5th Biennial Competition, Regulation and Development Conference

Fostering Innovation for Sustainable Development

Revisiting Intellectual Property Rights and Competition from the lens of Optimal Regulation

09-11 November, 2017
Hotel Clarks Amer Jaipur, India

Report of the Conference

Contents

Summary of Key Recommendations

CUTS International and CUTS Institute for Regulation & Competition organised the 5th Biennial Competition, Regulation and Development Conference in Jaipur, India on November 09-11, 2017. Through the 5th edition, the international conference entered its 10th year and as always, it brought together a unique set of expert stakeholders from across the globe.

Bearing in mind the overarching importance of harnessing an innovation ecosystem that addresses development challenges, especially from emerging nations' context, the objective of the conference was to bring research and empirical evidence on two seemingly contentious policy and regulatory issues which are far from being settled: a) the interface between competition and intellectual property rights (IPRs); and b) the role of competition and regulation *vis-à-vis* disruptive technologies. Alongside this, the imperative scope of innovation, collaboration, partnership, knowledge sharing and optimal resource allocation between different stakeholders, private and public were discussed.

Following are the Key Recommendations that Emerged from Discussions:

1. **It is crucial for developing nations to find suitable and well-informed approaches to achieve the delicate balance between IPRs and Competition Laws**

   The problematique of balancing two apparently divergent policy approaches to innovation (i.e. IPRs and Competition Laws) needs to be solved through evidence-based approaches and one-size-fits all approach should be avoided by developing nations. There might be a need to change the narrative where competition holds greater significance over IPRs and vice-versa. For instance, developing countries can explore optimal utilisation of TRIPs flexibilities to advance innovation in their economies. It is crucial to follow an evidence-based approach to form such policy opinions. Ultimately, however, each country has to make its own choice and the test is whether the IP-Competition balance it strives to achieve improves the lives of its people.

2. **Institutionalise good processes and build capacities to revitalise institutions**

   In order to spur innovation, protect competition and ensure optimal regulation, across sectors, especially the ones facing technology-led disruption as well as challenges *vis-a-vis* legally dichotomous dilemmas (such as maintaining a balance between IPRs and Competition and the manner and form of regulation), it is critical to institutionalise efficient process. Moreover, it is vital that institutions are always capacitated to tackle upcoming challenges. For instance, while optimising approaches to regulate rapidly evolving sectors such as digital finance, there might

be significant scope to explore institutionalisation of innovative approaches such as regulatory sandbox and regulatory impact assessment. Moreover, there might be a need to advocate for having more data in public domain to make informed decisions and to evaluate the impact of efforts in terms of regulatory approaches and models.

3. **Understand before you regulate/intervene**
   One of the most important role of policymakers is to enhance the innovative capacity of market players by optimally regulating the market and to build ecosystems which support innovation activities. The general rule for regulators and policymakers should be to *not* interfere in efficiency-enhancing innovative activities unless there is significant reason to do so. For example, collaborative standardisation processes in the ICT sector (which has significant benefits for consumers including quality and interoperability) should not be interfered with unless and until there is proof of harm to competition. Similarly, entities functioning in markets facing innovation-led disruption should be regulated based on the risks involved and not based on their type (maintaining a level-playing field for all market players). Moreover, by ensuring that the process of decision making for optimal regulations is inclusive can help frame well-informed frameworks for markets to function in.

4. **Improving coordination and generating awareness**
   It is often the case that imminent policy issues do not seem to lie in the clear jurisdiction of a single regulatory agency, thus making it difficult for common users to comprehend which is the relevant authority for the concerned issue. There is an urgent need to enhance dialogue between various public and private players to make sure that information asymmetry is tackled and institutions arrive at optimal decisions. Moreover, there is a need to promote economic literacy among consumers/users which would further results in augmenting consumer awareness.

5. **Evidence-based policymaking for increased certainty**
   There is a need of relevant, accurate and factual data, which should be used to devise policies. There is a divergence happening and the policy and real world has diverged very substantially. A symbiosis between policy objectives and actual implementation and policy recommendations based upon actual facts are the need of the hour. The policy mechanisms need to be more transparent, and feedback based, and more emphasis should be given to mechanisms, such as regulatory impact assessment to make policy formulation more inclusive.

1
Inaugural Session: Setting the Context-Role of Innovation for Sustainable Development

Overview

The inaugural session was aimed at setting the context for the conference. It entailed a panel discussion wherein discussants deliberated upon following issues:

- What constitutes an innovation based ecosystem?
- What are the challenges to achieve an innovation based eco-system? How can this
  ecosystem aid in sustainable and inclusive development?
- Does the ecosystem require a multilateral trade and competition policy arrangement?
- How to balance competition principles and IPRs to foster an innovation-based ecosystem?
- How to achieve an enabling regulatory framework that promotes growth of disruptive
  technologies without disregarding the risks, thus fostering an innovation based ecosystem?

The panel discussion was chaired by Pradeep S Mehta, Secretary General, CUTS International, who also delivered the welcome address. The key note address for the session was delivered by Suresh Prabhu, Minister of Commerce and Industry, Government of India, through a video link. Other panellists included Eduardo Perez Motta, Former President, Federal Competition Commission, Mexico; Isabelle Durant, Deputy Secretary General, UNCTAD and Nitin Desai, Former Under Secretary General, Department of Economic and Social Affairs, United Nations.

Proceedings

The session started with an emphasis on the need for an ecosystem which supports sustainable development. In this regard, striking a balance was necessary. A balance needs to be achieved between competition and exclusivity for innovation; between interests of incumbents and disrupters for optimal regulation; between growth and equity for development; and in consumption patterns for development to be sustainable. In this regard, it was pointed out that steps are needed to address regulatory failures and weak institutional capacities in emerging economies, to achieve optimal competition, innovation and regulation in developing countries.

The significance of innovation in driving productivity, growth and competitiveness amongst nations was stressed. Innovation is also a key to improving the living standards of people and supports social welfare, by determining the way goods/services could be produced and distributed. The above has certainly been realised by nations lately and therefore the cases of innovation have accelerated over last 40 years. In order to further

support an innovation-friendly ecosystem, it was pointed out there is a need to strike a balance between IPRs and market competition.

This could be done by addressing following key questions which are imperative to designing a suitable policy framework: how should IPRs be granted? how should they be used? how should they be enforced? To this end, it was suggested that agencies, such as United Nations Conference on Trade and Development (UNCTAD) and Organisation for Economic Cooperation and Development (OECD) must prepare policy guidelines on IPR, based on the three questions/imperatives.

Additionally, need for nations to arrive at such a balance by initiating actions at all levels of advocacy was highlighted. These includes: a) domestic action by national-level competition agencies/regulators, i.e. creating opportunities for stakeholders to share their opinions on the subject; b) joint action by competition regulators and IP protection agencies, i.e. by facilitating greater dialogues between the two agencies; and lastly c) international level action mainly including promotion of research on patent protection and mobilising investments for the same.

The need to strike a balance between competition and IPR through optimal governance and regulation was also pointed out. The positive correlation between competition and innovation was acknowledged and it was suggested that it is also important to protect certain sectors from competition, such as the ones covered under the Paris Agreement. The importance of adopting an integrated policy approach for a well-functioning innovation ecosystem and the need for designing incentives to promote innovation were highlighted.

It needs to be recognised that developing countries have to deal with constraints such as lack of capacity, access to finance, weak infrastructure, poor research and development (R&D) and ineffective policy frameworks. Therefore, there is a need to formulate global standards on IPR and competition that can apply to all developing nations.

An alternative view was also presented at the session. It was highlighted that the narrative has to change from 'striking a balanced approach' to where competition holds greater significance over IPRs, as IPRs were *de-facto* monopolies. It was argued that there was lack of evidence showcasing positive impact of IPRs on productivity, growth and spending on R&D. Number of patents issued is not necessarily a measure of innovation. Further, it was pointed out that big breakthroughs in development have come through competition, through drive of innovators and not through IP protection. Consequently, it was argued that patent protection has rather become an instrument for corporate warfare, constrained innovation and did not promote the same.

Conclusion

It was concluded that a power game was at the core of issues of conflict between IP and Competition, which relate to conflict between mercantilism and equity. Where there was a point of view which called for optimal balance to promote innovation, other view that competition was sufficient for innovation and consumer welfare to which IP rights must be subject too.

Way Forward

The deliberations held during the session brought forth two divergent opinions to the table, i.e. need to strike a balance between competition and IPR, and need to change the narrative where competition holds greater significance over IPRs. Taking the above as a starting point, CUTS could undertake research on the subject and also nudge policymakers through advocacy to support research on the issue, and accordingly determine the suitable policy objectives for India and the world.

2
Plenary I: Finding the Right Balance between IPR and Competition

Overview

The session deliberated upon balance between IP protection and competition from development perspective, which largely translated into striking balance between 'interest to promote competition' and 'incentive to innovate'.

The session was chaired by Allan Asher, Chairman, Foundation for Effective Markets and Governance. There were two paper presenters: Thomas Cheng, Associate Professor, University of Hong Kong on *A Developmental Approach to the Patent-Antitrust Interface* and Uros Cemalovic, Associate Professor, John Naisbitt University on the topic *The Interest to Promote Competition vs. the Need to give Incentives to Innovate*. While Keith Maskus, Professor, University of Colorado and Shamnad Basheer, Honorary Research Chair Professor of IP Law, Nirma University were discussants for the first presentation, Daryl Lim, Associate Professor, The John Marshall Law School and Geeta Gouri, Former Member, Competition Commission of India were discussants for the second presentation.

Proceedings

It was argued that while some may say that there are no conflicts between patent and competition policy, in reality there are tensions, which demand a balance – between need of lower price for consumers and protect innovation incentives. In developed countries the discourse on IP necessarily emphasise patent protection for innovation where dynamic efficiency results in much better consumer welfare. However, from developing country perspective this argument needs to be scrutinised much more rigorously.

It was pointed out that often imitations play an important role as innovation in the development process. For most developing countries innovation really is imitation of leading technology, which may get retarded with very strict patent protection. Since technological progress is very important for economic growth, therefore in striking a balance between IP protection and competition, this larger picture need to be kept in mind. More so, in developing countries most consumers are poor and to ask them to incur "consumer welfare" loss to generate incentive to innovate would be harsh. In addition, except certain middle-income countries (say BRICS countries), the poorer countries with small markets should not buy the argument that the multi-national companies would rely upon their patent system to generate incentives for innovation.

Even in developed countries, where IP protection is very strong and too favourable to innovators, judiciary have begun to intervene (e.g. disfavouring automatic preliminary injunction) to restore the balance between competition and IP. According to the US Supreme Court, both competition policy and patent policy define the scope of the patent approach. The judiciary often has significant freedom and flexibilities to tailor IP jurisprudence in the ways that promotes competition and consumer welfare. For instance, Indian courts in pharmaceutical patent cases have refused to grant injunction just because the applicant has patent rights; and have begun to weigh it against larger public interest.

It was pointed out that in addressing the question whether IP should trump competition or vice versa, one should note that if the problems are in the IP system, then logically one should repair the IP system itself for which the Trade Related Aspects of Intellectual Property Rights (TRIPs) gives flexibilities. Therefore, the issue is complex for any country – developed or developing – and gets further complicated when the dimensions of globalisation are included. It was suggested that defining terms like 'patent misuse' or 'patent abuse' can significantly bring down this complexity. It would be desirable to first list out the interactions between IP, competition and market failure.

It was presented that under the EU law, free competition is ultimate objective and IP as a field is relatively newer in origin. However, the EU Directive 2004/48, on the one hand, provides for 'need to eliminate distortions of competition', on the other, it demands "need for creation of environment for innovation and investment". Most times these two concepts cooperate with one another, rather than conflict. Key issue is 'abuse of monopolistic position' as far as IP-antitrust interface is concerned.

Questions arise with to respect to existence of instances which could be considered illegal under competition law, which at the same time are legal under the IP law. In this regard, the 2007 case of *Microsoft vs. the European Commission* becomes relevant wherein the decision of the Court of Justice of the EU (the apex court), provided the common European response by obliging the IPR holder to 'sufficiently establish' that it would have 'a significant negative impact on its incentives to innovate', on account of increased competition. The use of the said two phrases by the Court, however, gives rise to further unforeseeable uncertainties.

Consequently, the question is: if innovation is taken as driver of the economy, then why countries such as the US tend to be risk averse and hence unwilling to intervene to protect competition, whereas in jurisdictions like EU and China regulatory agencies are more willing to intervene? It was pointed out that it may be because of human/regulator behaviour in these administratively heavy countries or on account of populism. More so, countries have their own priorities. For instance, EU has a single market and European Court of Human Rights as its priorities; China has obsession with one party rule and its stability; the US has prioritised Laissez-faire, and hence suspicious of government with encroachment on private liberties.

Ultimately, each country has to make its own choice and the test is whether the IP-Competition balance it strives to achieve improves the lives of its people. But from competition policy perspective it should be kept in mind that protecting consumers means protecting competition and not protecting competitors.

Conclusion

A balance is needed in IP and competition policy that in turn would depend upon the level of development of a country. Such balance can also be different for different sectors, depending on their importance to the national economy as well as citizens' access to basic needs and their paying capacity. The TRIPs flexibilities are useful tools in this regard. The judiciary has lots of freedom and flexibilities to tailor IP jurisprudence in the ways that promote consumer welfare.

A competition policy approach towards IP would become clearer and effective if the terms like 'patent misuse' or 'patent abuse' are well defined and a clear map of points of interactions between IP, competition and market failure is drawn. Populist zeal should be avoided by agencies and governments, who should be protecting competition and not competitors. In the ultimate analysis IP-competition balance depends upon country to country based on their level of innovative capacity. These differences in approach translate into international games at multilateral negotiations.

Way Forward

There is a need to carry forward an advocacy work in developing countries for implementation of TRIPs flexibilities. In addition, consultative research projects can be useful in demarcating points of interaction between IP, competition and market failure as well as establishing consensus on definition of the terms like 'patent misuse' and 'patent abuse'. An evidence-based awareness generation programme can be initiated in order to warn agencies and governments against the use of market distorting populist measures.

3
Plenary II: A Comparative Perspective to IPR and Competition: Lessons and Experiences from Across the Globe

Overview

The plenary was chaired by Edurado Perez Motta, Former President, Federal Competition Commission, Mexico. Two papers defining the relation between IP and competition regulatory regimes were presented in this session. The paper presenters were Itumeleng Lesofe, Senior Legal Analyst, Competition Commission of South Africa; and Avinash Sharma, Panel Counsel, Competition Commission of India. The papers were discussed by four experts: Derek Ritzmann, Senior Vice President, Compass Lexecon; Ayman Shafei, Independent Consultant, Egypt; Sujitha Subramanian, Senior Lecturer, University of Liverpool; and Kiran Meeterbhan, Former Executive Director, Competition Commission of Mauritius (CCM).

Proceedings

The discussions were initiated on the extent to which innovation needs to be rewarded while not disincentivising competition. It was pointed out that under the Indian Competition law, there was no conflict between IP and competition regimes and it was proposed that both regimes can exist simultaneously. In emerging sectors, collaborative sharing of knowledge through standards setting organisations has massive network effects and can benefit everyone. Coordination between competition and regulatory agencies is crucial in this regard, which needs to find mention in the legislation. The role of judiciary in the interpretation of IP and competition law and policies was also emphasised upon.

The issue of forum shopping was also discussed and it was pointed out that the constitutional court of South Africa has noted discomfort with forum shopping. Forum shopping can lead to inefficiencies and there can be over-concentration of cases in one forum. It was pointed out that there was weak IP regime in South Africa as there is no detailed examination for patent grant in South Africa and further no provisions exist for pre and post grant challenges in patent law. Weak enforcement of IP rights was also an issue in Middle East and Egypt, owing to which there can be cases of forum shopping. It was pointed out that CCM in its guideline provides that there is exclusion of IP from Competition Law but CCM can look into if there is cartel behaviour among IP owners.

While discussing the lessons from developing counties on aligning IP and competition policies, the session saw exciting debate on issues like procedural challenges faced by institutions in overcoming these challenges. While observing that agencies can under

enforce or over enforce, the importance of cost benefit analysis was emphasised and remarked that there can be deterrent and chilling effect of over enforcement. Consequently, the role of judiciary in the interpretation of IP and competition law and policies was significant.

Conclusion

From the developing countries perspective, it was emphasised that socio-economic conditions, need for transfer of technology to promote domestic innovation, and benefits to society and consumer welfare need to be taken in to account while tailoring the approaches for aligning IP and competition policies. Issue of expertise among the bodies is critical and joint investigations can help in better use of resources and knowledge sharing among agencies in IP/competition interface cases.

Way Forward

Specific areas for research, advocacy and capacity building which emerged from the session:

1. How to promote effective transfer of technology in developing countries to promote domestic innovation?
2. How to assess benefits of society and consumer welfare while analysing the competition harm in cases related to IP?
3. Identification of best practices of coordination between competition and IP agencies and preparation of database.
4. Capacity building of staff of competition agencies on IP issues.

4
Session 1.1: Information and Communications Technology: Licencing of Patents and Standard Essential Patents

Overview

The session witnessed participation from a unique mixture of experts including economists, academia, practitioners and regulators. The session was chaired by Shyam Khemani, Special Advisor Competition Policy, SKP Group. Speakers included: A Damodaran, Professor, Indian Institute of Management, Bangalore; Cihan Dogan, PhD Candidate, Istanbul Bilgi University; Derek Ritzmann, Senior Vice President, Compass Lexecon; Keith Mascus, Professor, University of Colorado; Mahesh Uppal, Director, Com First (India) Private Limited ; Rajan S Mathews, Director General, Cellular Operators Association of India; Santanu Mukherjee, Advocate and Head of Chambers, Ex Lege Chambers and Vikas Kathuria, Assistant Professor, Bennett University.

The basic objective of the session was to analyse the potential clash of patent protection and competition in the context of Standard Essential Patent (SEP) licencing and to discuss if and how the two could be reconciled to sustain innovation in the Information Communication and Technology (ICT) sector.

Proceedings

The session started with discussions about the prevalent theories of harm to competition *vis-a-vis* licensing of SEPs and whether there was sufficient economic evidence to prove the same. The consensus was that collaborative standardisation brings several efficiencies in the market and promotes consumer welfare. There is substantial value in promoting collaborative standardisation paradigms and several speakers stated that there is little or no quantifiable evidence which proves that SEP licencing has restrained innovation and competition in the market. The discussion went on to deliberate the regulator's role and the consensus was that regulators and adjudicatory bodies should not presume that SEP licensing *per se* results in anti-competitive harm. It was flagged that patents are essential for industries which rely on standards and it is not reasonable to argue that patents and licensing of SEPs *per se* cause harm to competition.

Furthermore, while discussing whether possible theories of harm justify policy and regulatory intervention, it was stated that standard setting process is integral for interoperability and regulators should ideally see how market plays out before intervening. It was also pointed out that there might be scope for intervention where public interest is being harmed and diverse country perspectives might influence the same. While dealing with efficient governance of SEPs, the legal and practical aspects of

SEP licencing, such as patent injunctions and Non-Disclosure Agreements (NDAs) were also vigorously discussed and it was stated that a case by case and factual intervention through well-informed *ex-post* adjudication should be inculcated. Interestingly, a case for widening powers and capacities of regulators was also made and it was stated that there ought to be clear guidelines for *ex-ante* and *ex-post* regulatory intervention.

The Fair, Reasonable and Non-Discriminatory (FRAND) aspects of SEP licencing also entered the discourse and there was specific focus on the non-discriminatory aspect wherein it was recognised that non-discriminatory does not necessarily mean treating patent licencees equally. The Indian perspective was put forth where academics stated that India is moving towards autonomous innovations where start-ups are leading the ecosystem. Nevertheless, the conflicting nature of SEP licencing was recognised and it was proposed that supplementary to the statutory rights of parties to approach adjudicatory authorities, there is a need for conflict management systems such as alternate dispute resolution (ADR).

Conclusion

In a nutshell, it was acknowledged that standards emanating from collaborative standard setting procedures have led to several benefits (e.g. interoperability between products) and will continue to do so as society moves towards increased connectivity and the Internet of Things (IoT). Bearing in mind its value proposition from the perspective of consumers as well as producers, regulators and policymakers should ideally not interfere in efficiency-enhancing activities like collaborative standardisation, unless and until there is proof of harm to competition. There might however, be a need to further supplement the effectiveness of such systems by bringing in place ancillary mechanisms such as specific guidelines on regulatory intervention and alternative mechanisms for conflict resolution. The thumb rule should always be: 'do not fix what isn't broken'.

Way Forward

A way forward for CUTS was put forth wherein speakers pointed out towards the research vacuum *vis-a-vis* innovative mechanisms to deal with such issues and the need for building ecosystems for good-faith negotiations. A dissonant view on patents as a system to kill innovations was also put forward in the open floor discussions and the need to shift the focus to *open standards* was felt. Therefore, open standards and mechanisms for good faith negotiations could be possible research ideas that CUTS could pursue.

5
Session 1.2: IP Competition Interface in Pharmaceuticals and Agriculture

Overview

The session saw participation of experts including academia, practitioners and regulators etc. It was chaired by David Ong'olo, Chairman, Competition Authority of Kenya. Speakers in relation to pharmaceuticals sector included: D G Shah, Secretary General, Indian Pharmaceutical Alliance (IPA); Sothi Rachagan, Vice Chancellor, Nilai University; Sujitha Subramanian, Senior Lecturer, University of Liverpool; Nripi Jolly, Associate, DMD Advocates; Priyanka Choudhary, Research Fellow, National Law University-Delhi. In relation to agriculture sector, speakers included: Suman Sahai, President, Gene Campaign; Shivendra Bajaj, Executive Director, Association for the Biotech Led Enterprises Agriculture Group; Serdar Dalkir, President, Competition & Regulation Economics Testimony and Consulting; K Sharma, Chairman, K Sharma Law Offices. The session was designed to analyse the potential clash of IP protection and competition in the social sectors: viz; pharmaceutical and agriculture, with emphasis on usefulness of TRIPs flexibilities in addressing potential competition concerns.

Proceedings

Pharmaceuticals

It was highlighted that there are studies to indicate that IP protection alone is not the driver of innovation. During 1970-2004, when there was no product patent available for pharmaceuticals in India, innovations took place. Thus, it cannot be said that IPRs is must for innovation. Competition too drives innovation. In the field of biological drugs (biologics), new barriers are being created to defeat competition from their generic forms (called biosimilars). As per law, drug regulator requires from biosimilar applicants to establish similarity (bioequivalence) with that of the originator's biologics, for which firms need to buy samples from the originator firms. There have been incidences where the originator firms have refused to sell the samples to generic companies. Cognisance of this issue has recently been taken by the US Fair Trade Commission.

It was pointed out that there is another tactic that is being adopted by IP-holder/originator firms to defeat or delay the introduction of legitimate biosimilars in the Indian market. By using Right to Information, originator firms cull out details of companies that are importing biologic samples. (many firms begin preparation for launching biosimilars well in advance using Bolar exception that permits R&D during patent protection). After obtaining such information, the originator firm goes to high courts and claims irreparable loss, and demands injunction. Many times, they are successful in obtaining interim injunctions, because court proceedings are held ex parte.

The Malaysian Competition Commission is in the process of finalising an enquiry of the pharmaceutical sector, viewing steep rise in the prices of certain drugs in the recent past. There are complexities involved, for instance, what is the relevant product market in case of pharmaceuticals. Malaysia may need to revisit its patent regime to see that it does not create unnecessary hurdles in competition. There is also a need to look at procurement and prescription practices, so that cost effective alternatives are chosen.

It was noted that the issue of IP and access to medicine is more between consumers and developers who are abusing the patent system, rather than between developed and developing countries. While IP laws provide for dealing with anti-competitive abuses, the competition law concedes that just because a firm is dominant it does not necessarily be anti-competitive. Competition concerns like 'pay for delay', 'ever-greening' and 'patent thickets' are some of the concerns that may not be dealt within the patent regime alone. Most of the times, such issues come to the fore when a matter is brought before the courts. Thus, in order to avoid such situations, a broader law or policy is nedeed, such as competition policy.

The Competition Commission of India (CCI) has begun to play its role in pharmaceutical sector and jurisprudence related with collusive practices and bid rigging is being developed. However, more needs to be done by the CCI, particularly under its advocacy function.

Agriculture

As a pro-competition measure, India used TRIPs flexibilities to the fullest, when it selected *sui generis* legislation over patent protection for new plant varieties. The Indian law also incorporates the principles enshrined in the UN Convention on Biological Diversity (CBD). This was possible because of a strong civil society movement, which has also prevented India in joining the International Union for the Protection of New Varieties of Plants (UPOV) – a treaty that does not recognise farmers' rights.

It was pointed out that so far, India remains the only country in the world where farmers' have full-fledged rights, as against 'mere exceptions' to the plant breeders' rights in some countries. Farmers' rights include rights to save, use or even sell (in non-branded form) the protected seed. In addition, farmer's varieties are given separate entity and are at par with breeder's varieties. If farmer's varieties are used in development of a new variety, the developer has to pay in Gene Fund constituted under the Indian law. However, in future, the emergence of 'synthetic biology' could pose new concerns, since there could be very wide range of interactions between 'synthetic biology' and agriculture.

It was pointed out that the concept of FRAND aspect in GM seed is a result of unwarranted contractual dispute over royalty between technology provider and technology user, which in this case happened to be local Indian company. Today India has around 45 companies that are licencee of Bt Cotton Technology, which signify that the present licencing arrangement is not restrictive in nature. The present GM licencing disputes, including the one pending in the CCI, is a vertical problem and not horizontal

problem. This Monsanto case highlights the tension between competition at home and foreign direct investment (FDI).

Although the recent mega mergers in agriculture input sector may pose competition concerns, one can expect that it would engender more funds into R&D. The market concentration, however, needs to be monitored so that consumer welfare and the interests of farmers are not compromised.

Conclusion

Using TRIPs flexibilities in national IP laws are pro-competitive and useful in avoiding anti-competitive situations in pharmaceuticals as well as agriculture. There are new strategies being adopted by innovator firms of biological drug to block or substantially delay introduction of biosimilars. Such strategies, though seemingly within the legal purview, has anti-competitive effects and needs to be tackled. These are no longer north-south issues and the same goes against consumers' interest in developing as well as developed world. IP-competition issues in agriculture sector could be the next big minefield.

Way Forward

There is a need to sensitise competition authorities of developing and least developing countries about the importance of TRIPs flexibilities from the perspective of competition policy. In this regard, workshops may be conducted for these authorities so that they can use their advocacy functions and accordingly communicate/recommend with/to their governments.

There is also preparedness need on the part of competition authorities and related regulators viewing the consolidation in agriculture input sector and adoption of newer technology like synthetic biology.

6
Plenary 3: Disruptive Technologies and Economic Regulations

Overview

Emerging disruptive technologies and their increased global significance have raised challenging questions which strike the foundation of the recognised approaches of prevalent regulations across the globe. Hence, it is essential to deliberate upon these complicated disruptive technologies and how regulation needs to address their impact on competition without regulating competitors.

The session was chaired by Isabelle Durant, Deputy Secretary General, UNCTAD. Speakers were Barak Orbach, Professor, University of Arizona James E. Rogers College of Law; James Mancini, Analyst, Competition Division, OECD; Cassey Lee, Senior Fellow, ISEAS-Yusof Ishak Institute; Ajay Shah, Professor, National Institute of Public Finance and Policy; and Seema Gaur, Senior Economic Adviser, Ministry of Electronics & Information Technology, Government of India.

Proceedings

The importance of technology for inclusive growth was highlighted by the speakers. There exists little difference between the least developed countries (LDC) and developing countries, with both requiring enhanced ICT literacy and penetration. There was a need for regulating algorithms, which enable collusion of prices among the market players. The lack of capacity of policymakers in drafting optimal regulations at the same time was also pointed out.

It was observed that digitisation has created a level playing field between countries on international trade. However, the two-sided market (TSM), which have originated, present various regulatory connotations. There was a need to address various issues such as liability binding in TSM, regulatory arbitration, data privacy, emergence of monopolies and near monopolies, predatory pricing, capital dumping, homing (exclusive contracts), use of information collected for unintended use, etc.

It was suggested that owing to dynamic nature of the industry, an open regulatory process was required, which will involve different stakeholders. New actors have come into fray, such as algorithmic consumers, robo-sellers, robo-suppliers, platform cooperatives, etc. which makes it difficult for policymakers to draft appropriate regulations. New form of price collusions might be leading to information asymmetry and privacy concerns.

Consequently, there was a need to define the meaning, context, potential regulation needed and protection mechanism for disruptive technology, which does not allow measurement of benefits but creates consumer and producer surplus. Thus, regulations should be based on social aspects and general changes sought in economy.

It might also be difficult for regulators to predict responses by disruptive technologies to regulations. Thus, there was a need to rethink regulatory variables, for which detailed information will be required. Establishing the right way for collecting consumer information and associated regulations might be a challenge. It was also pointed out that it might be easier for TSMs to bypass regulations as a result of which regulatory arbitrages have emerged between incumbents and new entrants in different traditional sectors. Consequently, there was a need for intervention by competition authority, but in an appropriate manner. Regulatory collaboration across sectors and jurisdictions was also the key. Reforms to the existing competition policy and regulations should not safeguard incumbents.

The problem of information asymmetry between different user groups in TSMs was also highlighted. The state lacks capacity in dealing with these issues, and is riddled with corruption and incompetence. The regulatory agencies also have limited capacities to enforce regulations. It was pointed out that there was a need to establish product liability in disruptive technology markets.

The role of data scrapers and related issues of data protection and privacy were also discussed. This is also closely related to creation of monopolies, which are making markets non-competitive while raising various competition concerns. To tackle such issues, there was a need to modernise regulations. Competition authority should introduce practical adoptions to the existing methods and regulate only if any harm is perceived. Regulations should consider the OECD competition assessment toolkit and assess the existing regulations.

On the issue of price regulation, it was pointed out that regulations on prices might not work as the platform owners would need to influence price to gain critical mass. Thus, as a possible regulatory response, discounted prices and capital dumping could be allowed for some time. However, when the exponential phase of growth begins, a bar on such measures could be placed. It was also pointed out that in order to draft optimal regulation, it is essential to reduce the cost of controversy in terms of legal litigation or challenges and potential inefficiencies. On the issue of utility of cross subsidies, it was pointed out that the same could result in altering consumer behaviour such as over dependence of consumers on a particular mode of transport. It is important to look at such issues on a country to country basis.

Conclusion

It was pointed out that while discussion focussed on bigger players in disruptive technology sector, there was need to accord equal importance to smaller players. In addition, the issue of liability binding for the sector needs to be resolved soon. The

process of decision making for optimal regulations need to be ensured inclusivity. Further, there was a clear need to enhance capacities of policymakers in order to draft optimal regulations.

Way Forward

CUTS needs to focus on the following areas to strengthen its profile on disruptive technology sectors:

- Enhancing portfolio of regulatory impact assessment (RIA) and regulatory sandbox assignment, to highlight the need for adoption of these tools by policymakers while drafting regulations.
- Creating more forums for interaction of relevant stakeholders, which will enable building capacity of regulators and policymakers.
- Deeper understanding of data protection and privacy issues.

7
Session 2.1: Digital Payments – Innovation in Regulation to Manage Disruption

Overview

The session was chaired by Atiur Rahman, Former Governor, Bangladesh Bank. Speakers included Ravinder S. Aurora, Executive Director, Mastercard; Kailas Karthikeyan, Policy Consultant, Gestalt Consulting; Sanjay Khan Nagra, Senior Associate, Khaitan & Co.; Sumita Kale, Research lead, Indicus Centre for Financial Inclusion; Srikanth Lakshmanan, Founder, Cashless Consumer; David Ong'olo, Chairman, Competition Authority of Kenya; Ashish Aggarwal, Consultant, National Institute of Public Finance and Policy; Enamul Haque, Professor, East West University; and Mandar Kagade, Consultant, Indira Gandhi Institute of Development Research.

Proceedings

The session began with speakers highlighting consumer trust in the financial system, challenges posed by innovation in the sector for regulation to maintain high level of trust and measures adopted by different regulatory agencies, such as Bangladesh, in this regard. This was followed by narration by innovators and non-bank service providers, who are often required to comply with the prevailing regulatory framework in order to fit into the sector. This may lead to high cost of compliance for service providers.

This was followed by a perspective from traditional players who often end up collaborating with innovators. Consumers face problems such as information asymmetry and absence of optimal grievance redress. However, it was pointed out that availability of digital modes has enabled commercial banks to reach out to last mile consumers, and to enable consumers to uptake financial products and services, literacy and awareness generation were critical.

It was pointed out that in order to gauge the impact of efforts made by regulators and service providers to push digital financial services, adequate quality data needs to be made available in public domain.

Inability of regulators to implement regulations on account of capacity constraints was also pointed out. It was highlighted that design of regulations need to take into account needs of merchants and consumers and the digital payments products must aim to cater to problems faced by such segments. It was pointed out that specific use cases such as e-commerce, transit, federated payments and other models could be pushed for digital payments.

It was also pointed out that the regulatory design of digital payments needs to be consultative and take into account interests of different stakeholders. India is in the process of constituting Payments Regulatory Board which is expected to have members from within and outside the regulator. In addition, a formalised mechanism to consult with stakeholders (such as a Payments System Advisory Board) was critical. Issues with respect to interface between monetary policy and digital payments were also discussed.

It was highlighted that incumbents themselves are often subject to stringent regulatory conditions as a result of which they are unable to expand their services at low cost to the last mile. Consequently, the regulatory architecture for incumbents also needs a review. In order to adopt a cautious risk based approach, the regulatory agencies can adopt tools, such as RIA and regulatory sandbox which enable them to assess the costs and risks in specific regulatory approaches and business models.

Conclusion

It was concluded that regulators need to walk the tight rope and achieve a balance among interests of incumbents and innovators in digital financial service sector. The regulations need to be light touch which do not result impose excessive cost on service providers, while protecting consumers' interests. The role of competition agencies was also critical in this regard, to ensure the activities of service providers do not impede competition and consumer protection.

Way Forward

There is a need to promote balanced regulatory framework, for which utility of tools, such as RIA and regulatory sandbox may be highlighted. In this regard, evidence-based projects resulting in advocacy and capacity building of policymakers and regulators are necessary.

In addition, there is a need to advocate for the need for more data in public domain to evaluate the impact of efforts in terms of regulatory and business models.

Also, it would be useful to identify and highlight use-cases for digital payments and concerns of consumers and merchants which need to be addressed while designing products and services for different use cases.

8
Session 2.2: Regulating Multi Sided Platforms (Transport and E-commerce)

Overview

The session witnessed participation from experts including economists, academia, practitioners, regulators, industry amongst others. The session was chaired by Bipul Chatterjee, Executive Director, CUTS International. Key speakers were Pornchai Wisuttisak, Assistant Professor, Chiang Mai University; Natalie Timan, Director of Economics, Competition and Markets Authority, United Kingdom; Hanne Melin, Director, Global Public Policy, eBay; Subhashish Gupta, Associate Professor, Indian Institute of Management-Bangalore; Smriti Parsheera, Consultant, National Institute of Public Finance and Policy; Duangthip Chomprang, Director, International Institute for Trade and Development; Puree Sirasoontorn, Assistant Professor, Thammasat University; Cezley Sampson, Director, Privatisation and Regulatory Business Practice, London Economics Limited; Iravati Damle, Lead, Public Policy (West India), Uber.

Primarily, the objective of the session was to assess the need for and approach to regulating multi-sided platforms (MSPs). Further, the manner in which MSPs could be optimally regulated to ensure innovation, competition and consumer protection was discussed.

Proceedings

The deliberations started with the role of government and regulatory agencies to promote competition in the market. It was conferred that there is a need to reform the existing legal framework, in order to regulate MSPs. This may be done through endorsing regulation of competition rather than regulation for competition. Further, while competition should prevail in the market, it must not compromise on consumer welfare. However, to facilitate competition, barriers to expansion of markets must be lowered, which may be achieved through minimising regulatory requirements and red-tapism. Also, MSPs are often labelled as data aggregators; therefore, it was argued that data portability is needed to reduce information asymmetry.

Furthermore, it was reasoned that while regulation should be made keeping consumers at the heart, but inadequate economic-education of consumers might prove to be a barrier for market. In addition, there are multiple bodies regulating a sector which muddles the understanding of consumers, and often create jurisdictional conflicts. Thus, it was opined that there should be one regulatory body. In the process, consumer grievance redress becomes more complex, which needs to be streamlined. It was also argued that some MSPs connect remote and small, but independent enterprises, to the

global value chain. This was made possible because the operation cost to run such enterprises has reduced manifolds.

It was also pointed out that the MSP had taken up the share of the conventional business model; however, there was no consensus on the issue. While MSP had taken up the share from conventional business model, it had also created self-employment. Therefore, there is a need for further deliberations on whether such platforms are sharing a piece of pie with traditional and local enterprises or the size of pie has increased. Consequently, more research is required to determine if such MSPs should be differently treated from other market players.

Conclusion

It was acknowledged that there is a need to regulate the sector; however, it was not clear that who will regulate these platforms. MSPs have introduced multiple issues such as anti-competitive practices, data privacy amongst others. These issues are being dealt by different regulatory agencies, thus making it difficult for common users to comprehend which is the relevant authority for the concerned issue. So, there is a need to promote economic literacy among consumers/users which would further results in augmenting consumer awareness.

Way Forward

A way forward for CUTS was put forth wherein speakers highlighted that there is need for empirical research in the sector. These MSPs are data-driven platform and have accumulated plethora of data and the same could be used to analyse prevalent issues in the sector. Therefore, empirical research to assess competition and regulatory challenges could be a possible research idea for the CUTS.

9
Plenary 4: Building Organisational Capacities for Tackling Policy and Regulatory Uncertainties

Overview

The plenary focussed on the impacts of policy and regulatory uncertainty on business environment of a country, the reasons behind it, and what measures could be taken to build organisational capacities to tackle these issues.

The session was chaired by Arun Maira, President, CUTS International. Parveer Singh Ghuman, Senior Research Associate, CUTS International and Thula Kaira, Competition and Regulatory Policy Consultant presented their papers addressing the subject.

V. Ranganathan, Former Member, Telecom Regulatory Authority of India; Raju Parakkal, Associate Professor, Thomas Jefferson University – East Falls; Shankar Singham, Director, Legatum Institute; V K Mathur, Former Chairman, International Airports Authority of India; Pranav Kumar, Head – International Policy and Trade, CII; and Shakti Sinha, Director, Nehru Memorial Museum were part of the panel as discussants.

Proceedings

The discussions started with a question upon whether knowledge should be treated as a property, or put in use for public good, what interventions are required for a free market and what should be the right balance between regulations and freedom. Few more questions that were raised along the same lines were who should regulate, and what is the role of a regulator?

The papers presented discussed the impacts of policy and regulatory uncertainty, the recent trends associating it with declining global investment flows and what may be the possible factors (such as change of government, organisational inaptitude, lack of resources, leadership, policy fragmentation, among others) contributing to it. The role of civil society bridging knowledge asymmetry between people and policies along with the need of policies across sectors not being in sync was also stressed upon.

The panel expressed concern over lack of data available in the public domain and no correlation between data generated by disruptions and conventional industries. The panel opined upon more transparency in effective policy formulation, rising protectionism and need for improved mechanisms to redesign the existing regulations. The panel also discussed the need of more dialogue between the researchers and policymakers in the radically changing environment, and making both complementary, where researchers can provide relevant and accurate data for policy formulation.

The deliberations also focused on how pro competition regulations can be achieved and anti-competition practices can be avoided by capacitating the regulators and ensuring strong political will. The importance of a dynamic regulatory framework in a dynamic market was also highlighted, along with the changing patterns in trade practices. Another point was raised on the unavailability of tools in the rapidly changing technology front, its quick uptake with the masses and how to regulate these industries. The importance of academic and non-academic research, without looking for profit was brought to attention as well.

The floor contributed by emphasising on the importance of well-designed institutions based upon acceptability, accountability and simple mandate as one of the most basic element to deal with regulatory uncertainty. The issues with directions and providing budget for the institutions were also brought forth. Issues regarding analysis of policies and whether they are successful or not and implementation of policies in environment, energy, labour, and small and medium enterprises etc. were also pointed out.

Conclusion

There is a need of relevant, accurate and factual data, which should be used to devise policies. There is a divergence happening and the policy and real world has diverged very substantially. A symbiosis between policy objectives and actual implementation and policy recommendations based upon actual facts are the need of the hour. The policy mechanisms need to be more transparent, and feedback-based, and more emphasis should be laid on mechanisms, such as RIA to make policy formulation more inclusive. The regulators also need clarity and a mix of support from society and political will for the effective implementation of policies. It is not about free competition, but fair competition.

The regulators need to focus more on light touch regulation, in order to devise policies for the disruptors. Optimal trade liberalisation is important. While governments may change, good policies will continue.

Way Forward

An institution's role is not to propose policy, but to help society to shape the policy. CUTS as a consumer organisation is already doing that. However, what more is needed is it can perhaps increase its grasp in the feedback based policy mechanisms and frameworks, similar to what has been done in RIA, and suggest recommendations to governments, organisations, and institutions based on those by staying at the top of the field.

10
Plenary 5: PPPs and Innovation for Sustainable Development

Overview

It is a common perception that private public partnership (PPP) mode of development is a failure in India and examples are cited for some of the failed contracts very often. On the other hand, the success stories are never brought open to the public. No doubt, there have been a few failures in the PPP model during the past decade however, that is not the complete truth about PPP. It is time to design the PPP models with people first concept and relaunch the models to achieve the sustainable development goals of UN by 2030.It is high time to recognise the success story of PPP in delivering critical infrastructure projects with service delivery standards.

In this regard, the panel focussed on innovative models for developing better PPP frameworks. Key speakers were: Arvind Mayaram, Chairman, CUTS Institute for Regulation & Competition (CIRC); Sebastian Morris, Professor – IIM Ahmedabad; Sharmila Chavaly, former Joint Secretary Department of Economic Affairs, Government of India; and Prasanna Srinivasan, Expert and PPP consultant.

Proceedings

The session started with recognising the huge funding gap in financing infrastructure needs of developing nations to meet sustainable development goals of 2030. Consequently, it was important for governments to partner with private sector to tackle the shrinking financing capacities of the states. In the current scenario, PPPs become critical in bringing on board the private investors to cater the rising expectations of consumers those are beyond the capabilities of local bodies and other government authorities. State of art technology and innovation will hold the key for successful delivery of public services via a PPP model.

It was pointed out that one of the key barriers that exist in India is 'jurisdiction of a single project under multiple government authorities' and to address the issue, the necessity of developing a framework which integrates large number of services under a single project specific department was pointed out. Another key issue was maintaining a transparent procurement process to promote competition and assure delivery of quality service to the end consumer.

There were several issues in implementation of PPP projects – ranging from delays and extension of timelines to lack of capacity and capabilities within the state, along with the design issues that needs considerable attention from all the stakeholders. Poor project designs and policies create space for vested interests which, in turn, make it difficult to

amend them in the long run of the project. An integrated model to get better output from the partnership was needed.

It was highlighted that 335 PPP projects were successfully rolled out of 400 projects awarded in the year 2011-2013. Out of the unsuccessful projects, while governments can be attributed to failure for nearly 30 projects, the rest project failures can be attributed to aggressive bidding by the private competitors or due to high cost of debt from highly leveraged project promoters. Emphasising on innovation, policies, framework and organisational structure, it was quipped that 'where strategies proceeds roll outs there is a success'. Discussing on the problem relating to re-negotiation in a PPP agreement, law bound difficulties and its effect on the project transparency was pointed out. It was also mentioned that, re-negotiation is now being considered and certain flexibilities are given under the concession agreement for taking into consideration the uncertainties associated with a long-term project. Efforts are also being made by the government in rolling out pan India capacity building programme on PPPs with assistance by the private sector.

While discussing about the devising new instrument for financing PPP projects, the focus remained on long-term financing by debt and freeing the equity. Some of the new long-term debts instruments for financing were deliberated upon, which included infrastructure debt funds (IDFs) and infrastructure investment funds (IIFs) and municipal bonds. Regulatory issues related to dispute resolution and recent development in terms of changes to Arbitration Act and Specific Relief Act were also discussed, as dispute resolution still remains a critical issue to be addressed. Failures are good test models to learn and adopt good practices for highly successful projects.

Public reluctance to pay user fees to a service provided remains a major concern for any PPP project. Thus, revenue generation for long-term sustainability for a social sector PPP projects remains a major concern for the government. The necessity to reconstruct the PPP structure and imbed innovative techniques in operationalising PPP projects on a larger scale was also highlighted.

In order to make contracts easily approachable by the rural community or *panchayats*, a major part of the contract should be pre-approved by government officials and only the necessary guidelines should be brought forward for local leader consideration. This way complexity in the contract documents would be removed to a major extent and this will be amenable to local leaders in towns and *gram panchayats* to adopt it quickly.

Conclusion

In the concluding observations, it was pointed out that there is need to accept the concept of learning by doing. Consequently, there was a need to tolerate failure - zero toleration to failure, at all level costs other projects to suffer. In anticipation of best results, we tend to fail to recognise good results.

11
Concluding Observations and Key Takeaways: Optimal Regulation and Competition for Innovation and Inclusive Growth – Building an Actionable Agenda for Promoting an Innovation Ecosystem

Overview

Based on deliberations in the conference, the objective of the concluding session was to provide guidance for an action agenda to promote optimal regulation and competition for innovation and inclusive growth. The agenda can include substantial sector specific action points towards developing a holistic innovation-based ecosystem. In addition, a programme of action is also expected to be developed to promote research and advocacy on regulatory and competition reforms. This can include case study-based projects on capacity building to address the perceived conflict between competition & IPR, and regulation and disruptive technologies.

The concluding session was chaired by Sebastian Saez, Senior Trade Economist, World Bank. Alice Pham, Centre Co-ordinator, CUTS Hanoi Resource Centre and Chenai Mukumba, Centre Coordinator, CUTS International, Lusaka were rapporteurs. Speakers in the session were: Arun Maira, President, CUTS International and Former Member, Planning Commission of India; Rajat Kathuria, Director and Chief Executive, Indian Council for Research on International Economic Relations; and Arvind Mayaram, Chairman, CIRC.

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It was highlighted that interface between competition and IPR is imperative, and there was a need to achieve right balance between the two seemingly conflicting policies at various levels. Developing countries should consider their levels of development as well as priorities while building their IP protection regime, at the same time using competition policy as a complementary instrument to promote and protect public interests. This should then be translated into appropriate policy formulation, implementation and enforcement to promote both innovation and consumer welfare.

In addition, there is a need to consider the merits of government interventions and regulations, for adapting and modernising existing regulations, and for building the institutional capacities of regulators. This is in response to rapid changes in the markets and the emergence of new business models such as multisided platforms, fintech, and other disruptive technologies, as evidenced in sectors such as ICT, pharmaceuticals, agriculture, transport and e-commerce. Devising an optimal regulatory framework

would bring clarity and certainty to stakeholders, promote investment and trade while also ensuring consumer interests are protected and promoted.

Conclusion

It was suggested it is important that citizen system and governance system collaborates with each other in order to create an environment where systems learn to listen better. This will ensure that the 4th P (People), which has also been missing from PPP models, will always be heard. Optimal regulations must be envisioned to support innovation and instil inclusivity so that no one is left behind. Since systems and innovations apparently contradict one another, such has to be the approach that shapes various collaborative systems without breaking them. It is a known fact that price of IPR is been paid by the poor across the world today, hence it is critical to assess how competition can temper IPR for the benefit of society.

Way Forward

Following were the broad action points emerging from the session:

- Work towards adoption of process reforms wherein voice of all stakeholders, particularly citizens is heard (and responded to) in governance and policy making.
- Work towards adoption of systems approach wherein different parts of the system (such as, government departments and industry) listen to each other and collaborate for economic reforms.
- Compile a database of cases and examples that showcase IPRs as deterrents and/or catalysts of innovation. At multiple occasions, there have been strong opinions highlighting both scenarios and this database will help in analysing the big picture. CCI should be given the role of determining what sort of royalty rates may be applied to mandatory licencing with reference to IPRs.
- Compile a database of examples to showcase interaction between innovation/disruption and regulatory reforms and consequent impact thereof, to better understand how can innovation and systems collaborate and work in tandem.

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