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Competition and Sectoral Regulation Interface

Introduction

In an examination of the interface between competition and sectoral regulation laws, it is instructive to revert to David Boies' quotation in 1977[1]*:*

'The interface between anti-trust (competition law is referred to as anti-trust in the United States) and regulation is a veritable no-man's land for students and practitioners alike. Since the theories of anti-trust and regulation reflect differing assumptions about government intervention into the market place, it is often difficult to rationalise their impact on particular industry behaviour. The anti-trust laws, to borrow a phrase, are brooding omnipresence, with pervasive, almost constitutional meaning in our jurisprudence. Direct economic regulation (which is entrusted to agencies rather than the courts) may supplant the anti-trust laws and specific industries for carefully carved-out purposes. But at the edges, these purposes thin out and the anti-trust laws inevitably reappear in the background. At this point, it is no small matter to blend the policies of the two conflicting regimes into an overall regulatory purpose that preserves the values of both'.

This paper is aimed at presenting a critical examination of this 'no small matter' – the interface between competition and sectoral regulatory laws, especially in the 7-Up (a CUTS project which involved a comparative study of the competition regimes of seven developing countries of the Commonwealth) countries, with a view to assisting institutional designers in providing for appropriate distribution of the complementary roles of sectoral regulators and the competition authority in the process of promoting competition and economic development.

The Interface Problem

David Boies' comments were echoed at the commencement of the American deregulation and privatisation movement, by which time the US had a tradition of anti-trust regulation going back some 90 years. American regulation has traditionally been considered inimical to competition, constituting barriers to entry and with more lenient standards in the 'public interest' than mandated in the more rigorous anti-trust laws, especially against mergers.[2]

Under the American approach, where there is market failure for reasons of natural monopoly, high sunk costs and decreasing costs to scale, problems of information asymmetry and externalities, entry barriers were legislatively enforced, with one franchised operator providing services to a multitude of buyers in a given market.

Economic theory has been of the view that one operator, say in water, electricity or telecommunications monopoly running one line down a street, supplies at a lower cost than any two operators could provide. Similarly, in the case of a multi-product industry with economies of scope, one operator produces different products at a lower cost than any two or more operators producing the several distinct products. American utility regulatory laws, until recently, gave long exclusivity periods to the privately-owned vertical and horizontal monopoly utility and the law operated to preserve the *status quo*, preventing new entrants to the industry.

When the UK came to privatise the publicly-owned utilities in the 1980s, Allan Walters, the Government Economic Adviser, and Stephen Littlechild, who was commissioned to develop the new regulatory structure, rejected the American approach[3]. The specific industry regulators, which were established for each of the privatised utilities, were given a new mandate, that of encouraging competition in those parts of the industry where competition was possible and feasible. For the British, the monopoly situation was transient. There would be a period of competitive transformation, when the incumbent would retain market power. However, effective competition would inevitably develop, eliminating the need for sectoral regulation and the economy–wide competition rules would take over.

In the UK, regulation is more about remedying structures, permitting new entrants to the market, as well as about application of price-control formulae, and remedying market failure, whilst competition is essentially about conduct, except in merger matters. There have, therefore, been two conflicting philosophies, promoting competition and the application of general competition laws. In some countries, competition laws adopt both conduct- and structure-oriented approach to address the problem of lessening competition, with an emphasis on conduct, except for merger matters.

For large developed-country markets, the issue is often one of structure, as it is possible to unbundle vertically and horizontally integrated monopolies and still maintain large-sized operating units with the attendant economies of scale. For small

developing-country markets, the issue is more one of conduct because of the small number of players. What is often more important for competition in small developing-country markets is trade liberalisation.

Since the 1990s, many developing countries have followed the UK in privatising their publicly-owned, vertically-integrated utilities. The challenge has been to prevent the transfer from public monopoly to private monopoly and the determination of the extent to which general competition policies and laws should apply to the privatised utilities.

Similarly, during their course of economic reform, all 7-Up countries have complemented the trend of economic deregulation by sector-specific measures designed to eliminate public monopolies or to open up strategic sectors, such as telecommunications, electricity distribution, etc., to competition. This practice could be attributed to the paramount significance of these sectors for technological and economic development. In many sectors, the introduction of competition has led to decreases in costs and prices, as well as an increase in the range of services offered to consumers and higher levels of economic growth.

Objectives of Competition Law and Sectoral Regulations

Competition policies and laws seek to protect the process of competition, not agents in the market with a view to maximising productive and allocative efficiencies. Regulation American style seeks to protect the agents in the market.

Competition rules operate in a negative form, as they tell the agents in the market what they should not do. The group of economy-wide rules cover predatory pricing and price-fixing, especially in oligopolistic markets through cartel and collusion; market sharing; collusive tendering or bid-rigging; discriminatory treatment; collective boycott; refusal to deal; tied-selling; resale price maintenance; and regulation of mergers and takeovers. Rules are set out for three areas: restrictive practices and behaviour, abuse of a dominant position and the creation of mergers designed to introduce or strengthen a position of dominance. They emphasise on what market agents should not do. Regulation does the reverse and tells market agents what to do.

As indicated above, the problem has become urgent because of changes in technology and marketing techniques. The technological developments, which emerged in the 1990s, have been more pronounced in the telecommunications and electricity industries. The result of these changes is that several major segments of these industries, once treated as vertically-integrated monopolies, can now be subjected to competition. Combined Cycle Gas Turbine Technology (CCGT), along with the application of commodity-market principles, have made the electricity-generation sector competitive, as much as smart metering and non-discriminatory access brought about increased competition at the electricity retail segment.

The generation and retail segments, which often combine to account for up to 70 percent of the industry's cost, can be made competitive, whilst the network sector, the transmission and distribution lines, which remain with natural-monopoly characteristics, continue to require regulation. It is, however, possible to introduce yardstick competition in the distribution sector by unbundling the industry geographically.

In the telephone industry, the last segment that retained natural-monopoly characteristics, the path into the home, has recently disappeared with the emergence of wireless in the local loop (WLL) technology. It is now possible to enter the home via cable TV, mobile phone and the traditional fixed-wire service. Cellular technology, fibre optics and satellites have transformed telecommunications services into a competitive market. The market for telephone is no longer a market for landline fixed-switch services but simply for telecommunications services.

In developing countries like Botswana and Tanzania, there are more cellular units than customers connected to the landline network. The incumbent may still maintain dominance over the network segment. Hence, the need today is only to regulate interconnection to the network, the radio spectrum, a scarce resource, and number portability to afford more convenience to consumers.

In the gas industry, competition is also possible at the upstream extraction and processing stages and retail market segment. In the railways, whilst the rail track – the network segment – remains a natural monopoly, through open access regimes, train services can be opened to competition. Railways, however, face competition from road and other modes of transport. Water seems to be the only industry that has retained almost all of its natural monopoly features, and even here it is possible to create competition for market and yardstick competition.

Competition can be facilitated by open access, pooling and time-tabling; competitive determination of optimal service delivery in networks where homogeneous services need to be sent to specific end-points, e.g. auction for airport landing slots[4]. Because ordinary competition rules may not be sufficient to control core monopoly, especially when the traditional incumbent retains market dominance in the competitive sector, sectoral regulation is often prescribed. The result is that industries and firms, which traditionally were subjected only to sectoral regulation and excluded from the competition authorities, now find that they have to face regulation from both competition and sectoral regulators at one and the same time.

In the case of Zambia, the Energy Regulation Board recently prevented a fuel price increase by the dealers on the ground that the increase resulted from collusive behaviour. The Zambia Competition Commission (ZCC) simultaneously threatened to prosecute the fuel dealers for the same collusive behaviour. Consequently, fuel dealers are subject to the regulation by both the competition authority and the sectoral regulator.

In the case of Sri Lanka, following the establishment of the Telecom Regulatory Commission and the National Transport Commission, the functions and powers of these sectoral regulators and the Fair Trading Commission, Sri Lanka's national competition authority, have become blurred. The result is that the actions of agents in the two sectors are exposed to regulation by both sectoral regulatory bodies and the competition authority. This gives rise to problems of overlapping jurisdiction and, eventually, for the courts to intervene to revolve the issue.

Competition and Sectoral Regulation Interface

In most countries, historically, two types of regulatory institutions evolved as distinct agencies with relatively limited formal relationships. In the case of Pakistan, there has been a proliferation of sectoral regulators, with the emergence of the National Electric Power Regulatory Authority, the Pakistan Telecommunications Authority, the Oil and Gas Regulatory Authority and the Atomic Energy Regulatory Authority. These regulators operate independently of each other and the Monopoly Control Authority (MCA), Pakistan's national competition authority. They may consult with the MCA. However, they are not legally bound to accept the advice of the MCA. In countries such as Pakistan, where the interaction amongst regulatory authorities with overlapping responsibilities is ill defined, the opportunities for turf-disputes and legal wrangling are multiplied.

In the case of Zambia, the approach taken has been that of interlocking the directorate between the ZCC and other sectoral regulatory agencies. A representative Director of the ZCC acts as an ex-officio member of the other regulatory boards. This approach has not eliminated the problem of overlapping responsibilities. There is a strong case for harmonising the regulation of the market behaviour of economic agents. This has been particularly striking in the banking and non-banking financial services sectors, where anti-competitive market behaviour continues to go unchecked by the authorities.

The global trend of utility privatisation and the proliferation of sectoral regulators creates a new sense of urgency in finding a solution to the problem for developing countries undertaking the process of reform. In India, the relationship between the competition authority and other sectoral regulators is very ambiguous. The regulatory laws, by and large, do not carry provisions to deal with anti-competitive practices and, hence, competition issues may be kept outside the purview of regulators.

With the development in technology, the traditional distinction between sectoral and competition regulation is rapidly breaking down. As competition is introduced into traditional network monopoly utility industries, new mechanisms are needed to ensure effective interface between the two regimes. There is also increased need to exploit the complementary expertise and perspectives of the two types of regulators. The sector-specific regulatory bodies often carry specialised expertise in the technical areas of the industry. However, they tend to display limitations regarding competition issues in the industries concerned.

The potential interactions or overlap between sectoral and competition regulation may be at the level of rules and/or institutions. Competition rules on the misuse of a dominant position take on added importance in relation to access to essential facilities, such as in the case of these network utilities. In telecommunication, electricity and railway, the network segments remain natural monopolies. Therefore, non-discriminatory access to encourage new entrants to the industry is critical, if competition is to develop in the competitive segments. Competition rules prohibiting the misuse of a dominant market position can be used to address this problem. This is the case in the EU and New Zealand.

The critical areas where competition rules interact with industry-specific rules are interconnection or access, monopoly-pricing, anti-competitive agreements and merger control[5].

Network Access and Interconnection

In integrated monopoly enterprises, regulatory rules seek to establish barriers of entry to the markets of the incumbent firm. Under this traditional structure, there is no requirement of the monopolist to engage in anti-competitive conduct, as there are no competitors. However, in the network industries, where the monopoly segments have been separated from the potentially competitive elements, the question of access to the monopoly "essential facility" requires regulation to ensure free and non-discriminatory entry. It is also important to restrict the incumbent operator of the essential facility from acting in a manner that would be disadvantageous to rivals in the newly developed competitive sectors. Classic examples are the vertically integrated investor-owned electric utility or the incumbent telephone operator acting in such a manner as to disadvantage competitors to the electricity transmission or the basic switched telephone system, respectively.

In some regimes, competition rules and judicial precedents on interconnection prohibit misuse of dominant market position and this may be sufficient to address the problem, as is the situation in the US. Refusal to allow a competitor to a network on non-discriminatory terms could be ruled unlawful. This rule, however, has the potential to overlap or conflict with industry-specific rules dealing with network access and interconnection under sectoral regulation law.

With regard to this practice (in 7-Up countries), the South African telecommunication sector may provide such an example. In South Africa, utilities and infrastructure services have been 'privatised' through 'strategic equity partners' who bring in technical and management expertise along with capital. In some cases, limited-time monopoly, as in the case of the telecom sector, has been provided. Following the 1996 Telecommunications Act, a 30-percent stake was sold in 1997 to a consortium comprising SBC Communications of the US and Telkom Malaysia.

At the same time, a five-year monopoly was granted to Telkom in the provision of fixed-line, public telephone network service, with the option of a further year, depending on Telkom's performance in meeting a range of criteria. In the provision of value-added network services, including Internet services, the market has been liberalised. Telkom has to compete directly with private operators and there have been many complaints and ongoing court battles relating to access to the incumbent's network. Whilst the limited-time monopoly granted to Telkom is consistent with sector-specific regulation, from the competition perspective, this practice may be sub-optimal.

The problems faced in South Africa can arise in other countries as well. Since the sector-specific regulatory bodies are often responsible for defining 'entry conditions', their actions directly affect the nature of competition, after entry has taken place. Consequently, the conflicts between sectoral regulators and competition authorities are expected to arise.

Monopoly Pricing

Some competition regimes include rules that restrict excessive or unjust prices. Such rules could also conflict with industry-specific pricing rules established under sectoral regulation. Alternatively, the industry regulator in fixing prices may find that the competition rules against price-fixing are so general that they give the competition regulator the authority to challenge the price-fixing decisions of the sectoral regulator.

Restrictive Business Practices

In the case of the vertically integrated monopoly firm, there are no competitors. Hence, there is no one to enter into agreements with or to behave in a manner that would restrict or lessen competition in the market for relevant utility services. When the industry is unbundled or liberalised and opened up to competition, the potential for anti-competitive agreements or conduct that could restrict or lessen competition emerges. Again, competition rules could be used to challenge co-operative arrangements, which have been sanctioned under sectoral regulation. Alternatively, the sectoral anti-competitive rules may conflict with the anti-competitive rules of the competition authority.

Merger Control

Restrictions on mergers between utilities and other firms or reintegration are often provided for under sectoral regulatory rules. For example, in the new unbundled environment common ownership of generation, transmission and distribution firms is normally restricted under sectoral regulatory rules. Again, there is potential for conflicts in respect of interpretation of the sectoral regulatory rules and the competition rules.

Use of Courts to Interpret the Rules

Where the boundaries are not delineated clearly in the legislation, then the matter is left to the courts to interpret the language of the respective legislation and determine the appropriate application of the respective legislative provisions. Presiding over a recent case in South Africa, Standard Bank Corporation Ltd vs Competition Commission and Others 2000(2) SA 797 (SCA), the Supreme Court of Appeal held that the bank regulator, and not the Competition Commission, has jurisdiction in respect of bank mergers. It is, therefore, preferable to determine the roles of the two classes of regulators in the new legislative structure.

Exemption from competition rules or giving primacy to the industry-specific anti-competitive and merger control rules are options which have been adopted in some jurisdictions. In these instances, regulated services or industry is either exempted from the jurisdiction of the competition legislation and the reach of the competition regulator or the industry-specific rules of the sectoral regulator are given primacy over the rules of the competition regulator. This is the case in Australia, USA and Canada and amongst the 7-Up countries, this appears to be the case in Pakistan, Kenya, Sri Lanka and Tanzania.

In Tanzania, the distribution of responsibilities is still in the process of formulation. A new Competition Act, due early 2003, is expected to provide clearer rules. The South Africa Government recognised the problem of overlapping jurisdictions between competition authorities and regulatory bodies and stipulated that the Competition Act would not apply to 'acts subject to or authorised by public regulation'. Other regulated industries, such as banking and agriculture, have used this provision to argue in the High Court that the Competition Act did not apply to their respective sectors. The Government has since removed this stipulation from the Act.

However, in the case of merger control, some regimes require both the regulators to approve merger transactions within the regulated industries. Otherwise, the lack of coherent co-ordination and consultations between those two institutions over merger control would lead to sub-optimal regulatory outcomes. Evidence of such outcomes could be found in the Kenya. In the acquisition of ABN AMRO Bank by Citibank, the matter was dealt with entirely by the Central Bank of Kenya (CBK). Competition concerns were not incorporated as a factor in evaluating the case by the CBK and neither was the Competition Authority consulted. Post-merger, the combined entity became the fourth largest bank in the country. It is quite possible that the transaction might have raised competition concerns in the relevant market.

Similarly, in Pakistan, under the Banking Companies Ordinance 1962, the State Bank of Pakistan (SBP) is fully authorised to regulate and supervise banks and financial institutions. However, the SBP's supervisory policy does not take cognisance of competition issues in the sector. The result is that regulatory issues related to the acquisition of ANZ Grindlays by Standard Chartered Bank were evaluated only by the SBP and the competition authority was not involved. The deal had a smooth sailing, even though it has significantly lessened competition in the corporate banking market segment.

Another very simple approach, which has been adopted, is that of assigning the powers of the competition rules under the industry-specific legislation directly to the competition agency. This approach tends to be adopted as a transitional measure, until industry-specific regulatory institutions are established.

Resolving the Problem

International experience shows that interaction between sectoral and competition regulators can be managed through the institutional approaches: giving primacy to the sectoral regulatory law or the competition law or requiring consultation between both the regulators.

Where the economy-wide competition law takes precedence, the sectoral regulator may still have a role in assisting the competition authority to conduct analysis of the competitive effects of agreements in the regulated industry, especially with their natural advantage over technical issues.

The imposition of the requirement for consultation on competition issues between sector regulators and competition agencies can only help to improve the efficiency and effectiveness of the regulatory process. This conclusion is supported by experiences in one of the 7-Up countries. The statutory requirement imposed on the sector regulators to consult with the Zambia Competition Commission has led to very constructive consultations, with the result that effective regulation is enhanced and consumer rights are protected.

The Zambia 7-Up Country Report[6] highlights the point that Zambia National Water Supply and Sanitation Council (NWASCO) 'must exert more competitive pressure on the utilities and municipal companies through appropriate pricing than it has done to date', if consumers are to be protected because 'consumers have the right to demand water quality service'.

The use of a single agency for both sectoral regulation and enforcement of competition law is another approach that has been adopted to find a solution to the problem. There are three possible institutional arrangements: the competition authority may handle both sectoral regulation and competition law, as in the case of New Zealand; the use of the competition authority as an interim measure, as has been the case in some Eastern European countries, to be replaced by sector-specific rules and institutions at a later stage; and the use of the competition authority through sector-specific laws to handle sectoral regulation, as is the case with Australia. The experiences under the different jurisdictions can only help to provide lessons as to the future direction developing countries should take in resolving the interface problem between the competition and sectoral regulators, particularly for the 7-Up countries.

Box 1: New Zealand's System of "Light-handed" Regulation and no Sectoral Regulator

In 1989, with the reform of the telecommunications sector, New Zealand introduced a system of light-handed regulation of utilities, relying primarily on competition law and the competition authority. Simply put, competition issues are dealt with under the Commerce Act by the Commerce Commission, the economy-wide competition authority, rather than a specialist sectoral regulator. This approach is supported by implicit threat to introduce more intensive regulation if serious problems should arise.

The New Zealand approach relies heavily upon the courts to adjudicate issues on such matters as access to essential facilities. This is an ambitious approach and is not without its problems. It lacks clarity on certain industry-specific issues such as interconnection and what constitutes abuse of dominant position. Protracted litigation often develops relating to pricing and interconnection. In the famous Clear Case, the matter went all the way to the Privy Council in London, New Zealand's highest court of appeal.

Reliance on the court system and the attendant appeals process would be problematic for most developing countries lacking the inherent expertise and institutional endowment to deal with complex interconnection, pricing and other economic issues. Additionally, this approach involves the conferment on political authorities substantial discretion, which may cause considerable concern for private investors in countries without the legislative and judicial endowment and institutional capacity.

Light-handed Regulation

New Zealand has adopted one of the most novel approaches, in the form of what has been described as light-handed regulation. (See Box 1) New Zealand not only declined to introduce sector regulators, no separate industry-specific regulatory laws were provided for the utility industries. The competition rules, however, are so general that they give rise to serious problems of interpretation and application on such matters as interconnection, with the result that the courts are required to intervene to resolve the problem through judicial precedents. This approach, however, is not only expensive and costly, it requires an environment where the judiciary has had a long tradition of dealing with competition matters[7].

Box 2: Australian Competition Regulator Administers Industry Specific Rules

Australia adopted the position that specific rules were preferable to reliance on general competition rules. Administration of industry-specific rules has been entrusted to the Australian Competition and Consumer Commission. This was to avoid proliferation of regulatory bodies and to facilitate the transition to more competitive markets. Market access issues related to telecommunication, gas and electricity, airport postal services, as well as the administration of price control oversight over federally operated utilities, was brought within the purview of the Commission.

The ACCC was formed in 1995 from a merger of the Trade Practices Commission and the Price Surveillance Authority and, under the Competition Policy Reform Act 1995, a requirement is provided for the right of access to services declared essential facilities. The objective was to avoid uneconomic duplication, while, at the same time, ensuring competition. For example, the creation of competitive electricity supply and telecommunication services require that generators have access to the transmission grid and cellular operators have access to the telecommunication fixed network, especially the international gateway. In order for the right of access to be declared, efficiency benefits to the community must exceed the costs. The access regime principle applies to all the natural monopolies. The facilities must not only carry natural monopoly characteristics, they must also be of national significance and show where third-party access is required for effective competition in related markets.

Use of Competition Authority to Administer Sectoral Regulatory Rules

Australia provides a further variation to the use of a single agency. The competition authority is given the statutory powers to administer the sectoral regulatory rules. The responsibility for the administration of industry-specific rules on access and related matters has been entrusted to the Australian Competition and Consumer Commission (ACCC) (See Box 2).

Collaborative Approaches

Mexico has taken the route of a collaborative approach. Here, the competition agency is entrusted with the responsibility of determining whether or not the conditions for effective competition exist, or are sufficiently absent, to justify the continued imposition of price regulation. Administration of price control rules is then entrusted to the sectoral regulator, in the event that such conditions are justified (See Box 3).

Concurrent Regulation

The UK has, over the years, opted for concurrent jurisdiction. Both the Director General of Fair Trade Authority and the sectoral regulators were allowed to refer competition matters under the 1980 Competition Act to the Mergers and Monopolies Commission, with the exception of merger matters, where the responsibility was with the Secretary of State. This principle was maintained in the 1998 Competition Act (See Box 4). The concurrency approach, however, presents a number of problems, as the different regulators may very well interpret the rules differently, as the UK has discovered, creating the requirement for some consultative mechanism.

South Africa, following from its unsuccessful attempt to exclude 'acts subject to sector regulators' from the jurisdiction of the competition authority has recently followed the UK approach and has introduced the principle of concurrency. However, in order to avoid inconsistency in interpretation, the sector regulators are required to factor the principles and philosophy of the competition law into their decision-making process. The expectation is that these modifications should serve to minimise the incidence of inconsistency, as in the case of the UK.

Emerging Experience and Direction in the Design of Regulatory Institutions

Emerging experience in the design of regulatory institutions provides some insight into the likely direction of future developments. The proliferation of specialist regulatory agencies reflects the current trend. Recognising the advantages of insulating regulatory decision-making from political interference and, in so doing, safeguarding the independence of the new agencies, more and more countries have increasingly been resorting to the multi-sector approach[8]. The UK, Jamaica, Bolivia, Ghana, Australia, Panama and Sri Lanka have, in recent years, followed the multi-sector approach. The multi-sector agency approach has been the common institutional form adopted at the state level for well over 100 years in the USA. They serve to reduce costs and provide for more consistent approaches across industries to enhance credibility and legitimacy of the independent regulator and address the scarcity of experienced professional resource, especially for developing countries

In Sri Lanka, the banking, insurance and securities watchdogs have recently been subsumed into one financial regulator. Meanwhile, in Tanzania, the Government is now creating three multi-sector regulatory agencies: the first one to regulate electricity, natural gas distribution and water; the second one to regulate the communications sector, telecom, electronic broadcasting and postal services; and the third one to regulate the transport sector, ports, public road transport and railways. This new legislation is expected to provide clear guidelines regarding the division of responsibilities between the competition authority and sector-specific regulators.

Box 3: Role of Commission Federal de Competencia in Sectoral Regulation in Mexico

The sectoral regulators are empowered to establish tariffs and maximum prices for their respective sectors. Appeals against such determinations by firms within the respective sectors are made to the Commission for relief.

The sectoral regulator is also permitted to solicit the opinion of the competition commission, the Commission Federal de Competencia, on sectoral regulation regarding the existence of effective competitive conditions in the market.

The sector regulator is empowered to establish a pricing regime, as long as the conditions dictate. Depending upon the finding, the Commission can require that price regulations be lifted, or modified, within 30 days. The provision has been applied to various sectors and, in particular, the transport, port, telecommunication and energy sectors (natural gas and liquid petroleum). The Commission's role, in addition to economy-wide competition jurisdiction, also covers appellate matters.

Box 4: Concurrent Jurisdiction in UK

Since 1998, the country has moved to a new arrangement in dealing with competition and regulation interface issues. The Director General of Fair Trade and the Director Generals of the Sectoral Authorities carry concurrent jurisdiction, directly. They carry exactly the same powers to investigate anti-competitive practices, make decisions and impose penalties. The 1998 Act is closely modelled on Articles 81 and 82 of the EU Treaty. Decisions of both the sectoral regulators and the DGFT are subject to appeal to the Competition Appeals Tribunal, formally a part of the Competition Commission. The argument in favour of concurrency is that the sectoral regulators needed to have powers to increase competition enforcement, as they are deemed to have the necessary technical expertise, enabling more effective enforcement than the economy-wide competition authority that is preoccupied nationally.

Concurrency, however, creates a problem of consistency between regulators with different views. The experience has been that both types of agencies publishing rules and the emphasis being different. Sectoral regulators have found that the competition agency norms are not always suitable to address market power issues in network industries. For example, firms with as little as 10 percent market share have been found to have significant influence on prices in the electricity wholesale market in England and Wales.

The result is that sectoral regulators have sought to impose licence conciliation to control anti-competitive conduct, or market abuse. Often, these use different criteria and different market share rules as indication that dominance exists. Concurrency also leads to duplication and provides for less efficient use of resources. Strong arguments have been put for one agency to be responsible for the application of competition law, so as to reduce the risk of inconsistencies.[9]

Resistance to the developments in the multi-sector approach is likely from three sources: the industries themselves, as they prefer their own independent regulator; the sector ministries, as they seek to retain control; and the existing industry-specific regulators themselves, concerned about their own future job security or authority.

Over time, a liberalised industry, such as telecommunications, which traditionally operated as a natural monopoly utility industry, is likely to become sufficiently competitive to migrate from sector-specific regulatory regime to the economy-wide competition regime. The requirement to manage this transition efficiently will make imperative the need to establish well-defined relationships between historically distinct sectoral and competition regulators. The South Africa Competition Commission would appear to be looking towards such a future and has facilitated the launch of a Regulators' Forum aimed at promoting transparent, consistent and coherent regulation between sectoral regulatory bodies and the Competition Authority.

Experiences of Tanzania, Zambia and South Africa should be examined by other developing countries during the process of creating or reforming their regulatory regimes, so as to ensure harmonised interfaces between the competition authority and the sectoral regulators.

Conclusion

It has been argued that, with the gradual introduction of competition and the application of competition law to the utilities industries, sector-specific regulation is being rendered unnecessary, as a way of remedying abuse of market power. The notion of sectoral regulation is based on the premise that it is needed to address the absence of competition in the privatised utilities. Therefore, legislative controls are needed to control market power. The extension of competition into the utilities market, as we have seen in the telecommunications industry, raises the important question as to whether sector regulation will be needed in future. Should competition law in industries such as telecommunications replace economic regulation where a strong competition market structure is being developed?

Prosser[10] has stated that it is not possible to do without regulatory institutions and leave matters to the market and competition law, as is suggested from the New Zealand example. Regulation should not be seen as an intrusion in a naturally self-regulating market place, but as necessary for limiting monopoly power and creating and policing the conditions for effective competition. Regulation for competition will continue to be necessary even after unbundling in such areas as telecommunication, rail, electricity transmission and distribution, gas transportation and airports.

In fact, in New Zealand, the law gives the minister the power to impose price controls in goods and services where competition is limited. If regulatory structures are not created, disputes on interconnection will inevitably occur, as well as expensive litigation. While the need for regulation remains unquestionable in the traditional utilities, which are now being exposed to competition, this does not solve the question of responsibility for competition regulation in these industries. There is no doubt that the debate as to whether sectoral regulation should be handled by competition agencies will, increasingly, become a moot point, even for developing countries where these new institutions are being established for the first time.

End Notes

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