

National Training workshop on Competition Policy and Law
MAURITIUS

8-11 August 2007, Mauritius

Organised by
Institute for Consumer Protection (ICP), Mauritius
&
Consumer Unity and Trust Society (CUTS), India

Acknowledgement

The National Training workshop is an initiative of Consumer Unity and Trust Society-Centre for Competition, Investment & Economic Regulation (CUTS-C-CIER). This National Training workshop has been organised by ICP under the CUTS-7UP Project. We would like to thank the Department for International Development (DFID) and the Norwegian Agency for Development Cooperation (NORAD) for supporting the 7UP 3 project. We are extremely grateful to Kasturi Moodaliyar, Thulasoni Kaira and Manas K Chaudhuri for being the resource persons at the training workshop, and sharing their experiences with the participants leading to an enriching discourse on specific issues. Lastly but not least we would like to thank all participants for their valued participation.

1. OPENING SESSION

1.1 Welcome Address

The representative of the Institute for Consumer Protection (ICP) Mosadeq Sahebodin welcomed participants and resource persons to the training workshop. He highlighted that the National Training Workshop was organized as a part of the Stage-II of the CUTS-7Up3 project, as one the capacity building endeavours of the project. The Institute for Consumer Protection, in its capacity as Advocacy Partner of CUTS International, was responsible for the organization of the Training Workshop.

The purpose National Training Workshop was to enhance the understanding of select national stakeholders on competition policy issues, so that they would contribute to the process of development and implementation of the competition regime of the country.

1.2 Outline of Training Workshop

Representing CUTS International Vladimir Chilinya, welcomed participants and resource persons. He provided an introduction to CUTS International, particularly the work of the organisation with regards competition policy and law and other relevant issues in Africa and Asia. He concluded his delivery with a brief overview of the training workshop – covering the purpose and the outline of the sessions.

2. TECHNICAL SESSIONS

Summary of Presentations

2.1 Introduction to Competition Policy and Law – Rationale & Objectives

Kasturi Moodaliyar (Professor, University of Witswatersrand, South Africa)

The presentation highlighted the following issues; definition of Competition Policy and how is it different from Competition Law, objectives and Scope of Competition Policy and Law, Anti-competitive Practices and how do they affect consumers?

What is Competition Policy?

The term competition policy is used to describe an array of government policies and/or measures that influence competition in domestic markets. On that broad definition, policies regarding industrial promotion, tariff protection, taxation, deregulation and direct foreign investment, for example, would be covered within the ambit of competition policy.

What is Competition Law?

Competition law is intended to eliminate or curtail restrictive business practices, which hinder or prevent firms from competing freely with one another in the market. The law recognises that, in some circumstances, the benefits to the community from a particular anti-competitive agreement or anti-competitive conduct will be greater than the detrimental effects that it causes.

Why do we need a competition Policy?

Countries (especially developing countries) need competition policy because if firms are unmonitored, they may resort to actions that increase their profits but harm society. Moreover, competition policy helps evolve a level playing field that stimulates industrial growth and economic development. So, a competition policy is one of those rare instruments that promotes both economic and social development – elements that are indispensable for overall growth and development in the third world.

How do we analyse competition policy?

Competition policy requires both legal and economic analysis. Legal, for interpretation and application of the competition law; and economic analysis provides valuable insights into market structures and business practices.

2.2 Introduction to Competition Analysis

Thula G. Kaira (Director, Mergers and Acquisitions, Zambia Competition Commission, Zambia)

Most competition commissions have been established on different models, and for Zambia, the current set up comprises on the Competition Division, which is stronger than the Consumer Division. There are current efforts to reverse this and come up with a Competition and Consumer Commission. Issues of competition policy will normally be administered by Competition Commissions at National levels and in some regions there are efforts to establish regional bodies to address matters of competition.

Competition law apply to, business, charities, gas, electricity, water, telecoms, airlines, nationalized industries, State purchasers, e.g. defence, health. It is a policy decision, in some jurisdictions competition laws apply to “undertakings” “engaged in an economic activity” regardless of their legal or regulatory status

2.3 Vertical Restraints/ Agreements

Kasturi Moodaliyar

Issues of concern in vertical agreements that were discussed at length were:

1. What are the terms of the agreement?
2. What is the agreement restricting?
3. Is competition being eliminated by the agreement?
4. Is there any competition even with the agreement in place?
5. Does the agreement-
 - a. Eliminate competition through foreclosure?
 - b. Raise barriers to entry?
 - c. Facilitates price discrimination?
 - d. Results in the monopolization of another industry?
 - e. Cartelize an industry an industry through either a distributors or manufacturers cartel?
 - f. Raise rival's costs?
6. Evaluate whether the agreement has any likely competitive benefits?

2.4 Horizontal Restraints

Manas Chaudhuri (Head of Competition Law Practice, Jyoti Sagar Associates, India)

Case:

Eight steel producers reached an agreement to refrain from selling in home markets of other members (part of this agreement) for the purpose of reducing competition in their respective domestic markets. In instances where a number of producers share a domestic market, the entire group designated the allocation of sales. The agreement also encompassed operations in third markets, but charges made by the Competition Authority were directed to the operation in the market where the Competition Authority exercised its jurisdiction. During the period of agreement, approximately 40% of worldwide exports of the product under the agreement were accounted for by exports from the host countries, and this figure rose slightly towards the end of the agreement. Over the period of the agreement, exports of the product from the host countries to all developing countries totaled \$ 13.08 billion. Prices rose in unison in the late 1980s, reached a peak in 1990, dipped in 1994 and again in 1997, but in both cases recovered immediately. The mid 1990s marked the beginning of increasing price volatility, and two out of eight members of the agreement stood out conspicuously as the two countries that set the price trend and the bounds of price movements.

Mr. Chaudhuri used this case to explain the concept of horizontal agreements – where he dealt with collusive agreements leading to cartels. He also elaborated on the adverse impacts of cartels to the economy and especially to consumers.

2.5 Dominance and Abuse of Dominance

Manas Chaudhury

Dominant position means a position of strength, enjoyed by an undertaking, in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus the firm reaches a point where it possesses the ability to behave independently of its competitors, customers, suppliers and ultimately the final consumers. Holding such market power would have the ability to set prices above the competitive level. Firms could even get away with selling products, or provide services of inferior quality. Thereby, there is no incentive or motivation to reduce rates or innovate to be competitive for such a firm.

Dominance accounts for a significant share of a given market; has significantly large market share than its next largest rival; many legislations do not provide for any arithmetical figure to identify market shares - but some consider a market share of 40% or more is dominance.

Factors that determine ‘dominance’ could be summarised as below:

- Market share of the enterprise;
- Size and resource of the enterprise;

- Size and importance of competitors;
- Economic power of the enterprise;
- Commercial advantages over competitors;
- Vertical integration of the enterprises;
- Sale or service network of vertically integrated enterprises;
- Dependence on consumers on the enterprise;
- Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- Entry barriers including regulatory barriers;
- Financial risk;
- High capital cost of entry;
- Marketing entry barriers;
- Technical entry barriers;
- High cost of substitutable goods or service for consumers;
- Market structure and size of market;
- Social obligation and social cost;
- Countervailing buying power;

2.6 Competition Policy and Consumer Protection

Thula Kaira

Objectives of competition policy and law and consumer protection converge especially on the issue of consumer protection. Consumer law protects the interests of consumers. Competition law, on the other hand, protects not only consumers but also promotes the process of competition in the market. While both have concern for consumers, competition law/policy has the larger objective of ensuring freedom of trade carried on by other participants in the market.

A consumer is one who purchases or hire-purchases good or services for private use or consumption. Consumer can be regarded as a member of a broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection and other trade practices for which consumer protection laws exist. A consumer needs to be distinguished from a manufacturer who produces goods and wholesaler and retailer who sells goods. Over the years, the definition of a consumer has been broadened to include anyone who consumes goods or services at the end of the chain of production.

2.7 Interface between Competition and Sectoral Regulation

Manas Chaudhury

Overview

According to the OECD (2002) findings on telecommunication sector, despite widespread privatization and liberalization, large segments of the industry is still dominated by incumbents; a small but rising share of new entrants exerting significant

competitive pressure on the incumbent and most liberal countries: Canada, Japan, UK, USA, Sweden and Australia and the most restrictive – Greece, Switzerland, Austria, Luxembourg, Iceland and Turkey.

International Scenario

- In Australia, the Competition Authority incorporates industry-specific technical regulators.
- In UK, the Office of Fair Trade (OFT) and the sectoral regulators have concurrent jurisdictions with a common appellate tribunal (CAT) – appeals from sector regulators lie to the UK Competition Commission in the first instance.
- In South Africa, sector regulators were initially exempted from the jurisdiction of the competition authority but later the exemption was withdrawn.
- In Zambia, the competition authority is represented on other regulatory boards. Besides, all sector regulators are required to consult the competition authority

The jurisdictions of the Competition Authorities and Sector Regulators are not so well defined in India, Sri Lanka, Kenya, Botswana and Pakistan.

- In the Indian Competition Law under section 21, the Commission is empowered to look into a competition issue provided the sector regulator decides to refer the same. But the opinion of the CCI will not bind the regulator in disposing of the matter finally – forum shopping appears inevitable.
- In Canada, the Canadian Competition Bureau is legally empowered to intervene in policy determination of federal and provincial regulatory bodies.
- In France, latest law provides for mandatory consultation between radio & television sector regulators and competition authority.
- In Germany, the Competition Agency and the Regulatory Authority for Telecom and Posts exercise jurisdictions with minimum interference so as to minimize parallel competencies

3. COMMENTS AND DISCUSSIONS

Floor discussions are summarised below;

- Stakeholders urged that the government should include CSOs in their consultations on matters of competition policy and law in the country;
- The meeting proposed a national working group on competition law, which will discuss and make inputs to the draft competition law for Mauritius once it has been circulated;
- There is need for consistency in capacity building activities, as these would enhance their input into the policy;
- Concerns were raised that Mauritius need to develop its own policy according to its own national priorities and not to copy from any existing models, but to use the existing models as guidelines;
- Since the law is still in draft and has not been presented for discussions, there is need for sharing it with other experts in the regional so that Mauritius could benefit from the same;

- The meeting agreed that ICP would share the draft law for comments with the experts who were delivering the training;
- There is therefore need for advocacy on the effective model for Mauritius, and identifying key areas of interventions;
- A number of cases were presented, and stakeholders expressed much interest in the Case involving South African Airways. This is in the case where South African Airways was fined by the authority for inducing travel agents to sell their tickets;
- There were concerns from government representatives on how to include, other clauses in the law which will ensure the protection of consumers, and how to deal with vertical restraints;
- While the process of developing a competition law is on going there is need to take into consideration issues of public interest;
- A number of curtails and involvement of key government figures in businesses is hindering progress in the process of competition law development, and might even hamper its administration in Mauritius as well;
- Participants requested for more networking in order to enable Mauritius come up with a best model for its law;
- There are a number of models, which have been used by different countries for establishing their competition agencies, e.g. the Australian Model, the United Kingdom model etc. However, the effectiveness of any model depends on the national environment, and priorities;
- At the regional level both SADC and COMESA are in the process of coming up with Competition frameworks, which will serve in regulating business practices that pervades borders.

4. WAY FORWARD

- Regarding advocacy work, Mosadeq indicated that ICP has been and in future as well would pursue competition advocacy vigorously, especially through its contacts in the print and the electronic media.
- There is room for developing materials for disseminating competition related information – especially those that could enhance public awareness and understanding.
- ICP is keen to host a national training workshop, to include participation from Universities, Colleges, Research institutions etc for a fee. This would be conducted by bringing in experts from the region and other countries.

5. CONCLUSION

In conclusion, presenters thanked the organisers and participants for making the process a success. And on behalf of CUTS and the local organizers Vladimir Chilinya thanked the presenters and participants. Mosadeq concluded by urging participants to be effective in the national process of developing and implementing Mauritius' competition law.