Policy Brief

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Constraints Faced by Competition and Regulatory Agencies

Competition and regulatory agencies in developing countries face peculiar constraints. The main objective of competition policy and law is to preserve and promote competition as a means to ensure efficient allocation of resources in an economy. When properly designed and enforced, a competition and regulatory regime promotes economic growth and benefits consumers directly through lower prices, better quality and an improved choice of products.

However, the enactment of a law does not necessarily translate into an effective regime. Competition and regulatory laws are only an element of competition policy. Therefore, it is important for the laws to be realistic and capable of being implemented. In particular, developing and transition countries often fall short in implementing such laws for several reasons such as the lack of appropriate institutions, concerns of prioritisation, limited resources and qualified staff, deficient legislation, overlapping jurisdiction between the competition agencies and sectoral regulators, political capture, inadequate jurisprudence, among many others.

This policy brief uses theory, analysis and empirics to understand the challenges facing competition and regulatory agencies of various countries, particularly those of developing countries.

Introduction

Every country has different competition concerns that determine the nature of competition regime to be adopted. In countries, where former state-owned enterprises (SoEs) retain substantial power in the market, the development of a fair market environment is crucial to economic development. Taking the case of a competition law, the combination of socio-economic ideologies of the government and the obstacles created by political pressures are important determinants of its adoption and enforcement. It is recognised that the adoption of a competition law may encounter resistance from many groups in the society. For example, competition law would limit the ability of monopolists and those who have formed cartels to continue their anti-competitive practices and would be among the leading sections of the society to resist its implementation. This becomes a major constraint for competition agencies to start with.

Institutions for Competition and Regulation

In order to promote competition in a country, institutions are needed both generally and specifically at the sectoral level. Competition policy in some countries is influenced by objectives other than competition. The institutional requirement would vary on the basis of the size and structure of a nation's economy. The actual institutional structure might vary from country to country but the broad contours are similar. Furthermore, competition regimes in developing countries are often distinguished by the explicit inclusion of public interest objectives in addition to the efficiency objectives, which are most commonly the core focus of a competition regime.

As far as the actual structure of institutions is concerned, the one adopted by South Africa for implementation of its competition law is relevant. There is the Competition Commission of South Africa, which investigates anti-competitive conduct and monitors competition. Then there is a Competition Tribunal, which adjudicates on matters referred to it by the Commission and by the complainant. There is also the Competition Appeals Court, which considers appeals or review of a decision of the Tribunal.

Developing countries in terms of their geographical spread, size of economy and markets, extent of prevalence of anti-competitive measures, etc. are justified in their desire to put in place a multi-tier institutional framework. Many of them, however, might not be able to do so in view of concomitant constraints, some of which are discussed below.

The Constraint of Prioritisation

Often competition agencies in developing countries find a huge number of anti-competitive practices all around. It is physically impossible to handle all of them simultaneously due to their limited resources and capabilities. Competition agencies need to ensure that their resources are effectively allocated and casework prioritised. This, however, is not an easy task. They may tend to take up cases, which are more important and harmful to the economy and society. However, these cases may be more difficult to solve and by taking up such cases, the competition agencies may fall short in overall achievements which is vital for moving forward with their agenda.

The main factors usually considered by competition agencies are as follows:

- *Likelihood of competitive harm:* Focuses on the concept of exclusionary market power, which is the ability to raise prices above the competitive level or maintain supra-competitive prices by raising the costs of rival firms and thereby causing competitors to reduce their output;
- *Resources for investigation;*
- *Relevant market;*
- *Deterrent value of pursuing:* Indicates the likely consumer deterrent prevented;
- *Aggravating factors:* The blatancy and duration of the infringement are examples of aggravating factors; and
- *Policy considerations:* These could include new sectors, priority sectors, need for policy clarity, novel infringement, criminal cartels, etc.

Limited Resources

Despite possessing institutions and proper prioritisation, not all countries can successfully implement competition laws. The resource constraint for a vast majority of competition agencies entails a combination of a relatively small staff, lack of requisite technical skills and limited finances. In many countries, the limited number of staff places severe strain on the agency's ability to respond readily to queries and complaints, requests for data, and other appointments. Further, since some agencies deal with both consumer protection and competition matters, the volume and nature of complaints require much more human resources.

Regulatory and competition agencies are often unable to raise their own resources and are inadequately funded. For example, the following are the annual budgets of some countries:

- Argentina: US$738,525
- Jamaica: US$572,000
- Zambia: US$100,000

The competition agencies can raise financial resources through other means such as fees for notifications/complaints and charges for providing copies of publications/reports. It can be argued that generation of funds though publications etc. might detract from the primary objective of competition protection and advocacy. On the other hand, it does promote financial independence, which is necessary for competition agencies to perform their responsibility in an unbiased manner.

Skills Constraints

Regulatory and competition agencies are also constrained by a lack of technically able personnel whereas the number of cases/complaints is often very large. In most cases, the staff lack experience and the turnover rate is high. This results in the inability of competition agencies to readily identify offending practices and handle complex issues.

Technical assistance programmes might provide a supply of professionals through training not only in prioritisation of tasks but also in rigorous legal and economic analysis. Advanced developed countries can provide such assistance. Technical assistance can also be provided by multilateral agencies such as United Nations Conference on Trade and Development (UNCTAD), Organisation for Economic Cooperation and Development (OECD), and the World Bank. The Zambian Competition Commission has made use of such technical assistance from multilateral agencies. However, providers of technical assistance have to be well steeped in the cultural, legal and economic system of the country and should be able to tailor their assistance after taking into account the specific characteristics of such systems.

Table 1: Prioritisation Frameworks for Competition Agencies in Some Countries

Priority	The Netherlands	US	Japan	Germany	Korea
Cartels		✓	✓	✓	✓
Mergers	✓	✓	✓	✓	✓
Abuse of dominance and Monopolisation	✓	✓		✓	✓
Abusive Exercise of IPRs			✓		

Deficient legislation

Competition legislation is often not ideally suited for meeting its objectives and implementing it becomes very difficult for

competition and regulatory agencies. There is a tendency to import legislation from advanced countries without realising that there is no "one size that fits all" and without tailoring it to the level of economic development, availability of infrastructure and human capital and the existing political will. Moreover, the terminology used is often incomplete, confusing and ambiguous. The rules and laws are often inconsistent with the existing legal framework.

For example, the constitutional separation of powers between the legislature, executive and judiciary meant that the appointment of a bureaucrat as the head of the Competition Commission of India (CCI) was considered a constitutional violation by the Supreme Court which ruled that the CCI be headed by a judge chosen by the judiciary. In many countries, the legislation often turns out to be outdated. For example, in Peru, legislation does not counter some new anti-competitive practices including some forms of predatory conduct. Some legislation also does not provide for a prioritisation of complaints and implies that all complaints, however unimportant or irrelevant, have to be attended to.

Overlapping Jurisdictions

Though competition authorities and regulatory agencies are expected to perform different functions there is often a perception of overlap in their jurisdictions. This might lead to conflict. At other times certain issues pertaining to competition might be shunned by the competition authority as well as the sectoral regulator because of lack of understanding about the division of responsibilities. The boundaries between the roles of the economy wide competition agency and the sectoral regulators are often not well defined. Anti competitive measures might invite conflicting or inconsistent actions by the competition agencies and the sectoral regulatory authorities (see Box 1).

In many cases there is a tendency for each party to withhold punitive action as it expects the other party to act. A study conducted by the International Competition Network (ICN) reported that as high as 30 percent of the reporting countries see no interaction between the competition authority and the regulatory agency. Only 43 percent of the countries in which interaction is present actually have a precise definition of responsibilities. Detailed communiqués between the competition agencies and the concerned regulatory agencies might be a way of bridging such gaps in communication and delineating jurisdictional boundaries.

Box 1: Turkey: A Case of Confusion About Jurisdiction

The telecommunication industry in Turkey has suffered from a lack of communication between the telecom regulator and the competition authority. Incumbents (Turkcell and Telsim) tried to shut out the competition of ARIA, an entrant by denying it roaming services. According to Turkish Telecommunications Law, mobile telecommunication operators are required to satisfy economically feasible and proportionate requests from other operators.

ARIA went to the telecommunications authority, which drafted a roaming agreement and asked the concerned parties to accept it. The incumbents declined to accept this agreement and appealed to the International Court of Arbitration saying that the new agreement was not consistent with the initial concession agreement they had entered into with the Turkish Government. They also applied to the local courts for injunction arguing that acceptance of the roaming obligations during the process of arbitration at the International Court would lead to unrecoverable losses.

A desperate ARIA then asked the Turkish Competition Authority (TCA) to intervene. TCA decided to investigate as the matter fell in the realm of ex-post competition investigations, which are under its jurisdiction. However, it refused to consider the request for interim measures for providing the roaming services of incumbents. ARIA, therefore, had to wait for the results of the 18-month long investigations which were in its favour.

However, during the investigation period it was unable to attract new subscribers as it was deprived of national roaming. This could have been prevented if the competition authority had exercised its rights to determine specific conditions for access to infrastructure. However, it did not do so as it did not want to breach the *ex-ante* regulatory authority of the sectoral regulator.

Conflicts may arise because of a difference in the time horizons of regulatory and competition agencies and that of the government. Political objectives are short run whereas the outcomes of competition policy are obtained in the long run. A government might want to maximise revenues from the sale of a public utility company by selling it in one piece to a single private firm thereby enabling it to be a private monopoly This enables it to reap monopoly rents. Considerations of competition would not lead to the advocacy of such a sale. This has happened in Sri Lanka when it launched its reforms programme in the 1970s.

Lack of Political Will

Lack of political will is often a major constraint. The lack of government belief in a competitive environment and its understanding that certain sectors are the prerogative of the State, leads to delayed institutional implementation even after laws are enacted, such as in the case of Malawi (see Box 2).

Bureaucratic Constraints

Corruption is rampant in developing countries and the development of a competitive environment robs bureaucrats of the power to grant lucrative exclusive licenses to entrepreneurs. This implies that bureaucrats have an incentive to delay the implementation of competition rules. Even with the enactment of competition rules, monopolies might be sustained because of the collusion between the monopolist and the bureaucracy as a result of which potential entrants' efforts are foiled by bureaucratic blockades. In 1997, Mexico's telecommunication sector was thrown open to competition. The incumbent, *Telmex* continues to control approximately ninety five percent of Mexican lines and data traffic. From this it can be inferred safely, that the competition legislation is primarily on paper and was not implemented properly in this case.

Competition Culture and Advocacy

Competition culture, which refers to the awareness of the general public, the business community, politicians and bureaucrats about competition law and the benefits of competition, is either insufficient or totally absent in most of the countries. For example, in China there is excessive intervention by the Government in markets and in Indonesia some proponents of competition law have taken it to mean that the powers of minorities must be reduced. Augmentation of awareness requires public education, which should attempt to tackle the misgivings about competition. For example, a possible and fairly popular misgiving is that promotion of a competitive climate will encourage displacement of domestic entrepreneurs by foreign investors.

The public and government agencies also need to be educated about the benefits of competition, the functions and powers of the competition agency and how the public can interact with it. This entire set of activities is known as "competition advocacy". Competition advocacy is needed before competition legislation to ensure that rules made during market reforms are consistent with the competitive spirit and to counter the activity of interest groups trying to capture ground lost through recent economic liberalisation.

Competition advocacy consists of reviews of existing and proposed laws, outreach activities to educate the public and informing judges and legislators about policy-related matters. An example of a competition advocacy measure is the campaign conducted by the Polish Competition Commission under the slogan, which translates to "Don't let them rip you off". This was to inform the public about the possibility of seeking free legal advice from local consumer ombudsmen. In Australia, advocacy is done through newsletters, publications and toolkits.

Box 2: No Implementation after Legislation: The Cases of Malawi and Mexico

In many developing countries, new competition laws are not enforced because of lack of political will coupled with the interests of powerful individuals. In Malawi, although the Government claimed to support competition, the enactment of relevant laws was not followed with the establishment of relevant institutions. The Malawi Competition and Fair Trading Act was enacted on December 31, 1998 and brought into legal force on February 01, 2000. The Act provides for the creation of a Competition and Fair Trading Commission as Malawi's competition authority. However, due to the lack of financial and technical resources, the Government could not immediately set up the regulatory institution to enforce the Act.

In Mexico, competition is reduced by monopolistic structures. The situation was described by Jorge Castaneda, a former foreign minister, "The entire system is locked by political, economic and communications monopolies". There are two major examples of lack of competition in major industries in Mexico. The first is regarding a telecommunications company called *Telmex*, which is owned by Latin America's reputedly richest man, Carlos Slim Helu. Despite the altering of rules in 1997 to allow for competition, the company continues to control approximately 95 percent of Mexico's lines and data traffic. A second example is the cement producing company *Cemex*, which controls between 40-50 percent of the market. Although it is difficult to estimate the exact effect of the dominant position of this company, it is clear that Mexicans generally have to pay more for products and services than other consumers in the region. *Cemex* spokespersons dismiss the high prices as the result of peculiarities in the local market and high distribution costs.

Independence/Autonomy of Regulators

Independence, or the likelihood that competition authorities and regulatory agencies are able to implement policies without outside interference, is often not realised because of capture by political and corporate agents. Evidence indicates that some competition authorities lack the critical level of independence required for unbiased decision-making and policy implementation. While making pronouncements regulatory agencies often cannot go directly to the media but have to go through layers of government. The need for government approval in all interactions with the media in turn implies that the regulatory leverage exercised by these agencies is effectively curbed and their ability to freely interact with and inform the public is reduced.

A good regulatory/competition agency is expected to maintain an arm's length distance from the government and other political and special interest groups. An evolution of performance therefore also entails an assessment of independence. A common measure of independence is based on objective answers to a number of questions:

- Whether appointment involved some participation by the legislature or not;
- Whether some minimum qualifications were required for the executive of the agency to occupy office;
- Whether the term of office was fixed;
- Whether the term was less than four years;
- Whether there was collective decision-making;
- Whether appeals against the agency's decisions were restricted to the judiciary;
- Whether there was public dissemination of decisions reached; and
- Whether there was public consultation during decision-making.

Answers which are associated positively with independence (some participation by the judiciary, some minimum qualifications required for appointment of executive, a term of office which was fixed and more than four years, collective nature of decision-making, existence of public consultation and dissemination of decision making and the possibility of appeals only to the judiciary) fetch a positive score whereas negative answers fetch no score at all. An average of the scores on various questions is used to arrive at a measure of independence. At present the questions usually do not include those relating to many important aspects of independence such as financial/ functional independence, institutional independence and accountability. Further, research needs to be undertaken for incorporation of these aspects in indices measuring independence of regulatory/competition agencies.

A study conducted by Oliviera, Machado and Novaes for Centre for Regulation and Competition (CRC) reveals high average scores (the average has been taken as 29) for the International Competition Network (ICN**)** countries for the agencies regulating the electricity and telecommunication industry as well as banking and postal services. Agencies regulating transportation, water and aviation recorded low scores. The independence scores when averaged over the agencies belonging to each country show surprisingly that there is no tendency for the score to dip as we move from a more affluent to a less affluent country. Developing countries/emerging economies like Serbia, Latvia, Estonia and Brazil recorded scores, which were much higher than the average score of 4.6. The same tendency is observed for just the electricity and telecommunication sectors. Regression analysis actually reveals that the index of independence of an agency is linked negatively to the level of the Human Development Index for the associated country (which is an average of educational attainment, per capita income and longevity) but positively linked to the age of the agency.

These results bode well for the future of competition and regulatory agencies as many developing and emerging economies seem to have taken action to maintain the independence of these agencies in order to avoid threats to credibility in the future. It is also seen that with age agencies seem to get more independent over time. Thus, we should see higher levels of independence in the future. This is probably due to the impact of lessons learnt from the past.

Conclusion

While it is not possible to suggest the easiest options for competition agencies to tackle in their initial years, insights can be obtained from experiences of some agencies around the world (See Box 3). The common factor, however, in choosing the anti-competitive practices to handle first is the ease with which evidence can be obtained.

Competition policy and law in a specific developing country should reflect the level of economic development of the country concerned, the structure of its economy and its constitution and culture. It should not only contribute but should also be seen to be contributing to the lives of the people. It should be tailor-made for the specific country and not merely copied from a developed to a developing country. The design and implementation of competition law and the mix of policy instruments and enforcement priorities must reflect the institutional endowments and technical

Box 3: Cases Easy and Difficult to Solve		
Competition Agency in	**Easy**	**Difficult**
Jamaica	Misleading advertising, cases of discrimination, non-hardcore horizontal restraint and cartels	Where evidence is difficult to gather
Peru	Cartels and unjustified refusal to buy or sell	As above
Venezuela	Unfair competition cases	As above
Zambia	Exclusive dealings, horizontal and vertical mergers and acquisitions, deceptive conducts, mis-representations, and abuse of dominant positions	Predatory behaviour and transfer pricing
Zimbabwe	Price-fixing, conditional trading, bid-rigging and excessive pricing	Predatory pricing, conditional trading and unfair business practices
Bulgaria	Unfair competition	Cartels and abusive practices
Serbia	Where evidence and facts are easily available	Where information is required from competitors, consumers or institutions.

capacity of countries at different levels of economic development. Some suggestions can, however, be made to mitigate constraints:

- Giving priority to advocacy over enforcement activities has been suggested for competition agencies. Advocacy and enforcement support each other in a remarkable way. Enforcement becomes more effective as knowledge of competition law and policy disseminates as a result of advocacy.

- Further, for those developing countries that are in the process of enacting a competition law, it might be advisable to establish strong and predictable legal institutions, well-established property rights, flexible capital markets and those government and private institutions necessary for sustaining a robust market economy.

- A comprehensive competition regime requires a judicial system as a part of an institutional apparatus of antitrust enforcement. Many decisions of the competition agency are subject to judicial review. A serious problem with the judiciary in most developing countries is the low level of expertise of judges in antitrust issues. For those developing countries that have established the competition agency, collegiate (quasijudicial) decision-making could be the predominant structure.

- The strengthening of anti-cartel enforcement should be a priority for competition agencies in developing countries because hard core cartels raise prices, restrict supply, reduce innovation and can lead to artificially concentrated markets, waste and inefficiency.

- The relationship of the competition agency with other regulatory agencies and the issue of jurisdiction must be addressed. Competition agencies in developing countries should interact with sector regulators in order to ensure clarity with respect to jurisdiction and to develop opportunities to share information on responsibilities, procedures and policy. Further cooperation and interaction with other relevant competition agencies and sector-specific regulators, particularly by putting formal arrangements (joint working groups) in place for liaising with regulators concerned, with the purpose to promote competition in such markets should be encouraged.

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