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CUTS CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION

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Pulling Up Our Socks

Introduction

Transition from a command-control regime to a market economy is a difficult process for any country, especially owing to the need for structural changes and new policy regimes. There are innumerable problems in establishing new policy regimes and making them efficiently functional, not to speak of the inherent conflicts in the objectives of one policy with those of another. In this context, competition policy is a particularly interesting subject to analyse.

By now there is a near universal consensus among economists and other proponents of the free-market philosophy that, left to its own devices, a market economy could give rise to the most undesirable outcomes. Anticompetitive practices are one such outcome. There are eminently tenable arguments in economic theory to curb such malpractices. Besides, their effective regulation is a major challenge for any economy. Most typically, the solution comes in the form of a formal competition regime with a competition law and a well-functioning policy environment for its enforcement.

At this stage, it is pertinent to ask the question: Why has competition policy and law suddenly become a subject of such overwhelming interest to one and all, given that anticompetitive practices have prevailed since as far back as living memory goes and there are countries that have handled competition without a formal regime? The answer becomes obvious the moment we take note of the fact that the number of countries having a competition regime has risen from 35 in 1995 to over 100 today with another 30 odd countries in the process of adopting a competition law. This phenomenal rise could be ascribed to the recent trend, gaining momentum in the 1990s, of a large number of developing economies going for trade liberalisation, deregulation and privatisation.

Establishing and maintaining an efficient competition regime is quite a mammoth task, not without peculiar administrative and operational problems. This paper discusses the findings of the 7-Up project concluded by CUTS which was centred around the problems of competition regimes in seven developing countries of Asia and Africa.

Background

From the introduction, the current surge of interest in competition policy and law should be obvious. As a matter of fact it is to many people in the business of policymaking who have responded or are responding by adopting a competition law and establishing a formal competition regime. What is not immediately obvious is how to create the right institutional environment and provide adequate resources for the effective implementation of competition law and policy. Admittedly, despite a formal competition regime in place, many developing countries have little or no competition culture. By competition culture is meant awareness of competition issues among consumers and the practice of behaving competitively among producers.

The reasons why developing countries lack a competition culture are not far to seek. Traditionally, in developing economies, competition policy has been overshadowed by the more pressing needs of industrial policy such as creation of a strong and viable industrial base. Public enterprises were given utmost priority for this task and huge investments were made in them. As a consequence, competition policy has often been low in the policy priorities of these countries, especially because private business never constituted a sizeable proportion of their economies.

Institutional changes brought about in the wake of economic transition have significantly altered the scenario. Private business has begun to thrive and foreign interest in domestic markets has started to grow. Besides, the newly found freedom of operation in a deregulated environment has widened the scope for seeking self-interest with guile. As a result, the threat of anticompetitive practices has become more credible.

However, governments' policy preferences have taken more time to adjust to the changing reality, the effect of which shows in the performance of the competition regimes of various developing countries. Although the arguments for competition law and policy have been well taken by almost all countries adopting a competition law, their commitment to maintaining the competition regime has been seriously lacking.

The 7-UP Project

Against this backdrop, the CUTS Centre for International Trade, Economics and Environment took up the 7-Up project with a view to understanding and analysing the problems of the competition regimes of seven developing countries of the Commonwealth, namely Kenya, Tanzania, Zambia, South Africa, Sri Lanka, Pakistan and India. The project was supported by the Department for International Development (DFID), Government of the United Kingdom. The name 7-Up was adopted for three reasons:

I. There are seven countries in the project;
II. The project has seven objectives; and
III. The project aimed to pull UP the socks of the competition authorities in the seven countries.

Objectives

The stated objectives of the project were to:

1. conduct an evaluation of the existing competition legislation and its implementation in the target countries;
2. identify typical problems and suggest solutions based on practices prevalent elsewhere;
3. suggest ways forward to strengthen the existing legislation and institutions dealing with competition issues;
4. assess the capacity-building needs of the governments, their institutions and civil society;
5. develop strategies for building expertise among competition-agency officials, practitioners and civil society at large;
6. help build constituencies for the promotion of a competition culture;
7. create an advocacy group both at national and international levels to pursue the necessary reforms.

Methodology and Findings

The project was divided into two phases. Phase I was meant to conduct a research study of the existing competition regimes, while Phase II involved an analysis of their functioning by a case study approach.

The distinguishing feature of the 7-Up project is the inclusion of countries of different sizes at varying levels of economic development. While the two least developed countries Zambia and Tanzania have enacted their competition laws only recently (in 1995 and 1994 respectively), probably under pressure from international lending institutions, the two large developing countries India and South Africa have had competition laws in place for a much longer period (since 1969 and 1979 respectively). In fact, the latter have framed new laws in 2003 and 1998 respectively in order to cope with changing times. The remaining three developing countries Kenya, Pakistan and Sri Lanka are in the process of adopting a new law.

The findings of the quantitative-cum-qualitative analysis of the competition regimes of the selected countries are quite revealing. What follows is a brief discussion on them.

Budgets

- The size of funding varies considerably within the 7-Up group, both in absolute and relative terms.

Figure A: CA's Budgets as % of Government Expenditure

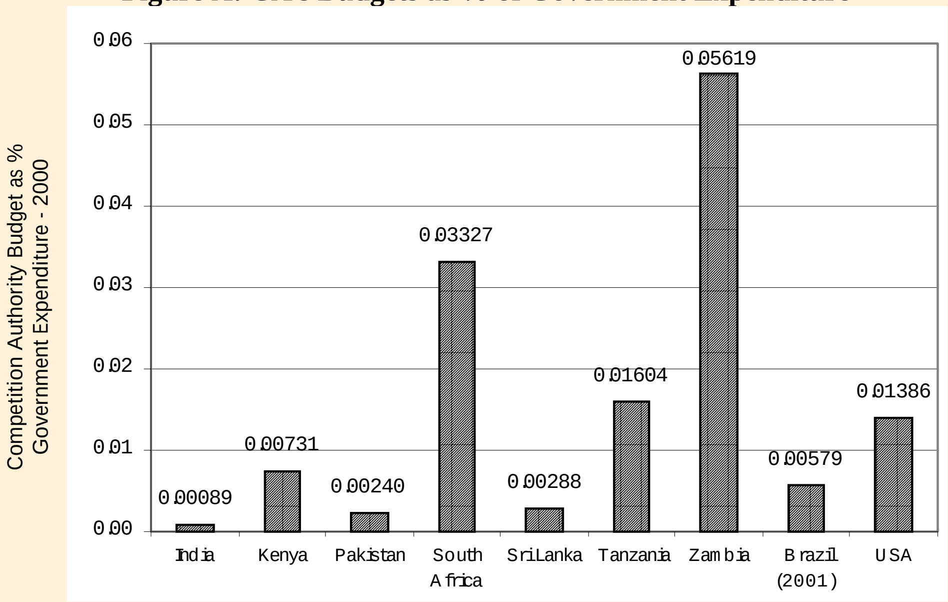

Table A: Human Resources in the Competition Authorities

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Full time members	4	1	3	1	1	1	0
Part time members	0	0	0	8	5	0	12
Professional staff	23	24	5	37	7	2	5
Support staff	125	6	25	32	7	3	6
Total	152	31	33	78	20	5	23

- In general, the budget of each competition authority is low in absolute terms, the only exception being that of South Africa. South Africa's competition regime appears to be the best funded. Its budget was US$7.74mn in absolute terms and 0.033 percent of the annual government budget in the year 2000. It would be interesting to note that 49 percent of the budget (1999/2000) of the South African Competition Commission was obtained from filing fees paid by companies seeking a merger.
- The budgets of the three South Asian competition authorities, as a percentage of the respective government's total expenditure, are much lower than those of the African countries in the project. In relative terms, India's competition authority has the smallest budget and the Zambian and South African competition regimes have the largest. Figure 1 provides the details.

Personnel

- The competition authorities find it very difficult to attract and retain competent and qualified staff. Most of them maintain a skeleton staff. In countries where the numbers are higher, the staff mainly comprises support staff and not professionals. For details, see Table 1.
- The professional staff of all the seven competition authorities is dominated by economists. There is a general shortage of lawyers. Besides, even where the professionals have an economic or legal background, their skills are not of the required standard.
- The process of recruitment is not systematic and is not taken very seriously in most of the countries. Lack of training facilities available to the professional staff aggravates the problem.
- Lack of funds and proper salary scales are two key reasons why the competition authorities have been unable to attract top quality economists and lawyers. Except in Zambia and South Africa, the salaries paid are considerably lower than the salaries paid in the private sector. Even the agencies of Zambia and South Africa have difficulties in attracting and retaining competent staff. In Sri Lanka, the professional staff members are paid salaries that are lower than even those in the government sector.

Case Handling

- Adequacy of legal provisions is the most important aspect of a competition regime determining its effectiveness. The inadequacy or lack of legal clarity in dealing with cases, though prevalent in all countries, was most prominent in the case of India. The lack of research and investigative capacity in the seven countries makes it very difficult for the competition authorities to deal with cases judiciously.
- In most of the competition regimes, competition cases take unusually long to deal with. This can be partly explained by the lackadaisical attitude of the staff, especially in the authorities of the South Asian members.
- Further, the authorities in some countries are not manned by the right kind of people. In such situations, dealing with cases with an international dimension is an even greater problem, as the authorities are oblivious of the activities and prosecution of international cartels in developed countries and hence do not take action such cartels in their own countries. Moreover, little attempt is made to communicate with the competition authorities of developed countries for information and cooperation to handle international cases. Notably, the losses inflicted by such cartels are substantial in developing countries as evident in Table 2 that provides estimates of losses in the 7-Up countries due to the notorious vitamins cartel.
- The autonomy of a competition authority is of crucial importance for the effective handling of cases. In all 7-Up countries, except in Kenya and Tanzania, competition authorities are *de jure* autonomous. Yet government interference is quite evident. In Sri Lanka, although government interference permeates the system, it is not apparent so far as handling of cases is concerned.
- There are other kinds of external influence on the competition authorities as well. Sometimes, they get swayed by public opinion/emotions or national sentiments and take decisions not in the best interests of competition.
- Lobbying by different interest groups can make a difference in many jurisdictions. It was generally observed that businesses are more active in lobbying and consumer movements are weak in these countries. Except for in Zambia and South Africa, political will is

Table B: Estimated Losses in 7-Up Countries due to the Vitamins Cartel

Country	1. Estimated losses in US$mn	2. Purchasing power parity ratio	3. Effective losses in PPP$mn (1X2)	4. Ideal budget* for the CA in US$mn
India	25.71	5.19	133.43	8.13
Pakistan	36.82	4.17	153.53	1.35
Sri Lanka	N/A	3.98	N/A	0.33
Kenya	1.79	2.80	5.01	0.32
South Africa	99.93	3.03	302.78	2.32
Tanzania	0.16	1.89	0.302	0.10
Zambia	0.06	2.50	0.15	0.03
*The ideal budget is calculated at 0.01% of the annual government expenditure.				

lacking badly in these countries and they are lagging considerably in the enforcement of many reasonably adequate laws.

Conclusions

The salient conclusions of the 7-Up project may be summed up under the following heads:

Poor competition culture: On an average, the 7-Up countries have a poor competition culture. The problem is as much in the letter of law as in its implementation. When it comes to the applicability of competition law, it varies considerably from country to country depending upon the economic situation.

Secondly, awareness of competition issues is quite insignificant and whatever of it exists is mostly found among businesses and bureaucrats. Few in the media, academia and civil society are cognisant of competition matters. However, a desire to improve the competition regime is quite palpable in all the member countries.

Focus on Structure Rather than Conduct: The laws of most of the countries deal with structure rather than conduct, except in the case of South Africa. India had structure as its main plank for regulatory action in the 1969 law, but the new 2003 law has shifted focus entirely to conduct. Dealing with conduct will be a big challenge for all developing countries, as it is more complex than structure. Especially meeting the resource requirements of the conduct approach will be a formidable task.

Limited budgets: Budgetary constraints make the functioning of competition authorities extremely difficult and pose a problem in attracting staff with the desired qualities. Besides, the available professional staff in most competition authorities is not well trained. Moreover, it is difficult to recruit well-trained people in these countries. The need for training cannot be overemphasised. It is necessary to ensure that competition authorities are headed by well-informed and dynamic people.

Lack of consumer movements: There is considerable need to strengthen the capacity of consumer organisations and similar NGOs to conduct research and bring forward complaints before the competition authority.

The project study has revealed that while India and Pakistan have well-funded consumer organisations, consumer movements in Sri Lanka and South Africa are very weak. Tanzania does not have even a single consumer group.

In Kenya and Zambia there are dedicated activists struggling to establish a strong consumer group.

In South Africa, which has apparently the best competition regime among the seven countries, a weak consumer movement has led to undesirable outcomes, as the competition authority has not adequately addressed concerns of the lay people.

In developed countries like the USA and the UK, consumer and other specialised advocacy groups are quite active in highlighting anticompetitive issues. A similar approach may be helpful in the developing countries also.

To conclude, there is a general need to build capabilities of the competition authorities. The task is not an easy one and the competition authorities would need to take help of outside agencies.

The 7-Up project hopes to establish a healthy and dynamic competition culture in the countries involved. Such a culture is indeed an essential prerequisite for deriving the benefits of competition and its contribution to the furtherance of economic development.

This Briefing Paper is an abridged version of the final report of the 7-Up Project entitled *'Pulling Up Our Socks'* published by CUTS Centre for Competition, Investment & Economic Regulation, For the research report please write to: D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.220 7482, Fx: 91.141.220 7486, E-mail: c-cier@cuts.org, Web Site: www.cuts.org. The report is priced at Rs. 500/US$50 +20% postage charges. Printed by Jaipur Printers Pvt. Ltd., M. I. Road, Jaipur 302 001, India.