Policy Brief

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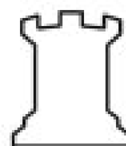
Effective Regulatory Regimes
Experiences of India, Kenya and Belgium



In the last two decades many countries have witnessed a rapid transition from price control regimes to market economies and have seen an accompanying increase in private sector participation in areas that were hitherto reserved for the public sector. A new role for the state has, therefore emerged. On the one hand, governments retreat from sectors where it used to be interventionist and on the other, it increasingly regulates these now-liberalised markets. By examining the competition and regulatory regimes in India, Kenya and Belgium, this policy brief sheds light on the best practices.

Introduction

When designing policy-making and related enforcement mechanisms it is essential that the economic agents' perception and likely assessment of the intended policy measures be taken into account. The behaviour of market actors is influenced to a great extent by the level of trust they have in the stability, predictability and impartiality of policy measures, and their behaviour in turn determines the successful implementation of policy objectives.

It is the nature of the political institutions that are crucial for the economic actors' assessments of policy credibility. In terms of regulatory regimes, therefore, this perception is influenced by the extent of the government's delegation of power and authority to the regulators and the accompanying guarantee by the Government of non-intervention in its functioning. This institutional independence is imperative for the regulator to perform, and be seen to perform, the challenging task of maintaining a judicious balance amongst conflicting interests and maintaining an arm's length distance from external influences and pressures.

The independence of a regulatory body from either Government or other external influences (stakeholders, interest groups, consumers) is two-dimensional. Firstly, the regulator needs to be completely independent of external coercion, and this largely depends on the level of *financial autonomy* the regulator enjoys. The second aspect of independence is *functional autonomy*. This aspect of independence need not be absolute and is usually governed by the dictates of the parent legislation that set up the regulatory body. However, it is essential that the regulatory body and the regulators be free to perform their assigned functions and adjudicate in a manner that ensures a level playing field for the different market players.

Tenets of Effective Regulatory Frameworks

Financial autonomy

Most regulators are dependent on government making funds available for their functioning, which leaves open the possibility and potential for abuse. Often these allocations are made without consulting with the regulators or keeping their requirements in mind and leads to regulatory officials 'lobbying' their cause in the corridors of the Ministerial secretariats. The natural fall out of this is an undermining of the independence of the regulators.

One way of establishing the financial autonomy of the regulatory body would be to leave the budgetary allocation to be determined by the executive branch of government, while mandating that this determination be in consultation with the regulatory body. Ultimately the budgetary allocation should be put before the Parliament to vote on thus minimising the government's control over the regulator's finances.

Functional autonomy

Policy Directives

Although the government has the power to issue policy directives to the regulatory body, this power needs to be a) contained specifically and clearly in the parent legislation and the issuance of such directives; b) in consultation with the regulator; and c) confined to non-technical and non-administrative areas and not to individual cases that may come up before the regulator.

Usually, however, public interest policies and pure competition principles are seen to be in conflict with each other, especially in cases where the elected representatives wish to appease their voters' vested interests and hence are not willing

to give up their influence/power over regulatory bodies. What is required then is an alignment between both the 'competition policy outcomes' i.e. the long-term economic gains and the 'incentives for politicians' i.e. the short term political gains.

What is required is a clear demarcation of the domain of functional responsibilities of the regulator with the State policy being clearly stated in the parent statute from the beginning. This would limit any government interference and subsequent directives in the name of policy enforcement, unless of course issued in consultation with the regulatory body itself, and allow the regulator a degree of separation from government influence.

Institutional Independence

Another element that guarantees institutional independence is the level of autonomy guaranteed to the regulatory officials under the parent legislation. The various parameters that govern the selection, appointment and removal of the Chairperson of the institutional regulator and its Members are indicative of whether the regulator is indeed independent, effective and efficient. Parameters include, but are not limited to:

- transparent selection process;
- clearly defined selection criteria;
- prescribed tenure;
- clearly defined disqualification criteria and specific grounds for removal; and
- ban on employment.

Expertise

Regulators require expertise in the relevant and related areas. The statute governing the regulator itself should specify the qualifications, experience and knowledge required for appointments on the regulatory body. The fields to qualify for selection should be wide enough to provide for a multi-member and multi-disciplinary tribunal. This would enable the regulator to tackle the relevant but varied aspects and issues that may govern the cases coming up before it. For example, expertise in the areas of economics, accountancy, international trade and commerce and related complex issues are likely to be highly relevant to and beneficial to the competition regulator.

Regulators need to be supported by experts and consultants who assist them on various specialised issues. However, it is seen that private sector experts and technocrats are reluctant to affiliate with regulatory bodies due to lack of adequate and competitive monetary compensation offered. There is also the problem of the requirement by the regulators to get governmental approval and face other 'entry barriers' before hiring or employing experts, which causes unnecessary hurdles for their association with the regulatory body.

Accountability

Autonomy and accountability go hand in hand. It is argued that there is a danger in allowing agencies to become too autonomous as they have no democratic legitimacy and are not accountable to any democratically elected body.

Allowing a regulator sufficient autonomy to take decisions in a judicious and competent manner without any interference or pressure, direct or indirect, from the government entails a reciprocal understanding that the regulator will then need to be held responsible for its functioning and related acts.

Once there is a clear separation of functions between the government and the regulator under the legislation creating the regulatory body, accountability will transfer from the government to the regulator. Parliament would then also need to be made aware of this independent and responsible role of the regulator to be answerable for any issues that arise out of the functioning of the regulatory body.

Where independence is conferred, regulators need to be aware that they will be held accountable for using or exploiting this freedom. This need could be addressed in the following ways:

- The regulator needs to ensure that its decisions and judgements, which should be published, are reasoned and preceded by observance of rules, regulations and the laid down procedures.
- Ancillary to the above role is the right to appeal the decisions of the regulator, which by itself contributes to accountability on part of the regulator.
- An important aspect of accountability is to be answerable to Parliament.

Developing Countries' Experiences

Like most developing countries, India and Kenya have also responded to their transition from price control regimes to market economies in the last two decades. The table below compares the competition regimes of the two countries on some of the tenets of effective regulatory frameworks discussed in the previous section with a view to evaluate the levels of credibility and predictability these regulatory institutions offer to the regulated stakeholders.

India	Kenya
The Competition Acts	
The Indian Competition Act of 2002 that set up the Competition Commission of India (CCI) replaced its predecessor, the Monopolies and Restrictive Trade Practices Act (MRTPA) of 1969 and the Competition Law Authority created under its auspices.	In Kenya the Monopolies and Prices Commission of Kenya (MCK) was set up under the Restrictive Trade Practices Monopolies and Prices Control Act of 1988 (hereinafter 'Kenya Act of 1988').
Financial Autonomy	
The financial autonomy of the CCI is undermined by the provision of Section 50 of Act of 2002, where the statute states that the Central Government may make to the CCI "grants of such money as the Government may think fit for being utilised for the purposes" of the Act. There exists no provision making it obligatory for the Government to determine these grants in formal consultation with the CCI, which could not only result in the budget falling short of the needs of this institution but also leave open the potential for undermining the independence of its regulators. Under Section 51 of the Act of 2002 an independent 'Competition Fund' is to be set up to be administered by Members of the CCI, as determined by the Chairperson. From the reading of the text of the provision the Government will not exercise any control over the fund and its utilisation. Whether this is so in practice remains to be evaluated. This form of 'automatic funding' is a welcome situation where the regulatory body, through the levying of fees and charges from the industry, may tap independent resources to raise funds for its functioning. However, care needs to be taken that such fees and charges need not be imposed beyond what is reasonably justified, possibly through the imposition of a 'cap' beyond which fees would not be levied, so as to minimise the chances of the regulator passing on its costs to its consumers.	In the Kenyan context, the Kenya Act of 1988 that sets up the MCK falls under the purview of the Ministry of Finance and what was in fact an institution set up in response to the demands by various stakeholders for an independent competition authority is under the absolute control of the Ministry. The MCK being a government department is solely dependent on government budgetary allocations. The MCK has no power to raise alternative funds through imposition of fees etc.
Functional Autonomy - Policy Directives	
Under Section 55 of Act, the legislation prescribes that the CCI will be bound by the Government's direction on questions of policy. However, the saviour is that the Government is confined to issue policy directives only in areas other than those relating to technical and administrative matters, and although not specific, this would be interpreted to mean that the Government might not issue directives on individual cases and administrative matters. Yet due to the ambiguous language of the legislation Government might still determine how certain types of mergers are to be viewed or other interpretative directions on key terms such as 'abuse of dominant position' under Section 4 of the India Act, and though it could be	In Kenya the decisions of the MCK are seen more as recommendations rather than binding orders and the Government influence is heightened as the approval of the Minister is sought before any decision is implemented. The Minister has the power to approve mergers and takeovers, determining the existence of restrictive trade practice and unlawful concentration of economic power. Although the Minister is expected and may seek the technical advice of the MCK, yet it sometimes results in regulatory uncertainty, as the legislation does not make it mandatory for the Minister to either seek this advice or to follow it.

<table>
<tr><td>argued that these issues fall under ‘technical matters’ on which the Government is prevented to intervene what is really needed is that the CCI and Government sit together and clearly draw out their turfs.</td><td>Such close links between the Ministry and the MCK might give rise to the perception that the MCK might also be able to partake in or influence government programmes and policies of interest to its stakeholders. However, this is not so in the case of the MCK. More often in the case of Kenya the regulators are the direct tow line of the political arm, and the essential requirement, of an impartial and unbiased regulatory authority that aims to balance the rights and interests of all its stakeholders without any external influences on its workings and thereby maintaining the trust and credibility with all its consumers, is absent. This kind of structure, however, is linked to the traditions and the institutional structure of Kenya and is difficult to do away with.</td></tr>
<tr><td colspan="2">Institutional Independence</td></tr>
<tr><td>Under the Act, Section 9 rightly gives the Government the power to appoint the Chairperson and the Members of the CCI, however, the selection is to be carried out “in the manner as may be prescribed” as per the Rules made under the primary legislation. The Collegium approach recommended by the High Level Committee on Competition Policy (2000) set up by the Government, was removed from the draft presented to Parliament and the Government has constituted the selection committee as it desired (appointing its own candidates for the selection panel), possibly to retain control over the selection and appointment of the Chairperson and Members of the CCI.

Upon the recommendation of the High Level Committee that the Chairperson should be one who has considerable knowledge in the area of international trade and commerce, the Act provides that the Chairperson and Members need not be only from the judiciary and could potentially be from any of the various disciplines identified in the legislation itself. It was argued that competition law is a socio-economic legislation and not just a framework for setting up a judicial body hence the net needs to be cast very wide in order that an appropriate person is selected for this post.

The Act aims to achieve some level of stability and independence in its staffing rules. It lays down certain eventualities that constitute grounds for removal and the Government has the power to remove the Chairperson or any Member of the CCI from office only after an inquiry by the Supreme Court. The Act also lays down certain eventualities that constitute grounds for removal and the Government has the power to remove the Chairperson or any Member of the CCI from office only after an inquiry by the Supreme Court. The India Act of 2002 prohibits the Chairperson</td><td>The actual appointment of the Chairperson/ Commissioner of the MCK is not provided for in the Kenya Act of 1988. It is assumed that this appointment is made from the general civil services system. This seems to be so in the case of other staff and officers of the MCK. Hence regulators appointed to the MCK are not independent experts in the field of industry, commerce or finance but are government employees working for the Ministry of Finance. Even in practice the Commissioner’s powers are not independent or absolute and he is placed under the supervision of the Permanent Secretary in the Ministry. The powers of the Commissioner are limited to receiving and investigating complaints and then making recommendations to the Minister of Finance for the final determination. Due to the political influence over the staffing of the MCK there is public suspicion of the regulators and the staff and this has posed a great hindrance to the work of the MCK.</td></tr>
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and Members, for a period of one year from the date they cease to hold office to accept any employment in or connected with the management or administration of any enterprise that has been a party to a proceeding before the CCI under the Act of 2002.	
Expertise	
Although the Act provides fields to qualify for selection that are wide enough to ensure a multi-member and multi-disciplinary tribunal, what is missing is the autonomy of the CCI to appoint officials at different levels and experts. The Act talks of hiring of experts to assist on specialised matters and cases, yet it does not empower the regulator to employ or hire experts either on a permanent or even on an *ad hoc* basis or to create new posts, without seeking Governmental approval first. The pay scales and remuneration offered by the Government are much below the market rates and hence do not attract candidates with the requisite expertise and experience.	An industry regulator and/or competition regulator generally undertake regulation. In the case of the former, the regulator may have a multi-sector or single sector focus. Cost constraints may dictate a multi-sector focus, although interestingly, Kenya has opted for the more costly single focus, possibly because such a steep learning curve is presented. Moreover, expertise from industrial countries is based largely on single-sector experience. The Act clearly states under section 3(2) that the Competition Authority is a Department of Treasury. All staff is appointed under the government civil service system. They are government employees working for the Ministry of Finance.
Accountability	
The CCI is bound by the Code of Civil Procedure 1908, as having the status of a civil court within the legal system. The Act also requires the CCI to prepare an annual report giving a true and full account of its activities during the year and forward it to the Central Government and to lay it before both Houses of Parliament. The Parliamentary discussion deal with systemic issues and procedures rather than individual cases brought before the regulators. It is also stipulated in section 52 of the Act that the accounts of the CCI will be audited by the Controller and Auditor General of India and his report will be forwarded to the Government and laid before both the Houses of Parliament.	Apart from the Minister and the Commissioner section 64 (1) of the Kenya Act of 1988 provides for a Restrictive Trade Practices Tribunal (hereinafter 'Tribunal'). The Tribunal is a judicial appellate body that hears appeals from Ministerial orders given in consultation and upon recommendation of the Commissioner. This Tribunal acts as a check and balance on the decision-making powers of the Minister and can overturn, modify, confirm and/or refer back to the order appealed against by aggrieved parties. The decisions of the Tribunal can be appealed to the High Court of Kenya.

Belgian Regulators

Belgium is a federal state, a representative democracy, a member state of the European Union and belongs to the group of industrialised countries. The value of experience of such a country for developing countries is not *a priori* clear and should be seen accordingly. The introduction of regulation in network industries (with the exception of financial regulation) and the adoption of a competition law are fairly recent.

Regulatory authorities that have been set up earlier (e.g. the Banking, Finance and Insurance Commission) are more independent in their functioning as opposed to later regulators (e.g. the railway regulator). Here, an attempt is made to identify the individual characteristics contributing towards a regulatory authority's position on the global independence index.

Competition Authority

The dualistic system introduced by the 'law protecting economic competition' in Belgium, divided the tasks between the *Competition Service* (charged with investigating cases brought before it) and the *Competition Council* (the decision making body) that acts mainly on the reports prepared by the Competition Service. The Council is theoretically administratively independent from the Ministry.

However, its budget depends on the Federal Public Service Economy and being part of the Service for Competition and Prices of the Federal

Service, is as such no discernible entity. Secondly, the Council also lacks competency to recruit its own Members and personnel, who come from the Federal Public Service through Government appointments. Another compromise with regard to the independence of its Members is that there are no formal barriers for part-time Members and potential personnel to have positions in the corporate sector.

Other Regulators

After a review of the various Belgian regulatory authorities what becomes apparent is that a preponderant aspect of independence has been the lack of financial autonomy. Taken together with restrictive rules on notifying concentrations the authorities are forced to spend most of their scarce resources to handle innocuous mergers and acquisitions. A regulatory authority without teeth can hardly claim to be a credible authority.

The Banking, Finance and Insurance Commission (CBFA) has over the years built up its credibility; hence it is argued that a sufficient period of existence can assist in creating a perception of stability. However, more than this aspect, the CBFA has historically had enough financial means to carry out its tasks and its general independence from the executive has been high.

The Belgian Federal Gas and Electricity Regulator represents the average European regulatory body on the global independence index. Most likely, this can be attributed to the rules regarding the constitution of its General Council and Executive Board. The former is composed of independent experts representing the various related areas within the sector and the latter's independence is secured though security of tenure, ban on employment and transparent and independent hiring rules.

Conclusion

In view of the inherent specific institutional, political and cultural differences between countries, each has to devise its own design of regulatory structures. In doing so, a country can look at experiences of other countries but it should not prevent them from customising their own needs by keeping, among others, the following in mind:

- Financial independence from Government – to be determined in consultations between Government and regulators and subject to legislative approval. Provision for 'automatic funding' through levying of justifiable fees and charges.
- Policy directives might remain the prerogative of the Government, yet these should not interfere with the Executive in technical decision-making and should clearly demarcate competencies and powers in the parent legislation.
- Recruitment of the staff should be transparent and through an independent body.
- High level of expertise should be ensured through independent and merit based hiring procedures for staff.
- Accountability of the regulators before the legislature should be ensured through the parent legislation.

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