CHALLENGES OF INTRODUCING COMPETITION LAW IN DEVELOPING COUNTRIES: THE DEVELOPMENTAL DIMENSIONS

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1. Introduction

The present article deals with the challenges that developing countries might experience when implementing competition policy. This task is particularly important as it involves not only the creation of a competition law, but also, and perhaps more importantly, it requires the construction of a competitive environment where such a tradition often does not exist.

The analysis of competition policy has at least two dimensions. The first, which might be called the formal or institutional dimension, relates to the creation and implementation of policy. The second, the building of a competitive environment, is clearly a more complex and vast area related not only to the policy framework but also with the idiosyncratic, social and cultural aspects of the implementation of competition law.

The creation of a competition law requires the examination of a series of issues. The formal creation of competition law is not sufficient to guarantee the proper functioning of competition policy. Effective implementation requires the independence and credibility of the Competition Authority and, of course, the necessary human and financial resources. Additionally, other considerations might arise in order to have a consistent competition policy, which requires analyzing the tradable and nontradable sectors.

In order to build a competitive environment, it is essential to generate societal awareness of the benefits of competition policy. In general, this awareness does not exist in less developed societies and its creation requires [us] to educate consumers, firms, and other government authorities.

After considering these two dimensions, one must realize that the process of implementing a competition law would involve a number of conflicts. These conflicts might arise with existing policies that are inconsistent with competition policy. In addition, different interest groups may put up resistance to the successful implementation of the competition law. The identification of potential areas of contention will be discussed in this paper, since not taking them into account reduces the probability of the successful implementation of competition policy. In other words, conflicts and sources of resistance should be anticipated and treated
proactively to avoid the difficulties they imply.

In the present article, different theoretical aspects will be illustrated, using the factual situations that developing countries have encountered while implementing their competition policies. There have been a variety of experiences in introducing competition policy in developing countries. Not all of them have been successful. However, if the ultimate goal is in fact to implement a consistent competition policy, it is important to know and learn about them.

The article is structured as follows. Section 2.1 deals with the creation of competition policy, while section 2.2 deals with the implementation. Section 2.3 considers the issues involved in ensuring consistent competition policy. Section 3 deals with the construction of a competitive environment and highlights the importance of social awareness to the creation and maintenance of a consistent competition policy. Section 4 considers the possible conflicts that may arise when implementing competition policy (section 4.1) and also potential sources of resistance (section 4.2). Section 5 presents the author’s conclusions.

2. The Creation and Implementation of Competition Policy

The creation of competition law involves the definition of the following general aspects: (a) the scope - that is to say, whether the law would have jurisdiction over all sectors of the economy or not; (b) the subject of protection (e.g., producers, including small producers and consumers, the well functioning of the market, etc.); (c) the type of rules that would be invoked - per se rule or rule of reason approach; (d) the type of conduct to be analyzed. Additionally, the creation of the law requires analyzing the way that the competition law is to be promoted - by the executive power, the Congress, multilateral institutions and/or unilateral and/or regional agreements.

These formal aspects are not sufficient to guarantee that the competition policy will function properly. Effective implementation requires that the decisions taken by the competition authority should be independent from other considerations or units of government. These decisions should be credible, and credibility is something that cannot be achieved in one day. Finally, the competition agency should have enough economic and human resources in order to apply the law effectively.

2.1 The Creation of the Competition Law

The first issue to consider is whether the Competition Authority should have jurisdiction over all the sectors of the economy. Ideally, there should be no exemptions, as jurisdiction over all the sectors reflects that the Competition Authority has extensive power. Full coverage also guarantees that the competition law is of general application. In Argentina, for example, since 1999, the Competition Law has had jurisdiction over all the sectors of the economy, even regulated sectors - telecommunications, electricity, gas, and banking.

However, the debate about the relationship between regulators and the competition authorities is still on. The U.S. Competition Authority for instance has no jurisdiction over telecommunications or energy. On the contrary, in England - as in Australia - the Competition Authority has jurisdiction over all the regulated sectors. In spite of the different approaches, even in the event of a separation between the regulated...
sectors and the Competition Authority, a good and fluent relationship between them is essential.

The second issue of note is the question of whether the competition policy should have the same status as commercial policy, monetary policy or fiscal policy. Theoretically, all these four policies should be at the same level, because all of them aim at the same goal: an efficient allocation of resources. However, in only very few countries is competition policy at the same level as the other three types of policies. And this is especially true in periods of depression or recession. In fact, even in the US or Europe, government tends to relax competition policy when there is economic depression. The Argentine experience is another example of this argument. During the 1990s up to 1998 there was very rapid economic growth, during which time there was tremendous development of Competition Policy. However, during the recession that started in 1999 and still continues, the application of the competition law has not been as successful as it was previously.

Third, the creation of competition law requires determining the subject of protection. In this regard, there are a number of alternatives such as consumers, small producers, producers and consumers, or the well functioning of the market.

In fact, there is still an international discussion regarding who is protected by the competition law. Even in the US, it depends on who is in power. When Democrats are in power they tend to protect consumers; when the Republicans are in power, they tend to protect business. In Europe, for instance, the subject of protection is the integration of the European Market. This discussion is also present in Argentina: in some periods, what was protected was total economic welfare while during others, consumer welfare.

Besides, the type of rule to implement has to be defined, that is to say, whether to use 'per se' rules or the 'rule of reason'. Per se rules define a set of conducts, actions that are a priori anti-competitive, which do not need further proof. If the Competition Authority finds that one of these conducts is verified, then the firm or firms that committed that conduct must be penalized. Instead, the rule of reason approach requires some research and investigation about the consequences of that conduct on the functioning of the market. Therefore, it is necessary not only that the conduct effectively takes place, but also that it has an effect on the functioning of the market. Only in this case, is it going to be penalized. In other words, this approach requires an obliged evaluation of the consequences of the conduct.

Originally, US anti trust law was based on per se rules. However, modern Anti-Trusts tend to use the rule of reason approach. Considering the tradition of the competition law in Latin America during the 1990s, almost everywhere - Brazil, Venezuela, Perú, Argentina, Colombia, etc. - the 'rule of reason' approach has been the predominant one.

The debate about which of the two approaches is the best is not closed. For instance, in the US both approaches are used, while in Europe they only use the rule of reason, like in Latin America. However, it can be argued that for less developed countries, it might be easier to have a per se rule as a first stage and as society and market develop, gradually move towards the more flexible approach, i.e., the rule of reason approach. However, this statement requires further analysis.
Additionally, it is important to determine whether to analyze only anti-competitive conduct, or to also control mergers and acquisitions. Again, the history of anti trust shows that, in general, countries began penalizing only anti-competitive conduct in the beginning, and in a second stage, they included the control of mergers and acquisitions. That was the case in the US, in the European Union, and in many Latin American countries. In fact, there are still some Latin American countries that do not control mergers and acquisitions.

Finally, in drafting the law, one must take into consideration what is the impetus to the introduction of the Competition Law: the executive power, the Congress, or through bilateral or regional agreements. Historically, there have been many cases in which the national executive introduced Competition Policy as part of reform programmes. Additionally, particular consideration must be given to the role of multilateral institutions such as the World Bank that, particularly during the 1990s, pushed many governments in Latin America to introduce Competition Law.

There are other ways that anti-trust laws can be introduced, however. For instance, in the US, it was done by the Congress through the pressure of small businessmen. This was also true in Argentina in the 1920s. Another way in which competition law can be introduced is through bilateral and regional agreements. For instance, in Mercosur, Uruguay introduced Competition Law because Mercosur’s regional agreement required them to do so. The same thing is true with many Latin American countries where the FTAA is forcing them to have competition law. Additionally, many European countries were forced to introduce competition law because of the constitution of the European Union. CARICOM countries are now required to introduce Competition Law to comply with the Revised Treaty of Chaguaramas.

2.2 The Implementation of the Competition Law

The effective implementation of competition policy requires that the Competition Authority has the following attributes: independence, credibility, competition advocacy, cooperation with other agencies of the government, among others. The Competition Authority must be independent of other considerations or units of government and must have credibility of their actions in order to obtain respect. It must not be captured (influenced) by firms or by politicians.

The history of institutional autonomy in Latin America is very poor. Although formally almost all Latin American agencies are independent, in practice such a completely independent Competition Agency does not exist. This is also a serious issue in other parts of the world.

It is also essential that the Authority have a significant measure of credibility. This is particularly relevant in countries where the implementation of competition policy is on its first stages. The building of credibility requires consistent behavior over time. That is to say, to become credible and reliable, the Authority must show that their decisions are consistently well founded, logically sound and that their authority is not influenced by considerations other than the protection of competition. Their actions and decisions must be anticipated and their decisions must be publicised. The competition agency must build a reputation of consistency, accountability and transparency, in order to build credibility with society as well as with other arms of government.
A Competition Authority should also have a competition advocacy role, that is the agency should be empowered to take action against anti-competitive decisions taken by other arms of the Government. In other words, the agency should be empowered to intervene and take action to counteract decisions taken by other arms of Government that are effectively or potentially anti-competitive.

Additionally, the implementation of competition policy requires having enough economic and human resources in order to apply the competition law properly. There is a strong need for meritocracy. Countries should spend enough resources on the development of the system. In this matter, it is essential that the agency have a reasonably large professional staff: (economist and lawyers, etc.) capable of conducting sound research.

Finally, it is important to cooperate with other agencies to build international cooperation. However, it is very difficult to create such relationships among Competition Authorities from countries at varying levels of development. Cooperation in the area of competition policy between countries with similar levels of economic development, as Argentina and Brazil for example, is a simpler prospect because, their competition authorities have similar experiences.

### 2.3 A Consistent Competition Policy

In addition to the formal/institutional and implementation related aspects of Competition Policy, there are others that greatly contribute to having a consistent competition policy. These aspects can be divided between the ones that are related to the tradable sector of the economy and the ones that belong to the non-tradable sector.

For the tradable sector of the economy it is necessary to open the economy, since the competitive pressure from opening the economy is a big part of Competition Policy.

In the non-tradable sector, it is essential to deregulate the domestic market as much as possible. Frequently, regulations imposed by government deter business or generate barriers to entry that impede competition from new comers to the market. Consequently, in order to encourage competition and new investment flows, it is desirable to deregulate the domestic market.

Utilities constitute an important part of the non-tradable sector. Traditionally, utilities have been under public regulation. Economic regulation can be defined as a type of public intervention in which general rules of conduct for economic agents are defined. Regulation must also guarantee that these rules are respected. The restrictions imposed by regulation may be justified in various ways. In particular, it may become necessary when there are failures in the activity of markets to efficiently allocate resources. Therefore, competition and regulation are closely related, and that is why, in analyzing what is necessary for a consistent competition policy, one must consider the role of regulation.

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1 In particular, some of the market failures emphasized are: the external effects associated with consumption and production of goods and services, the existence of public goods, economies of scales, indivisibilities, natural monopolies, etc.
During the last few decades, a number of developments have altered the relationship between regulation, the structure of the markets and the role of competition. These developments include technical change and privatization.

On the one hand, technical change and the appearance of new technologies have altered the advantages that competition has as a mechanism to solve the inefficiencies of monopoly over the direct regulation of utilities. In such a context, and whenever the technologies allow one to do so, the promotion of competition in particular segments of utilities has emerged as a means of achieving the efficient allocation of resources. Examples of such a situation are telecommunications and electricity.

On the other hand, the process of privatization becomes another source of change in the structure of utilities. Over the past few decades there has been a general move from public to private ownership not only in Latin America, but all over the world. If such changes in ownership are to result in efficiency gains from an economic point of view, a competitive environment is vital to the fulfillment of this objective. Therefore, privatization is significantly related to the creation and successful implementation of sound competition policy.

In Latin America, there has been a long history of privatization, especially during the last decade, but care was not always taken to introduce pro-competitive measures. In Argentina, for instance, telecommunications privatization involved the transfer of a state monopoly to a private monopoly with almost no regulations. There was no benefit to society, since this did not imply an improvement in the allocation of resources. Positive example is Argentina’s privatization of the electricity sector. The latter was done in a pro-competitive way, and evidence showed that, as a result, electricity prices went down, while quality and quantity rose up.

There are similar experiences of pro-competitive privatization in Latin America, leading to positive results. (e.g., privatization of electricity in Chile). At the same time, there are many instances where privatization did not improve allocation of resources, thus becoming inconsistent with competition policy.

3. Building a Competitive Environment

As was mentioned earlier, the challenge that developing countries may face when implementing competition policy has two dimensions. This section analyses the second dimension, that is to say, the building of a competitive environment. In order to build such an environment, it is essential to generate social conscience about the benefits and implications of competition policy, which in general does not exist in developing countries.

The present discussion deals, therefore, with the need to educate consumers, producers, judges, politicians, economic policy makers, students and government agencies. Each of these are of particular importance to the process of informing society about the importance of competition policy and the effective creation of a competitive environment.

Consumers: They usually lack access to relevant information and may not know the benefits of competition. This problem is known as asymmetric information between producers and consumers. Consumers do not know their rights, nor are they aware of the benefits of encouraging competition between firms.
Producers: they may not be aware of how competition policy may be an asset to them. They might even be engaging unknowingly in anti-competitive conduct.

Judiciary: The benefits of educating the judiciary stem from the fact that decisions taken by the Competition Authority are appealed to the Courts. In most of the less developed countries, judges and magistrates do not have enough knowledge about competition law and do not understand its economic underpinnings. If this is the case, judges will tend to reverse the decision of the Competition Authority. This problem is common, not only in countries like Argentina, where judges are not very familiar with competition law, but also in countries with a significantly longer tradition of competition policy.

Politicians, Parliamentarians and Policy Makers: Competition policy should not be a political issue. However, politicians in general listen to sectors that have lobby power, and parliamentary representatives (Congressmen) tend to use competition policy politically. In fact, the application of competition law should be as independent as possible from political concerns, thus guaranteeing/ensuring the effectiveness of the system. It is necessary to educate economic policy makers, as they tend to consider the other three ‘Policies’ - Monetary Policy, Fiscal Policy, Commercial Policy - without regard for Competition Policy.

Students at the University level should also be educated, because the education of new generations on the importance of competition would create a competitive culture. In addition, the press might contribute to creating a social awareness about the importance of preserving competition and why competition tends to favor consumers.

Government Agencies: that may have a potential conflict with the Competition Authority - such as the intellectual property rights agencies, sectoral regulators, the Central Bank and consumer protection agencies - should be informed about the importance of competition policy.

4. Potential Conflicts and Resistance

As alluded to above, conflicts may arise in the process of implementing a competition law due to the prior existence of other policies that might be inconsistent with competition policy. Potential sources of conflict are commercial, industrial, regional development and intellectual property rights policies. At the same time, various economic groups may put up resistance to the successful implementation of the competition law. The identification of the potential areas of conflict and the rationale for them are the main issues of this section.

4.1 Potential Difficulties

Commercial Policy: The protection of particular domestic producers through commercial policy may be inconsistent with competition policy as it affects market competition. In other words, the protection of local producers from foreign competition can distort the allocation of resources within an economy and harm domestic customers.

In order to avoid this kind of conflict, it is desirable to have an open commercial policy, i.e., no quotas, no non-tariff barriers, low import tariffs and, if possible, uniform across all sectors. Conflicts between commercial policy and competition policy are particularly common place in Latin America. In general when there is a conflict between commercial policy and competition policy, commercial policy prevails.
Industrial Policy: Industrial policy is another potential source of conflict, because the protection of some industries may affect others. For example, consider the industrialists who are the producers of capital goods. They always have incentives to seek protection. If government concedes, this is going to have an effect on the entire economy, as such protection makes input prices higher than prices in the international markets, creating a transfer of resources from the economy-as-a-whole to the industrialists receiving protection.

Regional Development Policy: The implementation of regional development policy requires the use of subsidies and/or tax exemptions to develop a particular region. These not only affect the allocation of resources but also reduce competition, thus making competition policy inconsistent.

Intellectual Property Rights (IPR) Policy: Intellectual property rights entitle the owner to a monopoly to produce a particular product for a defined period of time. IPRS do not promote competition in the short run, but they do so in the long run. While the monopoly lasts, it guarantees that the entrepreneur would be allowed to enjoy higher benefits without having to face competition. This gives the incentives for the investor to invest a considerable amount of money to develop new products or processes which have a high risk associated with them. IPR’s, therefore promote the development of new products and competition between investors, because there is the opportunity to enjoy higher benefits.

4.2 Resistance to Competition Policy

Resistance will come from domestic monopolies or oligopolies that usually have lobby power. Such groups fear that competition policy may reduce the benefits they enjoy, and hinder them from obtaining higher profits. In other words, if competition policy is implemented successfully, the maintenance of a competitive environment would affect their capacity to obtain economic rents.

Trade unions may also put up resistance because they might be accustomed to dealing with the monopolies and the oligopolies. Since they fear unemployment and lower wages, they may prefer the status quo. They may believe that implementation of a successful and effective competition policy might lessen their power.

Foreign firms might not like competition policy in less developed countries if they believe that they will be subject to greater regulation. They may sometimes react in this out of fear of corruption, which in many developing countries is a particularly serious problem.

Government officials may also resist competition policy, especially when competition policy applies to all sectors of the economy. For instance, if the Competition Authority has jurisdiction over the banking sector, it may take decisions with which members of the Central Bank may not agree.

Finally, elected officials may not like competition policy because businessmen always lobby over the Congress and they may be reluctant to change. In addition, they may be simply ignorant/unaware of the importance of competition policy.

5. Conclusion

Introducing competition law is not an easy task and this article has dealt with the challenges that developing countries may
face when implementing competition policy.

Emphasis has been given throughout the paper to the developmental dimensions of the implementation of competition law. In this regard, there are at least two dimensions to analyze when introducing competition policy: on the one hand, issues related to the creation and implementation of the competition law; on the other, the construction of a competitive environment.

If the ultimate goal is the implementation of a consistent competition policy, it is important to become fully aware of the issues and difficulties that might arise when introducing competition policy.

All the challenges discussed in the paper have been experienced in Latin America during the 1990s. Among the countries of Latin America, there have been different experiences and, not all of them successful. In Europe, the United States of America, and Australia, government has faced similar challenges in the process of implementing their competition law. Each has had a transition period of many years to reasonably improve their competition systems and to build a competitive environment.

The article has also addressed a number of difficulties on conflicts that may arise as a result of the introduction of competition policy. There may be conflicts with other policies (commercial, industrial, regional development, intellectual property rights policies, etc.), or some economic groups that put up resistance to the implementation of competition policy. In order to successfully implement a consistent competition policy, particular attention must be given to all of these potential sources of conflict.