

Making global markets work through competition and consumer protection

**Allan Asher
Consumers' International**

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There has emerged, over the past decade, a near universal belief amongst policymakers that a precondition for sustainable development is the emergence of well functioning markets. This is especially true of economies, which are more open to trade, and to the effects of international capital markets. To achieve the benefits of global exposure while reducing or eliminating its negative impacts, developing countries need both efficient markets and effective governments.

In relation to developing countries, it is a generally accepted observation that throughout the period from the mid-1970s the late 1980's too much attention was paid to removing obstacles to market forces while too little attention was paid to the need for effective governance and social cohesion.

While it is often claimed that foreign direct investment will avoid countries in which regulatory burdens are perceived to be excessive, it is equally true that investors will also avoid states where the regulatory infrastructure is such that investors cannot rely on the objective application of predictable policies which ensure law and order, promote the development of human resources through education and health policies and provide protections for property rights. Needed is a regime which neither unduly constricts business nor one, which is so lax as to expose, its citizens to goods and services which may be unsafe or fail to perform as they ought or business practices which are fraudulent or monopolistic. This paper reflects on some public interest considerations in relation to competition issues and then proposes some measures which, if implemented, could lead to closer co-operation between consumer and business interests in cross border competition matters.

Global Mergers

In recent times there has been a spectacular increase in the extent of international merger activity, in one sector after another – finance, communications, oil, airlines, pharmaceuticals, automotive and professional services.

For the most part, these mergers are not anticompetitive and pose no major challenge to the global economy's major competitiveness. Indeed, in many cases, they enhance competitiveness and improve economic efficiency by creating more efficient arrangements for international business transactions.

However, it is very important that consumers be vigilant about these matters.

Some mergers occur internationally, which can damage competition and will force consumers to pay more in certain countries with particular market structures.

Market Power

A further dimension of competition policy relevant in the discussion of consumer policy, competitiveness and development is the misuse of market power occurring on a global basis. The point can be made about the Microsoft case in the United States.

In November 1999 the United States District Court found that Microsoft possessed monopoly power in the markets for Intel-compatible PC operating systems and browsers, and that it used this power to thwart competition in contravention of US anti-trust law, which resulted in substantial consumer detriment. On 6 June 2000 the Court ruled that Microsoft should be split into two distinct entities. While a US appeal court has now dismissed the proposed remedy, the essential findings of fact concerning monopolisation have been sustained. We all await with interest the attitude of the courts to the proposed DOJ settlement and the dissent of the State plaintiffs.

The point to make about this case is that it is essentially about anti-competition arrangements in the United States that have a global effect. Moreover, the Microsoft case illustrates the importance of applying antitrust law to areas of the economy, which are characterised by high rates of technological innovation. Put another way, the new economy is not immune from either the misuse of market power or conventional anti-trust remedies. Questions about Microsoft are still under consideration in Europe.

Policies to protect the interests of consumers

To date, the main interest in issues relating to global price-fixing cartels, global mergers and monopolisation has been in OECD countries. It almost seems that there is an assumption that issues of this character are unimportant in developing economies. It is my contention that the opposite is true. To create functioning markets, which satisfy the needs of consumers, rules are needed. Price-fixing, anticompetitive mergers and monopolisation drain welfare from consumers and delay sustainable development. It seems obvious that in a globalising economy characterised by ever increasing degrees of economic interaction between countries with ever greater activity on the part of trans-national firms with global cartels and global market power, that some kind of international effort is needed to deal with some of the problems. National governments alone cannot deal with all global problems.

The issue is, with no international antitrust or consumer protection regime, nor any real likelihood of one being introduced in the near future, what should and can be done to address the issues raised in the context of development?

Competition regimes and competitiveness: a growing consensus

Competition policy, which aims to ensure more efficient allocation of resources, usually through the prohibition of price fixing or market sharing cartels, abused by dominant firms and control of concentrations will assist the creation of markets responsive to consumer signals, through success of firms which are best able to satisfy quality, choice and price requirements of consumers and exit through failure of those which are not competitive.

There is a growing consensus on the need for ensuring fair competition in the market as an essential ingredient for enhancement and maintenance of competitiveness in the economy. With the advent of globalisation and the gradual opening of economies, domestic competition is important to enhance or maintain competitiveness. Michael Porter in his study (1990) containing a major survey of international industrial performance found that it is the firms which face strong domestic competition which perform best in international markets. More recent work by Porter (2000) shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn – examples include cameras, automobiles and audio equipment.

Efficient allocation of resources leads to increased competitiveness resulting in higher growth and development. This also means higher output, better quality and lower prices leading to increased consumer welfare. This needs sound industrial and trade policies, complemented by a suitable competition policy and law.

So what practically can be done to enhance convergence between competition policy and consumer protection?

It is all very well to note the trends in the global economy and to recognise the important forces that are driving changes in the way that we utilise policies to deal with those changes. What we must do however is to focus our attention clearly on what we can do practically to ensure that consumer policy and competition work well together in a globalising world policy environment. The core principles for such policies must be transparency, engagement and co-operation.

Transparency

Free and easy access to information

Ordinary citizens hear a good deal about how mergers and cross-border economic agreements will benefit them. However, there is often very little detail. They tend to be left, in the words of that immortal US food advert, asking 'where's the beef'. One of the best ways to help address this problem is to be more free and easy with the information and data. It must be remembered that most citizens and consumers get their views of mergers and deals from 'opinion formers'. If these people have better access to good information, then debate is enhanced. So how can we do this?

1. Simply make more information available

The US gives a clear lead here - if you look at the sort of filing information made public during competition investigations it makes you wonder why other jurisdictions do not do likewise. The simple lesson is - if you want to engage your populace in debates about competition and consumer policy - you have to give them the information to be able to get into the debate in the first place.

2. Make that information more consumer focused

A further means of making the consumer more engaged in competition policy is to develop a pro-forma document that spells out the claimed benefits of a merger or agreement in public interest terms. This Public Interest Statement would, of course, be a voluntary declaration by a company seeking to advance a merger or agreement. It would, however, help to inform debate and trigger discussion. Such a document might consider a range of issues such as the following:

- Fostering business efficiency and promoting international competitiveness
- Rationalisation of inefficient industries to reduce or contain costs
- Employment expansion in efficient industries
- Access equity
- Interests of consumers
- Promotion of consumer sovereignty
- Promotion of efficient small and medium enterprise sector
- Enhancement of product and service quality, safety and performance
- Expansion of consumer choice concerning the range of available goods and services
- Provision of information to market participants to enable better informed choices
- Promotion of practices which promote ethical and equitable markets
- Measures which reduce costs such as to reduce final prices
- Measures which contribute to sustainable development

In assessing global mergers or other arrangements between competitors, regulators and consumer representatives will also consider the extent to which the markets, in which the proposed transition is to occur, suffer from anti-competitive practices. It can and should be anticipated that where there is evidence of the following market problems, then greater scrutiny will be required.

- Incidence of national, regional or global cartel activity within the industry
- Extent to which legislation protects or promotes cartel conduct (export cartel exemptions, joint venture defences)
- Application of anti dumping laws for protectionist reasons

Engagement

Engaging the public

Almost every agency is finding that the relationship between competition policy and the citizenry is an increasingly important one to deal with. The phrase 'competition culture' has come from almost nowhere to be one of the most popular phrases uttered at international conferences. Engaging with the public and with the consumer movement that seeks to advance their consumer rights, is a key part of this culture. This has to be done by:

1. Creating a constituency for competition

This job will not be easy everywhere in the world. But the key job of creating a constituency for competition is to get public interest consumer groups on board. The business community will never be a permanent friend of competition - it simply cannot be - the conflict of interest issue will arise whenever a particular case or policy affects the bottom line. Competition agencies have to engage in real out reach and training work to spread the constituency. International consumer bodies must also be engaged to proselytise among their membership and ensure that the competition message is delivered in a consumer friendly manner.

Engaging the international community

Engagement cannot simply be a matter of dealing with national constituencies, as important as this is. There is also a job to do in building confidence among those countries either without competition and consumer policies (of which there are still a fair number) or those without the resources or will to ensure that those policies are both strong and well enforced (of which there are a far greater number).

Co-operation

We hear a huge amount about co-operation in the competition community and there is a lot of very good co-operation being offered. However, we think that two specific forms of co-operation need to be developed alongside each other.

1. Twinning

Rather than spreading the resources of all agencies across all requests we think that general training and co-operation should be handled by the international agencies best suited to those

tasks. However, we think that the competition agencies of developed countries should engage in a process of twinning with a small number of developing country agencies. This twinning should consist of staff sharing, training and case handling. This process should be a deep one as well as a broad one. The length of time that this twinning should cover should not exceed five years, but should generally not be shorter than this. This will build effective, strong, well supported agencies, quickly and permanently.

2. Civil society development

Keeping the training and twinning work to the confines of official agencies will not help to embed those agencies in their civil societies. Alongside the twinning arrangements with agencies separate programmes have to be run with civil society representatives, most notably consumers' organisations, to ensure that the strengthened competition agencies in developing countries can lay down their roots in fertile and welcoming ground.

CHALLENGES AND OPPORTUNITIES FOR THE FUTURE

There is widespread apprehension that the ongoing process of globalisation is bound to aggravate global inequality and will have serious negative impact on the poor. It also does not follow that the developing countries will be better off if they shut themselves off from the process of globalisation. Therefore the ways forward for the developing countries is to devise policies which will help them to:

- Calibrate their globalisation and liberalisation process,
- Communicate with the people cogently,
- Put in safety nets for the poor, vulnerable and the disadvantaged, and
- Maintain a check on the adverse effects of globalisation.

While increased competitiveness in a globalising world meets more overall wealth, it has also been noted that it increases inequitable distribution of wealth. The numbers of poor, and extremely poor, far from being reduced has increased worldwide. It is time for measures aimed at increasing competition and competitiveness to be matched by global social networks and measures aimed at dealing with the adverse effects of marginalisation.

Measures such as social safety nets health and employment insurance schemes and training provisions to cushion poor people in low-income countries against being battered by the twin forces of globalisation and the digital divide, should be built into the system of international relations.