SOCIETY FOR POLICY STUDIES
www.spsindia.in

SPS Policy Brief

REGULATION IN DEVELOPING COUNTRIES - GROWING PAINS OF THE INDIAN MERGER REVIEW REGIME

Archana G.Gulati

Society for Policy Studies (SPS)
J-1824, Chittaranjan Park, New Delhi
E: feedback@spsindia.in W: www.spsindia.in

REGULATION IN DEVELOPING COUNTRIES - GROWING PAINS OF THE INDIAN MERGER REVIEW REGIME

Given the lack of information and institutional weaknesses found in low-income countries, private monopolies are more likely to exploit their position by influencing the regulatory environment or by evading regulation. Weak regulation of competition is likely to undermine the potential gains to be made from privatisation and deregulation[1].

PART I: REGULATION IN DEVELOPING COUNTRIES

An interesting take on competition law in developing countries by Amine Mansour[2] highlights that even enacting such a law can be difficult in a developing country as there will be a vested interest in maintaining status quo i.e. the undeserved profits (arising from lack of competition) which powerful and dominant firms enjoy, at the cost of the consumer and the economy. This is especially likely in the face of the concentration of economic and political power in the same hands. The same clout can make the enforcement of anti-trust law by competition authorities a very difficult task. Therefore, on one hand "one of the most important roles for competition law and policy from the perspective of development is tackling the concentration of economic and political power," on the other, it is this very concentration that can also make competition law and policy ineffective in most developing countries.[3]

It is a well-known fact that regulators in developing countries face several challenges. The first is the constant threat of external influence and capture by the regulated[4]. The second is information asymmetries[5] and the third is lack of public support in the face of general ignorance of or indifference towards, its mandate[6]. The latter is particularly true of a subject like competition whose impact on everyday lives and economic development is not easily understood by even the intelligentsia in a developing nation.

PART II: THE GROWING PAINS OF INDIA'S MERGER REVIEW REGIME

While a competition authority may make valiant attempts to educate the public, it is managing the pressure exerted by vested interests (dominant firms and their agents) that is particularly challenging. It is difficult for a young competition authority struggling to progress on a steep learning curve and stymied by resource availability, to counter these powerful forces who lobby privately and in the media, often attempting to disparage the competition authority's efforts to curb anti-competitive behaviour. Attempts by the Regulator to correct this imbalance by making the rules of the game explicit or stringent are unlikely to be welcomed, as the fewer the ambiguities, the lesser is the discretion available to regulators to interpret the rules differentially on a case by case basis. This would in turn limit the scope for powerful entities to have their way. Paradoxically, literature on regulation strongly recommends a clear-cut, rule based (relatively mechanistic) approach to regulation in developing counties in order to cope with limited regulatory capacities and the threat of capture and external pressures.

India's merger review regime[7] is barely four years old and has been praised for its efficiency and progress. While only two cases have been subject to remedies following a Phase II investigation[8], in a number of cases CCI[9] has in fact obtained voluntary commitments or clarifications from parties to allay possible competition concerns and consequently made its order conditional on certain behaviour.

There are stringent timelines set out for CCI wherein it must decide even a complex merger within 210 days from its notification to the Regulator. This includes completing gaps in notification[10] which are frequently plentiful partly on account of tight deadlines for notification that India's Competition Act[11] enforces on filing parties[12] and partly because there is a tendency to give the regulator as little information as possible. The Regulator is in fact made to jump through several hoops before a complete picture of the competitive significance of the transaction emerges. In the absence of requisite market related information forthcoming from parties or where the case specifics so demand, information must be obtained from third parties[13]. The regulator's efforts to do its job in the face of these obstacles is not helped by constant pressure by way of vested interests projecting the regulator's labours as being unnecessary or deliberately obstructive or anti-industry.

Even so, it is heartening to see that CCI's recently introduced set of amendments to merger regulations[14] have been appreciated for bringing in much needed clarity on notification requirements. It has been generally accepted that explicit instructions on filing requirements for M&A deals including unambiguous description of information requirements can help expedite merger review and avoid subsequent requests for information that the regulator is often compelled to resort to on account of vague, hurried, careless or deliberately evasive notification of the deal[15].

The rationalization of self-imposed time lines for forming a prima facie opinion on a merger[16] must be viewed against the abovementioned constraints as also in the context of vast differences in the design of similar regulation in other jurisdictions. Indian statutory provisions compel merging parties to notify a transaction to CCI within 30 days of specified trigger events. Perhaps this explains why in spite of the availability of a window for confidential pre-filing consultation[17] on how to notify, including vetting of draft notices, the same has rarely been availed by merging parties. Competition agencies in jurisdictions like the European Union iron out most of the information requirements in detailed pre-notification consultations, making it easy to adhere to statutory deadlines, as by the time the notice is filed, it has been already been vetted by the regulator in detail (a process that may run into months). Further, for CCI, the deadline of 210 days from date of notification runs nonstop under the Act unlike many other jurisdictions wherein time elapsed under statutory deadlines is counted only from the day that complete information (to the satisfaction of the regulator) is received. For complex mergers that go into detailed investigation (Phase II), the statutory time line of 210 days has always been counted without taking into account Phase I clock stops[18]. This is a huge difference. While the time limit was introduced in the Indian statue to allay fears of regulatory delays by industry, unfortunately this loud and relentless ticking of the clock has in the past also be gamed by the regulated or their agents to stonewall the regulator's attempts to obtain required information knowing well that there is only so much time available to the regulator before it must issue its order.

The power to invalidate a notice was always available under the Combination Regulations. Greater clarity on what needs to be notified, coupled with a clearer enunciation of the modalities of exercise of this power, should inspire better notification and act as a deterrent to the abovementioned gaming. Needless to say, the regulator is unlikely to invalidate a notice on frivolous grounds.

PART III: IT TAKES TWO TO TANGO

Finally, a much wonted notion is that strict regulation would deter investment. If that were the case, developed countries would attract the least investment. In fact, the effectiveness of regulation and the credibility of the regulator increases when rules are clear and explicit rather than ambiguous and when they are applied fairly across the board. This in turn, enhances trust and encourages compliance. When fear of delays and harassment are removed, mandatory compliance is no longer a deterrent to investment.

To digress a bit, as Indians we are often entranced by the peaceful queues we encounter in the developed world. There is hardly any fidgeting or impatience on part of the queuing public. A typical example of this admirable discipline is the calm queuing seen in crowded metro station during rush hour. This is possible on account of the credibility of the system. The waiting public knows for sure that while on one hand, breaking the queue will be frowned upon universally, on the other, they will definitely be able to obtain the awaited service, when it is their turn. The Indian queue on the other hand is almost invariably broken by the public and not strictly enforced by the authorities. Therefore, waiting creates a gnawing anxiety and impatience arising out of uncertainty. This is exactly replicated in our approach towards compliance to rules as a nation. We are unsure about the meaning of the rules and compliance requirements and are doubtful about the efficient, equal and impartial application of the rules. We are also acutely conscious of the possibility of our own or another's ability, given the laxity of the system, to jump the queue or bend the rule. This makes us reluctant to adhere to rules or patiently await our turn. This inspires a culture of trying to get around the system and to influence it.

For the system to work, the efficiency and impartiality of the authorities/regulator, must be coupled with a willingness on the part of even powerful stakeholders to comply equally (rather than expecting to be treated preferentially). This combination exists in the developed world and has proven to be more conducive to a healthy investment environment than an easygoing approach to regulation. The compliance culture of the advanced nations arises from efficient implementation of regulation coupled with strong deterrence by way of punishment for both noncompliance by the regulated and complicity on the part of regulators[19]. Such a system when firmly and consistently enforced in a merger review regime would also enhance trust and reduce the anxiety on the part of merging parties much like the queuing public. The regulator on its part should continue to make rules of the game clearer as it gains experience. It should also continuously build capacities to meet the valid stakeholder demand for speedy merger review. This would lead to outcomes that are positive, both for the investment environment in the country and for the consumer who is the ultimate focus of competition regulation.

Disclaimer:

Views are personal.

About the author:

The author is a civil servant. She can be contacted at archanagg14@gmail.com

Endnotes

---

[1] Paul Cook, Paper No. 2,"Competition and its regulation: key issues," Centre on Regulation & Competition, University of Manchester October 2001.

[2]Amine Mansour "The Concentration of Economic and Political Power, A Priority for Competition Law and Policy in Developing Countries?", http://www.cuts-ccier.org/pdf/reguletter_Jan-Mar2015.pdf

[3] ibid

[4] "The 'capture' of a regulatory body by the firms it is supposed to discipline. This implies influencing the regulator through various means including both bribes (including post retirement employment)as well coercive inducements such as (a) spreading negative (career damaging) rumors about the regulator or (b) through open confrontation, which may destabilize a regulator as it would impact government support to the regulator. The stronger the "rule of the law" in a country and the less likely are such inducements to work. The ability to capture regulators through lobbying reduces incentive of regulated firms to comply with regulation and to compete in the market through productivity & efficiency rather than rent seeking, thereby imposing a social cost (from, "Regulatory capture: a review, Ernesto Dal Bo, Oxford review of economic policy, Vol.22,No.2).

[5] Whereas the regulated firm has insider knowledge of its operating environment, the regulator lacks the same (from "Leading Issues in Competition, Regulation, and Development," edited by Paul Cook)

[6] Advocacy and increased consumer awareness can mitigate the harmful effects of regulatory capture as consumer groups who are beneficiaries of regulation and potential voters can then act as counter power.

[7] Under sections 5 and 6 of the Competition Act, 2002 a proposed merger or acquisition (combination) meeting prescribed thresholds, must be filed with the Competition Commission of India (CCI) for review (as to whether the combination is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India.)

[8] Unlike cases where the Commission believes that there is no likelihood of an appreciable adverse effect on competition (and whose review ends in Phase I itself); in cases where the Commission is of the [prima facie] opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it carries out a detailed investigation into the combination (taking the case to Phase II).

[9] Competition Commission of India (the Indian Competition regulator)

[10] The initial filing of information about the combination (merger or acquisition) by the parties to the combination in prescribed format.

[11] Competition Act, 2002 at http://cci.gov.in/images/media/Advocacy/CompetitionAct2012.pdf

[12] Parties must file within 30 days of occurrence of defined trigger events.

[13] This is also never very easy as many a times consumers, competitors and government bodies take a long time to respond

[14] Available at: http://www.cci.gov.in/May2011/Home/regulation/cjuly2015.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf0

[15] Some of the comments are available at (a) http://www.kpmg.com/IN/en/services/Tax/FlashNews/Amendments-to-Combination-Regulations-under-the-Competition-Act-2002-1.pdf ("The amendments could provide greater clarity and transparency in the filing of applications. Specifically, the issuance of Guidance Notes to Forms could go a long way in clarifying various ambiguities, which were faced by the applicants.") and (b) http://thefirm.moneycontrol.com/story_page.php?autono=1829801 ("While the changes will certainly lead to filings being more tedious and may delay transaction timelines, the CCI must be appreciated for bringing in more transparency and certainty to its procedures. This may actually prevent the regulator from 'stopping-the-clock' during its review process, which had become the norm rather than the exception.")

[16] From 30 calendar days to 30 working days

[17] http://www.cci.gov.in/May2011/Home/ConsultationPrior250511.pdf

[18] Regardless of the fact that these clock stops are afforded by the regulation referred to as Commination Regulations

[19] See note 6 above

The Society for Policy Studies (SPS) is an independent think tank focused on public policy, international relations and human development and their strategic, security, economic and social impact on India and the larger South Asian region. It helps foster dialogue among opinion leaders and provides a non-partisan forum to engage with critical issues, affecting India and South Asia.

As this region grapples with mounting challenges from feeding its poor to providing healthcare and education, protecting the environment, meeting its security challenges and fostering accountability and transparency in governance, the experiments in democratic engagement and policy design in India and other South Asian countries, including, Pakistan, Bangladesh, Sri Lanka, Nepal, Maldives, Bhutan and Afghanistan, as well as the contiguous region, offer valuable lessons.

SPS, with its intellectual resources and convening power, is uniquely positioned to bring together policy makers, diplomats, officials, academics, analysts and journalists from India and the region to facilitate new thinking and provide more informed and objective perspectives to current policy debates and offer alternative approaches, viewpoints and even solutions to some intractable problems.

SPS believes in the power of knowledge, ideas and skills in today’s information-driven society and works to disseminate, debate and develop them through association with thought leaders, resource persons and domain experts in various fields.

Society for Policy Studies (SPS)
J-1824, Chittaranjan Park, New Delhi
E: info@spsindia.in W: www.spsindia.in Tel.: 011-41071299