Success and Limits of Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits

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This paper is a partial and preliminary draft of the introduction for the special issue that we hope will come out of our workshop. In this first draft, we provide some background, based on our reading of the literature, but primarily raise a number of questions. Workshop participants might not have addressed all of these questions in their papers, but we propose these questions for general discussion during the first session of the workshop and hope that they will be useful in the discussion throughout the day, too.

Please note that our own answers to the questions raised, whenever we suggest answers, are work-in-progress. We therefore ask workshop participants not to circulate this draft.

Introduction

Are competitive markets a privilege of rich, industrial democracies? Competitive markets ensure that the tremendous potential benefits of a market economy—such as product variety, innovation leading to new products, increasing quality, and/or lower price for the same goods, and economic growth or development—are both achieved and widely shared. So there is much at stake in understanding the conditions under which markets can become and remain competitive and under which laws and policies that seek to foster competitive markets will succeed.

More than one hundred and thirty countries or jurisdictions now have laws that seek to create and support competitive markets. At a minimum, such competition laws prohibit agreements among supposed competitors to fix prices, divide up markets, or in other ways avoid or undermine market competition. Yet, often these laws go much further. Many additionally seek to constrain the exercise of market power by authorizing regulatory intervention against monopolies and "dominant" firms in the market for a particular good or service, at least when there is evidence of an abuse of such power.¹ Many also require advance notification and "clearance" of mergers, acquisitions, and joint ventures ("merger control"). Some even establish a much broader competition policy, authorizing a competition agency to engage in advocacy vis-à-vis the legislature and government entities at the national or subnational level to minimize anti-competitive effects of laws, regulations, or administrative decisions and vis-à-vis society to establish a "competition culture."

¹ In the U.S. tradition, laws prohibiting anti-competitive behavior (from cartels to the abuse of dominance in a particular market) are also known as "antitrust" rather than "competition" laws, and we will use both terms accordingly.
More than two thirds of the now one 130+ jurisdictions with competition laws have enacted such a law for the first time only in the last twenty-five years. Most of them are developing countries, which have done so under conditions that are hardly conducive to the successful implementation of such pro-market legislation, as pointed out in the incisive study by Rodriguez and Menon (2010). A large number of the new competition jurisdictions are poor or even very poor countries that exhibit high levels of both economic and political inequality. Some still have autocratic political regimes; many have enacted their first competition law and/or established a regulatory agency for the implementation of such a law while democratizing their political systems and/or while liberalizing their economies. In many of these countries, the state retains a large ownership stake in many industries or is still expected (by elites and/or large parts of the population) to "guide" outputs and inputs of the private sector. In a number of them, corruption is rampant and the judiciary is far from independent, contributing to generally poor performance on measures of rule of law and access to justice. Many of the recent adopters of a competition law also suffer from weak bureaucratic capacity—and they did so already before adding the regulation of market competition to the tasks assigned to their public administrations. The serious challenges for competition law and policy, which arise from these conditions in developing countries, have been further examined in recent scholarship by Gal, Fox, Bakhoum, Drexl, and Gerber (2015) as well as Sokol, Cheng and Lianos (2013).

Some young competition agencies in the developing world, however, appear to have overcome these challenges and—based on their often short record so far—seem to have succeeded in becoming politically highly independent, building substantial analytical capacity, and in some cases becoming highly effective in dismantling private and public barriers to competition in their countries, contributing to development and other goals of these societies. It is the variation in trajectories after the first adoption of a competition law that we seek to understand, focusing on the questions:

• Why has the establishment of a competition law and regulatory agency succeeded in some countries while it largely failed in others?
• What are the conditions, including possibly the characteristics of the laws and/or the regulatory agencies, under which competition law and policy will contribute to development, equality and economic and/or political liberalization?

We begin with a closer look at the notion of effectiveness or "success" of competition law and agencies. The existing empirical literature on this issue has tended to conceptualize success implicitly by examining whether measures of competition law and policy have a significant positive impact on indicators of economic growth, inward foreign investment flows, democracy, or corruption (Dalkir 2009; Gutmann and Voigt 2014; Petersen 2013). Before reviewing the literature on the impediments to successful implementation of competition law and policy, as well as the reasons for variation in the success that has been achieved, we seek to advance our understanding of "success" and effectiveness deductively. Section 2 then discusses the most important impediments to successful competition law and policy in developing countries. Beyond [very briefly for now] summarizing what (we think) we know from the existing literature, we raise for some of the impediments questions about just how severely impeding these conditions are. Section 3 similarly provides a summary of existing explanations for variations in success or effectiveness. Here, too, we raise some questions, albeit more preliminarily. In [the for now final] Section 4, we examine the importance and limits of political independence or autonomy of competition agencies.
1. Competition Law and Policy Success: What is it? How can we assess it?

What constitutes success—and conversely, what constitutes failure—for competition law and policy? Any attempt to answer this question will have to wade into long-standing debates over what the goals of competition law and policy are or should be. A complete review of those debates is beyond the scope of this paper, so we will merely provide a sketch of our reading of the literature.

A broad-based consensus might be said to exist that the goals of competition law and policy are to foster competition whenever markets are used as an allocation mechanism and to safeguard market competition against anti-competitive practices such as cartels and collusion and against the abuse of market power. But what does all of this mean concretely? What steps should be taken in pursuit of these goals and how might we measure whether they have been achieved?

The challenge of operationalizing these goals of competition law and policy is illustrated, on the one hand by the lack of a precise, widely agreed definition of "market competition," even in economics (Martin 2012:5-11; McNulty 1967; Stigler 1957; Vickers 1995), despite the centrality of the concept to the discipline, which generally prides itself on its near-universally shared "priors." Even the more readily understood notion of "perfect competition"—requiring, at a minimum, that no buyer or seller controls a sufficiently large share of supply or demand to be able to influence the market price unilaterally and that all buyers and sellers act independently—provides not much guidance: Institutionalized relationships between economic actors, which provide for stability and predictability beyond a specific transaction, are crucial for any economy with substantial division of labor (Coase 1937; Hall and Soskice 2001). Prohibiting and preventing any deviation from an economy of atomistic individuals, as appealing as that ideal may have been, e.g., to many early advocates of U.S. antitrust, therefore can not be the operationalized goal of competition law and policy.

On the other hand, does the goal of competition law and policy, as articulated above, imply that competition agencies are justified in intervening against market power only when positive economic analysis can show dominant firms in concentrated markets to have clearly abused their market power? A strongly affirmative answer might seem to be suggested by the recognition, in economic theory, of possible efficiency gains from almost any vertical merger and even many horizontal increases in concentration, combined with the inherent difficulty of providing empirical evidence for the counterfactual of a less concentrated industry, which has contributed to the near-complete abandonment of Section 2 of the Sherman Act as a basis for antitrust enforcement in the United States. However, as Brandeis argued a century ago (Brandeis 1912), the strict adherence to such an approach reduces competition policy to the ex post regulation of monopolies once they have formed, and the internationally widely shared understanding of merger review as part of competition policy would seem to suggest that preventing high concentrations of market power remains in fact a proper goal of competition law and policy.

In sum, deriving specific operational objectives or measures of success from the general goals of competition law and policy is difficult. We therefore structure the discussion for the

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2 For a recent collection, capturing many facets of these debates, see Crane and Hovenkamp (2013).
3 Many would add that the goals include promoting the use of markets over other modes of allocation, but we consider this a theoretically separate question.
Efficiency: Under the influence of the Chicago School and its strictly economic approach to antitrust/competition law and policy, maximizing consumer welfare became in the late 1970s/early 1980s the predominant operational goal of competition law and policy in the United States and—after some time and to a variable extent—in many other countries, too. This operational goal implies in practice that anti-competitive practices such as price-fixing cartels, which clearly result in a welfare transfer from consumers to producers (or intermediaries), should be the priority for antitrust enforcement and competition policy more broadly. It has also been understood to imply taking a more permissive approach vis-à-vis other competition-reducing or -impeding practices, as long as they do not necessarily result in consumer welfare losses or as long as the risk of such losses (e.g., from reduced competition in the aftermath of a horizontal merger in an already concentrated industry) is counterbalanced by the possibility of welfare gains (e.g., because some of the gains from economies of scale might be passed on to consumers).

Already in the early work by the advocates of the Chicago School approach (e.g., Bork 1966), however, consumer welfare as the rhetorically emphasized goal gave way to efficiency as the actual operational measure of consumer welfare, allowing firms engaged in anticompetitive mergers and even some forms of anti-competitive practices to invoke efficiency gains as a defense, as long as the presumption could be maintained that efficiency savings might be passed on to consumers, even if the reduction of market competition rendered this assumption harder to sustain (see also Posner 1979).

The claim that efficiency maximization is the only legitimate operational goal of competition law and policy, as well as the claim that efficiency gains should be generally available as a defense for anti-competitive structures or practices, remain contested in many countries (Dabbah 2010; Gerber 2010)—and even in the United States (see, e.g., Fox 2008; Kirkwood and Lande 2008). It is not necessary, however, to buy into these claims to accept efficiency maximization or at least efficiency gains as one operational goal of competition law and policy. Doing so implies that increases in production, allocation, or dynamic efficiency—insofar as they warrant being attributable to competition law and policy—would count as a measure of success.

Economic Growth and Human Development: A number of scholars and practitioners have argued that, for relatively poor countries with large agricultural sectors, which are still at early stages of the industrialization process, maximizing efficiency must not be the only—and might even be an entirely misguided—goal of competition policy. Although protecting inefficient producers may only postpone painful yet ultimately necessary adjustments at a potentially substantial loss in economic welfare, exposing inefficient producers to more efficient competitors without limits or assistance amounts to a kind of "shock therapy" that can exacerbate poverty and inequality, cause unnecessary losses of income and productivity (multiplied by a minimalist or entirely absent welfare state, see Rudra 2008; Wibbels 2006), and bring about massive socio-economic dislocation that undercuts the political support for reforms even if those reforms promise substantial long-term benefits. Accordingly, a number of scholars—often pointing out that today's advanced industrialized countries have during the early decades of their competition laws used them for a wide variety of goals (e.g. Bhattacharjea 2013:53-57)—have argued that developing countries should (be free to) use competition law and policy to pursue...
their economic and non-economic developmental needs, each tailored to the country's particular circumstances.

Including economic growth and development among the goals of antitrust certainly has much appeal, and all else equal, a developing country should surely implement its competition laws in ways that foster rather than delay or impede development. As a practical matter, however, economic growth as a measure of success of competition policy is problematic, given that the most sophisticated, complex models of economic growth lack the precision to be able to assess the effect of competition law and policy with confidence [REF]. And as a matter of policy, growth and development are too far removed to yield clear operational guidance for competition agencies. Often, therefore, calls for pro-growth competition policies have amounted to little more than exemptions from the application of competition rules, for instance for industrial policies, even when there is little evidence of economic benefits (Evenett 2005). Some proposals for implementing a pro-development competition policy, however, suggest specific steps to be taken, which might at least serve as a measure of whether a country is pursuing such a policy.

Drawing on the broader notion of human development, Bhattarcharjea suggests that competition law enforcement and policy in developing countries should focus on "competition issues in sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture [and its inputs] and health care" (2013:53). And he advocates that developing country agencies focus on disclosing and alleviating concrete local impediments to the operation of competitive markets—both because such a focus promises to build popular support for competition policy and because they need to build technical capacity and transgovernmental institutions before they have a chance of success in going after the transnational cartels that often ruthlessly target developing countries (2013:61f). For assessing success, these arguments imply looking at the sectoral composition and geography of enforcement efforts.

Fox (2011) goes further in suggesting a specific modification of the operational goals of competition policy that promises to yield the kinds of local benefits for which Bhattarcharjea calls: Pointing out that in highly unequal societies, inequality in education, access to capital, etc. creates severe barriers to entry, she suggests that a competition policy that seeks to foster competition with equality of opportunity to partake in the market and share in its benefits must include measures to overcome such inequality or at least its effects (Fox 2011:275, 281-83, 285f). What are the implications for assessing success? Competition law and policy would from this vantage point be clearly successful if they contributed to actual increases in market participation from previously marginalized or excluded segments of the population. And they might already be considered at least partly successful to the extent that they measurably reduce the barriers to entry.

**Unleashing Rivalry: Capacity Building**

The foregoing discussion reminds us that, if competition law and policy is to foster competition, it needs to identify impediments to competition, such as barriers to entry, as well as intervene to alleviate or reduce those impediments—and there must be potential new market participants that are at least sufficiently

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4 In adopting this label, we borrow from the title of the joint report by the Competition Commission of South Africa and the Competition Tribunal of South Africa (2009). We are indebted to Eleanor Fox for bringing this report to our attention.
interested in entering the markets so as to constitute a real competitive threat. This calls our attention first to capacity building and advocacy as important operational goals, then to fostering a "culture of competition."

Intervening against anti-competitive practices and forestalling anti-competitive effects of mergers by imposing conditions or blocking such mergers altogether requires, first, the ability to identify or detect such threats to competition, then the ability to undertake law enforcement or other measures to stop or minimize the anticompetitive practices or effects (and monitor compliance thereafter). As Nelson (1979) noted in his incisive comment on Posner's depiction of the Chicago School of antitrust thought: "It may be easier to identify warts than to perform surgery that does not leave scars or have other nasty side effects. But this does not mean that a steady alert and occasional operation are not called for." A number of scholars have pointed out how resource and capacity constraints restrict the ability of developing country competition agencies to take even the first "easier" of these steps, which necessitates advanced economic, legal, and possibly political analysis. However, developing country agencies may be less unique in this regard than they seem. Few if any competition agencies have come to life fully formed and well-resourced. The EU Commission's Directorate General for Competition (originally DG IV) illustrates this point well: When it was first set up—amidst considerable skepticism even among those member states who had supported the treaty provisions for a supranational competition policy against proposal by the most powerful governments, of France and Germany, to do away with enforceability—DG IV had a pitifully small staff of mostly low-ranking officials and no meaningful resources beyond the intellectual firepower of the individuals who applied for the low-rank, low-prestige position, mostly out of intrinsic commitment but with little prior experience since none of the member states had meaningful competition law enforcement agencies at the national level prior to 1957 (Büthe and Swank 2006). For the first several years, they mostly conducted market analyses, in some cases collecting evidence for later enforcement actions but often simply disclosing publicly both governmental and private impediments to the operation of markets. Thus they gained the analytical and practical experience needed for their later enforcement work—and they built a constituency, making impediments clearly known to market participants who could benefit from their removal and alerting such constituents to the availability of EU-level competition law and policy as a means to seeking redress. The EU experience suggests that capacity can (and maybe must) be built internally, though doing so takes time.

Accepting capacity building as an operational goal of competition law and policy implies that the production and publication of market analyses that identify impediments to market competition and estimating their material consequences should already count as success, particularly in the first decade or two of a competition agency.

**Unleashing Rivalry: Advocacy vis-à-vis Legislatures and Public Bodies:** Competition advocacy has increasingly come to be recognized as a very important (and distinct) part of competition policy (Botta 2012; Kovacic 1997, 2006; Rodriguez and Coate 1997). As defined by the International Competition Network, advocacy refers to "activities conducted by the competition agency related to the promotion of a competitive environment by means of nonenforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition" (Sanchez Ugarte et al. 2002:25). In developing countries, advocacy vis-à-vis legislatures and parts of the executive branch with rule-making or market-regulating functions is often particularly important because it
is often "the state [that] harms competition" (Fox and Healey 2014) through laws and regulations that render the market mechanism dysfunctional, including the grant of monopolies (a prominent concern already for Adam Smith and his contemporaries!) and state-owned enterprises.

Success in advocating for letting the market work and avoiding anti-competitive policies requires ultimately a level of political support that no competition agency should be expected to generate on its own (see Section 4, below). What other, more intermediate measure of success might we identify? Accepting the importance of advocacy as an important element of competition policy in developing countries therefore implies that an explicit recognition of the need for competition advocacy, as well as actual well-prepared and targeted advocacy work might already be considered an indication of (partial) success. Specifically, the incorporation of provisions allowing for, or prescribing, advocacy by the competition agency in the laws of a country that did not previously contain such provisions, or the legislature's specific allocation of additional resources for advocacy work might then already serve as measures of success, as would the practice of competition advocacy.

**Fostering a "Culture of Competition":** Markets do not exist in any state of nature, especially markets in which arms-length, fully voluntary transactions coordinate the behavior of economic actors sufficiently well to foster sustained economic development. Such markets are deeply embedded in, and depend upon, supportive formal and informal social institutions, which usually take a long time to develop (Hough and Grier 2015). Among those supportive social institutions is arguably a "culture of competition," which may be defined as a broad-based consensus in the private sector and more generally among the public, economic actors and state institutions that competition between economic actors is generally beneficial and normatively desirable as fundamental principle for the operation of the country's economy. Historical analyses of the development of EU competition law and policy often emphasize the fostering of such a culture as one of the most important contributions the supranational EU Commission made—over the course of several decades—to reducing pervasive cartelization and collusion (e.g., Wilks 2007) and U.S. regulators and private sector practitioners with a long time horizon similarly tend to mention creating and maintaining such a culture as an important contribution of U.S. antitrust law and policy⁵ (see also Freyer 1992). To be sure, the European Commission's ability to foster a competition culture in the business community at the local level might have depended upon the availability of local legal institutions and bureaucratic capacity (Drexl 2011: esp. 243-246), which might be lacking in many developing countries. But such practical impediments, discussed in the next section, do not invalidate the goal.

Accepting "fostering a culture of competition" as a goal of competition law and policy implies that changes in the expectations and normative disposition toward market competition, if they can be attributed to the competition authority's efforts, should count as success, particularly in the early years of a new competition regime. In term of specific actions, it implies an emphasis on advocacy with a specific content (the presence of which might be considered a sign of success) as well as (at least a minimum level of) actual enforcement to signal that the rules are meaningful.

**Economic and Political Freedom:** Economic resources can almost always be used to gain influence—in the market and beyond. Consistent with this view, the concern that high concentrations of economic power are inimical to economic freedom was a prominent theme in

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⁵ Not-for-attribution interviews, Washington DC, 27 March 2015.
the Congressional debates of the bills that eventually became the Sherman Act of 1890 (Kintner 1978). Moreover, as most explicitly articulated by ordo-liberal competition law and policy scholars and practitioners (e.g., Böhm 1933, 1961; Eucken 2001), if economic power is political power, some restrictions on market concentration may be of fundamental importance for the compatibility of political democracy and a market economy. This issue has not received much attention in the existing literature on competition law and policy in developing countries but seems particularly pertinent since many of them have only quite recently made the transition to democracy. It underscores the value of advocacy. Might it also suggest the suitability of relying to a greater extent on structuralist market analysis?

2. Review of the Literature—and Discussion (1)

**Impediments to Effective Competition Policy in Developing Countries**

Effective implementation of competition law and policy faces many obstacles in developing countries, which we roughly group into five categories.

First, competition policy enforcement frequently suffers from fundamental weaknesses of markets in developing countries. Domestic markets may be underdeveloped due to infrastructural weaknesses, such as poor conditions of roads and ports, and impediments from geography and climate that prevent existing infrastructure to be utilized to create a truly internal market (Gal and Fox 2015). Besides physical impediments, domestic markets may also be institutionally underdeveloped. Property rights might not be respected (sometimes above all by the state), and contract enforcement might be weak. Furthermore, in some cases domestic markets might be too small to work anything like a truly competitive market even in the absence domestic anticompetitive conduct (Gal 2003). The size of the domestic market also constrains enforcement efforts against international cartels and merging firms, which can easily circumvent the agency’s penalties or conditions. These weaknesses of markets means that even the most brilliantly executed competition policy by itself cannot bring about significant improvements.

Second, many developing countries' markets also do not work like truly competitive markets due to the state retaining significant ownership stakes in some industries, or having a traditionally high presence in the economy through regulating prices or directly regulating competition among rivals. For instance, the Mexican state effectively organized and protected a cartel when the sector regulator "ordered the telecoms firms in Mexico to set their rates for calls entering Mexico at the rate set by the largest firm," Telmex (Fox and Healey 2014:772). And many countries' competition laws include exemptions for state-owned enterprises and/or government-sanctioned monopolies. Unlike the structural or geographic weaknesses of market, however, these characteristics of many developing countries' markets beg the question: Do such impediments not simply intensify the need for a strong competition regime, rather than constitute an insurmountable obstacle to effective competition policy?

A third set of obstacles to effective competition policy enforcement is political-legal in nature. A significant number of developing countries that have adopted competition laws in the last thirty years are characterized by weak rule of law and little judicial independence, which hampers the development of an effective competition regime, particularly since the judiciary

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6 On this point, see Kirshner's work on ostracism in Athenian democracy (2013) and Issacharoff's work on political democracy (e.g., Issacharoff and Pildes 1998).
often times plays an important role as the final arbiter in the enforcement of competition law. This problem is exacerbated by often pervasive corruption, creating uncertainty about impartial enforcement of competition laws. Autocratic regimes or weak democracies are common among younger competition regimes as well, which means that diffuse interests, such as the interests of consumers, tend to get only weakly represented (Weymouth 2012). Relatedly, massive political inequalities characterize public policymaking in many developing countries with recent competition laws, increasing the risk of political interference with competition law enforcement in the interest of firms or groups with privileged access to political leaders. Here, too, however, one might ask whether the possibility of such intervention is necessarily a severe impediment to the success of the competition regime, or maybe an additional reason to reinforce the independence of the competition agency?

A fourth set of constraints in developing countries impedes both regulatory enforcement more broadly, and competition law enforcement specifically. Frequently developing country regulatory agencies lack the financial resources to carry out meaningful enforcement efforts (Gal and Fox 2015:14; Gal 2010:420). Shortage of expertise, in particular of well-trained competition lawyers and economists cripples the agencies’ efforts at enforcement. This problem becomes even more acute when younger competition agencies choose more economics-based approaches to competition law (Gerber 2015), which relies on highly complex models for evaluation of anticompetitive conduct and stringent data requirements, which demand higher computational and staff resources for enforcement. Even when skilled staff can be found or trained in competition agencies, attrition to the private sector is a major concern in developing countries. It has also been questioned whether competition law enforcement is the best use of resources and skilled personnel in the least developed countries where such resources and skills are very scarce. A related problem has to do with the lack of expertise in the judiciary on competition law issues, which in some instances has crippled early years of competition policy enforcement with the courts reversing agency decisions on many crucial cases (ICN 2007). One might ask, however, whether all of this does not simply heighten the need for capacity building and advocacy? And while attrition is a real problem, if training in competition law and policy fosters transferable skills, it might ease building political support for it to treat the costs as a public investment with positive spill-over to the larger economy.

A final constraint in the way of enforcement of competition law and policy in the developing countries is the lack of what is usually referred to as a competition culture, or the lack of genuine support for market competition. In many of the developing countries that have recently transitioned into market economies, it is argued that many economic actors still have little trust in the functioning of market mechanisms (see, e.g., Fels and Ng 2013; Lewis 2013). Support for market competition among the economic actors and the society in general is crucial to the effective implementation of competition policy. Without such support, the natural constituency for competition law, which is composed of groups such as consumers, and producers and entrepreneurs that face high entry barriers from existing firms, does not form or become vocal, denying the competition agency of advocates and allies in the society, and of potential sources of complaints and information. Lack or weakness of such support is arguably one of the most important impediments to effective competition law and policy in developing countries, and perhaps also the most difficult one to overcome given that it is not easily resolved by increased agency resources or by technical assistance from abroad. At the same time, might this seeming impediment not simply underscore the need for competition law and policy—albeit
surely a differentiated policy that puts advocacy and building a competition culture front and center?

3. Review of the Literature—and Discussion (2):
Conducive Conditions for Effective Competition Policy in Developing Countries

Despite the presence of various factors that impede effective enforcement, some developing country agencies succeed in enforcing competition law and improving the competitive process in their countries. A number of factors are pinpointed in the theoretical literature and case studies as conditions that help agencies succeed. First, some minimum level of financial resources and expertise of staff is surely necessary for a meaningful level of enforcement. Many observers emphasize how a group of dedicated, well-trained competition policy experts can make a difference even in contexts where significant other impediments exist [REFs]. At the same time, relatively generous funding and staffing is not guarantee for ensuring success, as may be illustrated by cases such as Saudi Arabia. Indeed, Dalkir (2009) suggests that “effectiveness gaps,” where an agency performs below the expected degree of effectiveness given their level of funding and expertise, are widespread. The issue may be that the resources are used in a way that does not improve the agency’s effectiveness; for instance, a large budget may be used to make political hires rather than hiring on the basis of meritocracy. Sometimes other impediments that we outline above (weakness of markets, political conditions, lack of support for market competition) are so severe that even a well-funded and staffed agency may not be able to make a big difference.

A second factor that helps account for more successful cases is the presence of domestic allies that help support the competition agency. For instance, democratization in a country gives voice to previously excluded groups such as consumers and small businesses, aiding competition agencies’ efforts to curb the power of dominant economic actors that prevent newer firms from entering into markets (Weymouth 2012). Civil society, both domestic and transnational, can also help boost agency’s enforcement efforts (Foer 2008). Non-governmental organizations such as the Consumer Unity Trust (CUTS) in India and Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional (IBRAC) in Brazil have helped educate the public and contribute to national debates on competition policy. A competition agency may also find allies among other regulatory agencies, different parts of the government and the bureaucracy, as their interests coincide in pursuit of regulating the competitive process in the country. For instance, memorandums of understanding or protocols signed between sector regulators and competition agencies in the recent years have become common ways to establish cooperative relations between different agencies.

Finally, political support from international and regional organizations may help boost a competition agency’s effectiveness in various ways. International organizations such as the United Nations Conference on Trade and Development (UNCTAD), and the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) provide competition agencies with much needed resources and/or know-how on enforcement issues. The UNCTAD and the OECD have working groups focused on various aspects of competition law and its enforcement. The International Competition Network (ICN), which is a virtual network of competition agencies founded in 2001, aims at promoting convergence among national competition laws and enforcement practices (Coppola 2011; Djelic
and Kleiner 2006). These three organizations hold regular forums for competition agencies, where the member state agencies cooperate, share experiences, and draw up recommendations, best practices and model laws. They offer technical assistance to younger competition agencies, and provide opportunities for voluntary peer reviews of competition policy law and its enforcement in countries that request to go through such a review. These forums create a peer group for competition agencies, which fosters learning and capacity building in younger competition agencies, and additionally creates pressures for building or keeping up an agency’s reputation as an independent, effective agency.

Regional organizations such as the European Union (EU) have also positively influenced the effectiveness of competition policies in the member states, prospective members and associated countries. The EU typically includes competition policy provisions in its trade and association agreements, and candidate countries have to adopt competition laws or modify their existing laws to conform to the EU’s legislation in this area (Aydin 2012; Doleys 2012). The adoption and subsequent development of competition laws and policies in Central and Eastern Europe was influenced significantly and for the most part positively by membership negotiations (Gwiazda 2007). Conditionality of the Customs Union Agreement of 1996 played a key role in the adoption of the Turkish competition law, and membership negotiations have contributed to the maturation of the Turkish competition authority (Aydin and Kirisci 2013).

Foreign support of either kind can be a double-edged sword, however. On the one hand, such support may help alleviate impediments to agency effectiveness by addressing issues such as lack of resources and expertise. International and regional organizations may also serve as important external anchors for competition policy reforms, which may otherwise be blocked by entrenched interests, private or public. On the other hand, such foreign support may reinforce the perception of competition law as a foreign import, and undermine local receptivity to such laws. Foreign support may also leave less room for developing countries to devise competition laws that are more attuned to local conditions, which might have better chances of being enforced (Fox 2011; Gal and Fox 2015). Thus, while support from international and regional organizations have been key to the effectiveness of competition law and policy in some developing countries, there are also significant pitfalls to international involvement.


Much has been written about the importance of independence of regulatory bodies (see, e.g., Maggetti 2012; Wonka and Rittberger 2010). Specifically, regulators as "agents" should be independent from their nominal political principals in order to be able to pursue their assigned goals without being distracted by conflicting agendas and in particular to be safeguarded against pressures from policymakers to abuse their powers for short-term gains of their political principals (see, e.g., Kono 2006). In addition, they are to be autonomous from the regulated as a safeguard against capture by special interests (for recent reviews, see Carpenter and Moss 2014; Dal Bó 2006). These arguments have been particularly clearly articulated with regard to central bank independence, and even though there are some notable differences between central banks and regulatory agencies (Gilardi 2007), the core arguments in favor of central bank independence

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7 The World Bank and the Inter-American Development Bank also financially support various national and regional projects in the area of competition policy, and foster research in this field.
(and autonomy) have been said to apply similarly to competition authorities (Vickers 2010). Moreover, on the empirical side, there is anecdotal evidence of the importance of agency independence (e.g., Boadu and Olofinbiyi 2003), as well as statistical evidence suggesting that de facto independence of competition agencies increased perceived effectiveness of a country's anti-monopoly law or policy (Ma 2010), and that both de jure and de facto independence of competition agencies lead to significantly higher total factor productivity, as well as lower levels of corruption, in both developed and developing countries (Voigt 2009:esp. 1239ff).

Does this imply that the optimal institutional arrangement is one that maximizes agency independence? Notwithstanding the above arguments and findings, we suspect that the benefits of independence are conditional on how the strength of the rule of law in the country (which is a hallmark of liberal democracy but should be considered a distinctive institutional characteristic) and—seemingly ironically—the strength of political support for competition policy. Competition agencies thus might not so much need pure independence or autonomy but something akin to what Evans, when discussing characteristics of the state that are conducive to adjustment and economic growth, has called "embedded autonomy" (Evans 1992, building on Ruggie 1983). If our reasoning above is correct that, in developing countries in particular, competition regulators need to take on entrenched interests within the government and the state (challenging unnecessarily competition-restricting laws and regulations as well as anti-competitive practices by state-owned enterprises)—in addition to having to challenge the anti-competitive practices of often powerful economic elites in the private sector, they would need to be extraordinarily powerful (to the point of incompatibility with democratic governance, see Barry 1985) to stand a chance.8

References


8 For a discussion of the challenge if not necessarily complete futility of trying to foster a competition culture without political support, see e.g. Freyer's (2006) and Hadley's (2003) accounts of the development of Japanese competition law and policy and Botta's (2012) comparative analysis of the Argentinian and Brazilian competition regimes. See also Jenny's (2012) distinction between structural and operational independence, which we will more properly engage in subsequent versions of this paper.
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