

CONTOURS OF A NATIONAL COMPETITION POLICY: A DEVELOPMENT PERSPECTIVE

Executive Summary

Competition policy is built on the conviction that competition drives firms to become efficient and to offer a greater choice of products and services at lower prices, aiding growth and development and bringing benefits to consumers. In a competitive market, firms face incentives to produce efficiently and to respond to consumers needs in terms of product range and specifications, and wealth and prosperity will be more equally shared between producers and consumers.

Worldwide, governments are increasingly turning to market-based solutions for their economies. However, markets, like governments, do not always operate perfectly. Competition policy is necessary to create and enhance the national competition culture and to shape competitive forces in the economy to ensure that they generate development and public welfare.

Competition policy is a broad notion. While competition law itself is a central element, policies of privatisation, trade and foreign exchange liberalisation, good regulation and deregulation policies are extremely important in energising the economy through the forces of competition. Competition policy also has strong links with consumer policy.

For most developing countries, competition policy is seen as a means to stimulate development and it rests on the notion of the public interest. Of course, the public interest is difficult and controversial to assess but countries nevertheless try to achieve a balance between efficient markets and sustainable development. This is in contrast to countries like the US and Canada where the emphasis of the competition policy is on economic efficiency.

Where it is left up to the discretion of officials, the competition policy as a whole risks becoming captive to the political process and to influential interest groups. Public interest may sometimes be invoked to protect a specific interest group without justification for why this group's interests should take precedence over others. It is vital for the competition policy to be fair and transparent if it is to retain the confidence of consumers and businesses and bring benefits to the economy. Without openness and consistency, a competition policy may run aground in the attempt to balance economic, social and political objectives.

Another challenge in competition policy is to weigh up the effects of a reduction in competition against efficiency gains from combining resources. Very few of the cases that a competition authority has to deal with will be clear-cut. From an economic point of view, each situation should be investigated thoroughly and on its own merits. But on the legal side, there is a need for a clear set of rules to deal with cases quickly and to foster certainty in the application of the national policy.

Another potential source of tension is between competition policy and other government policies. In the South, development objectives may conflict with engendering competition in certain sectors or in certain periods. Public interest may be best served if certain exceptions and exemptions are specified in the competition policy. Relationships between competition and other government policies will be discussed in more detail below.

This paper outlines the contours of a national competition policy. Countries at different levels of development and with different economic structures have different needs in terms of their competition policy. The contours given here may not all be relevant therefore, to every nation. On the contrary, when it comes to competition policy, one size certainly does not fit all! There is no replacement for extensive debate at the national level, drawing forth the views of all stakeholders, particularly consumers, to frame an effective competition policy.

The Contours Law and Policy

The scope of competition policy is very broad, encompassing all government measures that directly affect the conduct and behaviour of enterprises and the structure of industry. Governments often do not have a coherent and explicit competition policy, which will instead be made up of separate but interconnected policies implemented by a range of government ministries and agencies. A competition law forms one element of a competition policy, providing the legal back-up to the policy. This first section examines various policies that form part of a national competition policy, while the subsequent section examines competition law.

Government policies

a. Deregulation and privatisation

Competition in many economies in the developed and developing worlds has been stifled by high degrees of regulation and government ownership. The Indian 'permit raj' is a prominent example of how high compliance costs and rigid bureaucracy can hold back businesses.

The trend among governments now is toward opening up these markets, by allowing the private sector to compete in industries previously reserved for a government monopoly and by easing the requirements in permits and registrations. Regulatory reform is therefore the complement of competition policy, with the former broadening the scope of competition while the latter protects the public interest within the competitive market.

Deregulation and privatisation together create new opportunities for entrepreneurship in the economy and should act as a sharp spur to productive and allocative efficiency in the economy.

Sector specific regulation aims to maintain competition in sectors which are either natural monopolies, in which case the regulator has an ongoing role, or in a newly privatised and restructured sector during the period in which competition becomes established. These regulators will be responsible for monitoring and setting prices and output but may also, depending on their specific legal remit, be responsible for maintaining competition in the industry. Specific sectors are discussed further below in relation to the scope of the competition law.

Overlapping jurisdiction between the regulatory and competition agencies could create problems, despite the fact that the fundamental objectives of the bodies are the same. For example, two bodies could investigate the same case and come to different conclusions on its competitive impact. The roles and responsibilities of the agencies therefore need to be clearly circumscribed.

b. Trade liberalisation

Trade liberalisation is intimately interconnected with competition in the economy. On the one hand, competition from foreign firms provides a vital spur to the efficiency of domestic firms. It has even been argued that a liberalised trading regime obviates the need for a national competition policy. However, there are a number of

reasons why this is not the case, in particular:

1. Large parts of the economy are not in the traded sector. Trade liberalisation only exerts competitive pressure on traded products so a national competition policy is still necessary to ensure the preservation of competition in non-traded sectors.
2. Domestic consumers need to be protected from abuse of dominance and restrictive trade practices by foreign firms operating in the domestic market. National competition laws are not concerned with effects on foreign markets, consumers cannot appeal to the laws of the transnational corporations' home countries to seek redress in these cases.
3. The liberalisation of investment regimes has led to rapid restructuring of domestic industry as foreign firms have engaged in a flurry of mergers and acquisitions. While this is a part of a healthy competitive process, it further reinforces the need for a strong national competition law to assess the competitive impact.

On the other hand, it is argued that the vigorous application of competition policy damages the ability of domestic firms to compete in world markets as they are unable to build up sufficient scale. A number of points can be made in response to this:

1. Firms protected from competition are unlikely to be as efficient as firms in a highly competitive market. There is a danger that firms protected by tariffs and quotas will not be efficient enough to compete in world markets.
2. Competition policy should use multiple factors to determine whether a firm has a dominant market position rather than simply looking at size. If a firm faces competition from foreign firms, then national competition law should not be a barrier to its expansion.
3. It is not necessary for firms to be large to compete effectively in international markets. Many small firms export successfully.

In general, therefore, trade liberalisation policy and competition policy will enhance each other, generating benefits for consumers.

c. Consumer protection policy

Consumer protection law and competition law both seek to protect and promote the welfare of consumers. Competition policy achieves this indirectly through monitoring and maintaining competition in the market, while consumer protection law does so directly without reference to the effects on competition. Consumers may be harmed by unfair trade practices and deceptive methods which do not fall under competition concerns. Unfair trade practices include deceptive advertising, inaccurate labeling etc.

In some countries, competition policy may contain a chapter devoted to consumer protection law, while in other countries consumer protection legislation may be entirely separate from restrictive business practices legislation. Tied-selling, the practice of selling a product on condition of the purchase of other products, is one area of direct overlap between unfair and restrictive business practices. Where consumer and competition law are separate, the applicability of the two laws should be carefully defined to avoid duplication or inconsistency.

Even where their legal basis is separate, it may be more efficient to implement the laws through a single agency. For economies with a small industrial base, a single agency can undertake the administration of the consumer law as well as the competition law. In Peru and Australia, to take two examples, these functions are carried out successfully by a single agency. In Peru, the agency also deals with intellectual property issues.

d. Intellectual Property Rights

The relationship between intellectual property rights (IPR) and competition throws up complications for competition policy. Intellectual property is included in most anti-trust laws and licensing agreements are scrutinised in the same way as other potentially abusive agreements between firms, except that the legal exclusivity granted by the State to inventors may justify some practices that would not otherwise be acceptable.

IPR give holders a temporary monopoly position in order to provide incentives for innovation. However, this does not justify the abuse of that position through anti-competitive practices. As in other areas, the competition authority will have to judge cases on their own merits, weighing up the effects on incentives against harm to the public interest caused by restricted competition. The competition authority may choose to impose compulsory licensing, licensing against the will of the right-holder, in order to protect competition.

In some countries, patents, trademarks and copyrights have given rise to competition problems and some competition laws contain specific provisions dealing with these issues as in the UK, Spain and the EU. The US has also adopted guidelines to assist those who need to predict whether the anti-trust enforcement agencies will find a certain practice anti-competitive.

A further set of considerations with regard to the inter-relationship between IPR and competition policy relates to the provisions of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). Two important provisions of the agreement are those that relate to parallel imports and compulsory licensing. Parallel imports refer to products that are licensed for production in one country and exported to a second country. Under TRIPs, IP rights are 'exhausted' once the right holder releases the IP. They therefore cannot restrict sales or export by the licensee.

Some companies have now begun to integrate provisions preventing parallel importing into their licensing agreements. It is not clear in international law whether this constitutes an anti-competitive practice. Most developing countries have an interest in allowing parallel imports and in order to protect their interests, specific provisions regarding parallel imports need to be written into the national competition law.

The second important provision of TRIPs allows for governments to enforce compulsory licensing under certain conditions, one of which is where the owner of the IP engages in anti-competitive practices. The agreement also allows for commodities produced under compulsory licenses, granted to remedy anticompetition practice, to be exported. However, due administrative or judicial process must be followed, which requires national law, most likely competition law, to contain provisions for this.

e. Other policies

In the pursuit of other social and economic objectives, some government policies may restrict competition in the economy. Potential areas of tension include:

- Industrial policy and Government procurement. Some argue that any policies favouring particular sectors or clusters of businesses are necessarily antithetical to the principles of competition. However, according to a developmental understanding of competition policy, the government may be justified in targeting policies which will lead in the long-run to a more equitable distribution of the benefits of the market.
- Labour policy. Legislation concerning the hiring and firing of workers exists to protect employment and to ensure certain standards in working conditions, but may also constitute a barrier to exit for firms. The government must weigh up the employment-generating effects of a competitive market with the employment-protecting benefits of a restrictive labour policy.
- Taxation. Governments target groups for preferential treatment in taxation and to create certain incentives for businesses. Where this seeks to create a level-playing field for businesses which face disadvantages in the market, it is not necessarily in conflict with the principles of market competition.

Policy-makers should consider carefully the impact on competition of other policies to ensure that the policies contribute towards the government's development goals rather than contradicting each other.

The 7-Up project is a comparative study of the competition regimes of seven developing countries of the Commonwealth. The countries include: India, Sri Lanka, Pakistan, Kenya, Tanzania, South Africa and Zambia. The mission statement of the project is "Shaping Competition Culture in Developing Countries." The study is being funded by the Department of International Development of the UK.

Competition Law

a. Scope of application

Competition laws do not apply to the sovereign practices of the state, and this exemption is clearly specified in most national laws. Local government, branches of government acting within their delegated power and natural persons compelled or supervised by the State are also exempted.

Initially, the primary objective of maintenance and promotion of effective competition was to counter private restrictions on competition; hence competition laws in most countries continue to prohibit price-fixing and abuse of dominant market position. However, during the past two decades or so, the role of competition policy has expanded to include lessening the adverse effects of government intervention in the marketplace.

In many countries, the competition law applies without discrimination to both public and private sector firms but firms supplying public services or functioning as monopolists are exempt from the law only within the limits of the mission attributed to them. However, monitoring public sector firms gives rise to complications for the authority. For example, a firm with a government monopoly in one product may use its position to compete unfairly

with private sector firms in another product market that has been liberalised. Another danger in dealing with public sector businesses is that the process will become politicised.

In order to deal with restrictive practices and abuse of dominance by foreign firms operating within the domestic market, the competition law should clearly specify its extra-territorial reach. On the other hand, national competition policy would not normally apply to domestic firms forming cartels exclusively for exports.

For the purpose of dealing with cross-border competition concerns, the law should provide for extra-territorial jurisdiction and to give meaning to this jurisdiction the government or the Authority should negotiate cooperation agreements with their counterparts in other countries.

b. Exceptions and exemptions

The special characteristics of certain sectors and the multiple economic objectives of governments justify general exemptions and special treatment for certain classes of actors or enterprises. Exclusions represent decisions by courts, legislature or the government to remove the subject from the jurisdiction of the competition law or the competition agency. Where there is an exclusion, there may be another law concerned with competition and regulation in that sector. Exemptions, including special rules or treatment, arise under the competition law itself and represent decisions by the enforcing body or others about how the law should be applied.

Sectors commonly subject to one or the other are: utilities (electricity, gas, water, telecoms); transport (rail, air travel, truck, ship), communications and broadcast, agriculture, professions, services, financial and insurance sectors. Some special characteristics of these sectors include:

- **Utilities.** Utility distribution networks and other aspects of utility supply may be natural monopolies. This means that the most efficient industrial structure for the sector is a single supplier and a structural approach to controlling the abuse of dominance is therefore inappropriate. A regulator will normally monitor and set prices. Regulation of utilities is further complicated by a universal obligation to supply.
- **Transport.** The same considerations apply to transport as to utilities, and safety provides a further dimension for which the regulator will often be responsible.
- **Finance.** Instability in this sector leads to powerful reverberations throughout the economy and so it requires extensive regulation. Particularly where the financial sector is not yet well developed, it may not be appropriate to apply competition policy.
- **Communications and broadcast** are closely interconnected with social and political objectives which the Government may choose to give priority over efficiency issues.

Governments may also support strategic industries or clusters of firms to compensate for market failures or to further other policy objectives. The market generally under-provides for investment in training and research and development, which justifies government subsidies, and the 'infant industry' argument justifies support to firms as they build up scale. To reduce the potential for conflict between industrial and competition policy, subsidies should be distributed to all firms in the sector and a high

degree of openness and transparency in the objectives of the policy should be maintained.

Certain actors or groups of actors within the economy may be the targets of government policies. A broad conception of development includes sharing out the benefits of growth among the population and creating a level playing field for historically disadvantaged groups and regions.

Small businesses play a special role in employment creation and innovation in the economy. At the same time they face disadvantages in terms of economies of scope and scale in comparison to large firms. Many governments offer special treatment to small firms in financing, tax, employment etc. which could be considered 'unfair competition' under competition law if special exemptions are not specified in the law.

c. Agreements

A central purpose of a competition policy is to tackle agreements between firms that restrict competition. Agreements between competitors are known as horizontal agreements, while agreements between firms at different stages in the production process are known as vertical agreements. Horizontal agreements are more likely to raise competition concerns, but they may not necessarily be harmful to competition. Joint activities that may be beneficial include collaboration for research and development (R&D), joint development of a new production facility that a firm could not afford on its own, joint purchase of inputs to reduce costs, networks of suppliers, gathering operational information etc. These agreements can raise efficiency and ultimately benefit the consumer by making a wider range of commodities available at lower cost.

The competition law therefore has to distinguish between agreements with an ambiguous impact on market efficiency and agreements that are unequivocally harmful.

i. Cartels

Agreements which are inherently anti-competitive are known as cartel agreements. Cartels have negative efficiency and welfare effects and are therefore condemned strongly in most competition laws. Most competition policies will contain laws that specifically prohibit the following:

1. Agreements fixing prices or other terms of sale
2. Collusive tendering
3. Market or customer allocation
4. Restraints on production or sale
5. Concerted refusal to purchase or supply

They may also include a prohibition on collective denial of access to an arrangement or association which is crucial to competition.

Cartels may be prosecuted as crimes in most countries. In the US and EU, cartels are pursued vigorously and large fines may be imposed. In some countries, culpable individuals may also be fined. In the US, individuals may be sentenced to prison terms of up to three years for each offence. It is important that fines and other penalties are sufficiently severe to create a deterrent, particularly given the difficulties of detecting and proving the existence of a cartel.

Where no written agreement exists, as will often be the case, proof of collusion rests to a large extent on circumstantial evidence. It may be difficult to distinguish between rational behaviour by firms reacting to independent decisions of competing firms and cartel-like behaviour. Given the difficulties of gathering sufficient evidence, competition law should try to encourage 'whistle blowers.' Leniency for those giving evidence against members of their alleged cartel has resulted in a jump in the number of cases reported in several countries.

The use of straightforward rules such as *per se* prohibition, simplifies the judicial process and provides clear guidance for businesses. But it is important that the rules are not so broad that they stifle conduct that could enhance competition.

Some countries treat cartel agreements as illegal regardless of whether the set prices or output are reasonable or not. Under such an approach, the prosecutor need only prove that an agreement was made and that it could be anti-competitive. It is not relevant whether the effect was in fact anti-competitive.

However, cartels are not always illegal *per se*, as in Canada, where the cartel must affect a large part of the market, or in Spain, Sweden and the UK where a rule-of-reason approach is adopted.

Agreements that may enhance competition should be carefully evaluated to determine their effects. An evaluation of five steps may be used:

1. Is the restraint inherently likely to restrict output and raise prices?
2. Is the restraint naked or is it obviously related to some pro-competitive integration of economic resources?
3. Will the restraint restrict output and raise prices, or otherwise create or facilitate the exercise of market power?
4. Is the restraint necessary to achieve asserted pro-competitive goals?
5. Do the restraint's pro-competitive benefits outweigh its anti-competitive risks?

Cartels are notoriously hard to prove and for this reason, laws try to capture a broad range of potential forms of collusion. For example, the agreements may be written or oral, formal or informal, and may or may not be intended to be legally binding. The law of Spain covers multiple possibilities that go beyond agreements, namely, "collective decisions or recommendations, or concerted or consciously parallel practices."

ii. Vertical agreements

Some agreements between an upstream firm, such as a manufacturer or wholesaler and a downstream firms, such as a retailer, may raise competition concerns. Attention has in practice focused on restrictive agreements in retail distribution. Examples of such agreements include:

1. Resale price maintenance whereby the retail price is fixed by the producer or a maximum or minimum price is imposed;
2. Exclusive distribution agreements whereby distributors are assigned exclusivity in a geographic area or over a particular type of customer or product;

3. Exclusive dealing arrangement whereby downstream firms are prohibited from dealing with competing producers or distributors;
4. Tie-in sale agreements whereby downstream firms are required to purchase a certain range of products before being allowed to purchase a particular product. An extreme example of this is 'full-line forcing' in which the downstream firm is required to purchase the entire product range;
5. Quantity forcing whereby downstream firms are required to purchase a minimum quantity of the product.

Vertical agreements are most likely to have harmful effects in markets in which either the upstream or downstream firm holds a position of market power. They will therefore usually be covered by the provisions in the competition law that deal with the abuse of a dominant position.

d. Abuse of dominance

Competition law is also required to tackle acts or behaviour by firms that constitute abuse of market power. This may be one of the most challenging and difficult tasks for the competition agency, because business practices that could be abusive may also promote efficiency. Careful rule-of-reason analysis is therefore essential. The impact on competition will be a matter of judgement in the end, based on unobservable phenomena as well as statistical data.

To assess whether a firm has a dominant market share, it is first necessary to delineate the market, as in other types of competition investigations. Whether a firm holds a dominant position in the market that has been identified depends on two factors, market share and barriers to entry. The actual size of the firm is not in itself relevant to the evaluation. A handful of large firms in a market may be operating under fiercely competitive conditions if their market shares are equally balanced and barriers to entry are low enough that a new firm could enter the market rapidly if incumbents raised prices above the competitive level.

Countries may use a market share rule of thumb as a quick and efficient way to identify competition concerns. As it is unlikely that a firm with below 35 percent of market share has a dominant position, such cases can generally be ignored by the competition authorities, while a firm with a market share of 65 percent or more is much more likely to hold a dominant position, if sufficient barriers to entry exist.

Sample definition of abuse of a dominant position of market power
<p><i>Prohibition of acts or behaviour involving abuse or acquisition and abuse of a dominant position of market power:</i></p> <ol style="list-style-type: none"> i. Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services; ii. Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or likely to have adverse effects on trade or economic development.
<p><i>Source: Model Law on Competition, UNCTAD, 2000</i></p>

In recent years, competition authorities have tended to move away from a straight calculation of market share and instead have made a more detailed and differentiated assessment based on barriers to entry. Barriers to entry refer to how easy it would be for a new firm to enter the market for production or distribution of a commodity in the event that incumbent firms were maintaining artificially high prices in the market.

The ability of a firm to deter entry through behavioural tactics as well as through market structure is increasingly recognised. Thus the competition authority should investigate alleged cases of abuse of dominance even in industries without obvious structural barriers.

Usually, a competition law will only provide some illustrative examples of 'abuse of dominance' practices. These lists are not intended to be exhaustive so much as suggestive and will leave scope for the competition authority to look at the specific features of each case. Practices include:

1. *Excessive prices.* Prices in a market may be high for a number of reasons including surges in demand or high unit costs, so a competition investigation should be concerned with the reasons for the high prices rather than the level of prices itself. It is also difficult for a government agency to determine a firm's costs, especially where the firm produces several products. Direct regulation of prices distorts these incentives and should therefore be avoided where possible.
2. *Predatory pricing.* This is the practice of a dominant firm selling its products at prices below cost to drive out rival firms or to prevent other firms from entering the market. This is a short-term strategy in which the firm expects profits in the future to outweigh the costs of lowering prices now. The consumer suffers because in the long-run output will be lower and prices will be higher.
3. *Discriminatory pricing.* This is the practice of charging different prices to different customers in the absence of cost differences in supplying them. It is a key strategy for a firm to maximise profits. Price discrimination is not necessarily harmful to the consumer: it may allow more customers to be supplied than would otherwise be the case, and discount schemes that raise the cost of switching suppliers may in many cases be beneficial to consumers. However, price discrimination can injure direct competitors or competitors of the favoured customer and should therefore be analysed by the competition authorities.
4. *Refusal to deal/supply.* Competition law does not generally require firms to deal with competitors and firms may have legitimate health, safety or quality reasons for refusing to deal with other firms. A refusal to deal is often used by a firm to enforce other anti-competitive practices such as resale price maintenance or selective distribution arrangements.
5. *Conditions of resale.* These may include fixing the resale price of goods, known as resale price maintenance, which is specifically proscribed in many countries, and maximum and recommended prices which may be allowed. In the US, resale price maintenance is illegal where there is direct or indirect pressure for compliance. Dominant suppliers may also make supply dependent on the acceptance of restrictions on the distribution of rival goods, in a practice known as 'exclusive dealing arrangements.' They may also impose restrictions on where, to whom and in what form goods are sold on. These practices

Barriers to entry in competition law and policy

- Structural barriers to entry arise from basic industry characteristics such as technology, cost and demand. The widest definitions suggest that barriers to entry arise from product differentiation (branding and advertising), absolute cost advantages of incumbents (access to technology, physical and know-how) and economies of scale (at the most extreme, natural monopolies such as utility distribution networks). Sunk costs, which must be borne by new entrants, have already been covered by incumbents have a double effect as they also increase the cost of exit.
- Strategic barriers refer to the behaviour of incumbents. In particular, incumbents may act so as to heighten structural barriers or threaten to retaliate against entrants if they do enter. This could include pre-emptive behaviour such as over-investment by incumbents raising the spectre of a price war if a new firm tried to enter the market. Governments may also act as a barrier to entry through licensing and other regulations.

Source: Model Law on Competition, UNCTAD, 2000

are not unequivocally harmful to competition, as they may lead to similar efficiency gains to vertical integration, but nevertheless, cases of this kind need to be examined on their own merits.

6. *Raising rivals' costs.* Likely cases arise where one or a few dominant firms try to raise the costs of smaller firms, for example by supporting higher wages across the industry, engaging the small firm in litigation, or raising spending on advertising.
7. *Tying sales.* This is the sale of one product on condition that the buyer purchase another product or products. Tying is often motivated by the firm's desire to maintain or increase its reputation for quality or product liability. The gains to the consumer from this must be carefully balanced against any anti-competitive effects that the tie-in may also have.

These activities demonstrate the existence of market power. In most cases, criminal remedies will not be appropriate to deal with abuse of market power except in extreme cases. The most effective long-term solution may involve restructuring in the sector.

e. Mergers and acquisitions

The rationale for merger control in a competition law is simple: it is far better to prevent the acquisition of market power than it is to attempt to control or to break up the market power once it exists. For this reason, most competition laws have some provisions that allow for pre-merger scrutiny. Most mergers pose little or no threat to competition in the market. However, some mergers significantly raise the risk of abuse by concentrating economic power within an industry.

Usually the mergers considered by competition authorities will be horizontal mergers between firms that are actual or potential competitors. The two firms will be involved in the same stage of production of the same commodity in a particular geographical market although vertical mergers – between firms at different stages of the production process for the same commodity – may occasionally have an impact in competition in one or other market.

The positive effects of mergers in increased productive efficiency, economies of scale etc. are significant, and flexible industrial structure reflects dynamism in the economy. Mergers should therefore be examined quickly, if at all, particularly if a decision has to be taken before the merger can go ahead.

Merger investigations should be closed as soon as there is enough information to demonstrate that the merger does not pose a threat to competition both to preserve the scarce resources of the investigative authorities and to avoid holding up the healthy operation of the market. For example, only mergers that involve or would create an entity with a certain market share may be subject to investigation, or a market share test may be used as a prima facie test of legality. The analysis should take account not only of the current situation but also of the dynamic of the industry and prevailing market trends. In fact, much of merger analysis is forward-looking as it assesses the likely future effects of the transaction.

Most merger control laws are written generally, stating that mergers are unlawful if they “substantially harm competition.” It is then left to the competition authority to interpret and employ the standard. Some competition authorities have made public the guidelines that they use to assess mergers, which helps firms to prepare for the regulatory response or to take preventative actions even before notification of the proposed merger.

A national competition law may or may not require companies to seek permission, or register their intention to merge before doing so. In most countries, notification is only necessary where the merger entity has or is likely to have a certain concentration of market power. In the US and the EU, there is a system of notification prior to the consummation of the merger. In other countries, mergers must be notified after they have been consummated, while in other countries, the system of notification is purely voluntary.

The Competition Authority

A key feature of a national competition policy is the agency charged with the implementation of the law. This section looks at relevant features of the authority and examines how they may be designed to ensure maximum effectiveness in implementation. In countries where the competition law has been heavily or completely revised, there has also been a tendency to set up a new administrative body for the law. There is no single efficient model for the structure of the authority, but some general considerations can be noted.

a. Composition of the authority

The authority should be a multi-member body made up of experts in law, economics, business administration and international law. Selection of the members should be done in such a way as to ensure the independence and quality of the personnel. There has been a general trend away from the appointment of public officials towards the appointment of trained economists and lawyers. The tenure of appointment for members should be long enough to allow members to develop expertise without developing entrenched positions. In some developing countries, qualified individuals may be hard to find, and it will take time and technical assistance to build up capacity.

Possible remedies in abuse of dominance cases:

- Orders to cease abusive behaviour.
- Imposition of fines on the firm. Criteria for fixing fines include gravity, time period, effect, non-enforcement, difficult market conditions, size and profitability of the firm etc. Fines on individuals and imprisonment will usually not be appropriate in abuse of dominance cases because there is no criminal intent
- Order to repay “undue profits:
- Divestment or division of firms
- Order to take action to ensure fair competition for other firms
- Award of damages

Source: A Framework for the design and implementation of a competition law and policy, World Bank/OECD, 1999

b. Independence

The independence of the competition authority is necessary to ensure that businesses and consumers have confidence and respect for the authority, although in some countries the authority is a quasi-governmental authority. If the authority falls within a Government ministry or is supervised by a ministry official, the agency may be, or at least may seem to be, susceptible to political influence. Budgetary independence is also important.

On the other hand, sufficient checks and balances need to be in place to ensure that the authority does not act over-zealously. The actions of the authority should be reviewed according to the competition principles set down in the law/policy, and the Supreme Court or other high judicial authority should be able to review the authority's actions.

c. Functions

The authority has four essential functions which should be separated to ensure the integrity of the agency.

1. *Investigation*: Making inquiries and investigations, *suo moto* and on receipt of complaints from businesses or consumers;
2. *Prosecution* of defaulting firms;
3. *Adjudication*: Taking the necessary decisions, including the imposition of sanctions or making recommendations for action to the responsible minister, imposition of immediate injunctions;
4. *Advocacy*: Informing and educating the public, conducting studies and publishing reports. Assisting in the preparation, amending or review of government legislation and policy on restrictive business practices, or other policies that has direct & indirect effects on competition policy.

d. Powers, sanctions and penalties

The authority needs strong judicial and administrative powers for conducting investigations, applying sanctions etc., while at the same time providing for the possibility of recourse to a higher judicial body, such as the national Supreme Court. To be effective in discouraging firms from engaging in anti-competitive practices, the penalties need to be severe. Possible sanctions that the authority could impose include:

1. Fines (in proportion to the secrecy, gravity and illegality of offences, or in relation to the illicit gain achieved by the activity);

2. Imprisonment (in cases of major criminal violations by a natural person);
3. Interim orders and injunctions;
4. Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure etc.;
5. Divestiture (in regard to completed mergers or acquisitions) or rescission (in regard to certain mergers, acquisitions or agreements);
6. Restitution to the injured customers.

Injured persons should also be able to use the findings of the authority as evidence in damage actions.

e. Capacity for making inquiries and investigations

The authority needs to have its own investigative staff, the power to access information and the resources to carry out in-depth studies. The authority should be able to launch an investigation on its own initiative or following a complaint by a person or an enterprise. The competition authority may need to have access to information held by government departments, such as the internal revenue, foreign trade, customs, etc which should be facilitated by the administrative set-up, and the collection of information from enterprises should also be facilitated by government regulation.

In cases where enterprises do not comply with requests for information, the authority needs to have the power to order persons or enterprises to provide information and to call for and receive testimony. In the event that the information is not supplied, the authority should be able to obtain a search warrant or a court order to gain access to the information. Of course, any investigation should be conducted according to the due process of law.

In order to retain the confidence of business in the authority, and to encourage cooperation in future investigations, the authority must be able to ensure the confidentiality of information obtained from enterprises containing legitimate business secrets. It must also be able to protect the identity of persons who provide information to the authorities and who need anonymity to protect themselves from economic retaliation. The law should also encourage 'whistle-blowers,' particularly in relation to cartels where hard evidence is notoriously hard to come by. These informants should be rewarded and provided with legal immunity.

f. Information dissemination and competition advocacy

This is one of the most important roles of the authority. To create a healthy competition culture in the country, and for the competition law to be truly effective, consumers have to be aware of their rights and have to be active in demanding them.

In many developing countries, consumer awareness is very low, and consumers generally do not recognise that the law is there to protect their interests. The authority must therefore have adequate resources to carry out programmes of consumer education and competition advocacy, perhaps financed these activities through a fund in which all fines imposed by the authority are collected.

The Competition Authority can play an important role in revealing any anti-competitive impact that other government policies might have and actively providing input to changes in the legislation. Improving access and opening markets by reducing barriers to entry through deregulation, privatisation, tariff reduction or removal of quotas and licenses and marketing board schemes are specifically highlighted as important objectives in the administration of the competition policy of several industrial countries.

This does not mean that the competition authorities have a direct mandate over commercial, regulatory and privatisation policies in these jurisdictions. However, through inter- and intra-governmental participation in the development of public policies and by making submissions and interventions in regulatory proceedings, competition authorities can wield influence favouring market-determined solutions.

In some countries, competition authorities can analyse whether regulatory measures from the public sector will negatively affect competition and strive to have any measures that unreasonably limit competition amended or abolished, or propose legislation that could enhance competition. This is mainly found in advanced industrialised countries, but might also be a useful provision in developing countries that are trying to liberalise in the face of domestic resistance.

Conclusion

The elements of a national competition policy outlined in this paper would together form a comprehensive framework to ensure that a country reaps the benefits of competition between firms while achieving its national development objectives.

Under most circumstances, policies to promote healthy competition will also lead to growth and development but there may be clashes and the relationship between the two needs to be given careful consideration by policy-makers.

Furthermore, economic, political and historical factors vary from country to country and the design of the competition policy must take this into account. For developing and developed countries alike, developing and implementing a truly successful competition policy requires an active debate involving all stakeholders.

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