
Ukraine	OECD	OECD	1995;1996;1997;1998				X					X							X	X			X

Source: International Competition Network, Inventory of Technical Assistance Projects, http://www.internationalcompetitionnetwork.org/cbcpi.html, 15.8.2005.

In terms of modes of assistance, the ICN inventory clearly shows that regional and national workshops, seminars and conferences were amongst the most frequently used types of assistance, followed by study missions or internships. Considering that those also form part of the list with probably the "highest impact" and with the "most attention by beneficiaries" in the assessments of the ICN and the OECD respectively, we can deduct that the assistance granted to the three countries was probably effective and well received. Despite the fact that in those assessments, in-country consultations by use of short-term advisors were considered to be less effective and also received less attention by the beneficiaries, this method was the third most frequently used one in the three case countries. Also, long-term advisors, being considered as effective and well received, have been clearly less frequently been used in our countries. Of virtually no importance were the use of academic studies conducted for the countries, either financed by the donors or conducted by experts in the donor countries. Of only little importance were needs assessment, conducted only in the case of South Africa, despite the fact that UNCTAD values this as particularly important (UNCTAD, 2004, p. 1).

Across countries, assistance to the Ukraine was the most targeted at those methods of assistance identified as most effective and best received by the beneficiary with a clear bias on conferences or seminars and on internships, whilst Poland and South Africa placed more weight on probably less effective assistance e.g. by use of short-term advisors (which corresponds to the above mentioned preference of heads of competition agencies vis-à-vis the preferences of staff).

4 Conclusions on the role of these concepts for developing countries

The final chapter makes use of the discussion of lessons drawn from the experiences of the three case countries with progressivity, flexibility, technical, and financial assistance. Those experiences may help to advance the establishment of effective competition regimes in developing country members of bilateral or multilateral trade agreements and to assess the role that those types of special and differential treatment can play in the potential development of a multilateral framework for competition policy. The analysis showed that in all three case countries, a rather progressive and flexible design of the institutional reform into a national competition law were of pivotal importance, although not in all countries, the experience was positive. Assistance likewise played some role in implementing competition regimes in those countries, and played particularly important positive role where due account was taken to national particularities.

With respect to *progressivity*, the case studies indicate that sufficient time should be allowed for the drafting process of competition legislations. Competition advocacy in this process is of uttermost importance, in particular in order to get broad support for the new law within the society. In this regard, furthermore, it seems to be useful to involve all relevant interest groups to get the highest possible acceptance within the society for the new law. In this sense, South Africa's drafting process could be best described as 'bottom-up approach.' Contrary to this, the 'top-down approach' carried out in Ukraine seems to be less favourable. A further result considering progressivity with regard to the enforcement process suggests that in the beginning of the enforcement phase competition advocacy is just as important, in particular to establish a competition culture and to inform the society about the functioning of the law. This pertains mainly to informing both enterprises and consumers about what behaviour is lawful or not, and about their individual rights.

Moreover, the results suggest that *progressivity* in the implementation phase is strongly related to national particularities. E.g. whilst in South Africa, merger regulation was an important issue right from the time the law came into force, in Poland, however, the main task was to remove the causes of anti-competitive behaviour, e.g. building a competition culture, reducing entry barriers, etc. This indicates that there is no general rule for progressivity in the enforcement phase (it is often suggested that merger regulation should not be an important task at the beginning, because merger regulation is complex and time consuming), i.e. progressivity has to be designed with a view on national particularities. In this respect, it seems favourable to make use of *de minimis* rules right from the beginning to ensure that the competition agency does not have to use all resources for investigations but also retains some room for competition advocacy and for the learning curve. Over time, such use of *de minimis* rules (e.g. to focus on hard-core cartels as the EU suggests) can be reduced to an acceptable extent.

Considering *flexibility*, the results suggest that some flexibility is necessary to facilitate the introduction of a competition legislation. Two points seem to be important: first, it could be useful to broaden the scope of the competition legislation beyond the scope that a competition law would normally cover, in order to get broad support for the law within the society and to consider national particularities and development interests (e.g. South Africa). Second, it is maybe necessary to omit special issues and to allow for exemptions in order to facilitate the adoption of the legislation and to improve legal certainty (e.g. state aid in Poland). However, as the case of Ukraine shows, flexibility should not be used to water down the applicability of the respective law through an unclear definition of exemptions with a lot of interpretation possibilities.

Furthermore, with respect to the institutional setting, the experiences made by the case countries indicate that flexibility and progressivity should not be used here: an independent investigation authority, an executive body, and the right to appeal against decisions right from the beginning of the enforcement phase appears to be necessary for the establishment of a well functioning competition system.

With respect to technical and financial assistance, programmes can indeed make a difference in terms of convincing countries to start their own processes of competition law implementation, and this pertains mainly to developing countries due to scarce resources and lack of expertise. Our case countries may not have been constrained in those terms as much as least developed countries, yet all the same, they made extensive use of such programmes. This indicates that even for more developed countries assistance programmes may be just as relevant.[23]

In terms of a Multilateral Framework for Competition, the results indicate that some flexibility and progressivity may be beneficial for the development of a competition regime - which in turn is a necessary yet insufficient condition for a Multilateral Framework. Just as is often stated in other sources, our results also suggest that “there is no one size fits all competition law” (Cuts 2003a, p. 9). Whilst progressivity does not necessarily contradict the possibility to build a Multilateral Framework, flexibility seems to be more problematic, especially as it seems to be the case that every country needs an different approach of flexibility. However, developing a competition regime with the support of both concepts could be regarded as an important first step in building a Multilateral Framework for Competition. Furthermore, as the case of Poland suggests, rules that were left aside at the beginning, can be adopted in a later phase (e.g. state aid regulation).

23 Assessing the relative impacts of assistance programmes and instruments within case studies is suggested by ICN to be less informative (*ICN* 2005, p. 46). Rather, future research could use econometric analysis to determine relative impacts by way of regression analysis over a large set of countries.

Whilst suggesting the potential usefulness of those types of special and differential treatment for the development of an effective competition regime within trade-related agreements, our analysis does not infer sufficient general evidence as to what extent, eventually, such measures can be applied in particular other countries, and as to what mix of measures are most effective in particular other countries. This is due to the fact that the rationale for and the dangers involved with the application of flexibility and progressivity, as well as for technical assistance, root in the very country-specific particularities themselves. At this general level, however, our view of this issue is that adherence to the three “principles” of transparency, non-discrimination, and procedural fairness is a necessary condition for special and differential treatment to deliver the beneficial effects as discussed here. This would hence exclude the application of special and differential treatment measures to either transparency or procedural fairness or both.

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