BRIEFING PAPER

CUTS Centre for Competition, Investment & Economic Regulation
CUTS C-CIER

No.6/2006

Evolution of Competition Policy & Law

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…Countries adopt specific competition regimes to curb anti-competitive practices. It doesn't matter whether the country is developed or developing or passing through a transition phase…Competition policy and law is no longer a rich country luxury but has become an important public policy to provide safety nets and promote industrial democracy…

This briefing paper seeks to trace the evolution of competition policy and law and also examines the driving forces acting behind the adoption and implementation of competition laws and policies by countries across the globe.

Introduction

Over the last twenty-five years, more and more countries have given a greater impetus to promote competition through various public policies. Trade and economic liberalisation have also aided competition in the market, by increasing the offer of goods and services with better quality and lower prices. Yet, anti-competitive practices by economic players or induced by incorrect government policies negate the gains of liberalisation. This is why countries adopt specific competition regimes to curb anti-competitive practices. It doesn't matter whether the country is developed or developing or passing through a transition phase. Thus, fostering inter-firm rivalry has become an important, albeit intermediate objective of public policy. Today, competition law has spread around the globe and about 100 jurisdictions are said to have enacted one form of competition statute or another.

Competition policy and law is no longer a rich country luxury, but has become an important public policy to provide safety nets and promote industrial democracy. Laws are being drafted, enacted and implemented to deal with monopolies, entry barriers, cartels, etc. The voice of competition authorities has started assuming greater significance in the overall economic policy-making process of nations, while promoting consumer welfare and playing a watchdog role to achieve the competitive process.

Defining Competition

The term 'competition' can be defined in many ways and in many different senses. But in the context of this paper, competition can be defined as a process of economic rivalry between the market players to attract the customer. A firm is said to compete with other firms in the same market if the decisions that the former takes to maximise profits depend on either the steps taken by the other firms or on the price that prevails in the market. Thus, it is said that a firm's choices are constrained by 'competition' when its actions are influenced by its rivals' choices or by the prevailing market price. This characterisation of competition applies to all types of firms—be they multinational or national, domestic or foreign, wholesaler or retailer, or large or small.

In their pursuit to be ahead of the other, firms take decisions on how to compete with rivals. In this process, they usually end up competing in the following two ways:

- ***Fair competition:*** This relates to competition whereby firms produce better quality goods, become more cost efficient, adopt the best available technology, undertake more research and development, and the like. Here, firms strive in terms of innovation, choice, quality, and service, all of which are thought in principle to lead to greater customer satisfaction.

- ***Unfair competition:*** This is said to happen when a firm resorts to restrictive business practices, which can include predatory pricing, exclusive dealing, tied selling, resale price maintenance, collusion, cartelisation, refusal to deal, abuse of dominant position, etc.

In either case, competition, in the sense of economic rivalry, leads to a concentrated market, as the number of firms operating in them is reduced while the size of those still active increases considerably, resulting in greater market power. Thus the adage: 'competition kills competition'. This is true, if one follows the inherent logic within competition; the natural tendency then would drive competition to result in monopolies.

Given this, the appropriate definition of competition is "a situation which ensures that markets always remain open to potential new entrants and that enterprises operate under the pressure of competition".

One of the most important benefits of inter-firm rivalry is said to be improving national competitiveness. Here, governments have a significant bearing on how well their firms perform relative to foreign rivals, and indeed by fostering competition between domestic firms governments are thought by some to foster national competitiveness. One of the ways governments can foster competition between domestic firms is by enacting and implementing effective competition regimes or anti-trust laws. Competition can do wonders and other than improving national competitiveness, there are several factors, which buttress the need for a competition policy and law.

For Better Realisation of Economic Reforms

For developing countries, the need for competition law becomes paramount when it adopts economic reforms, as it has been strongly realised across that despite economic reforms being introduced, domestically, there is lack of competition. At the same time, it has also been observed that industries are not competitive, internationally. The full benefits of economic reforms are, therefore, felt to be better realised under the conditions of fair competition, which could stimulate consumer satisfaction, and reward those firms that are more efficient, while punishing those that perform poorly.

Broadly speaking, the need for a competition law arises to:

(i) Take care of the anti-competitive practices designed to restrict the free play of competition in the market;

(ii) Take care of unfair means adopted by firms against consumers in order to extract the maximum possible consumers' surplus; and/or producers' surplus; and

(iii) Maintain and promote the competitive spirit in the market.

While it is expected that the economic reforms introduced in different countries would enhance competition in various sectors of the economy through the lowering of both political and economic entry barriers, eliminating existing restrictive and unfair trade practices, there is no watchdog to explicitly promote competition. Governments have realised that market forces alone may not be able to address all the problems in the market place, especially in situations of market failure – caused by market power and its abuse.

Several countries, which went through the phase of privatisation and deregulation, began to experience that many state-owned enterprises affected by the policies of privatisation and deregulation tended to enjoy monopoly power in the market. These policies simply acted to transfer monopoly power from the public to the private sector thereby thwarting the interests of consumers, especially the poor. In such a situation, the absence of a competition policy and an adequate regulatory mechanism is strongly felt which could set things right.

The need for conceiving competition policy also arises to ensure and promote good governance in the corporate sector as well as in the government, which could be achieved by reducing the opportunities for rent-seeking behaviour, and the corruption that often accompanies it. Competition law and the regulatory tools invoked usually take care of a firm's behaviour and market failures. Governments often intervene when markets fail, but in the absence of clearly defined competition policy and regulatory mechanisms, the intervention can be arbitrary and serve vested interests, rather than the poor.

To protect small and developing countries from international anti-competitive practices also necessitates the availability of effective competition laws. Evidence suggests that international cartels of private firms that engage in restrictive practices designed to limit competition in international trade do exist. These arrangements can be quite durable and detrimental to economic development (Levenstein and Suslow 2001). Cross-border mergers and acquisitions that lead to market dominance and the restrictive practices that some transnational corporations engage in further necessitate the need for an effective competition legislation.

Competition policy is an integral part of economic policy. Competition policy serves to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers. A competition law may be quite narrow in its scope, but a competition policy is much more broad and comprehensive, and hence fills in the cracks and tries to bring harmony in all government policies that may encourage or adversely affect competition and consumer welfare. Hence, countries also need to conceive a competition policy, followed by a competition law.

Australia is a classic case in terms of spelling out competition policy objectives, which can remedy policy-induced anti-competitive outcomes. It has framed a National Competition Policy, which is a set of policy reforms adopted by provincial governments throughout Australia. The objective is to encourage better use of the country's resources, and hence provide a higher standard of living, through increasing competition. The Australian policy consists of a number of separate reforms, which, in aggregate, seek to deliver a widespread competitive revitalisation of the national economy.

Against the above background and as to the need for adopting a competition regime, this paper proceeds further, throwing light on the evolution of competition policy and law in the world.

Going Back in Time

While many believe that the US was the first country in the world to adopt a competition law or an anti-trust law, it was actually Canada, which was the first to do so in 1889. The second country to adopt a competition law was the US in 1890. However, the implementation of the law has been more vigorous in the US, hence it has been seen by many to be the first of its kind in the world.

The motive acting behind adopting a competition law arose from demands *inter alia* by agrarian interests to combat the collusive behaviour of merchants who were engaged in trading and distribution of farm goods, whether agricultural produce or livestock. They acted as monopsonies, or what is called a buyers' cartel. In fact, these collusive alliances were named as 'trusts' in the USA. Thus, came the term anti-trust or trust busting.

The collusion would cover not only prices of commodities brought to the market but other anti-free market tactics as to what and how much each farmer will produce; who he can sell to; what will be the terms of payment, etc. Farmers, small businesses and consumers are a powerful lobby – meaning votes, hence politicians did react to their demands positively and therefore the competition laws in Canada and the US came into being.

Finland's first affair with competition enforcement began with a court judgement in 1837, also on the grounds of a monopsony. Timber processing mill owners colluded to dictate prices and quantities to forest producers. A court struck it down after the aggrieved parties brought forward a suit. This action did not lead to the formulation of a competition law, immediately. But a policy debate on industrial combinations in 1928 ensued, when the polity asked for investigations and control of 'rings and trusts'. The debate remained dormant until 1948, when it was raised with renewed vigour. This catalysed the formation of a committee, which submitted its report in 1952, which led to the adoption of the first competition law in Finland in 1958.

In France, the initial foundations of a competition law were laid in the Chapelier Law of 1791, which contained a provision that barred members of the same trade to assemble for the purpose of promoting their common interests. This could mean either purchasing from basic producers or selling to customers. The 1810 Penal Code prohibited any concerted act to manipulate prices that could distort free competition.

After tracing the history of the evolution of competition policy and law, it becomes equally important to understand why countries adopt competition laws. In the following section, the paper examines these reasons. In this warp and weft, selected experiences of various countries have also been presented.

Scenario Across the World

Competition has become a dominant driving force with increasing number of countries giving greater impetus towards promoting competition and moving towards a market economy. Countries across the globe are adopting trade and economic liberalisation policies, both due to pressures from the World Trade Organisation and of their own volition. Laws are being designed and implemented to deal with monopolies, entry barriers, cartels, etc. Besides, the other motives, which act as the motivating factors for countries towards adopting competition policy and law, include the following:

In the case of the US, Canada, India, and Pakistan, high levels of concentration i.e. the production or trade being controlled by a handful of businesses, contributed towards the adoption of a competition law. Elsewhere, in the former (Soviet bloc) and current (China and Vietnam) communist countries, it was to curb state monopolies and government policies that hindered competition. In the context, a competition law was debated upon and subsequently enacted.

Sometimes, laws provide for the competition authority's right and responsibility to intervene in other government policies, which promote anti-competitive outcomes. In some, there are explicit provisions granting the power of intervention to the authority, while in others, it is through advocacy provisions where the authority can submit opinions to the government. How effective these are vary from country to country and often depend upon the leadership at the competition authority and/or traditions and conventions. One crucial area of intervention/advocacy is when countries are privatising. The authority can either be empowered through legal provisions or be asked to submit their opinion. Nowhere can an authority stop the privatisation process.

Generally, most countries, which followed a command and control type of economic management launched programmes covering liberalisation, deregulation and privatisation in their quest to become a market economy. It has been a universal prescription that before liberalisation is taken up, a proper competition and regulatory framework needs to be put into place. In fact, investors have wanted this as much as the country had a need, in order to envision a predictable legal environment. Not all countries have followed this systematically. India is a typical example, which implemented regulatory reforms after opening up the economy through fresh capacities or privatisation. For example, while the telecom sector was liberalised allowing private players in the sector, it did not have a telecom regulator. Its competition law was also outdated, and efforts to modernise the law were made much after the economy opened up. Thus, there was no agency to oversee the privatisation efforts through a competition lens. On the contrary, in Chile, the competition authority is empowered to oversee privatisation, so that it does not lead to a monopolistic situation.

Contrarian examples include Sri Lanka, which began reforms in 1976, but ended up turning public monopolies into private exploitative monopolies. Malawi also had a similar situation, where the petroleum comany was privatised and was taken over by the private sector petroleum importing company, which thus maintained a monopoly. In Senegal, the edible oil import trade was denationalised, but it was handed over to two well-connected traders, who became exploitative.

In many African countries, which underwent structural adjustment programmes under conditionalities from multilateral lending institutions – the International Monetary Fund and the World Bank (WB), they were required to lower tariffs, reform the civil service etc, and to put in place a regulatory framework for utilities, which were undergoing privatisation.

Another motive to adopt a competition law arises from commitments made under free trade agreements. Guatemala, Singapore, Jordan, etc., had to adopt a competition law because of their commitment under a Free Trade Agreement (FTA) with the US. A bad example is that of Sri Lanka, which has diluted its law removing the M&As provisions under pressure from the US under its FTA. Pakistan has not strengthened its law in spite of self-realisation, while Georgia has very recently diluted its law, probably under US influence, so that it does not deter investment.

Cambodia and Nepal have agreed to adopt a competition law under their commitment to the WTO when acceding to it, though as on date, progress has been poor.

Norway, Iceland, and Switzerland in Western Europe are not members of the EU, but have modelled their law on the EU model, as part of their commitment under the European Economic Area agreement etc. On the other hand, several former Central and Eastern European countries, like Turkey, have drafted their laws to bring them in consonance with EU laws. Many Latin American countries too are in the process of adopting a competition law due to FTAs among them or the Central American Free Trade Agreement with the US.

In many cases, there is the simple realisation that it is good public policy. If markets were to be liberalised and state intervention reduced, then a safety net or a micro reform measure would include a competition law, administered by an independent or an autonomous authority. However, in many cases, the authority is part of a ministry – usually the trade and

Table 1: Stages of Institutional Development of Competition Regimes			
I. Start	**II. Enhancement**	**III. Advancement**	**IV. Maturity**
Competition advocacy and public education + Control of horizontal restraints + Checking abuse of dominance + Exceptions and exemptions, including on well-defined public interest grounds + Technical assistance and compliance education	Merger control + Control of vertical restraints + Development of the effects doctrine	Regulation + International co-operation arrangements	Second generation international arrangements + Proactive competition advocacy

industry ministry, rather than being kept outside, such as in Jordan, Kenya or Vietnam. This is not just a developing country phenomenon, but is also seen in rich countries. The Netherlands is a case in point, where the competition authority was given independence in 2005. This is further evident from many examples, where countries like the UK, South Africa, India, Czech Republic, etc., have revisited (not just amended) their competition laws to cope with changing times, or on realisation that the existing law is quite hopeless.

Once a law is adopted, the next crucial step is implementation. Implementation of competition law is mostly smooth in rich countries, but poor in many developing countries due to political economy problems, corruption, apathy, business opposition, and inertia.

In this context, graduated implementation of competition law can be a better approach. Countries like UK, India, Taiwan, and Singapore have adopted this strategy while implementing their competition laws, wherein the first year has been spent in familiarising society about the law; the second in anti-competitive practices being taken up, and the third in taking up structural issues or vertical restraints. It is useful, for analytical purposes, to identify a sequence of evolutionary stages that could serve as a reference for comparisons among different countries. The following section focuses on sequencing the implementation of competition law.

Establishing Priorities

In terms of establishing the competition agency's priorities a phased approach may be appropriate to the design and implementation of a competition law. The sequencing illustrated (see Table 1) is a refined version based upon a presentation made by Gesner Oliviera (former chairman of the Brazilian Competition Agency). He developed this on a simple idea inspired by WB's Shyam Khemani and Mark Dutz (1996). While we have added one extra dimension of bringing in the 'effects doctrine' or extraterritorial jurisdiction in the second phase, which can enable a competition authority to tackle abuses which take place out of its jurisdiction but has a deletrious effect in its domain.

Given its limited resources and novelty, the agency should start with actions, which will most likely benefit the market and build its public acceptability. Gradually, it would introduce measures, which require more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of price fixing or collusion, the latter being positively welfare diminishing and easily identifiable by the polity and public.

Development is a continuum, and the stages will never be all this clear, and in some cases different priorities will be appropriate. In some economies, especially those that have a legacy of state owned or other dominant firms, abuse of dominance/ monopolisation might also require a priority similar to that given to horizontal restraints.

The stages suggested are organised according to the degree of difficulty authorities face in doing a cost benefit analysis of the impact of competition measures on social welfare. However, it might well be argued that legally sound prosecution of price collusion turns out to be more difficult than a merger review. In fact, it is generally easy to establish the ill effects of a collusive behaviour but often difficult to prove in a court of law, due to lack of legally sound and solid evidence. Therefore, the actual plan should take into account the damage caused to the economy and consumers of a particular anti-competitive act, but also the chances of success and the expected return on the money spent in pursuing the case, given the relative probabilities of success through other lines of action or public policies. The above-illustrated sequencing is what has been more or less adopted under the new Competition Act, 2002 of India.

Conclusions

In a nutshell, it can be summarised that nearly all the major countries have constitutional provisions to promote and preserve competition in the market place and have also adopted laws. Countries, which did not have a competition law, are today in the process of adopting one. Laws are being increasingly amended or scrapped and new ones adopted to bring them in line with current needs and the political economy of the country.

Though trade and economic liberalisation has been one of the most effective measures to ensure competition in the market place and curb abuse of market power it has some limitations too. Imported goods cannot reach the consumers directly and the well-entrenched market players may have a grip over the distribution channels, which may impair the gains of liberalised trade. Sometimes, domestic firms (acting individually or in collusion) misuse the anti-dumping provision against the cheaper imported goods and thus thwart competition. Then, there are goods and services, which are not tradable. There are goods, which are tradable but only within a limited market – cement being a classic example. Due to its bulky nature, it is not economical to transport it to distant markets. As a result, even geographical segments of a national market can be successfully monopolised or cartelised.

Thus, it is not surprising to see that while countries have gone for more and more trade liberalisation over the last one decade, more and more countries have also embraced competition laws, with many adopting new laws after scrapping their old ones. In the beginning of 1990, there were about 30 odd countries with a competition law. However, at present, the number is over 100 and many more are in the queue. Obviously, countries across have realised the fact that that trade liberalisation may not always be a perfect remedy for abuse of market power and have hence embraced a competition policy and law.

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*This briefing paper is based on the Introductory Chapter of a CUTS publication: "Competition Regimes around the World-A Civil Society Report". Pradeep S Mehta, Secretary General, CUTS International, edited the book, while Simon J Evenett, Professor of International Trade & Economic Development, University of St Gallen, co-authored the Introductory Chapter. For details, visit www.competitionregimes.com