

Some Recent Trends in Global Competition Policy

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Abstract: Principles of fair competition are built into all multilateral and regional trade rules in differing degrees starting from GATT 1947. Even though efforts at multilateral rules on competition policy did not succeed in WTO, more and more Regional Trade Agreements have been incorporating competition policy, and in more and more intensive way in recent times. However, after the global financial crisis there is a marked tendency among countries to have more restrictive trade policies. Industrial policy has been noticed to stage a return in many parts of the world. The pandemic has accelerated this trend. Regulatory forbearance, though necessary during serious crises, could lead to entrenchment of unfair practices for the medium to long term, with consequent loss of welfare. The very nature of and the emerging dominance of digital markets render the task of antitrust authorities to ensure fair competition difficult. Cross-border cartels have become more difficult to be spotted and booked. Even as cross-border mergers are becoming more common, coordination among competition authorities are still lagging. Multilateral trade liberalization has to gather momentum to keep the competition pot boiling for trade. G20 agenda needs to increasingly build in competition policy issues.

Introduction

The broad consensus that emerged over the years that competition in the market and for the market and a sensible competition policy by governments support enhancement of economic efficiency and increase overall welfare appears more and more in danger of getting diluted. This apprehension has been strengthened with the arrival and advance of the COVID-19 pandemic. The role of the state was to be confined to regulating markets and, where necessary, correcting 'market failures'¹, even though the contours within which competition should play out has always

remained a debatable subject. Will too much competition result in evolution of oligopolies or even near monopolies (the rule of three² phenomenon)? The emergence and increasing dominance of the digital economy has thrown up a completely new dynamics of competition law and policy in all its dimensions. Even as questions have been raised on the relevance of competition policy and the role of regulators, there have been voices echoing the view that the benefits of competition are relevant at times of economic crisis as well³. The COVID-19 crisis has magnified the importance of competition policy.⁴ Certain facts remain

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unquestioned: that cartels are a cancer on the economic fabric of countries across the globe, and that cross-border mergers need close scrutiny across jurisdictions, as also that coordination among competition authorities is becoming more and more essential to ensure that remedies when applied are compatible. Price fixing cartels, in particular, tend to be cross-border, what with global supply chains gaining grip over international trade over the years.

International Trade and Investment Flows

International trade flows have been languishing in recent years and the pandemic has brought down trade flows to historic lows⁵. Similar is the case with cross-border investment flows⁶. UNCTAD's Global Investment Trends Monitor released on 27 October 2020 showed that global foreign direct investment (FDI) flows fell 49 per cent in the first half of 2020 compared to the corresponding period in 2019, largely due to COVID-19. While the G20 leaders resolved during the global financial crisis to avoid protectionism with a view to avert any further deepening of the crisis⁷, similar sentiments were seen to be less forthcoming during the pandemic, which in effect, has had an even more damaging and more comprehensive effect on the global economic, social and political landscape. It has also resulted in a number of countries resorting to unilateral restrictions on imports and exports.⁸ It was found that the G20 Members took an unusually high number of investment policy measures since early 2020 when the COVID-19 pandemic began to sweep the planet. This in spite of the fact that the G20 Trade and Investment Ministers pledged to continue to work together to deliver a free, fair, non-discriminatory,

transparent, predictable and stable trade and investment environment, and to keep our markets open⁹. There have been broad consensus at international fora that emergency measures designed to tackle COVID-19, if found necessary, must be targeted, proportionate, transparent, and temporary, and do not create unnecessary barriers to trade or disruption to global supply chains.¹⁰ However, in spite of the consensus statements at various international and multilateral fora, trade restrictive measures tended to abound. WTO has made a compilation of restrictions imposed on trade by countries in the aftermath of COVID-19.¹¹

The most important flipside of such increasing trade and investment restrictions for mitigating the adverse impact of the crises is that there is a tendency for such measures, taken in times of emergency, to be sticky. Thus there is a real fear that trade liberalisation achieved over a long period of strenuous and protracted rounds of negotiations and consensus building, is at risk of being reversed on a near permanent basis by many countries. Such restrictions are contagious: restrictions in one country prompt other countries to retaliate or follow suit. International trade facilitates productivity growth and, theoretically at least, tends to facilitate convergence of income and welfare across the world. It is a potential medium through which the benefits of growth and development could be transmitted across borders. Thus both competition policy and trade mutually reinforce each other and serve the end of efficiency, productivity and welfare maximisation.

The economic convergence between developing countries and advanced economies visible since the 1980s and coincided with the Asian Miracle started

fading since 2008 with the surfacing of the global financial crisis. The main driver of this convergence was trade, facilitated by the lowering of barriers due to the Uruguay Round of trade negotiations, containerisation of cargo and falling costs of communication. The flying geese pattern of export growth in East Asian countries in particular has since ceased to be replicable, or only very few countries are capable of doing so in 2020. This trend again has been highly accentuated by the COVID-19 pandemic.

Anticompetitive practices, especially cartelisation and entrenched monopolies tend to lower the benefits of international trade. This is all the more evident in high-tech and digital economies. However, the relevance of multilateral trade still remains intact.¹² This however depends largely on the effective enforcement of competition law in various jurisdictions. The international dimension of competition policy is widely recognised¹³ and the collapse of the efforts at a multilateral agreement on competition in WTO in 2004 is not ground to believe otherwise.

Competition Policy and Industrial Policy

Industrial policy is generally viewed as a restraint on competition as it facilitates deviation from the path and/or destination where the market forces would have taken a sector or the economy. After a period of competition policy getting upper hand on industrial policy, there is now widespread talk of the return of industrial policy¹⁴. The Uruguay Round of trade negotiations and the Marrakesh Agreement and the birth of the World Trade Organisation (WTO), all aimed at and resulted in the restraining of the industrial policy-led gains from trade and growth

being minimised. Thus restrictions on local content requirements, non-discrimination in terms of Most Favoured Nation (MFN) and National Treatment (NT), all were aimed at this. While tariffs were capped, non-tariff barriers too were addressed to an extent. However, signs of a competitive return to industrial policy led growth has been particularly evident after the global financial crisis of 2008. A major step was the weakening of the trade multilateralism in general and the WTO dispute settlement system, in particular. The pandemic prodded restraints on trade and travel flows expedited the return to industrial policy in many parts of the country¹⁵. Instead of comparative advantage and factor endowment, industrial policies of countries have started dictating the extent and composition of trade flows. Fears have been expressed that by the time the dust of COVID-19 settles down industrial policy would be very well back in vogue.

The multilateral trading system under the WTO created to promote competition in international trade itself has been having a rather bumpy ride. On all the three aspects of its mandate WTO has failed the Members. The mandate to have continued negotiations and continued liberalisation has been largely stuck, with only ITA-I and ITA-II and Trade Facilitation as examples of results. There is dissatisfaction about governance at the WTO, including notification and compliance. The fate of the Dispute Settlement System appeared sealed, though the new administration in the US has given hope, especially with the support extended by the US for the selection of the new Director General.

Tariff reductions are a significant representation of the unfolding of competition in international trade.

However, non-tariff barriers to trade have emerged as major restraints on competitive flow of goods across borders. Such barriers are not confined to goods alone. Services too face non-tariff equivalent barriers. As the share of services in international trade increases as years go by¹⁶ the non-tariff equivalent trade barriers too are rising.

The UNCTAD classification¹⁷ identifying measures affecting trade flows includes measures affecting competition. This category covers measures granting exclusive or special preferences or privileges to one or more limited groups of economic operators. It also includes state-trading enterprises (STEs), with special rights and privileges not available to other entities, which influence through their purchases and sales the level or direction of imports of particular products. Compulsory use of national services like compulsory national insurance which involves the requirement that imports must be insured by a national insurance company and compulsory national transport which requires that imports must be carried by a national shipping company are also classified as instances of measures affecting competitive flow of trade across borders.

Efforts at Multilateral Rules on Competition Policy

There is wide recognition that competition policy could help best harness the potential benefits of foreign direct investment (FDI) as drivers of economic transformation.¹⁸ And efforts at a multilateral framework on competition policy have been underway for some time. GATT 1947 did not have any explicit provisions on competition policy, though the discussions leading to the Havana Charter had a full-fledged section on

restrictive trade practices. The Uruguay round of trade negotiations resulting in the Marrakesh Agreement and the birth of the WTO brought competition policy more explicitly into the multilateral trading system. The General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Trade Related Investment Measures (TRIMs) have specific competition policy provisions. More than 130 countries currently have enacted competition laws. The International Competition Network (ICN), UNCTAD and OECD provide international fora for discussions on competition policy and sharing of developments in the area.

The WTO TRIMs Agreement in Article 9 envisages that not later than five years after the date of entry into force of the WTO Agreement (i.e. 2000), the Council for Trade in Goods (CTG) shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. It is also provided that in the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy. The first Ministerial Conference of WTO (Singapore, 1996) mandated two separate Working Group processes which studied the issue of the relationship between trade and competition policy and that between trade and investment respectively. The Doha Ministerial Conference (2001) agreed on a structured discussion and a decision at the following (Cancun, 2003) Ministerial Conference based on consensus. Cancun conference was inconclusive. The Geneva Framework Agreement (2004) decided to take three Singapore issues of competition policy,

investment policy and transparency in government procurement out of the Doha round of trade negotiations.

During the accession process of newly acceding countries and during the Trade Policy Reviews of existing Members competition policies of the relevant countries are being increasingly and more and more intensely reviewed. There has been a proliferation of Regional Trade Agreements (RTAs)¹⁹ and most of the RTAs have provisions related to competition policy in differing degrees. Compared to the pre-Geneva Framework period when competition policy was part of the Doha Round, dedicated competition policy chapters in RTAs are higher during the post Geneva Framework years (64 per cent).²⁰ Non-discrimination, transparency and procedural fairness, the principles that appeared to crystallise during the WTO process of the Working Group on Trade and Competition Policy during the run up to the Cancun Ministerial Conference have gained traction in competition policy provisions in RTAs. It has been noticed that the deeper the level of integration of RTAs the more chance of stronger competition policy provisions finding place therein²¹.

Digital Economy

Digital economy has started dominating the global economic landscape with digital firms fast replacing global economic giants in the brick and mortar economy. While digital economy has resulted in new ways of satisfying the existing wants of consumers as well as generating new ones and satisfying them, this has also resulted in economic concentration and the consequent adverse effects on consumer welfare. Antitrust authorities find it difficult to apply the rules of the game developed

for the brick and mortar economy to practices by digital entities. Collusive conduct could be supported by self-learning algorithms. The role of humans on who alone antitrust authorities have jurisdiction is difficult to be brought out when self-learning and deep learning machines are involved. Dominance is generally inherent in the nature of digital industry, but has been noticed to be transient. There is a tendency to sustain such dominance unfairly by restraints on competition, competitors and potential rivals. The standard criteria for discerning abusive conduct are not applicable in most cases to the digital economy.

Competition Policy and Law in Times of Crisis

Governments all over the world are conscious of the need to perpetually register presentable growth rates of their respective economies to ensure that in the unspoken competition among nations their rankings do not slide and also to ensure that there is sustained economic growth. And competition authorities in general tend to be conscious of the prevailing economic milieu while taking enforcement action. In times of recession, depression and sagging economic growth regulators including competition regulators tend to choose forbearance and be 'lax' on behavior which in normal times would not have escaped their ire. As compared to the not so lenient approach during the global financial crisis of 2007-08 competition/antitrust authorities have been more understanding, if not lenient, towards enterprise conduct which in normal times would have been under their scanner²². Under such circumstances industrial policy tends to take central stage and caution in terms of competition harm is played down. And during the pandemic naturally there has

been near unanimity in views among competition authorities, inspired also by the thinking in the informal coalition of competition regulators (ICN)²³, to go soft on collusive conduct which could be justified as necessary to meet the exigencies of supply disruptions due to the pandemic. The near withering away of *per se* rule in antitrust enforcement in most jurisdictions has facilitated such response by the competition authorities. The flip side of this are mainly twofold, especially: (a) substantial subjectivity would be involved in decision making in enforcement as the authorities will have to enquire into the justification for particular conduct in the context of the pandemic; and (b) cartels could take root during this period and could get entrenched and persist for long, with the concomitant cost to consumers and to overall welfare. While many of the competition authorities tried to prepare frameworks for a lenient approach, including confining such approach to sectors severely affected by the pandemic, the chances of type two errors abound. There is no denying that such relaxations are necessary. Any negative effects have to be addressed and many governments have been addressing these through other legal instrumentalities like anti-price gorging laws.

Conclusion

Competition policy has always been the moving spirit behind economic liberalisation, national, regional or multilateral. And competition policy interface with international trade and investment has been well recognised. While efforts at creating a framework agreement on competition in WTO did not succeed, the underlying rationale behind trade and investment liberalisation is enhancement of competition and consequent efficiency in production

and distribution of goods and services. WTO agreements like GATS, TRIPS and TRIMs include specific provisions on competition policy. Starting with the global financial crisis there has been an increasing tendency for the dilution of competition policy and return of industrial policy. The pandemic and the consequent forbearance by regulatory authorities have clearly accelerated the trend towards return of industrial policy and international trade restrictiveness. Unilateral trade measures have been increasing. Trade multilateralism stands destabilised. Naturally trade and investment flows have dwindled.

Digital economy has continued to expand, led by enterprises with substantial and entrenched market power. Antitrust authorities all over the world are struggling to fit the extant competition laws to address the conduct of digital giants. WTO has found itself handicapped being unable to fulfill any of its mandates effectively. The new administration in the US and the swearing in of the new Director General are expected to turn the tide in favour of trade multilateralism. However, a lot of ground will have to be covered before industrial policy retreats and competition policy and trade multilateralism is back on track. In the context of the pandemic the G20 Trade Ministers reiterated the need to keep markets open and competitive. G20 needs to increasingly cover competition policy issues in its agenda.

Endnotes

1. See Wade 2012.
2. For further details, see Sisodia and Sheth. 2002.
3. Lowe. 2009.
4. See OECD web page on competition.
5. According to the latest press release of the WTO dated 31st March 2021 the prospects

for a quick recovery in world trade have improved as merchandise trade expanded more rapidly than expected in the second half of last year. The volume of world merchandise trade is expected to increase by 8.0 per cent in 2021 after having fallen 5.3 per cent in 2020. As per information earlier available from the WTO global trade in services in the second quarter of 2020 plunged by a record 30 per cent year-on-year. This contraction in services trade is the steepest since the financial crisis, when global commercial services trade plummeted by 17 per cent in the second quarter of 2009.

6. See UNCTAD website.
7. G20 Leaders "Declaration of the Summit on Financial Markets and the World Economy", Washington, 15 November 2008.
8. See UNCTAD website.
9. G20 Trade and Investment Ministerial Statement, March 30, 2020.
10. In March 2020, the Trade and Investment ministers of the G20 agreed that "emergency measures designed to tackle COVID-19, if deemed necessary, must be targeted, proportionate, transparent, and temporary, and that they do not create unnecessary barriers to trade or disruption to global supply chains, and are consistent with WTO rules."
11. More details are on WTO website.
12. See Melitz and Redding. 2015.
13. Refer to Anderson et al. 2018.
14. See Wade (2011); Aiginger and Rodrik. 2020.
15. See Olson. 2020.
16. In 2018, services accounted for an average share of 22.4 per cent of the world's trade in goods and services; this could be compared with a share of 19.6 per cent some eight years earlier, confirming that services were a growing part of world trade.
17. For classification of non-tariff measures, see UNCTAD.
18. See Weiss. 2020.
19. Refer to WTO RTA Database.
20. See Anderson *et al.* 2019.

21. See UNCTAD.
22. See Competition Policy International.
23. International Competition Network Statement on COVID-19.

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