

Competition Culture Key to Successful Competition Regime

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- Making competition work for consumers, businesses and economic growth

Introduction

The most fundamental step that should be taken by policy makers in any country that has made a commitment to embracing a more market based economy is to build a competition culture. Effective competition enforcement cannot happen without a strong institution. The agencies' role in making markets competitive through its enforcement actions to check anti-competitive practices and advocacy efforts to build a competition culture are extremely important.

It is conventional wisdom that for an effective competition regime, a competition agency must do more than simply enforce the competition law. It is important for competition agencies especially in developing countries to engage in competition advocacy and awareness generation.

Competition Advocacy constitutes all the activities conducted by the competition authorities relating to the promotion of a competitive environment through non-enforcement mechanisms.

Competition culture mainly involves being informed about the benefits introduced by competition, and development of the necessary awareness in the society as to the role possessed by the implementation of competition rules in securing such benefits. Enhancing the competition culture in consumers, businesses, and public institutions and organisations enables that it is rapidly adopted and implemented in the country and thus add to economic growth.

The public at large are not aware about the existing positive elements of the economy resulting from the prevailing competition regime in the country. It is important to orient and inform the common man on the benefits of a competition law and policy in order to ensure their support and sense of ownership towards competition reforms. This would not only

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ensure the process of competition enforcement relatively less difficult but also enhance the visibility of the law and the enforcement agency among the stakeholders.

Existence of a competition culture has obvious benefits for enforcement: businesses will more readily comply voluntarily with the competition law; businesses and the public will more willingly co-operate with enforcement actions, by providing evidence and the like; and policy makers will more enthusiastically support the mission of the competition agency. In this sense, enforcement and advocacy are mutually complementary. Enforcement is strengthened by an active advocacy, and advocacy cannot be truly effective in the absence of effective enforcement².

Furthermore, the paper suggests guidelines for enhancing the competition culture through building a Friends of Competition³ campaign in each country, using various tools. One tool for example is focusing attention of the people through observation of UN Days, which cover a variety of public welfare issues. Brazil observes the Anti-Cartels Day every year on 8th October, while the European Union observes European Competition Days around member states on random days in the year. The paper highlights advocacy of a World Competition Day to be celebrated on 5th December every year⁴. On this day in 1980 the UNCTAD Set on Competition Policy was adopted by the UNCTAD Conference on RBPs. Many countries have already supported the Day, while The Philippines has declared it as National Competition Day through an Official Proclamation.

Characteristics and Importance of Competition Culture

A healthy competition culture is the hallmark of a good competition regime and competition advocacy is a basic prerequisite for this. The lacklustre performance of competition policy and law in many countries is primarily due to the failure to recognise the importance of competition advocacy and subsequently, competition culture. A properly designed advocacy programme plays an important role in discouraging and sometimes eliminating anticompetitive practices. As prevention is always better than cure, advocacy not only reduces the incidence of anticompetitive practices but also substantially reduces the need for enforcement action, thus saving costs on both counts. In this regard it is extremely important that civil society especially consumer organisations and advocacy groups, be closely involved in the advocacy efforts of the competition authorities. This will give not only better outreach

² International Competition Network Conference, Naples, Italy (2002) Advocacy Working Group Report
Advocacy and Competition Policy, Executive Summary, page iv

³ <http://cuts-international.org/FOC.pdf>

⁴ http://incsoc.net/World_Competition_Day.htm

but also acceptability as there is a danger otherwise that the efforts of the competition authorities may be taken as a mere publicity drive

The existence of a competition culture has an extremely important role in the success of a competition regime. Competition culture in consumers, business circles, and public institutions and organisations enables that competition culture is rapidly adopted and implemented in that country.

For example competition authorities depend on a continuous supply of evidential and supporting information to expose and make determinations with regard to the effect of certain business practices on domestic competition. Only a knowledgeable and aware community will provide such cooperation. The lack of such a culture has plagued practically all young agencies.

Not surprisingly, competition agencies and the public in developing countries sometimes have special training needs that grow out of their countries' historical lack of competition culture. And since most developing countries lack a suitable competition culture, it is important for competition agencies to begin the process of building one through effective advocacy programmes

Some of the traits why competition culture is strong in some countries are:

- participation of the competition agency in regulatory reform and privatisation processes;
- a long experience with competition policy;
- resolution of cases with significant media coverage;
- existence of specialised competition tribunals;
- interaction with academic institutions/universities, publication of decisions, case studies and
- personal leadership of the head of the competition authority.

Reasons for a weak competition culture are:

- recentness of competition legislation;
- lack of experience by courts,
- lack of acceptance of competition principles by authorities
- lac of public awareness among others



In order to build culture of competition, the fundamental steps that should be taken by policy makers can be to conduct an assessment of the country's most basic needs and priorities in relation to competition. Such an assessment should cover three principal areas:

- an evaluation of the level of understanding of the benefits of competition, its strong links to other policy areas, and the level of commitment to competition among key constituencies in the country;
- the nature and extent of institutional restrictions on competition; and
- the effectiveness of any regime that may exist for addressing private anticompetitive conduct, or, in the absence of any such regime, what would be required to establish one.

The role of consumer advocacy and the media are necessary constituents to improve governance and create the right checks and balances in the system. Media plays an important role as a countervailing force against the nexus between government and business. In this context, the role of the consumer movement is also vital. Here one has to admit that the consumer movement does not exist in all countries. Even where it does exist, it may not have sufficient capability, financial and skills, to be able to advocate effectively. However, there are other types of civil society organisations (CSOs), which often fill this gap.

Competition Advocacy

Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of

*non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition*⁵

Competition advocacy comprises all activities by competition agencies promoting competition, which do not fall in the enforcement category. It comprises all efforts by competition authorities intended to make other government entities, the judicial system, economic agents and the public at large more familiar with the benefits of competition and with the role competition law and policy can play in promoting and protecting welfare enhancing competition wherever possible.

This implies a variety of activities among which seminars for business representatives, lawyers, judges, academics, etc. on specific competition issues, press releases about current enforcement cases, the publication of annual reports and guidelines setting out the criteria followed to resolve competition cases, are just a few examples. It is generally recognised that such activities enhance the transparency of competition policy and law along with the credibility and the convincing power of the enforcement agencies.

All such activities contribute to establish competition culture, which is perhaps best characterized by the awareness of economic agents and the public at large about competition rules. Thus, all efforts on behalf of competition authorities to make these rules known and understood are positive contributions to the competition culture

It has often been argued that in transition and developing countries, competition authorities should give priority to advocacy over enforcement activities. One of the arguments is that in those countries many economic sectors are privatised which gives rise to an intensive rule making process in which competition advocacy has an important role to play.

Autonomy of competition authorities is generally considered important to keep effectiveness of competition advocacy. However, there is nothing like a one size fits all concept to guarantee autonomy. Autonomous decision-making could be enhanced through legal provisions, making special emphasis on the appointment mechanisms of the head/chairperson of the agency, other aspects such as human resources, budgets etc also have considerable impact.

Evaluating and identifying competition advocacy issues:

When competition agencies engage in competition advocacy, they may aim to:

- persuade other public authorities not to adopt unnecessarily anti-competitive measures and help them to clearly delineate the boundaries of economic regulation;
- raise awareness of the benefits of competition, and of the role of competition law and competition policy among economic agents, public authorities, the judicial system and public at large
- ensuring that firms have a compliance programme in place and in order to incentivise firms to have such programmes in place, presence of the same can be 'rewarded' through lesser penalties in the event of a violation by such firms.

⁵ Advocacy and Competition Policy, ICN advocacy working group, ICN Conference, 2002

With these aims in mind, competition protection agencies may:

- assist other authorities to assess the impact they exert on competition when choosing among the different options for implementing a policy
- provide technical expertise regarding particular industries or markets to other policy makers;
- seek to resolve identified contradictions between competition law and other laws or regulations;
- increase in the awareness that leads to improving the well being of consumers and contributes to economic growth

Challenges faced by competition authorities in building competition culture

Up till now around 130 countries in the world have some sort of competition legislation to foster competition within their country. Most of these competition legislations are relatively new. In particular since the 1990s, the number of countries that have a competition law increased considerably. Some of this proliferation of competition laws is related to regional bilateral and multilateral trade agreements with a view of securing the benefits from lower trade barriers and open markets which may potentially be undermined by anti-competitive practices with their possible effects in other jurisdictions (e.g. international cartels)⁶.

However, it has been seen very common that despite enactment, countries often fall short of implementing and enforcing the law effectively for several reasons, e.g. lack of competition culture, scarce resources, lack of experience, bureaucratic and political resistance, vested interest etc. In this respect CUTS states that “enacting a competition law may not necessarily translate into an effective competition regime. It came out very clearly in the 7-Up (CUTS) projects that competition regimes in most of the countries selected therein are quite ineffective” (CUTS 2003b, p. 1). Furthermore, in a study by ICN, the point is made that “capacity building is a central challenge for the vast majority of the International Competition Network’s (ICN) members” (ICN 2005, p. 1)

Buy-in of key constituencies is critical⁷

Experience strongly suggests that the building of a competition culture within a developing or transition country is likely to be slow and feeble at best unless key stakeholders understand the benefits of competition and aware of at least some of the important links between competition policy and other important policy areas, and believe that greater competition in the economy will in fact improve the well-being of most people in the economy.

In this regard, the key stakeholders include politicians, bureaucrats, the business and legal communities, sectoral and other regulators, academics and the media. If any of these stakeholders do not understand the benefits that typically are associated with greater competition, or if they are sceptical about the prospects for those benefits to materialise

⁶ Franz Kronthaler and Johannes Stephan, 2005

⁷ <http://cuts-international.org/FOC.pdf>

within an acceptable timeframe, the process of transitioning to more competitive markets may be difficult and characterised by regressive periods along the way.

Accordingly, consideration should be given to adopting a comprehensive strategy for building support and enthusiasm for competition among these stakeholders, as well as among the general public. This is where the media and educational institutions can be particularly helpful. By sensitising journalists, professor and students to the benefits of competition and the various ways in which competition can be distorted, advocates of competition can cultivate important allies who are capable of galvanising public opinion in support of pro-competitive reform in various sectors. In turn, public support for greater competition can make it much more difficult for politicians to abandon, undermine or resist market reform efforts.

‘Political will’ turns out to be a key factor that determines the successful adoption and implementation of competition law. In Malawi, although the government claimed to support competition, the enactment of relevant laws was not followed with the establishment of institutions. There are various other similar cases from other countries as well where national constitutions always carry some provisions, but they are not translated into laws to provide the necessary enforcement backing.

If competition agencies is to yield all the envisaged benefits of competition law and policies, political will and consensus for reform is necessary. Adopting or strengthening an existing law by itself will not help. As political will is not created in vacuum, international efforts do make a difference. As a result of these multifarious efforts, some countries have adopted or amended competition laws, while others are making significant progress towards this end.

Business and their associations generally oppose competition regimes as they feel that it would reduce their market share and hence business profits. In most developing countries, economic power is concentrated and such businesses usually fund political activities and have great influence over economic decisions that politicians make. Under the circumstances, adoption and implementation of competition regime may easily fall prey to being captured or sidelined by powerful vested interests. In Thailand, for instance, though the government enacted its second competition law in 1999, to date it has had very limited impact due to the unholy nexus between politicians and businessmen and cronyism.

Capacity Constraint impedes spreading of competition culture. In many developing countries, competition and regulatory laws are entirely new concepts. In several cases, such laws have been adopted due to external pressure. Consequently, very few officials in the public service and political establishment appear to have understood what the new regime means and what it takes to have a well functioning regulator.

When agencies are poorly staffed, a greater likelihood exists of pursuing enforcement priorities that lead to errors in mistaken prosecution of procompetitive conduct or non-prosecution of anti-competitive conduct. These enforcement errors reduce both public and government confidence in the competition authority.

Recruitment of professional and technical staff and building their capacity is a particular challenge. The competition agency has to arrange for relevant training for its personnel. The vast majority of developing countries do not offer courses and/or continue with legal education programmes specific to competition/regulatory law and its enforcement.

Kovacic (1997) gives a list of factors that make competition law enforcement a difficult task for developing countries' authorities, to which one could add a few more elements in order to get the following set of obstacles:

- Resources are extremely scarce;
- Professional expertise is lacking;
- Jurisprudence is inadequate;
- Academic infrastructure is weak;
- Professional associations and consumer groups are not active enough;
- Judicial systems are deficient;
- The public sector suffers from a bad reputation (excessive bureaucracy, lack of transparency and corruption); and
- Political and bureaucratic resistance to reform is high

Need for Capacity Building for Implementing an Effective Competition Regime

CUTS experience on the series of competition reforms project in developing countries (7Up projects⁸) reflected how competition authorities went about implementing their competition laws, and what type of problems and hurdles they encountered. It is indeed true that many a time capacity that has been created or built is not used effectively. Therefore, proper utilisation of existing capacity is as important as building new capacities.

Following are some ideas through which such capacity building programmes can be undertaken by agencies to build effective competition regimes:

1. Awareness Generation

a. Media: One good method of creating public awareness is through media interaction, advertising and publicity. Besides, publication and distribution of literature through various targeted means is also desirable. This is a dynamic process that needs to be ratcheted as and when the authority decides cases, which helps to put the issues in the right perspective. Publicity without examples is quite dry, and people do not understand the issues. Writing regular periodical columns can also be very helpful

b. Public Meetings: Well- designed and implemented public meetings with simple literature can be very effective in raising basic awareness. The meets can also be organised as sessions during other meetings in an organisation. There are several such opportunities: professional association meets, trade union and staff association meets, and even staff annual meetings. These types of activities can best be executed by the consumer movement and/ or the compliance and education departments of the competition authorities (to be set up where they do not exist, and properly resourced, where they do exist)

c. Vehicles: It is important to identify a raft of institutions (vehicles) who can carry out these activities. The competition agency alone cannot do it. For example, bar associations, consumer organisations and advocacy groups, business chambers, professional associations etc should be roped in to assist the awareness generation programme

⁸ <http://www.cuts-ccier.org/7Up-model.htm>

2. International Competition Day

International days are observed to focus attention of the society at large on certain specific and relevant aspects of contemporary human development. Increased awareness and informed public opinion have been formed on a number of issues, once public attention on these issues were focused by dedicating a certain date of the calendar year on them. World Environment Day, World Women's Day, World Aids Day, World Consumer Rights Day, etc. are some examples.

One of the tools for enhancing competition culture and gaining mass attention is through observation of UN Days, which cover a variety of public welfare issues. Brazil observes the Anti-Cartels Day every year on 8th October, while the European Union observes European Competition Days around member states on random days in the year. Similarly, CUTS is advocating for a **World Competition Day to be celebrated on 5th December** every year⁹. On this day in 1980 the UNCTAD Set on Competition Policy was adopted by the UNCTAD Conference on RBPs. Many countries have already supported the Day, while The Philippines has declared it as National Competition Day through an Official Proclamation.

CUTS has maintained that 5th December should be selected as the World Competition Day, precisely to recognise the contribution that the UN Set has made in popularising the need for competition reforms among some government

3. Specialised Courses

It would be useful especially for the counties where the agency is still in nascent stage to offer both long term and short term training courses by universities, and colleges. Business chambers, professional bodies, CSOs and development research and training institutes can be roped in to offer such courses

In fact looking at this vacuum, CUTS has conceptualised a specialised institution called CUTS Institute for Regulation and Competition (CIRC) <http://www.circ.in/index.htm> which aims to fill in the prevailing gaps and enhance knowledge on competition and economic regulatory issues.

The overall approach will help to build up a cadre of competition and regulatory professionals in the country, which can appreciate and build the competition culture

4. Case study seminars and handbooks

The focus here would be on competition law enforcement and targeted at members and the staff of competition agencies. A small panel of experienced competition law enforcement officials from the developed and developing countries would be drafted into such programmes, as is being done by the OECD secretariat and other competition authorities such as the US Federal Trade Commission and Department of Justice. In such seminars, they discuss various recent cases handled by them in various countries. The cases are chosen carefully so that they bring into light the different dimensions in otherwise similar looking cases. In so far as possible, case studies from the country or the region will be good training materials.

⁹ http://incsoc.net/World_Competition_Day.htm

Case study seminars and handbooks will need to be designed to include various types of competition abuses in one category, with examples brought in from several jurisdictions to train competition officials and other stakeholders.

Thus judges and lawyers interested and involved in competition law enforcement should be given special training on competition issues. In order to assist in developing the relevant jurisprudence, publication of a handbook outlining how other jurisdictions have dealt with for instance 'rule of reason' cases, would be quite useful.

4. Exchange of officials

Although pedagogic training is necessary, there is no substitute for practical experiences. Thus it would be useful for the competition officials of new or inadequately developed competition authorities to see how the competition authorities in other countries handle different cases. This can be done through exchange of officials and experts. On one hand, officials from new and underdeveloped countries can do internship or study visits to other countries' competition authorities to gain first-hand knowledge there. On the other hand, experienced staff from competition authorities can visit underdeveloped competition authorities for short duration and guide the officials there in handling their cases.

5. Engagement with private sector/CSO

In order to orient relevant people on enforcement of the competition law, the authority could invite officials from the private sector and consumer activists on short-term secondment to them. That will provide valuable cross-fertilisation opportunities and ensure that neither an anti-business nor an anti-consumer mentality infects the authority or its staff persons.

6. Seminars on competition and regulatory issues

The awareness on competition and regulation issues in general is at an extremely low level in most of these countries. Because of this, the governments find it easy to put retired bureaucrats and judges in or send people from government ministries/departments on deputation/secondment to the regulatory authorities on the pretext that they are the only people who have some understanding on these issues.

In the overall, such handling of competition law creates an atmosphere of regulatory inertia and/or capture which makes the entire regulatory system ineffective. Therefore a number of such events need to be organised to build greater awareness on these issues among the different stakeholders, especially among the consumer organisations

7. Research

Research is extremely crucial for investigation and prosecution. Often cases can fail for want of adequate or even sufficient information and analyses. This can be quite crucial for determining the success of the competition regime and the concomitant internal confidence and external support. Very often, the competition and regulatory authorities find that the business entities are their only sources of information. Ironically these are the entities that are supposed to be regulated, and prosecuted when found engaged in anti-competitive practices. As a result, it has been seen frequently that there is not enough background material or competition agencies cannot do proper analysis of cases by virtue of which the prosecution fails or doesn't deliver the desired results.

8. Strengthening the consumer movement

This can be done by resourcing and strengthening the capacity of consumer organisations and similar NGOs to do research and bring forward complaints before the competition authority. In India, this environment does exist but much more needs to be done. Often consumer organisations run from hand to mouth, or are managed by part time volunteers. Thus they cannot effectively participate in bringing forward complaints on anticompetitive behaviour. They need to be professionalised and resourced accordingly

Conclusion

It is important that competition agencies in all countries engage in competition advocacy, but the picture above suggest that it is especially critical for those in developing countries to do so. There are certain events that occur in the formative stages of a market economy, including privatisation and regulatory reform, which will significantly impact how the new economy develops. It is better to accomplish these changes properly at the outset than to amend them later, and the participation of the competition agency as an advocate for competition has obvious value to that end. Further, most developing countries lack suitable competition cultures, and it is important for the agency to begin the process of building one.

These circumstances suggest that competition agencies in developing countries should be relatively more active in competition advocacy than their counterparts in developed countries. At the same time, however, they may lack the foundation for doing so – they may not yet have acquired the independence, the resources and the credibility necessary for effective advocacy.

There is no obvious solution to this dilemma. The agency must simply exercise good judgment in selecting and pursuing its advocacy projects. It must seek out matters that are economically important, politically visible, that will not occupy too many resources and in which the agency has a reasonable chance of success. It must give on going attention to building a competition culture through aggressive public relations and dissemination of information. And importantly, it must not neglect its law enforcement responsibilities.

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