COMPETITION AUTHORITIES AND SECTOR REGULATORS: WHAT IS THE BEST OPERATIONAL FRAMEWORK?

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Following the introduction of market reforms, sector regulators were put in place to control anticipated market failure, and part of their mandate included ensuring that there was fair competition in their respective sectors. The need for regulation of competition in the whole economy, however, saw the enactment of competition laws with competition authorities being given the mandate to regulate competition in all sectors of the economy. This ushered in some level of confusion and conflict as by implication sector regulators, which preceded the enactment of such competition laws, had to give up a portion of their 'authority' (relating to competition issues) – a diminution of mandate which these did not welcome. This viewpoint paper makes an attempt at suggesting the most ideal model on which the two set of regulators can co-exist from the point of view of social/economic welfare.

Introduction

Firms that are in dominant and monopoly positions would strive to abuse that position through engaging in anti-competitive behaviour. This is one rationale for the introduction of regulatory regimes, i.e. to monitor and control such abusive behaviour, and mimic competition where there are natural monopolies. Regulators generally fall into two categories – those with a mandate pertaining to specific sectors (sector regulators) and competition authorities, established to enforce national competition laws. Competition authorities have a regulatory mandate over competition issues which cover all sectors of the economy. The two sets of regulators share a common goal of protecting and enhancing social/economic welfare.

Despite sharing a common goal, it needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Competition laws seek to protect the process of competition, not agents in the market with a view to maximising productive and allocative efficiencies. Competition rules tell the agents in the market what they should not do, while sector regulation does the reverse and tells market agents what to do (CUTS, 2003).

The differences in the methods and approaches to competition matters may result in different outcomes, thereby causing confusion for stakeholders and also leading to forum shopping. Moreover, there is normally an absence of clearly defined jurisdiction in regulatory matters, leaving a lot of subjectivity as to which of the two authorities can be more effective in handling specific cases. This also results in regulatory authorities being asked or forced to reverse their decisions by line ministries, thereby undermining their authority. There is, therefore, a need for defining boundaries between mandates as well as understanding respective competencies to ensure that each regulatory body is given a mandate that is best suited for it.

Possible Approaches

In terms of the regulatory roles, there are three distinct aspects of regulation that can be identified, namely technical regulation, economic regulation and competition enforcement. Competition enforcement generally entails the control of abuse of dominance, anti-competitive agreements and anti-competitive mergers & acquisitions (M&As), using provisions of the competition law. The Organisation for Economic Cooperation and Development (OECD) defines technical and economic regulation as follows (OECD, 1998):

(a) Technical regulation involves setting and enforcing product and process standards designed to deal with safety, environmental and switching cost externalities; and allocating publicly owned or controlled resources such as spectrum or rights of way.
(b) Economic regulation implies directly controlling or specifying production technologies (other than those linked with setting common technical product standards); eligible providers (granting and policing

licences); terms of sale (i.e. output prices and terms of access); and standard marketing practices (e.g. advertising and opening hours).

The OECD also identifies and defines 'access regulation' as ensuring non-discriminatory access to necessary inputs, especially in network infrastructure. In this paper, this is assumed to be part of competition enforcement as this is linked to refusal to deal. In this paper, we adopt the OECD definitions of technical and economic regulation.

The United Nations Conference on Trade and Development (UNCTAD) identifies five possible frameworks that can be used in resolving the conflicting mandates (UNCTAD, 2006). These are as follows:

(a) Combining technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority;
(b) Combining technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions;
(c) Combining technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority;
(d) Organising technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority;
(e) Relying solely on competition law enforced by the competition authority for all aspects of regulation.

Many countries use a combination of the above approaches. For example, in Australia the approach involves both (d) and (e). While the Australian Competition and Consumer Commission (ACCC) has technical, economic and competition regulatory roles, where state regulators exist, they are given technical and economic regulatory responsibilities. Such combinations are also being followed by Canada and France (b and c); US and Zimbabwe (a and b); and Indonesia (a and c). Brazil, Tanzania and India use only approach (a), while Kenya, Malawi, Mauritius and Zambia use approach (b). Portugal, South Africa, Namibia and UK use approach (c), while New Zealand has opted for approach (e).[1]

Arguably, technical regulation does not have much direct relevance to competition concerns. Ongoing monitoring and application of sector specific expertise is needed, and such a function can best be served by a sector specific agency. Technical regulation also requires more frequent intervention and continuous assessment of performance against set standards, which makes it more suitable for a sector specific authority to handle the task.

On the other hand, competition enforcement can best be handled by the competition authority. Competition law generally applies to all sectors of the economy, and its implementation should be consistent across sectors; hence a more general approach rather than sector specific approach is desirable.

Technical regulation is generally regarded as an *ex ante* exercise while competition enforcement is generally an *ex post* exercise (except in merger analysis, which is generally a forward looking exercise). Moreover, technical regulation is generally a structural issue, while competition enforcement qualifies as a behavioural issue. Thus, it makes sense to give the responsibility of behavioural and *ex post* issues to the competition authority while structural and *ex ante* issues are handled by the sector regulator.

Economic regulation, however, adds some complication to the whole debate. Like technical regulation, economic regulation is also an on-going rather than periodic exercise requiring sector-specific knowledge. This may imply that it is best handled by the sector regulator. But at the same time, the specification of production technologies, granting of licenses, determining terms of sale and marketing practices have a direct bearing on competition. The procedure used by the sector regulator might for example result in exclusive licensing and marketing as well as imposition of significant entry barriers, which a competition authority may see some reason in challenging.

It is also important to note that even under technical regulation the input of the competition authority may still be needed on matters affecting market structure and concentration. Conversely,

[1] This country classification (excluding India) is based on UNCTAD, 2006

the competition authority may also recommend remedies that impede the mandate of the sector regulator. This shows the limitations of giving exclusive jurisdiction in critical matters. This is the basis for the adoption of concurrent jurisdiction approaches in various countries.

Concurrent jurisdiction implies that both competition authorities and sector regulators have mandates in regulatory matters, regardless of the issue. This implies that the two regulators have to find a way of harnessing their respective expertise. This is the approach used in the UK. The Competition Act 1998 gives concurrent powers to the Office of Fair Trading (OFT) and sector regulators in enforcing anti-competitive agreements and abuse of dominance provisions. As a way of avoiding confusion and dilemma over which agency to preside, the Competition Act (Concurrency) Regulation 2000 was adopted which spells out the procedure to determine which authority is best poised to deal with a case.

Even though the concurrent jurisdiction approach could be successful in UK, it is difficult to adopt such an approach in a developing country, where vested interest and regulatory capture could undermine the principles for deciding which institution is best suited to handle issues. In addition to causing confusion for the regulators themselves, this also confuses stakeholders, who may not know which institution to approach.

Conclusion

Due to the difficulties in delineating functions, the best approach is one which involves cooperation between sector regulators and competition authorities. The starting point however is to try and appreciate the difference between technical issues and competition issues. The sector regulators should have the leading role in regulating technical issues. Thus for structural issues, which in most cases are *ex ante,* sector regulators should take a leading role. For competition issues, which are largely behavioural and *ex post,* competition authorities should take a leading role. However, though either agency can take a leading role, there should always be consultations between the two bodies to ensure that remedial measures taken by one agency are not against the mandate of the other.

For cases in which it is difficult to classify either as structural or behavioural, there could be some complications. The competition authority should be allowed to carry out a competition analysis while the sector authority examines related technical issues. Both regulators need to be satisfied before the transaction can go ahead. Deadlines can be used to ensure urgency, or else there might be delays in getting the necessary approvals. Cooperation and consultation is therefore of paramount importance. In European Union (EU) member states, both sets of laws (competition as well as that pertaining to sector regulation) mandate, the need for the two agencies to confer with each other, while leaving behavioural issues to the competition agency and structural issues to the sector regulator. This appears to be the best model to ensure that there is cooperation and joint resolution.

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