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**Objectives and Scope of Competition
Law and Policy
&
Institutional Arrangement for
Competition Law Enforcement**

by

Ulla Schwager & Elizabeth Gachuri,
Competition and Consumer Policies
Branch, DITC, UNCTAD

Part I

Objectives and Scope of Competition Law and Policy



How to define competition in the economic sector? (1/2)



"a process of rivalry between firms ... seeking to win customers' business over time"

[UK Competition Commission]

How to define competition in the economic sector? (2/2)

*"Competition is a **basic mechanism of the market economy** and encourages companies to provide consumers products that consumers want.*

It encourages innovation, and pushes down prices.

In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others."

[European Commission]

Some Benefits of Competition

- Lower prices of products and services
- Better products and services
- Wider choices for customers
- Greater efficiency (allocative and productive)
- Stimulation of innovation

→ Contribution to consumer welfare and development!

Telecoms sector: successful product innovation driven by competition



Principal Objectives of Competition Law and Policy

- Protecting the process of competition in order to:
 - Promote consumer welfare
 - Improve economic efficiency
 - Ensure that benefits from trade liberalisation are passed on to population
 - Contribute to economic development
- Part of the legal framework for a well-functioning market economy

Secondary Objectives of Competition Law and Policy

- Limit further increases in the concentration of economic power;
- Protect small and medium-sized companies,
- Provision of state assistance on a non-discriminatory basis.

THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION (1980)

Part A – Objectives:

1. To ensure that restrictive business practices do **not impede or negate the realization of benefits that should arise from the liberalization** of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
2. To attain **greater efficiency** in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
 - (a) **The creation, encouragement and protection of competition;**
 - (b) **Control of the concentration of capital and/or economic power;**
 - (c) **Encouragement of innovation;**
3. To protect and promote **social welfare** in general and, in particular, the interests of **consumers** in both developed and developing countries;
4. To **eliminate the disadvantages to trade and development** which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries; [...]

Distinction between competition law and competition policy

Competition Policy

All government policies and measure aimed at creating a competitive environment, including:

- Trade policy measures;
- Deregulation;
- Fiscal policies;
- Subsidies to support R&D.

Competition Law

Legislative framework that aims at protecting the competitive process by

- prohibiting certain forms of anti-competitive practices of undertakings; and
- preventing concentrations that would lead to a substantial lessening of competition.

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Main Areas of Competition Law

How does competition law protect the process of competition?

Rules re behaviour of market players

Prohibition of anti-comp. agreements

- Price fixing
- Market sharing
- ...

Prohibition to abuse a dominant position

- Predatory pricing
- ...

Rules re market structure

Merger control

Prevention of the creation or strengthening of high market power/dominant position through external growth

Anti-competitive agreements

Agreements are prohibited by competition law when they **substantially lessen competition** or **limit access** to a market.

This applies to:

- Written agreements;
- Oral arrangements;
- Concerted practices.

Anti-competitive agreements

Examples for serious breaches of the law:

- Price fixing;
- Output quota;
- Market sharing;
- Collusive tendering;
- Concerted refusal to deal.



Anti-competitive agreements

By object

Per se offenses

- Cannot be justified;
- No need to assess effects;
- Eg.: price fixing, market sharing, output quota

By effect

Rule of reason

- Competitive effects to be assessed;
- Justification possible, if pro-competitive impact prevails
- Eg.: joint purchasing, R&D cooperation

Prohibition to abuse a dominant position

A dominant position in a given market is not in itself an offence!

Using a dominant position to lessen competition in a market or to prevent other firms from entering the market is

PROHIBITED

by competition law.

When does an undertaking hold a dominant position?

- Qualitative approach: substantial market power that allows a company to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers;
- Formal approach: presumption of dominance based on market shares.

Natural monopolies

IN SOME MARKETS, THERE MAY ONLY BE ROOM FOR

ONE EFFICIENT ENTERPRISE.

Examples: Network industries (railway, electricity transmission, landline telecommunications, etc.)

⇒ Often sector specific regulation in addition to/instead of competition law.

Examples for abuses of dominance

- Predatory pricing (or conduct)
- Price discrimination
- Refusal to supply
- Tying and bundling



Merger control

- aims at maintaining competitive market structures which deliver better outcomes than monopolistic ones.
- Its purpose is not to prevent a dominant company from abusing its position, but to prevent dominance from being created or strengthened through external growth.

What is meant by „external growth“?

Merger: two separate undertakings merge entirely into a new entity

Note: Often the term merger is used in a far broader way covering a wide range of corporate transactions!

Acquisition of:

- Shares in another undertaking
- Asset of another undertaking

Establishment of a joint venture

⇒ *The question is whether previously independent undertakings have come or will come under common control.*

Examples:

Mergers: Creation of the worldwide biggest steel company Arcelor-Mittal by the fusion of the former competitors Mittal Steel Company and Arcelor in 2007

Acquisition of shares: Acquisition of more than 50% of the shares in Volkswagen by Porsche in 2009

Acquisition of assets: acquisition of a client base, of production plants, trade mark or licenses, etc.

Different types of tests used for the competitive assessment

- Substantial lessening of competition
- Prevention of the creation or strengthening of a dominant position
- [Public interest criteria]



Different types of merger control regimes

- Ex ante vs. ex post merger control
- Compulsory vs. voluntary merger notifications
- Merger control carried out by the competition authority vs. merger control carried out by courts

⇒ Note that merger control is always based on a prognosis of the likely effects of the transaction!

Scope of Competition Law and Policy

Generally, competition law and policy apply to all industry sectors!

Exemptions possible:

- Sector specific exemptions;
- Specific type of agreements;
- Specific undertakings.

Part II

Institutional Arrangements for Competition Law Enforcement



Contents

- Distinguish between the roles of government and the competition authority in the administration and enforcement of competition law,
- State the general principles required for a competition authority to function appropriately,
- Determine the main structural requirements of a competition authority,
- Define the role of courts and tribunals in enforcing competition law.

A COMPETITION AUTHORITY SHOULD BE:

- ✓ Independent/autonomous
- ✓ Have adequate resources to investigate and prosecute alleged breaches of competition law
- ✓ Be accountable for its actions to the Minister or Parliament or any other designated authority

Government develops and passes a competition law

The law outlines:

- The scope and coverage of the competition legislation
- The powers of the competition authority
- The membership of the authority
- The budget of the authority

The Competition law cont....

The Law outlines:

- The types of sanction and remedy that can be imposed for breaches of competition law
- The public interest factors that should be taken into account (decisions on merger proposals or anti-competitive agreements)
- The procedures for appeals from decisions of the competition authority

Organisational models of competition authorities(1)

- **Autonomy** to deal with restrictive business practices, abuses of market power, anti-competitive mergers
- Operates under the **auspices** of a **government ministry** but decision-taking without minister's approval
- Can issue **injunctions** and impose **penalties** without reference to courts

Organisational models of competition authorities(2)

- Close collaboration between the competition authority and a government minister
- Competition authority investigates breaches of competition law
- Makes recommendations to the minister on actions to be taken

Organisational model of competition authorities (3)

- Competition authority makes its **own decisions** without reference to a government minister
- Must **prosecute** in **courts** to establish whether or not there has been an infringement
- **Penalty** to be imposed decided by the court if an infringement proved

Three General Principles Required For Competition Authorities

➤ ***INDEPENDENCE***

➤ ***TRANSPARENCY***

➤ ***ACCOUNTABILITY***

The Competition Authority

- Functions
- Composition
- Resources
- Co-operation with other competition authorities in other countries



The Composition of a Competition Authority

- Number of members (full/part time)
- Experience/qualifications of members
- Appointment of the Chairman
- Tenure of appointed members

The appointment of a Chairman of a competition authority

Possibilities:

- Elected by the Commission from among its members, (Zambia)
- Appointed by a Minister, Parliament or the Head of State, (Tanzania)
- Senior government official by virtue of his office.

Widely agreed aspects of the composition requirements of a competition authority

1. Some members experienced in law or economics (representatives of professional associations, Government, consumers etc)
2. Provisions to overcome possibilities of conflict of interest by members of the competition authority
3. Appointments to membership and chairmanship must not compromise the authority's independence

A CRITICAL ISSUE

Availability of resources to implement and enforce competition law

Budgetary Provision and skilled staff

- Insufficient government funds or budget cuts may result in cutting back work programme and/or rendering it ineffective/inefficient
- Lack of confidence from business community
- Shortage of skilled staff may hinder the investigation of infringements and the analysis of merger proposals

Adjudication of Competition cases

- Administrative decisions
- Tribunals
- Courts



There are other ways of achieving the objectives of competition law besides resorting to litigation (using courts)

They are often more expeditious and less costly and can be just as effective

Other ways of achieving the objectives of competition law

- Voluntary compliance programmes (Leniency programmes for cartel detection)
- Authorisation of proposed mergers and certain types of anti-competitive practice
- Acceptance of written undertakings as to a firm's future conduct

Thank you for your attention!

**For more information on competition
issues, visit UNCTAD web site on:**

<http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&language=1>