Caribbean Dialogue

Competition Law and Policy: Issues for Small Economies

July - September 2004
Anti-Competitive Agreements: Meaning and Examples
Frederic Jenny

Enforcement of Competition Law: Case Studies
Paulo Correa

Challenges of Introducing Competition Law in Developing Countries: The Developmental Dimensions
Diego Petrecolla and Lic. Paula Margaretic

The Tailoring of Competition Policy to Caribbean Circumstances: Some Suggestions
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Good Governance, the Informal Sector and Protection of Competition in the Market: Lessons from CARICOM
Taimoon Stewart

Introducing and Implementing Competition Legislation in Small Economies: Some Considerations
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Shaping Competition Legislation to the Needs of Small Open Economies: The Case of CARICOM
Taimoon Stewart

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Foreword

The SALISES, St. Augustine, undertook to study competition issues in selected CARICOM countries between October 2002 and December 2003. The project, entitled “An Empirical Examination of Competition Issues in Selected CARICOM Countries: Towards Policy Formulation” was funded by the Department for International Development (DFID) of the British Government and the International Development Centre for Research (IDRC) of the Canadian Government. A committee of international experts on competition law oversaw the project. In January 2003, the experts were brought to Trinidad for a brainstorming session, in order to evaluate the country profiles that were developed (Belize, St. Lucia and St. Vincent and the Grenadines now published in Caribbean Dialogue Vol. 9, No. 1 January-March, 2004 and Jamaica, the Bahamas and Trinidad and Tobago in Vol. 9, No. 2, April-June, 2004), and to chart the course for the second phase of the project involving interviews with the stakeholders.

SALISES took the opportunity of using such distinguished experts in the country by offering a workshop to the public on Competition Law and Policy. In this issue of Caribbean Dialogue, papers presented at the workshop are reproduced, as well as three policy papers drawn from the findings of the research.

At the time of the workshop, Professor Frederic Jenny was the Vice Chairman of the Conseil de Concurrence (French Competition Authority) and held the position of Chairman of the WTO Working Group on the Interaction between Trade and Competition Policy. He is a Professor of Economics at the Ecole Supérieure des Sciences Economiques et Commerciales (ESSEC) France, Chairman of the Committee on Competition Law and Policy of the OECD, Co-chairman of the Joint OECD Committee on Trade and Competition and Co-chairman of the Joint OECD Committee on Trade and Competition.

Mr. Paulo Correa is a Senior Economist at the World Bank; was Deputy Secretary of Economic Monitoring-Ministry of Finance Brazil (1999-2001) and also worked as a consultant for the Government of Panama (1997-1998).

Dr. Diego Petrecolla is the Director of the Centre for the Studies of Economic Regulation Universidad Argentina de la Empresa - World Bank Institute and he was formerly the President of the Argentine Competition Commission.

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Dr. Taimoon Stewart is a Fellow at the SALISES, St. Augustine Campus. She is the Vice-President of the Negotiating Group on Competition Policy in the FTAA.

Taimoon Stewart
Project Coordinator and Lead Researcher (September 2004).
My topic deals with Competition Law and Policy. It is no secret that during the 1990s a great number of developed and developing countries undertook market oriented reforms. In most cases they were visibly successful, and have led to greater levels of development. Trinidad and Tobago is one very good example of this.

In developing countries, at both national and international levels, the following question is being debated: Now that we have a more market oriented economy, should we have competition law and policy? There has already been quite a bit of trade liberalization which has put pressure on domestic economies. So, in addition to trade liberalization, should there also be a domestic instrument called competition law? What is competition law? What benefits can it offer? What are the specificities of competition law in the context of developing countries? Such are the various facets of the theme to be discussed.

To begin discussing whether competition law is needed, I suggest comparing the process of market oriented reforms to that of constructing transportation infrastructure. The role of markets is similar to that of highways which enable firms to deliver products to consumers and to respond to their shifting demands by reorienting production.

We all know that whereas roads are built to speed up communications, they must also be governed by rules and traffic regulations, without which all kinds of undesirable things may happen. Big trucks could drive small cars off the road, cars could run over pedestrians, or traffic could grind to a halt. If road infrastructures are to work for the common benefit, there is a need for some kind of order, implemented by regulations.

To a large extent the problem is quite similar in the area of market economies. It is one thing to liberalize trade or deregulate an economy, but in addition to this first step, some rules of behavior are necessary to avoid excess market power, abuses of consumers, and having some firms deprive others of economic opportunity. This is what competition law is all about.

Market regulation is necessary so that the market can work for the benefit of the community as a whole. This is just as important for developing countries as for developed countries. The question of whether competition law is necessary should not be dictated by what happens in other countries, but first and foremost by domestic considerations. Three main points can be made on this subject.

The first point concerns what can go wrong in a market when there are no regulations for creating order in the market.
I will use examples, taken from small developing economies outside the Caribbean region, to illustrate how things can go wrong and the fact that there are victims. The second point concerns the fact that small developing economies depend quite a bit on foreign trade. They need to import many goods (either industrial goods or consumer goods) and they also need to export.

If there are anti-competitive practices at the international level that restrict the benefits of trade, they will also restrict the benefits of trade for developing countries. I will give some examples of how this can happen.

Finally, I will discuss the cost of having a competition law and its possible benefits, and I will provide some estimates of the order of magnitude of the costs and benefits. In the course of my presentation, because I am going to focus on what can go wrong when there is no competition law at the domestic level or the international level, I will mention many cases where the victims are firms going bankrupt and consumers paying excessive prices.

With respect to domestic cartels in less developed countries, I can give a number of examples to address the issue of whether a competition law and policy is useful for small and developing countries in other parts of the world. Hong Kong resisted adopting a competition law, reasoning that since it was a small open economy, nothing could go wrong and a competition law was not needed. However if you read what The Economist and other specialized publications have written about Hong Kong, you will see that business people from outside Hong Kong say that Hong Kong is not a friendly place to do business and not good for prospective investments because there are too many cartels and too much collusion between firms there. This impairs the competitiveness of Hong Kong.

On the other hand, Singapore, which is considered investment friendly and has a competition law, has fewer cartels than Hong Kong. It is currently a more successful business center than Hong Kong because it has fewer cartels and fewer anti-competitive practices. So clearly, at least among members of the business community, there is a consensus as to the value of protecting the competitive process and having true competition in a country.

Let's consider several cases of small economies and what people say about competition in those economies. In Jordan, which is a small open economy, anti-competitive behavior is extremely visible. According to Jordanian economists, this has devastating effects in Jordan. They draw a link between anti-competitive practices in Jordan and its rate of unemployment because cartels deprive people of economic opportunity.

Let's consider coffee imports in Jordan, an example of basic foodstuffs. In 1994 the price of imported coffee went up in Jordan and all over the world because there was a freeze in Brazil. However, a year later the price of coffee had not fallen in Jordan, despite the fact that consumer demand worldwide had lowered because many people switched to relatively less expensive tea. In 1995 a Jordanian newspaper published an interview with the owner of one of the four domestic companies that controlled coffee supply in Jordan. The interview indicates that coffee prices would not be lowered and that both the government and the public were helpless against what seemed to be an import cartel. Although coffee is a basic staple in Jordan, its price still remains very high today.
Another problem in Jordan concerns a sector that exists in both developed countries and developing countries. When the Jordanian government decided to privatize the bus industry, at the end of the privatization process several bus companies went out of business. The remaining companies immediately agreed to fix prices and reduce service. As a result, when a travel agency sought to hire a 20 passenger bus, it was told that only a 50 passenger bus was available, that the price was not negotiable and that no one else would offer a lower price. The Jordanian tourist industry, which is an important source of foreign exchange, was hurt considerably. So just a few bus companies getting together to fix prices and force travel agencies to rent larger buses than needed increased the cost of the Jordanian tourist industry and decreased the competitiveness of Jordan in respect to other countries.

Like all countries, Jordan needs steel. The Jordanian steel manufacturing sector is not competitive and the government has complained that it is legally helpless against the steel import cartel. When the needs of all the industries that require steel are considered, this creates a real problem.

Two noted Jordanian economists, have evaluated the cost of not having a competition law in Jordan, showing the destructive nature of monopolistic practices that have reduced market efficiency, blocked entry, decreased consumer welfare and lowered the quality and quantity of output in several sectors, while increasing prices and pursuing practices that led to the lowering of capital and labor efficiency and hence decreased productivity.

Lebanon is another country with a small open economy, but there are only very few importers of pharmaceutical products as a result of which the price of drugs is quite high. This is a particular problem because Lebanon has no extensive national system of health care or of health insurance. As a result, poor people pay inflated prices for pharmaceuticals and do not have easy access to medicine. This situation creates both an economic and a social problem.

In Lebanon, the same type of anti-competitive practices already noted in Jordan also occur. According to Louis Hobeika, a noted Lebanese economist, economic growth in Lebanon has been partially hindered by weak competition in most sectors and the result for the Lebanese economy has been a lowered or even negative growth rate.

Indonesia is not a small economy, but it is a developing economy. During the past twenty years, monopolistic practices were initiated by the State and by government officials acting in cooperation with the private sector. Crony capitalism and nepotism were the order of the day. Business cartels were common. Consumers were sacrificed and had to pay unjustifiably high prices.

Although Kenya is not an island economy, it is a developing economy and not a very big one. Kenya has a major problem with petroleum imports. Four importers have an 80% market share of the Kenyan petroleum market and they collude on the retail price of fuel. Since there is great demand for fuel, the market is less competitive than in countries where there is more competition among fuel importers. Small island economies encounter many kinds of competition problems in sectors which are monopolized and not well regulated, such as air freight and telecommunications. In addition, these economies have no independent domestic organizations advocating the opening of competitive markets. Government officials
often recognize the direct negative effect of this state of affairs on the competitiveness of exporters.

When I arrived in Trinidad and Tobago two days ago and started reading local newspapers, I noted that the Express in particular has devoted quite a lot of space to presenting what is currently happening on the local flour and bread markets. Here are a few interview quotations from articles in the Express: "National Flour Mills which has over 90% of the local market share, say they are going to increase the price of flour because the price of wheat has increased." The Director of the Bakers' Association, is quoted as saying: "Well in the event of a price hike they will be forced to pass on the increase to the consumers", and the Consumer Affairs Minister is quoted as saying: "Well there is nothing the Government can do."

Now, all these comments may be entirely legitimate, but perhaps they are not. The question to be raised is whether some one somewhere is in charge of making sure that the price hike is truly justified by an increase in the price of wheat and whether there is competition among bakers or whether they have all agreed simultaneously that they are going to increase the price of bread. As long as Trinidad and Tobago does not have a competition law, there is no way to verify this and so the Consumer Affairs Minister is in a position to say that there is nothing the Government can do.

The point that can be made about this is that even in small open economies there are many areas (retail sectors, importers, pharmaceuticals, bread, etc.) where anti-competitive practices can exist. Thus these countries need a competition law and a competition authority to make sure that firms are not excluded from entering a sector and to make sure that consumers are not paying inordinately high prices.

The second aspect of competition law particularly relevant for small economies concerns international practices. Among the numerous international cartels that exist, I will give information about only two: the heavy electrical equipment cartel and the aluminum cartel. First I will talk about what is happening in general on the international scene and how it can affect developing countries. Then I will make a few remarks about some countries in the Caribbean region, without going into great detail.

Neither the heavy electrical equipment cartel nor the aluminum cartel has ever been prosecuted, despite the fact that they both control very important sectors. Electricity generation is absolutely vital to economic development and aluminum is also extremely important in developing countries, because aluminum is used by canneries and for making many other items of daily use.

The international heavy electrical equipment cartel has existed since the 1930s. We know that it lasted at least until the late 1980s. As far as we know, it may still be in existence because, as I mentioned previously, it has never been prosecuted. At the beginning, it did not call itself a cartel, but an International Electrical Association. Its membership was made up primarily of European and Japanese producers and its scope covered electricity generating equipment: turbines, generators, condensers, switch gears, rectifiers, etc.

Interestingly enough, the geographical scope of the cartel is worldwide, except that it does not apply in the countries where the firms that produce these heavy electrical equipment are located. This means that its scope of action covers all of the developing
countries, because all of the cartel member firms are located in developed countries. This is a salient point because since the 1940s, developing countries have been where the demand for heavy electrical equipment has been highest because this type of equipment is linked to the process of industrialization and therefore to economic development. The cartel thus affected the fastest growing segment of world demand, which happens to be in developing countries.

What firms are involved in this cartel? Firms from the UK, Italy, France, Switzerland, Sweden, etcetera. US firms did not participate directly, but they went along with its objectives, without being official participants. The history of this cartel contains one particularly interesting aspect. Initially, the Japanese were not part of the cartel because at the time Japan was not developed enough. When Japan sought to develop a local heavy electrical equipment industry, the cartel used practices designed to thwart the new Japanese industry, but it did not succeed. Eventually the Japanese were invited to join and became honored associate members of the cartel.

Basically, the system which has been enforced for the last fifty years is that whenever there was a tender offer for a liquid plant, a turbo generator, etc., all the cartel members who might be interested in participating, were required to notify their intention to submit a bid to the International Electrical Association, and the International Electrical Association informed all the other members who were also willing to submit a bid. Next, once everybody knew who was going to submit a bid, they all got together to fix prices, and establish a price schedule they were required to follow.

At this point, they would decide who should tender the lowest bid at the agreed price, which meant that all the others would make bids at a higher level, so that the government organizing the tender would have the impression that competition existed. Of course, it was merely fake competition. Because even the firms that knew they would not get the bid still had to take the time to fill out all the forms required to submit a bid, there was a compensation system for such firms. There were also severe penalties for any firm that did do not abide by cartel rules. For example, if a firm submitted a bid at a price lower than the agreed price and thereby won the tender offer, all the other cartel members would be informed.

An important item in the cartel rules was its limitations on technology transfers to developing countries. Firms in very developed countries feared that developing countries might develop their own heavy electrical equipment industries. Indeed, this is exactly what happened in Brazil. Brazil had trained engineers and a need for heavy electrical equipment, so it developed a heavy electrical equipment industry. Cartel members agreed that to avoid local industries becoming stronger on the market, no form of technological cooperation with firms from such developing countries would be permitted.

Second, a fund based on the profits made on all other orders was set up. A given percentage of those profits were allocated to the fund. This fund was used to offset predatory prices that were applied by the cartel whenever a competitor from a developing country would submit a bid. This is precisely how the heavy electrical equipment industry in Brazil went bankrupt. The Brazilian firms could never win a bid because as soon as they participated in a tender offer, all the cartel member firms would set prices at predatory levels, using the monopolistic profits they had made on tender offers when the competitors from Brazil were not bidding.
So, in the case of the Brazilian heavy electrical equipment industry, the cartel used a combination of predation, dumping and measures to exclude firms from a developing country.

In terms of volumes affected, as cartel documents made public by the U.S. House of Representatives have shown, the volume of commerce and trade affected was on the order of US $2 billion of heavy electrical equipment sales. The extra mark-up due to the collusive agreement was somewhere between 15% and 25% of that total.

Twenty percent of US$2 billion a year is a large amount of profit, particularly considering that the victims of these practices are developing countries. It means that there is a transfer from developing countries to developed countries in the form of extra prices in the range of US$300 to 500 million per year.

It is interesting to note that when developed and developing countries are considered separately in regard to average prices paid for the same kind of equipment, we discover that developed countries paid on average 99.6%, but that developing countries, which have less money, paid an average of 129.6%, and were thus really much more severely exploited than the few developed countries which were also the victims of the cartel.

The heavy electrical equipment cartel lasted for many decades and affected countries all over the world. Prior to coming to Trinidad, I looked at published records of the transformer section of this cartel, which is just one of its many components. The records documented the fact that Jamaica bought transformers and that the cartel acted against Jamaica. I chose to mention transformers because the cartel affected Jamaica when it bought transformers, but there are many other segments of the industry and many countries outside the Caribbean region which were also affected by this cartel.

The example of this cartel teaches us three things. First, that contrary to frequently held misconceptions, transnational anti-competitive practices, and in particular international cartels, inflict serious harm on consumers. Documentation on other cartels shows that many have been much more unreasonable and have practiced extra prices of 60% in some cases, or even as high as 100%. We also learned that the heavy electrical equipment cartel lasted for at least forty years and that it is possibly still active. Records available from various sources all over the world show that cartels also affect a large number of other industrial sectors.

We have also learned that those international cartels often prevent the emergence of local industries in developing countries. Cartels are most harmful in countries which do not have strong anti-trust laws. One of the reasons the cartels did not operate in countries where the cartel members came from is that the cartel members were afraid both of the European Commission, (because the European Commission could use its powers under the European Union competition laws), and of the US because of the severity of US anti trust laws. It is clear that in countries with strong anti-trust laws, firms are afraid to cartelize, but they are not so afraid in countries that do not have competition laws.

We have seen also that international cartels hit developing countries which are crucially dependent on imports (such as heavy electrical equipment) as well as on exports.
A recent World Bank study covering the decade of the 1990s, looked at well documented international cartels (either because they had been prosecuted or because public information was available) which were active in the 1990s and sought to assess how much the developing countries imports were goods covered by a cartel agreement.

The study results were fairly impressive: during the 1990s, developing countries imported US $81 billion per year of goods from industries affected by price fixing. These imports represented 6.7% of all developing countries’ imports, and 1.2% of their GDP. The surcharges involved were considerable. If we assume that the monopolistic surcharge was about 20% of US$81 billion, it amounted to US$16 billion.

Now, just a few remarks on the aluminum cartel. In 1994 a Wall Street Journal article explained exactly how the United States came to be involved in creating an aluminum ‘OPEC’. The headline read: “The case in point is fascinating example of international brinkmanship, Washington clubbiness, the limits of free trade, and how political expediency rules can be used, especially when the subject involved is too obscure for outsiders to care.”

The origin of the problem that led to the aluminum cartel was the collapse of the Soviet Union and the demise of the Eastern Block. Before the Soviet Union collapsed, most of the demand for aluminum in the Soviet Union came from the military sector. After the collapse, the demand for aluminum in the former Soviet Union decreased considerably. The worldwide result was an excess supply of aluminum and a decrease in prices. This phenomenon confirmed what students are taught in introductory courses on economic theory.

The price per pound plunged from US$93 in September 1990 to US$58 in September 1993. Inventories went up from 58,000 tons at the end of 1989, to 2.5 million metric tons at the end of 1993. Of course, this price decrease meant that the major manufacturers of aluminum started losing money. In 1993, Alcan lost US$112 million, Pechiney, a French firm, lost US$36 million and Alcoa’s profits went down by 50%.

At the time, the Chief Executive of Alcoa was Mr. O’Neill who later became Treasury Secretary of the US. As CEO of Alcoa, Mr. O’Neill approached the Clinton Administration with the suggestion that a global (worldwide) industry cartel should be created to increase the price of aluminum and ensure that it would stay at a high level.

At the same time, the U.S. Aluminum Association contacted the U.S. government, saying that the Russians were dumping their aluminum on the U.S. market and that U.S. anti-dumping laws should be used to beef up the price of aluminum on the US market. This led to discussions within the US government as to what should be done. The State Department was not very favorable to the idea of using anti-dumping laws against the Russians and offered a variety of reasons for its opposition.

First, it said that since Russia was in the process of liberalizing its economy, it was not a very good time or a very good symbolic move to use anti-dumping laws against a country trying to create free markets. It also put forth another reason. This second reason was that the U.S. had lent a lot of money to Russia and had an interest in Russia’s ability to repay its loans. If U.S. policy were to prevent Russia from exporting to the U.S., it would not be able to repay its loans and U.S. lender banks would be in trouble, which would not be a good idea.
Slowly but surely it appeared that anti-dumping measures were not the answer. The answer would be to raise the world price level of aluminum, and to do so a cartel agreement between U.S., European and Russian producers was necessary to avoid having too much aluminum on the market. This meant that Russia would make more money and would be able to repay its debt, that U.S. banks would be happy and that Alcoa would be happy. The people who would not be happy were those located in countries all over the world that import aluminum. The US producers began negotiating with European, Canadian and Australia producers to cut production and to ask the help of the US government in making sure that the Russians would also reduce their aluminum output. The U.S. Deputy Secretary of State promised Russia $250m in equity investments if Russia would cut production by a sufficient amount (to be negotiated) so that the glut on the market would disappear and prices would increase. At the time, the aluminum cartel was being organized, Joseph Stiglitz, was head of President Clinton’s Council of Economic Advisers and was very much opposed to this cartel because he knew that it would have devastating effects on many countries. He believed that such a cartel was against the free market idea and against everything that the U.S. had stood for. His ideas did not prevail, but his latest book (Globalization and its Discontent) includes a fascinating chapter entitled “The Saga of the Aluminum Cartel”. In it he indicates that the cartel was implemented, the Russians took their checks, and reduced their output, the Europeans reduced their output, the U.S. did the same and everybody made profits because prices were raised, and raised significantly. Between November 1993 and June 1994, prices rose by 30%, which is not negligible. Stiglitz also reports that whereas the profits of Alcoa and other producers were enhanced, American consumers and consumers throughout the world lost out.

The recent aluminum cartel is just one of many well documented international cartels, including the diamond cartel, the vitamins cartel, etc. We have seen that these cartels particularly hurt developing countries because, as a rule, developing countries are more dependent on imports than developed countries.

To get some idea of the real consequences of such cartels, I analyzed trade data from three years taken during the 1990 to 1999 period (1990, 1995 and 1999), to verify the levels of aluminum and electrical equipment imports and what they represented for several countries, including those of the Caribbean region. I reasoned that this would enable me to calculate the approximate cost of the anti-competitive practices involved. In the case of Barbados, for example, aluminum and electrical equipment imports represented roughly 3% of its total imports and in monetary terms they represented between US$24 and US$30 million per year. Belize, for which I also have the figures, imported between US$5 million and US$6 million per year of aluminum and electrical equipment, which represented about 2% of its total imports. Trinidad and Tobago imported between US$20 million and US$60 million worth of aluminum and electrical equipment products per year, depending on the year considered. These imports represent between 1.5 and 2.4% of the total imports of Trinidad and Tobago.

If we calculate the excess profit margin as being somewhere between 25% and 30%, because that is what documents on the aluminum cartel and the heavy electrical equipment cartel indicate, the results are far from negligible: for Barbados alone US$6-7
million in 1990, and US$8-10 million in 1999. This means eight to ten million dollars of extra profit that the colluding manufacturers of heavy electrical equipment and aluminum have extracted (on a yearly basis) from customers in this country. If we make the same calculation for Belize we get an estimate of annual overcharge somewhere between $1m US and $2m US. For Trinidad and Tobago, an annual overcharge between $5m US and $20m US.

This excess expenditure of millions of US dollars causes real harm to developing countries and merely represents the losses associated with only two of the many international cartels that operate in developing countries which do not have competition law, and where cartel member firms therefore have nothing to fear.

These figures are important because one of the common arguments offered about competition law is that it would be too expensive for a small open economy, a small island economy to have a competition authority. While a competition authority is costly, if such an organization can save a country US$15-16million by deterring international cartels from operating on its markets and can also prevent the creation of domestic cartels, having a competition authority is an idea worth considering.
The usual objective of the enforcement of antitrust (AT) laws is to prevent mergers and business practices from reducing economic welfare.

Economic welfare (W) is defined as the total economic surplus, which in turn results from adding the producers and consumers' surpluses (CS+TS).

In any anticompetitive merger/behavior (with the exception of overt collusion) both surpluses might be affected: the CS reduces as prices increase and the PS increases, as a result of the economies generated by the transaction. Mergers and business behavior reduce the economic welfare, therefore, when the reduction on CS is larger than the increase on PS (ie. \( \Delta W < 0 \)).

Williamson presented a nice geometric summary of this framework.
The above framework may be changed in different ways. One can choose to attribute different weights when adding the surpluses (in the extreme case, one could attribute zero weight for the consumer surplus). One could think of introducing some dynamics to the problem faced by the regulator (as it was presented in a static form) and also approach it in a more realistic way, considering the overall effects for the economy and not only for one industry (as it was presented in a partial equilibrium format). Finally non-economic issues (such as fairness) could also be included among the objectives of the regulator. Each issue is relevant and merit a detailed analysis. But considering them at this point would not be of much help.

The First Case Study: Airlines

In August 1999, the main executives of the four major airlines in Brazil met, privately, in a luxury hotel in São Paulo. Just five days after the meeting, the prices of the flights between central airports of Rio de Janeiro and São Paulo went up, by exactly 10%, for the four airlines whose executives had met. The price increase, on the same day and by the same amount, affected the most profitable market in Brazilian air transportation industry. The route between São Paulo and Rio de Janeiro connects the two major cities in the country and serves thousands of business travelers every day. The four airlines had 100% of the market for regular air transportation services on that route.

Collusion to fix price is one of the rare cases in antitrust where economic efficiencies are not expected (not having cost saving impacts). CS reduces more than PS increases such that economic welfare reduces. Therefore, collusion is considered a "per se" infringement in several jurisdictions. But gathering evidence, especially in a case where no direct evidence was available is a very difficult task, requiring specific power and investigative training.

The airlines were asked to explain the motivation for the price increase on that specific day. In response to this request, the companies gave unspecific answers and did not mention the price increase of their competitors or any price matching policy as the motivation for their action. Also, there was no explanation of the reasons for the choice of that specific date and amount of increase. Having discarded alternative explanations for the price increase, antitrust agencies in Brazil decided to sue the four major airlines for collusion.

After being sued for collusion, the defendants changed their argumentation and suggested that price leadership (following the leader strategy) was the main reason for the price parallelism. One of the defendants alleged that the leading company had increased its prices and rivals just matched the price increase, and the main tool for that was the computerized system of the Airline Tariff Publishing Company (ATPCO). According to this defendant, on August 6th the leading airline published on ATPCO a price increase that would become effective on August 9th. Therefore, the competitors just matched the price change.

ATPCO’s previous antitrust history is widely known. The case U.S. v Airline Tariff Publishing Company, et al. was referred to by Jonathan Baker as the first horizontal price-fixing case in cyberspace.
In the U.S ATPCO signed a consent decree in which they agreed to change their system in a way that competing airlines in the United States would not be able to see future price increases of their rivals before their tickets were available for sale. The system, however, was only adapted to comply with U.S. law and the service to Brazilian companies continued the same as before.

In Brazil, however, competing airlines can still post their prices on the ATPCO system announcing to their competitors future price increases that may or may not actually happen.

In the Brazilian case, the largest airline published its prices on the 6th of August and inserted a specific command – a first-ticket date – that instructed the system to disseminate immediately the information to other airlines, but to hold that information from the computer reservation systems until the 9th. As a result of this, from the 6th to the 9th, the competing airlines knew that one of them was planning to increase its prices, but no one else knew it, including customers and travel agents. If the price increase had not been matched by competitors, the first airline could have simply cancelled the price change and customers would not have any knowledge of these events.

The case illustrates that the design of the ATPCO system gives airlines a complete transparency on all the prices of their competitors, but the information is not known by travel agents and passengers. By using a first-ticket date, the Brazilian airline made transparent to its competitors information on what was a contingent price increase. This seems to be a typical facilitating device: by responding to one another’s price announce-
ments, firms could negotiate a new price through a series of interactions in cyberspace that involve no actual sales and, therefore, no actual economic costs. Consumers, for their part, were completely excluded from such exchange of information.

The use of first-ticket dates on ATPCO system increases the potential risks for market coordination without reducing the search costs or creating better conditions for comparison shopping by consumers, and should be ruled illegal since it limits, restrains and injures open competition, and arguably, is a way to obtain or otherwise influence the adoption of uniform or concerted business practices among competitors.

The Second Case Study: Hydrated Alcohol (HA)

In Brazil, HA (from sugar cane) is added to gasoline for its regular use and is also used as fuel in cars whose motors were specially modified. The use of HA as fuel was stimulated by the government as a response to the increase of international prices of oil during the 1970s.

The demand for “alcohol” was relatively high in the mid-1980s but started declining since the beginning of the 1990s, as oil prices were low and decreasing and the performance of vehicles based on alcohol did not improve. Also, as sugar prices became less attractive on the international markets, more sugar cane was transformed into alcohol (instead of sugar) increasing even further the supply of the product in the domestic market. Since the mid-1990s, therefore, HA prices in Brazil tended to decline in real terms. Price falls were mitigated however by a series of government interventions.
In 1999, two operations were submitted to the Brazilian antitrust agencies. The first operation was a joint-venture between all sugar cane producers of the Center-South region (roughly 85% of the national supply) to create a new firm (Brasil Alcool). The basic asset of the new firm was an inventory of HA equivalent to 15% of the supply of each of its stockholders. Stockholders’ agreements established several limitations for the supply of these inventories. No production capacity was added to the market.

In the second operation (submitted few weeks later), roughly the same businessmen presented another joint-venture (Bolsa Brasileira do Alcool – BBA). The new firm was aimed to be the sole distributor for its stockholders’ HA. As BBA’s stockholders corresponded almost to the totality of producers outside the Northeast region and as the two regions may be considered two distinct markets, the BBA creation represented – de facto – monopolization of the distribution of HA in the Center-South region. BBA seemed to represent, conceptually, a case of territorial restraint (one possible form of abuse of dominance).

Territorial restraint contracts (TRCs), in which a distributor acquires exclusive rights to sell a good in a given region, are a type of vertical conduct that may reduce consumer surplus by favoring collusion among rival producers with relatively low individual market-share (facilitating the exercise of combined market power). TRCs may be used as a device for coordination and market monitoring among competitors, facilitating the implementation of a cartel. Benefits of TRC are typically associated with the elimination of free-riding between distributors. TRCs eliminate the possibility that a distributor having lower costs (and prices) – because it makes inferior sales efforts – might appropriate part of the demand generated by the sales efforts of a rival whose costs (and prices) are higher as a result of superior efforts.

BA could not be considered a new company, since no production facilities would be added. Furthermore, the transfer of HA inventories represented a coordinated effort to withdraw 15 per cent of the alcohol supply in the Center-South region of Brazil.

The BBA’s vertical agreement with its shareholders involving the Center-Southern producers, implied the centralization under one entity of the effective supply of alcohol left in this region after the withdraw made by BA. The effects of this BA and BBA on HA prices were clear.

None of the traditional efficiencies would apply in this case. The defendants brought the “crisis argument” and alleged that the “survival of the industry”, should be seen as a benefit of the operation. But given the differences in productivity among plants in the region, in the absence of the operation it was likely that the industry would naturally adjust with the exit of some (less productive) firms and possibly mergers between others. The exit of some firms does not necessarily decrease competition nor implies by itself any harm for the economy. We must be careful, as the aim of competition policy is to protect competition and not the competitors themselves.

Moreover, the crisis of the alcohol industry was structural in nature and not temporary. In this case any antitrust exemption would simply postpone the
necessary adjustment of supply and the consequent reallocation of resources according to the consumer needs.

**Conclusion**

It is interesting to notice in both cases, how the conventional enforcement of the AT law might help to avoid important welfare losses. In the HA case, general equilibrium considerations would increase the evaluation of the losses generated by the operation as economic resources were prevented from re-allocating in more productive (agricultural) sectors. On the other hand, the inclusion of non-economic considerations, such as social/regional impact of the exit of less productive firms (in a situation where fiscal constraints make compensation policies less likely) could favor the operation.

Note also that the cases presented were not related to the size of the market. In fact, the anticompetitive effects of territorial restraints agreements and the use of cooperation mechanisms in order to limit price competition might happen in any small economy. The small size of an economy may even increase the likelihood of these events. In avoiding the effects of the abuse of dominance in non-tradable sectors, as opposed to merger control in tradable sectors, antitrust agencies could play a key role to promote competition, consumer welfare and growth in small economies.
CHALLENGES OF INTRODUCING COMPETITION LAW IN DEVELOPING COUNTRIES: THE DEVELOPMENTAL DIMENSIONS

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and
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1. Introduction

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

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

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

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

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

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

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

2. The Creation and Implementation of Competition Policy

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

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

2.1 The Creation of the Competition Law

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

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

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

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

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

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

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

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

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

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

2.2 The Implementation of the Competition Law

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

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

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

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

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

2.3 A Consistent Competition Policy

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

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

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

Utilities constitute an important part of the non-tradable sector. Traditionally, utilities have been under public regulation. Economic regulation can be defined as a type of public intervention in which general rules of conduct for economic agents are defined. Regulation must also guarantee that these rules are respected. The restrictions imposed by regulation may be justified in various ways. In particular, it may become necessary when there are failures in the activity of markets to efficiently allocate resources.\(^1\) Therefore, competition and regulation are closely related, and that is why, in analyzing what is necessary for a consistent competition policy, one must consider the role of regulation.

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

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

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

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

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

3. Building a Competitive Environment

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

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

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

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

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

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

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

4. Potential Conflicts and Resistance

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

4.1 Potential Difficulties

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

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

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

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

4.2 Resistance to Competition Policy

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

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

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

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

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

5. Conclusion

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

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

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

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

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

Rajan Dhanjee*

Introduction -The Problematique

Competition policy is concerned with preserving and promoting competition, both by enforcing competition law against restrictive business practices (RBPs) by firms,¹ and by influencing other governmental policies or measures affecting competition. The present article focuses mainly upon RBP control. From their origin in Canada and the United States during the last quarter of the nineteenth century, competition laws have now - to a large extent because of the universal trend towards market liberalization - spread to the majority of countries,² among which are three Caribbean countries: Barbados, Jamaica and St. Vincent and the Grenadines. A large number of bilateral and regional agreements touching upon this

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¹ These may be sub-divided into different types of: horizontal restraints among competitors or potential competitors in the same market; vertical restraints up or down the chain of production and distribution; abuses of dominant positions of market power; and anti-competitive mergers, joint ventures or interlocking directorates. See UNCTAD, “The basic objectives and main provisions of competition laws and policies” (UNCTAD/ITD/15), at www.unctad.org/en/docs/poitd_15.en.pdf.

area have also been concluded\(^3\) including, of course, Chapter VIII of the revised Treaty of Chaguaramas,\(^4\) the Cotonou Agreement\(^5\) - and, in the future, the Free Trade Agreement of the Americas. At the multilateral level, the General Assembly adopted in 1980 a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which, while not binding, has the political authority and legitimacy of a G. A. resolution.\(^6\) The WTO Working Group on the Interaction between Trade and Competition Policy had been discussing on the possible adoption of a binding multilateral framework on competition for several years; however, the outcome of such discussions is now not clear, given the breakdown of the Cancun Ministerial meeting.

It would be preferable if the adoption and application of competition policy in the Caribbean were not merely externally-driven, but were based upon conviction and knowledge about how it can significantly help individual countries and the region to better meet its problems. The impression an outsider forms in the Caribbean is that there is a deep-rooted skepticism about competition policy. Among some who are not familiar with this area, there is a questioning of the relevance of competition policy. Others may accept that the openness of Caribbean economies and their advanced process of economic liberalization would not suffice by themselves to ensure competitive markets, because of such reasons as non-tradeability of some goods and (in particular) services, or RBPs by foreign exporters, transporters or

3 See UNCTAD, "Experiences gained so far on international cooperation on competition policy issues and mechanisms used" (TD/B/COM.2/CLP/21/Rev. 2), at www.unctad.org/en/docs/c2clp21r2_en.pdf.

4 However, not all CARICOM countries have adhered to the 2000 amendments to the 1973 CARICOM Treaty, including Protocol VIII.

5 Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its member States, adopted at Cotonou, Benin, on 23 June 2000. Under Art. 45 of the Agreement: the Parties agree that the introduction and implementation of effective and sound competition policies and rules are of crucial importance in order to improve and secure an investment friendly climate, a sustainable industrialisation process and transparency in the access to markets; to ensure the elimination of distortions to sound competition and with due consideration to the different levels of development and economic needs of each ACP country, they undertake to implement national or regional rules and policies controlling RBPs, in wording following the general lines of the relevant articles of the Treaty of Rome (there is no reference to merger control); and agree to reinforce cooperation in this area with a view to formulating and supporting effective competition policies with the appropriate national competition agencies that progressively ensure the efficient enforcement of the competition rules by both private and state enterprises.

Caribbean countries have difficult feasible. This is linked to doubts about how the design and application of competition law and policy could be tailored to Caribbean circumstances so as to maximize its benefits, minimize costs and be administratively feasible. Such doubts are quite understandable - this is a complex area, many Caribbean countries have difficult problems and, while it has become a cliché that no one size fits all, there are few prescriptions about which sizes the cloth of competition policy should be cut in order to fit Caribbean countries.

Some issues that may arise in this connection are: in what respects, if any, should the application of competition policy in the Caribbean be different from that elsewhere? What objectives (or combination or relative weight of objectives) should competition policies have in Caribbean countries? How should competition policy be applied in the Caribbean, given the need: (a) to maintain incentives to invest (and to generate, import or disseminate technology) for both local and foreign firms and (b) to preserve efficiency arising from economies of scale and scope, while (c) avoiding excess capacity and waste in small economies with limited resources? How much can competition policy contribute to the urgent problem of maintaining Caribbean competitiveness in national and international markets - or conversely, might its application reduce competitiveness? What is the relevance of merger control in the Caribbean? The present article attempts to respond to these inter-related questions in an integrated manner, and make some personal suggestions as to how competition policy might be appropriately tailored to Caribbean circumstances. A balanced and nuanced approach is attempted - there is no intention here to provide facile answers which skate over the very real problems of applying competition policy in the Caribbean context. Nor is there any intention to over-state the benefits of competition; many of its benefits may be lost in the absence of supply capabilities to take advantage of new opportunities - but, as discussed below, competition can play a key role in promoting the creation of such supply capacities.

The article first gives an overview of the benefits and objectives of competition policy, and different approaches to it in different jurisdictions. The next section then lists possible characteristics of Caribbean countries - as gleaned by an outsider from oral and written Caribbean sources, particularly the reports prepared under this project - as well as problems arising from small size or weakness of the competition culture that may be particularly acute for Caribbean competition authorities attempting to implement their competition laws and policies. The third section then makes personal suggestions as to how competition policy might be applied in the Caribbean, covering both some substantive and institutional aspects. The conclusions briefly highlight key messages from this article, and suggests how further research in this area might be structured.

**COMPETITION LAW AND POLICY – BENEFITS, OBJECTIVES AND APPROACHES**

The benefit – and the common aim everywhere - of competition policies is to promote economic efficiency and consumer welfare by encouraging entrepreneurial activity, market entry by new firms, and
more enterprise efficiency and competitiveness. The two main types of efficiency promoted by competition are static efficiency (optimum utilization of existing resources at least cost) and dynamic efficiency (optimal introduction of new products, more efficient production processes and superior organizational structures over time). Competition also ensures that cost savings are passed on to consumers, who would benefit as well from greater product quantity, quality and variety. For this purpose, consumers include business users of intermediate inputs, whose product quality and cost structure would be improved by competition among their suppliers, as well as Governments undertaking public procurement. Competition may result in individual losses as some producers lose market share and possibly exit from the market, while even consumers in a market may lose, at least temporarily, as resources are reallocated to more productive uses in other markets (hence the emphasis of competition policy on keeping market entry barriers low to allow new entry). But overall, the economy would gain.

Apart from the efficiency and consumer welfare goals indicated above, competition policies also aim in different jurisdictions at other objectives such as: promoting competitiveness of national firms; ensuring freedom of economic action or fairness, controlling concentration of economic power, or promoting market opportunities for small firms; safeguarding the public interest (which may include maximizing national production or exports, or employment concerns); or market integration (in regional integration groupings). There are important differences among national (or regional) competition policies in respect of the willingness to take non-efficiency-related criteria into account, related to differences in the priority attached to competition vis-à-vis other policy objectives. Public interest objectives continue to be embraced on a fairly widespread basis by developing and transition countries, particularly in merger control.

Moreover, even in the application of competition-related criteria, differences of view still sometimes arise as to how competition law should be applied, given

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that perfect competition may sometimes lead to inefficiency because of such factors as economies of scale. Thus, there may be differences in the enforcement policies of individual jurisdictions as to the relative importance to be ascribed to existing market structures and their potential future evolution, whether actual or potential market entry or technological change would prevail over entry barriers to the relevant market, whether any countervailing efficiency gains are likely to arise from restraints to competition, whether and which are the trade-offs between static and dynamic efficiency and between short- and long-term consumer welfare, etc. Historically, there have been several schools of thought as to what framework of economic analysis should be applied to evaluate such questions, and this academic debate - which has practical implications for some areas of competition law, but is even more relevant to enforcement policy - is far from settled.10

There are also important differences among jurisdictions in respect of: the legal approaches used (rule of reason or prohibition subject to exemptions); the nature or scope of exemptions; delimitation of relevant markets; remedies or sanctions; the organization and powers of competition authorities in theory and practice, including the information, tools, resources and expertise at their disposal; the possibility and prevalence of private actions; and the relative roles of administrative or judicial authorities.11

Such differences would, in the majority of cases, not lead to greatly diverging decisions; competition authorities follow an eclectic approach, and the practical effects of applying different criteria or analytical frameworks would, in any event, often be similar. Moreover, there is a long-standing trend towards convergence in the provisions or the application of competition laws. Competition policies in many jurisdictions are now placing relatively greater emphasis upon efficiency and consumer welfare goals as opposed to other goals, and there is substantial convergence in economic analyses and enforcement techniques. There is general consensus among competition authorities that: “naked” cartels without redeeming efficiency benefits should in principle be proscribed (subject to different exemptions in individual jurisdictions); dominance should not be sanctioned but only its abuse (although there are important differences in how dominance should be determined and what constitutes abuse);12 and (despite differences in the substantive tests applied) vertical restraints and mergers should be subjected to careful economic analysis to ascertain whether they are really anti-competitive and whether there may be countervailing efficiency benefits – competition authorities do not intervene in most such cases. But greater convergence does not necessarily remove the potential for diverging decisions, since the economic analysis and

10 See P. Cook, Competition and its Regulation: Key Issues, and Competition Policy, Market Power and Collusion in Developing Countries, Centre on Regulation and Competition, University of Manchester, at http://idpm.man.ac.uk/crc/wpd6149.

11 See UNCTAD, UNCTAD/ITD/15 op. cit. and “The scope, coverage and enforcement of competition laws and policies, and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries” (TD/B/ COM.2/EM/2), at www.unctad.org/en/docs/c2em_d2.en.pdf.

12 In particular, the equivalent notion of unlawful monopolization in the U.S. is significantly narrower than abuse of dominance in the EU and many other countries.
remedies applied in competition cases leave much room for discretion. There may thus sometimes be important differences in the treatment of similar cases - which have on occasions led to tensions between the major competition jurisdictions. So far as developing countries are concerned, there is obviously a large gap between them and more advanced countries in respect of effective enforcement. It is not clear to what extent this is because of a decision (explicit or implicit) by the Governments concerned as to the priority they attach to competition, and to what extent this is simply because of lack of capacity.

It follows that there is no set formula which can be applied in this area by Caribbean countries. While there is a general blueprint of the main features of competition law and policy available, there remain many questions relating to its design and application which would necessarily have to be determined by each Caribbean country (and by the region where applicable), in the light of local conditions and social preferences. This would of course be the case for any jurisdiction wishing to adopt and apply a competition law. Indeed, the UNCTAD Model Law 13 is based upon this premise; it provides a skeleton of the typical elements of a competition law, and then reviews different approaches followed by different countries or regions in respect of each element, leaving it up to jurisdictions starting afresh in this area to make their sovereign choices from this menu on an à-la-carte basis. Realistically, Caribbean countries may not be able to diverge too far from well-known competition policy approaches, because of: the difficulties of trying to work out radically new approaches; Caribbean commitments under the above-mentioned international agreements; the disincentive effect an unfamiliar competition regime may have for foreign investors; possible pressures from home Governments of foreign firms in the event of action against such firms which does not follow well-known approaches; and the willingness of these Governments to provide co-operation in cases with cross-border implications. But despite such constraints, there would still be a large margin for manoeuvre.

CARIBBEAN CONTEXT FOR COMPETITION POLICY

As brought out in the research papers prepared under this project, several economic, socio-cultural and institutional characteristics of many or all Caribbean countries may be identified - some with more certainty and others with less, and with different degrees of relevance to competition policy in different Caribbean countries. There may be other relevant factors which are not mentioned below; on the other hand, several of these factors characterize other developing countries to a lesser or greater extent - and indeed, some developed countries as well. A particular combination of such factors, or of their degree of importance, may well characterize Caribbean countries. This is an empirical question which is not addressed here, although it should be noted that it has been recognized in the on-going FTAA

negotiations that the small size of Caribbean countries, particularly those with micro-economies, is relevant to the implementation of competition law and policy; also relevant for most Caribbean countries would be the features of small island developing states highlighted in the Declaration of Barbados. The key point is that the objectives, design and implementation of competition law and policy in Caribbean countries would necessarily have to take local conditions into account, including:

- developing country conditions, with the technological, economic, infrastructural and institutional handicaps that this implies;

- relative smallness in terms of geography, population, GDP, purchasing power, and size and economic strength of firms, combined in most cases with insularity, giving rise to: limitations in both available investment capital and possibilities for profitable economic activity (unless aimed at export markets), as well as

- diseconomies of scale and scope (and possible transaction costs) with respect to production, transportation, distribution, or financing, and in the provision of public goods such as infrastructure or governmental services;

- in most cases, relatively low growth rates;

- highly vulnerable and dependent economies, with: exposure to natural disasters, narrow resource bases, volatile rate of growth of GDP, excessive dependence upon exportation of relatively few products to relatively few markets, limited ability to influence terms of trade and dependence upon external capital and technology - thus high uncertainty surrounding investment and development plans;

- relatively high interest rates on loans and a wide spread with interest on savings, poorly developed capital markets and limited budgetary possibilities for Governments to provide investment subsidies or even tax credits;

- high concentration of market power, company management and/or ownership of resources in relatively few hands (including both long-established domestic firms and foreign investors), and a social environment where most key players in the private sector and in the Government are in the same network;

- but with market power mitigated by a high degree of openness to international trade;

- albeit with the effects of openness sometimes reduced by inefficient transport and communications infrastructure, market power in distribution networks, loyalties to national firms and brands and a relatively low level of intra-regional trade;

- despite the existence of a complicated patchwork of regional and sub-regional agreements, e.g. the Organization of Eastern Caribbean States as a sub-set of CARICOM countries;
- concerns about international competitiveness in an environment where old trade preferences are being phased out while new regional, extra-regional or multi-lateral agreements are being negotiated or implemented, as well as concerns about domestic competitiveness (i.e., that local enterprises should not be completely ousted from the local market despite their being admittedly generally less efficient than foreign firms);

- a prevalence in most Caribbean countries of English common law traditions, which would naturally affect the choice of external legal and administrative models (e.g., the Jamaican competition law is mainly based upon the Australian and New Zealand models);\(^{14}\)

- yet concerns that there may be rule of law or governance problems in some countries (difficulty of enforcing the law against the informal sector, smuggling, corruption, criminal networks, etc.);

- and weakness of the “competition culture” (lack of understanding of benefits of competition and/or lack of voice of its beneficiaries, avoidance of aggressive competition by businesses, etc.).

The relevance of the above characteristics would need to be verified on an individual basis. Reliance upon such general characteristics cannot substitute for careful open-minded case-by-case collection and analysis of data, even though these characteristics may well be reflected in such data, and also affect their evaluation. This economic analysis would inter alia involve: (a) an identification of relevant product and geographical markets (in the light of reasonable possibilities and/or willingness of consumers to switch to substitute products or producers); (b) an examination of the structure of such markets, competition from imports, possibilities for inter-brand competition and the likelihood of new market entry and (c) the factoring in of efficiency concerns. Thus, for example, the relevance of the smallness factor (which is a relative concept whose importance would vary from country to country) would be qualified by one important proviso - while it is true that, measured in terms of their political boundaries, the concentration levels of Caribbean countries would be high, it does not necessarily follow that their boundaries would coincide with relevant markets for competition analysis purposes, since markets for tradeable goods are often international, while markets for non-

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tradeable goods or services may be smaller than borders of even small countries.\textsuperscript{15} Subject to this proviso, some problems arising from small size may be particularly acute for newly established Caribbean competition authorities:

- market dominance may often be inevitable or more efficient, and fragmentation into smaller business units may lead to waste of resources and loss of international competitiveness;

- while this should not pose a problem in principle because the enforcement focus should be on the process of competition rather than the numbers of competitors and on abuse of dominance rather than its existence, it may not be easy in practice to decide where to draw the line between what is legitimate and what is abusive, given the difficulty of balancing;

- on the one hand, the public’s sensitivity to prices perceived to be unfairly high and the disincentive effects of high input prices upon local and foreign investment and

- on the other hand, the need to be sensitive to business profitability concerns, given the heightened relative importance of profits both as a source of investment and as an incentive for investment in an environment with a shortage of other sources of investment capital\textsuperscript{16} and a possibly unfavourable risk-return ratio, and given the need to

\textsuperscript{15} See M. Gal, \textit{Competition Policy for Small Market Economies}, Harvard University press, 2003; OECD, Global Forum, \textit{op. cit.}, documents relating to the item on \textit{Competition policy in small economies}, at www.oecd.org/document/1/0,2340,en_2649_34611_2395841_1_1_1_1,00.html, particularly, "Small economies and competition policy: A background paper" - note by the Secretariat (CCNM/GF/COMP(2003)4) and “Competition policy in small economies – New Zealand” (CCNM/GF/COMP(2003)29); and S. Evenett, “Competition policy in small developing economies: Reflections on current literature”, at www.wti.org. Gal’s prescriptions relating to small economies, which she defines as those which can only support a small number of competitors in most of their industries, and in which most relevant product and geographic markets are highly concentrated because of scale economies, with high entry barriers and sub-optimal levels of operation, has been criticized on the grounds \textit{inter alia} that: it does not address the above-mentioned question of market definition and international markets; it does not cover economies which may be small in other senses such as population, GDP, or level of development (the examples she provides are of countries larger than Caribbean countries); it is questionable whether all of the economies meeting her definition have enough in common to benefit from recommendations derived from their concentration levels and entry barriers; and the policy recommendations she makes do not differ markedly from best practice in developed economies.

encourage the introduction and application of new technology to overcome scale handicaps;\textsuperscript{17}

- an extreme example of the risks of deterring investment through the application of RBP controls or sectoral regulation may be in connection with privatization or with the grant of concessions: since relatively few firms (usually foreign investors who would have the necessary expertise and capital) may be able and willing to invest in such small markets, the Governments concerned, while accepting the principle that public monopolies should not be transformed into private monopolies, may not have the bargaining power to resist demands made by investors in respect of the scope and duration of exclusive rights or of pricing or service conditions;\textsuperscript{18}

- in larger economies, vertical restraints are often unlikely to raise competition problems unless they also amount to abuses of dominance, but it is possible that, in smaller economies, vertical restraints (particularly in the distribution sector) both correlate more often with dominance and are more likely to have beneficial efficiency effects;

- in oligopolistic markets, which may be relatively more prevalent in smaller economies, firms tend to be interdependent in their pricing and output decisions, taking rivals’ actions into account and pursuing follow-my-leader pricing strategies without the kind of overt (or even implicit) agreement which could be tackled under anti-cartel provisions - attempts to tackle such “conscious parallelism” through the notion of joint dominance have proved difficult even for experienced competition authorities;

- actions affecting one market may have relatively major ripple effects upon other markets within small economies, without the insulating effect of size;

- a related point is that high concentration of company management and/or ownership may inhibit competition in a given market despite lack of market power, e.g., a conglomerate may be able to squeeze competitors or customers in a market which it does not dominate because they know that it can retaliate in another market (either vertically linked or totally unrelated);

\textsuperscript{17} Significantly, the Jamaican competition law provides that behaviour will not be considered to be abusive if it is shown that it was exclusively directed to improving production or distribution or promoting technical or economic progress. No such defence is available under the equivalent provisions of art. 82 of the Treaty of Rome.

\textsuperscript{18} While some compromises may be inevitable in such situations, the existence of a competition law and policy and the involvement of competition authorities should at least enhance the bargaining power of policy-makers. RBP controls might also be applied to any practices going beyond the ambit of any exclusive rights granted.
- for such reasons, vertical and conglomerate mergers, which rarely pose problems in larger countries, may raise competition issues more often in smaller countries;

- it may be difficult to take action against interlocking directorates despite their possible anti-competitive consequences where there is a shortage of managerial or entrepreneurial resources and/or concentration of ownership;

- since all the main players in the economy would usually know each other, there is less likely to be written evidence of cartelization and, even where there is, it may also be difficult to maintain secrecy in advance of raids upon offices or residences to seek evidence;

- it may sometimes be difficult to draw the line between cartels which have no redeeming efficiency benefits and desirable co-operation aimed at achieving economies of scale, e.g. import cartels or bulk purchasing for importation and transportation purposes and/or to countervail the market power of foreign exporters, but which then feeds into cartelization in distribution channels without the savings necessarily being passed on to the consumer;

- while the openness and small size of Caribbean countries mean that competition authorities may be relatively more likely to be faced with cases having international implications, Caribbean competition authorities may have limited information, powers, resources or abilities to remedy conduct overseas affecting Caribbean markets, or even conduct by foreign investors;

- some market entry barriers against potential competitors may be difficult to lower (e.g. the financing difficulties referred to above) or may indeed be bound to remain high, e.g. there may be little land available to set up alternative distribution outlets, while infrastructural services and other essential local inputs may be subject more often to foreclosure;

- the social consequences of displacement of smaller by larger business units and the costs and duration of structural adjustment may be particularly difficult to handle for small societies or economies where the maintenance of social stability is extremely important, resources are limited and there are few profitable opportunities for their re-deployment;

- the small size of elites may reinforce the effectiveness of lobbying;

- there may be pressures to refrain from action against "national champions" because, since these would be fewer in a small country, they would be exceptionally important for its identity and

- there would be a shortage of resources and skills available for the operations of competition authorities, aggravated by the institutional diseconomies of scale mentioned above.
Other problems new Caribbean competition authorities are likely to face may be linked to the weakness of the local "competition culture" (in this, of course, the Caribbean is far from unique):19

- under-estimation of the importance of the work of competition authorities would further reduce the resources allocated to them;

- there may be little attempt by the Government or by academics to collect data relevant for competition policy purposes (despite their small size, there appear to be substantial gaps in data relating to many Caribbean economies);

- compliance efforts by businesses may be half-hearted, and there may instead be complaints about reporting or investigatory requirements, "red tape", bureaucratic or political interference, favouritism or corruption – which may, indeed, be justified if appropriate mechanisms are not put into place to counter such risks;

- consumer groups or the public may not come forth to make complaints;

- while some practices openly undertaken by trade or professional associations which constitute or lead to cartelization should be easy to deal with provided political opposition can be neutralized, it may be difficult to detect or prove the existence of secret cartels in an environment where there is no social consensus that cartels are really reprehensible – so that businessmen may collude without feeling guilty, informants or cartel members taking advantage of leniency programmes may be considered to be betrayers, and "dawn raids" to discover evidence or the levying of substantial fines or criminal penalties against cartel members may raise too much opposition to be feasible;20

- promoting market entry may be difficult with regard to services which require licensing (such as the operation of taxis), since licence-holders would strongly resist the grant of more licences, and may have political backing for this purpose;

- lawyers' and judges' misunderstandings about competition law and policy (aggravated both because resource shortages may limit the availability of foreign material on competition law and because any available foreign material may be


erroneously relied upon) could result in competition authorities' decisions being over-ridden in appeal or review proceedings and hamper the development of local case law;

- allowing private cases against perpetrators of RBPs may therefore be counter-productive, and may indeed be misused by firms seeking to hamper their competitors, e.g. through allegations of predatory pricing;

- and there may be limited response by Governments to advocacy efforts by competition authorities urging reduction of regulatory entry barriers to markets.

APPLYING COMPETITION POLICY IN THE CARIBBEAN – SOME SUGGESTIONS

As indicated above, three fundamental inter-related issues which Caribbean countries adopting or applying competition law and policy would need to work out would be how to deal with issues of dynamic efficiency, what importance to attach to size in relation to efficiency and competitiveness, and whether and how to incorporate objectives not related to competition or efficiency. However, to put this into perspective, it should be noted that

(a) Such issues would not come into play in many cases, e.g. routine enforcement against a cartel or abuse of dominance resulting in higher prices of some basic consumer necessities. It has indeed been suggested, on the basis of some cases in developing and transition countries, that whatever the merits of the argument that an industrial policy instrument may be useful for small developing countries in sectors exposed to international competition (i.e. those for which scale, experience or network effects are important), these sectors would usually be different from those where the effect of RBPs would be most directly experienced by consumers.21 Even in merger control, many cases may be relatively banal, involving succession problems of retiring owners of family firms. It is indeed through appropriate and effective action in such easily understood cases during the early life of a competition authority that it can build up the credibility and support necessary to enable it to tackle the hard cases and difficult issues.

(b) It may often be possible to resolve these issues through the standard economic analysis used by competition authorities, as described above.

(c) The existence of a sizeable informal sector may amount to unfair competition against formal businesses paying taxes, etc., but would still tend to constrain cartelization or abuse of dominance by the formal sector (although sometimes the products sold by formal and informal sectors may not be fully substitutable).

21 See on this point International Competition Network, Footnote 19.
That said, it may still sometimes be difficult to resolve such issues in some cases. It has been argued that, in small economies, the focus of competition authorities should be on dynamic rather than static efficiency.\(^{22}\) Such an approach would undoubtedly be valid for Caribbean countries seeking to promote economic restructuring and make their economies more competitive in a difficult and rapidly changing external environment. It is not clear whether or how far this would involve any departure from the practice currently followed in developed countries or regions (allowing for the differences in such practice), but there may be relatively more instances where dynamic efficiency considerations come into play in the Caribbean. Competition policies aimed at encouraging dynamic efficiency would require more sophistication and concern for incentives to invest than do policies solely concerned with promoting static efficiency; the difficulty would be to accurately assess potential dynamic efficiency gains in individual cases, particularly as the relevant economic arguments and evidence are mixed. On the one hand, competition provides incentives to undertake research and development, to introduce new production and distribution methods and new goods and services, and to create or enter new markets, in order to stay ahead of competitors. Moreover, if there are many paths which technological advance can take, competition allows many of them to be tried and then selects the best, something a monopoly would find hard to replicate. On the other hand, in some circumstances, competition may discourage innovation – e.g. where profits are likely to be reinvested in innovation efforts, or where there are scale economies in R & D. On the whole, there is little empirical evidence that, in developed countries, large firm size or higher concentration are generally associated with innovative activity – but it is not clear whether this would necessarily be the case in developing countries which, in any event, import a higher proportion of the technology they use than do the larger developed countries. In the case of the Caribbean, it has been suggested that small firms in the informal sector have in some respects shown more initiative in pioneering new trade opportunities than have larger established firms. The answers to such questions may perhaps depend upon the type of innovation in question in a given case, and whether what is at stake is its creation, introduction into the country, or diffusion. Thus, giving priority to dynamic efficiency requires both sufficient data and the institutional capacity to correctly evaluate such data. Otherwise, this might lead to the side-lining of the creation of a competition culture, with Caribbean consumers facing a certain loss in the present (higher prices to producers, etc.) without a reasonable certainty that this would lead to gains in the future (through better products, economic growth, etc.).

Regarding size of firms, despite what has been said above regarding the possibilities for competition authorities to take into account any efficiency benefits arising from it, there may sometimes still be real dilemmas as to where to strike the balance between firms large enough to benefit from scale economies and numerous enough to provide sufficient opportunity for effective rivalry. There is an old but still vigorous debate about what were the experiences of several Asian countries in respect of industrial policy limitations upon

\(^{22}\) See Singh, Footnote 16.
competition aimed at enhancing competitiveness, what were their effects, and what lessons may be drawn for other developing countries. A common argument is that the development process is best served, at least initially, by large monopolies or oligopolies, since they would be more efficient and competitive in international markets – despite possible welfare losses for the domestic consumer. Thus, during the preparation of the Jamaican competition law, provisions seeking to regulate monopolies, mergers and interlocking directorates were dropped primarily because it was felt that the Jamaican economy was still in its infancy and subjecting these aspects of its economy to scrutiny might impair economic development; there were concerns about economies of scale in particular.

Arguments have been made to counter this. It has been stated, for instance, in a presentation made at an UNCTAD meeting, that empirical evidence does not support the hypothesis that size helps significantly in export promotion; doubling of output was found to result in only about 10 per cent reduction of average cost at most. Size alone was not a good predicator of productive efficiency, a key determinant of exports. Accordingly, that presentation disapproved of permissive merger policy on the grounds that any benefits of higher exports would not exceed the cost of greater domestic concentration which would hurt purchasers (who might also be exporters), and might lead to dumping (thus exposure to anti-dumping actions) and the creation of active political players like managers and unions which might seek protection from imports, etc. However, this presentation has been criticized on the grounds that (a) it defines size on the basis of numbers of employees rather than assets, turnovers or market shares, which are taken into account in merger control; (b) it does not take into account crucial non-price factors for export performance such as marketing, quality, customer service, etc. and (c) mergers of developing country firms, which were generally smaller than developed country ones, would enhance exportation because this requires large-scale promotional efforts involving substantial financial expenditure, and because developing countries have to rely more on economies of scale than of scope. Early research relating to (mainly) developing countries did indeed find that price-cost margins, firm size, economies of scale, capital intensity and presence of foreign investors were positively correlated

23 Compare WTO, Study on issues relating to a possible multilateral framework on competition policy, WT/WGTCP/W/228, 19 May 2003, and Singh, Footnote 16.


with industrial concentration – however, it is not clear whether this was due to lack of competition or to relative efficiency and economies of scale.\textsuperscript{27} A recent article suggests that national aggregates of firms may (for a multitude of micro reasons or for systemic economy-wide reasons) achieve less than aggregate potential outputs for the inputs and technology used, suggesting that there is some size constraint upon efficiency;\textsuperscript{28} how far this would be relevant for competition policy purposes, specifically in the Caribbean, would need to be worked out.

Despite the above-mentioned differences of view, what is clear is that the importance of economies of scale varies greatly among different markets and fluctuates in line with technological changes, and that large size of firms can sometimes lead to inefficiency, especially if it occurs through mergers rather than organic growth. Arguments about size beg questions such as: which size one is talking about in which market; how size is sought to be attained and how it should be measured; whether or not inter-firm co-operation (and what kind of co-operation) may be preferable to mergers in individual cases; and exactly how it is being suggested that size may be relevant to different forms of efficiency gains. Ultimately, therefore, it may be best to resolve questions about efficiency and/or size through an open-minded case-by-case economic analysis in the light of local conditions, also taking into account any available data about other countries deemed relevant to such conditions.

Countries new to this area and subject to different pressures and constraints often do not make clear ex ante legislative choices as to the balance among competing objectives. But one important way in which both efficiency and non-efficiency concerns are addressed is through the use of individual or block exemptions (although such exemptions do not necessarily denote a derogation from competition principles). A variety of different types of exemptions or exemption criteria which often overlap may be utilized, including: de minimis exemptions for transactions involving firms with turnover or market share below a certain threshold; functional exemptions for certain activities, usually of a horizontal nature (e.g., research and development); personal exemptions relating to all or some of the activities of small and medium-sized enterprises, trade unions, agricultural co-operatives, trade or professional associations, public enterprises, or persons granted exclusive rights by the Government; sectoral exemptions; or acts to implement other legislation or international agreements. However, while some exemptions may be specified in the competition law, Governments may often not be able to foretell in advance all the exemptions which they may wish to grant, so may provide some general powers in this respect to competition authorities or to the competent Minister on grounds such as efficiency enhancement, promotion of technical or economic progress, or the public interest.

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\textsuperscript{27} See the references cited in UNCTAD, “Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development” (TD/B/COM.2/EM/10/Rev.1).

Even in the absence of legislative exemption powers, such issues may be left to be handled through the inherent "prosecutorial discretion" involved in individual case decisions.

Regarding non-efficiency objectives, it is often suggested that competition policy is a poor tool for pursuing them; they would best be catered for through other means. Taking this argument further, it has been argued that, in small economies, it would be vital for competition policies to give primacy to economic efficiency over other public interest goals since they cannot afford the deviations from efficiency that a large economy could absorb; in particular, they should avoid the pursuit of wealth dispersion and small size of firms at the expense of efficiency because of the risk of preserving inefficiency in firms and operation of the market. A related argument is that competition authorities, which are expected to be technically rigorous and impartial, would be ill-equipped to take non-efficiency factors into account, since these would involve subjective assessments based on unclear criteria; it is therefore often recommended that they should focus upon competition concerns and leave other matters for political decision-makers.

While such arguments have much force, the choice of objectives is ultimately a matter of social preferences and sovereign political decisions. Even if there are economic costs to any particular decision, it would be for the country concerned to decide whether it wants to pay such costs - taking into account both the adjustment costs mentioned above and the special importance of maintaining social stability in small countries. The issue in this context would not be whether it is "right" or "wrong" to take into account non-competition or non-efficiency criteria - these are real concerns which will likely be taken into account one way or another in economic policy-making if the political pressure to do so is strong enough. It may be questioned whether leaving such matters to the unfettered discretion of politicians would necessarily result in decisions which are in the best interests of the country or are, at least, perceived so to be by the public. A purist approach by a competition authority which fails to take into account the cultural context may only result in its being bypassed or over-ridden, while alienating it from the community upon whose support it depends. Nor may reducing the flexibility of the competition authority in interpreting and implementing the law - an approach that is sometimes advocated as a means of preventing decisions from being influenced by improper motives or external influence - be desirable given the need mentioned above to make nuanced economic analyses. It may accordingly be appropriate to focus instead upon establishing legal and institutional mechanisms which, as far as possible:

- generate and publicize the maximum information about the costs and benefits of competition in general, individual market conditions, data relevant to dynamic efficiency, upstream and downstream effects upon other markets, competition policy approaches

29 See M. Gal, Footnote 15.
30 See OECD, Footnote 24.
followed elsewhere, and alternative means available, if any, of catering for non-competition concerns in a manner compatible with competition principles;

- limit political involvement to general competition policy, legislation or enforcement approaches as opposed to individual case decisions;

- provide competition authorities with the resources, skills, independent authority and breathing space to process this information and make informed, impartial and credible decisions;

- review regularly the thrust of competition policy in the light of experience with its application and of evolving economic, market and institutional conditions;

- maintain flexibility both to make any general changes shown to be necessary by such reviews and in decision-making in individual cases, while also maintaining a reasonable degree of predictability so as to sustain business confidence;

- promote a general perception that the decision-making process and individual decisions are legitimate, equitable and appropriate, even when they sometimes result in losses for some actors; and

- also promote long-term cultural change to make the culture more "competition-friendly."

Accordingly, one possible approach may be to set up, separately from the competition enforcement agency responsible for the day-to-day application of the law, a competition council to deal with broader competition policy issues. This would include representatives of the main stakeholders in this area, so as to provide background information on the economy and to maintain social consensus while ensuring appropriate checks and balances. An advantage of smallness would be the relatively small number of people which would need to be included to cover the main stakeholders. It would be best to include the head of the competition enforcement agency on an ex officio basis so as to ensure synergies among the information thus generated, general competition policy and individual case decisions. Due account would also need to be taken of how to provide for adequate skilled input, avoid conflicts of interest and preserve confidential case information. The operation of such a council might help to avoid both unduly blinkered and technical decision-making, on the one hand, and regulatory or political capture, on the other - ensuring that considerations not related to competition are genuinely used to address development concerns rather than function as an escape hatch for vested interests. Such a council would necessarily have to operate on a voluntary basis, to minimize budgetary implications. One example of the pending establishment of such a council is the Competition Advisory Council provided for under the Competition Bill of Mauritius; the objects of the Council are to: (a) advise the Minister on matters relating to RBPs with emphasis on consumer protection; (b)

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31 The Bill has recently been adopted by the Parliament but had not, at the time of writing, received the Prime Minister's assent.
promote activities to raise the awareness of the business community and consumers on competition and related matters; (c) maintain effective communication with the business community and consumers' associations and (d) promote research in emerging trends in the field of fair competition and best business practices. The establishment of such a council might well predate the adoption of a competition law, since it would not necessarily initially need a legislative mandate (which could be formalized later on); this would help to establish some advance understanding and commitment by the significant players in relation to the competition law, and allow them to provide input into its contents - such as in respect of institutional matters, abuse of dominance, or the choice between a prohibition or investigation approach for controlling RBPs (as discussed below). Whether before or after the adoption of a competition law, issues that might be deliberated upon by such a council might include:

- how best to factor in efficiency considerations in the application of competition policy and, related to this, the general coherence between industrial and competition policies, and the achievement of structural changes required for economic development;

- what might be considered to be abuse of dominance, whether to accept and how to deal with trade-offs between abuse of dominance and efficiency, and what weight should be ascribed to cost savings and efficiency gains not necessarily passed on to the consumer;

- identification of "strategic bottlenecks" to competition, and how access to essential business services might be facilitated;

- whether there are any dangers of market saturation and over-capacity in some sectors (which might best be tackled through information campaigns aimed at discouraging excessive market entry rather than through competition policy per se), or

- any risks of deterring investment (and associated transfer of expertise and technology) through the application of competition policy;

- enterprises with exclusive rights, State enterprises, privatisation, subsidies, where the line should be drawn between sectoral regulation (e.g. for utilities or financial services) and RBP controls, and how to enhance co-operation and co-ordination between the activities of competition authorities and any sectoral regulators;

- how to design and implement merger control;

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32 It may be noted in this connection that, unlike under EU law, the Jamaican competition law provides that an enterprise shall not be considered to be abusing a dominant position if its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit; even where there is a finding of abuse, the Jamaican law appears to require that there be a further finding of substantial lessening of competition in a market before action can be taken against the abuse.
how to tackle the difficult problem of the informal sector, such as how to take it into account in competition analysis given data difficulties, and whether and how to tackle entry barriers (e.g. cost of capital, excessive regulation, RBP's practised by the formal sector) preventing growth in the formal sector so as to allow it to absorb informal operators;

- any particular problems being experienced with the enforcement of competition law against foreign firms and how they might be dealt with;

- appropriate exemptions and the conditions upon which they might be granted - while some flexibility and scope for discretion in this area would continue to be unavoidable, the need for legal security would argue for the use of block exemptions (at national or regional levels) as far and as soon as possible, which would still allow fine-tuning of the application of prohibitions in line with the economic evolution of different sectors;

- advocacy for the application of competition principles to other governmental policies or measures - this would involve not just recommending liberalization, but also how, when and in what stages it might be undertaken so as to minimize costs and maximize benefits;

- what research may be desirable to shed some light to guide the difficult decisions in this area ex ante and examine their effects ex post facto;

- how competition principles might be propagated and a "competition culture" strengthened - a task which should be facilitated by the representative membership of the council and the small size of Caribbean countries and, in this connection

- how to heighten general awareness regarding adverse effects of cartels and indicators of the existence of secret cartels – which, as mentioned above, would be essential to enable efficient enforcement against them, and

- whether and on what conditions to allow private cases in this area.

So far as enforcement priorities are concerned, the choice of cases will often be influenced by two related sets of factors: (a) available resources, "obviousness" of anti-competitive effect and estimated chances of success and (b) likely economic effects (e.g. cases raising issues of competitiveness or having pervasive effects across the economy such as financial services), symbolic effects (i.e. the extent to which a case can transmit messages to the public and build up credibility), and the need to be seen to be responsive to complaints received and public concerns expressed about problems affecting daily life (e.g. prices of basic food-stuffs, transport, utilities, pharmaceuticals, building materials, etc.). Subject to these factors, initial priority may have to be provided, almost by default, to abuses of dominance/vertical restraints, despite the above-mentioned difficulties of analyzing their economic effects - which would necessitate substantial training efforts. It is often argued that a new competition authority should initially focus upon
enforcement action against hard-core cartels because of “obviousness” of anti-competitive effect – leaving for later action against other practices requiring complex economic analysis. However, it may be questioned whether, given the difficulties of cartel detection mentioned above, granting initial priority to action against secret cartels (as opposed to open cartel-like practices by trade associations, etc.) would necessarily be appropriate. It is in fact not clear that cartels are all that prevalent in the Caribbean, given the prevalence of single or joint dominance, as well as possible cultural aversion to co-operation - but it is impossible to be sure about this since cartels are usually secret. This is not to minimize the extent of damage that cartels may cause; it is rather to query whether there is evidence that they currently do cause substantial damage in the Caribbean or, even if they do, how feasible it currently would be to catch and punish them. Even where international cartels have been subjected to enforcement action by foreign competition authorities, it may not be easy to prove that such cartels affect Caribbean markets, since confidential information about them would not be communicated by the competition authorities concerned. However, even if cartels may be relatively rare within the region for the time being, it may be reasonably anticipated that, in future, greater competitive pressure through lowering of entry barriers and enforcement efforts against other RBPs would enhance the incentive to cartelize. So early steps would need to be taken to prepare the apparatus for detecting and sanctioning cartels (including cross-border cartels), as well as appropriate public perceptions. Another key task would be in relation to mergers. As implied above, fears about introducing merger control in Caribbean countries are misplaced. But businesses and Governments would have to be convinced that this is so, which would require a full airing of the concerns and the arguments. Moreover, merger control is complex, and the maximum public input would be desirable in working out whether advance notification of mergers should be required, what might be appropriate thresholds for notification or intervention, which procedures should be followed, and whether or to what extent merger control is best left to be tackled at regional or sub-regional levels. This would suggest that, while a new competition law may well have general merger control provisions, the entry into force of such provisions and the detailed criteria and review process might be introduced later through implementing regulations or enforcement guidelines, taking the regional framework into account.

In general, it may be preferable to bring a new competition law into force on a phased basis, by giving the competent Minister the power to issue statutory instruments specifying substantive or procedural details relating to provisions contained in a Competition Act, or bringing into force different parts of the Act. This would make its administration and implementation manageable, enable difficult questions such as merger control or treatment of efficiency gains to be worked out, and allow time for both pedagogical activities and a learning process by competition authorities themselves. A harsh application of the law could be avoided until its provisions could be presumed to be understood by businesses. However, it would be best that those provisions of the law which had come into force be fully enforced, so as to not to lose credibility and run the risk of provisionally “legitimizing” some RBPs, making it more difficult to sanction them later on; there could instead be a focus on information campaigns and warnings, and flexibility or leniency about remedies and sanctions. Remedies and sanctions would in any event have to be
carefully worked out, as it would be counter-productive if they were to lead to market exit by the firms concerned.

No attempt will be made in this article to discuss: whether competition authorities in Caribbean countries should also deal with other areas such as consumer protection (or whether it would be best to mandate existing institutions such as Central Banks or utility regulators to deal with competition policy); what might be their set-up and procedures or what could be an appropriate allocation of investigative, adjudicative and appellate/review powers within competition authorities and among different national authorities (taking into account the need for effectiveness, fairness, accountability, compatibility with existing norms, institutions and traditions, political support, access to investigation resources and cost-effectiveness). Problems have already been experienced in this respect in the Caribbean - because of "breach of natural justice" concerns highlighted upon appeal, Jamaica is having to amend its Fair Competition Act to clarify and distinguish between the roles of the Fair Commission staff and the Commissioners as, respectively, investigators and adjudicators. The design of the competent institutional machinery raises particularly difficult issues for small countries, which can be even more difficult than the substantive issues. Indeed, the two cannot be entirely separated: for example, the choice between a prohibition system (whereby some practices are prohibited in principle subject to exemptions, with the competition agency having the authority to determine whether an individual practice or type of practice falls within such exemptions) and a system based on administrative investigation of whether a practice is anti-competitive or not, has implications for the design, powers and independence of competition authorities, the role of courts and Ministers, etc. The omission in this article in dealing more in-depth with such questions is because, on the one hand, they are country-specific (solutions which are appropriate for the larger countries would not necessarily be so for the micro-economies of the Caribbean, although it is arguable that an investigation approach would be more appropriate for countries lacking experience in this area) and, on the other hand, they are best considered within the context of the broader regional and extra-regional picture.

While regional and extra-regional co-operation can help in working out and implementing competition laws and policies, particularly in respect of cases with regional or international implications, the precise allocation of competence among national and regional institutions would need to be worked out. This has already been done to some extent in the Caribbean, but there may be need for further reflection on this, and the details would need to be fleshed out. Other key questions meriting further reflection in this connection include:

- the interface between national development objectives and competition law and policy, on the one hand, and sub-regional, regional, extra-regional or possible multilateral norms, on the other, including the degree of flexibility to be maintained in this area;

- mutual compatibility and interaction among such external norms, both in their content and - which is likely to be more difficult - in their long-term implementation;

- how to use or strengthen the mechanisms provided for under external norms to further the
application of national or regional competition policies and ensure that private restraints do not impede trade liberalization or regional integration, e.g. through exchange of experiences, joint research (including by examining price differentials for the same products within and outside the region and the question of parallel imports), sharing of skills or enforcement costs, joint tackling of cases with regional or international implications (e.g. in the shipping and tourism sectors), joint co-operation with external bodies, etc. and

- how to involve and obtain feedback from business, and from all societal interests, with regard to external negotiations in this area - which is admittedly a difficult area.

Conclusions

Much of this article sets out a listing of issues and problems, and many of the suggestions made are rather general in nature. But the aim has been to identify some appropriate starting-points and an institutional process for working out more detailed responses on a case-by-case basis. It would in any event be for each Caribbean country and for the region to work out what it wishes to do in this area. While some initial choices are inescapable - and have indeed already been made by those Caribbean countries with competition laws, as well as in regional and extra-regional agreements - the only way that such things can be fully worked out is through actual experience and a trial and error process, and no choice made, however valid, would necessarily remain so for all time. Difficult trade-offs may sometimes be necessary, resulting in losses for some actors. The general message that this article has sought to transmit is that competition policy has the potential to bring many benefits to the Caribbean, but this potential is unlikely to be fully realized unless competition policy is applied in a way which (a) fully takes into account relevant Caribbean conditions and social preferences, as well as external experiences, as illuminated by thorough research; (b) appropriately factors in efficiency and competitiveness considerations and (c) both avoids straying too far from social consensus and promotes an evolution of this consensus, by engaging society in a project of economic transformation and development. All of these would require good data and institutional capacities - and since these cannot be obtained until sufficient public support and resources have been acquired, a phased approach towards bringing competition laws into full force would be desirable. It would therefore be desirable to retain a large measure of flexibility in this area - including both flexibility in respect of the objectives, content and application of national competition laws and policies, and of regional or international agreements - while maintaining reasonable predictability. Regional and extra-regional co-operation can help in working out and implementing competition laws and policies, particularly in respect of cases with international

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implications. Academic research should also provide information and analysis to facilitate this “discovery process” - an excellent first start in this respect is the SALISES/UWI research project in pursuance of which the present article has been written. But such research efforts should be pursued, ideally through the establishment and operation of a network of national, regional and extra-regional researchers and research institutes to build up the information base and skills necessary to tackle such questions.
Competition law protects the process of competition in the market by proscribing anti-competitive business conduct by public and private economic actors. The assumption is that enforcement of such rules would lead to welfare benefits for consumers and entrepreneurial opportunities for producers as firms become more efficient, offer better products at lower prices, and leave open opportunities for market entry by competitors. Yet, an examination of competition issues in selected CARICOM countries revealed that, even if there were competition law and effective enforcement in these economies, this would have been insufficient to protect the process of competition in the market. Interviews in these economies revealed that intervention in the market by government officials to favour some competitors above others, and illegal activities in both the formal and informal sectors were distorting competition in the market. This points to the need to address issues of good governance simultaneously with introducing and implementing a competition regime.

In small societies, political contestation becomes very personalized, and while in larger societies there is a greater scrutiny of public figures, and accountability to a public moral grid, in Caribbean societies, political campaigns are fought, not so much on issues and ideological differences, but on appeal either to ethnic loyalty in Trinidad and Tobago and Guyana, or "tribal" loyalty to a party that originated with a hero leader in the era of decolonization (e.g., Jamaica). Contestation is over who would control state resources and distribute benefits to their followers, rather than who can offer the society enlightened leadership. Political largesse is an expected reward for active support of the party that wins the election and forms the government.

In all the countries studied, political largesse was found to be a normal part of the payback for supporting a political

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1 Belize, The Bahamas, Jamaica, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.
party. Hence, lack of transparency in tendering procedures facilitated granting contracts to party supporters and cronies. The present government of Trinidad and Tobago is investigating the conduct of the former government in granting contracts to party supporters to build the airport, for instance, in which there were allegations of unfair tendering procedures, bribery and corruption, with big paybacks to the officials who were responsible.

There were allegations of impropriety in Belize in granting contracts for supply of goods and services, small and large. Interviews with some businesspersons revealed that they do not even bother to tender for contracts for supplies any more, because they are not supporters of the current government, and, as such, would not even be considered. Such favouritism and lack of good governance not only compromise fair competition in the market, but discredit the government in its contradictory role of enforcer of competition rules on the private sector, while at the same time granting unfair competitive advantages to some firms in the market.

In these small societies, with scarce financial resources, government employees are not paid a wage comparable to that earned in the private sector. This is the case, for instance, with customs and excise officers and the police force, leaving them vulnerable to accepting bribes or becoming part of the drug circle. Moreover, limited size of population makes access to officers by “Joe Public” very easy. While it was acknowledged that there were exemplary officers in all sectors of the government service, allegations of corruption were widespread. Jamaican licensing officers were accused of being liberal in the granting of licenses in return for bribes, and this is surely not the only CARICOM country where this happens. Customs officers in all the case study countries were accused of allowing acquaintances to escape paying duties and taxes, another feature of small size and familiarity of social contacts. More seriously, in some cases, there are allegations of officers allowing into the country in return for bribes, container loads of goods intended for retail, without charging duty. In Belize, there were allegations of leakage of goods from the Free Commercial Zone into the local economy.

It is important to note that the perpetrators of these illegal acts are from both the formal and informal sectors. Corporate governance was found to be sorely lacking, with allegations of under invoicing and transfer pricing being used to escape full payment of customs duties and government taxes, as well as using contacts to avoid paying duty. There were also allegations of abuse of incentive regimes for hotels, for instance, for the importing of construction materials duty free. Importers purportedly inflated the order and directed the surplus tax-free goods into their retail outlets.

Most Caribbean economies have exchange controls because of their weak foreign reserve position, and this is in itself a result of the severe problems faced by these economies, with declining terms of trade, removal of preferential markets and severe economic contraction. Without exchange controls to ration the foreign reserves, the countries could find themselves unable to import essential basic needs. However, exchange controls featured strongly in
generating underground currency markets. Belize, for instance, is facing serious shortage of foreign reserves, and all businesses have to find ways of accessing foreign currency to pay for imports. This has led to instability of prices, shortages and inconsistency in importation, thereby fuelling a strong parallel market for foreign currency, and strong suspicions about certain businesses being the conduit for these activities.

A consistent feature of Caribbean societies is the existence of a fairly large informal sector: a survival strategy for the unemployed to earn a living. Unlike larger economies, there are no social welfare cheques for the unemployed. This sector has therefore played a vital role in absorbing the unemployed and thereby defusing social pressures and preventing social implosion. However, the informal sector in many countries has been transformed in the last decade from the benign survival strategies of the poor to one in which a segment of the sector has become a highly sophisticated criminal drug element that has penetrated the government sector at all levels, the security forces and the formal business sector.

These countries have become transshipment points for drugs sent from Columbia to the United States. High unemployment and lack of options for legal economic activities, combined with the ease of earning high incomes in the drug trade, make individuals in these societies very vulnerable to the attractions of the drug trade. The activities of this element of the informal sector fuels the corruption in customs, facilitating ease of passage of goods entering the economy duty free, thus distorting competition in the market.

The challenge posed by the informal sector ranges from a nuisance factor in some countries (like Belize, where the drug dimension seems to be miniscule), to a serious threat to the survival of the formal sector, such as in Jamaica, where it is estimated that the informal sector now contributes approximately 41 percent of GDP. Indeed, complaints were heard that businesses in the informal sector were selling goods at a price that was equivalent to the cost price paid by formal traders for the same goods. Several businesses have closed as a result of this unfair competition. Others are struggling, and complaining bitterly.

Money laundering has become a serious internal problem in these countries, affecting the way in which the market operates. In Jamaica, there were reports of methods used by the criminal drug element to convert drug money through the banks, by-passing the transparency rules requiring revelation of the source of money. In some countries, the drug barons have entered the formal sector by laundering drug money through legitimate businesses, offering prices so far below that offered by competitors who are operating legally that they cannot compete. This complaint was heard particularly in Trinidad, where there is a serious drug problem and a rapidly escalating problem of crime and violence in the society, with attacks on businesspersons and their families leading to closure of businesses and migration of families. Indeed, the Director of Public Prosecution in Trinidad and Tobago recently confirmed the link between organized crime and legitimate business in this country, stating that “high-profit criminal activity, laundered through allegedly legitimate business, creates
competitive imbalances that bear no relation to the market realities and enable businesses with crooked sidelines to stifle rivals who work with profit and loss statements that are not buoyed by unlawful income” (Sunday Guardian, February 15, 2004).

Can one really talk about fostering competition in a market without simultaneously addressing these serious problems that are not only distorting competition in the market, but also tearing the fabric of society apart? The penetration of the influence of the drug lords to individuals in all sectors of the government compromises the ability of the government to effect changes by rooting out the criminal element, and this is paralyzing the society. In sum, good governance in the public sector and the associated elimination of the criminal element of the underground economy must be addressed seriously in these societies if a good competition environment is to be fostered.

Granted, this is not an easy task since those in the drug driven criminal world and those in the formal sector but who engage in illegal activities invariably have skills and financial and other resources that are far superior to that which is available to small states. No Caribbean state acting alone can mobilise the resources necessary to deal with the challenges of good governance, particularly those posed by globalisation. Good governance is also a very expensive social good, both in terms of the material resources required as well as in terms of human capabilities. Acting collectively and with the support of international governments and agencies, the odds improve, but only just. Efforts must however continue to be made even if only to prevent the problem from becoming worse, leading to state failure. Moreover, there is a need for questioning the Westminster System of Government, and effecting constitutional reform, so as to devise a system of government that is not, in the final analysis, “Winner takes all”. This work has been underway for some time in the region, with leading political scientists seeking solutions.² It is critical to Caribbean survival that the political directorate is visionary enough to change the system of government, thereby curtailing their own power to the greater good of society.

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² Amongst these are Clive Thomas, Selwyn Ryan, Lloyd Best, Brian Meeks.
INTRODUCING AND IMPLEMENTING
COMPETITION LEGISLATION IN
SMALL ECONOMIES:
SOME CONSIDERATIONS

Taimoon Stewart

This policy paper looks at the processes involved in drafting legislation, taking it through the stages of consultation, parliamentary approval and enactment, developing the institutional framework and taking the first steps in implementation. The information is derived from empirical data collected in CARICOM countries, but also draws on lessons from the experiences of other developing countries.

Before competition legislation is drafted, there should be a study of the market to determine market structure and business culture and how these impact on competition in the market. This would allow drafters to target the specific problems in the relevant economy, rather than copy the law from developed economies that were formulated to address different economic structures and business cultures. This would allow drafters to target the specific problems manifested in that economy, and address peculiarities that may exist because of the small size of the economy. An accompanying policy paper to this project, "Shaping Competition Legislation to the Needs of Small Open Economies: The Case of CARICOM," provides some initial guidelines drawn from empirical work conducted in selected CARICOM economies. The findings point to the need for proscribing anti-competitive agreements, abuse of a dominant market position and merger control regulation, but each tailored to specific circumstances found in small economies.

An important lesson learnt from the Jamaican experience, as well as other developing countries, is to have the draft law critically examined by experienced international competition experts. There is a dearth of skilled lawyers and economists with sufficient expertise and experience in implementation of competition law in CARICOM. It is therefore insufficient to have this done in-house. Loopholes need to be identified that could lead to challenges by private sector lawyers in the enforcement of the law. This could bring the law and the enforcement institution into discredit, as happened in Jamaica. The Jamaican Fair Competition Act did not separate the functions of the investigative arm from the judicial arm in the Fair Trading Commission, a loophole that led to a legal challenge based on breech of natural justice, and subsequent
Supreme Court ruling in favour of the complainant. The Fair Trading Commission has been crippled as a result, while the law is revised to correct this flaw.

Informed consultations on the draft law with the private sector and civil society could ease the passage of the law. The emphasis here is on “informed consultation.” This is because in CARICOM countries there is little or no understanding of the law and the implications for various stakeholders of the enforcement of the law. Therefore, consultation requires a workshop format, in which the provisions of the law are explained, with case examples from other jurisdictions to enhance understanding, before soliciting views on the draft law. Otherwise, there would be little interest in the consultation, and very little useful feedback, as was experienced in Trinidad and Tobago.

Providing a proper groundwork for understanding competition law will also contribute to the development of the institutional framework through influencing change in the habits and practices of the business sector towards a culture of competition. This is urgently needed in CARICOM countries. Interviews conducted in six CARICOM countries revealed that the business sector and consumers had little or no knowledge of competition law and the potential gains for themselves of its introduction (except in Jamaica where there has been a law since 1993). Moreover, many practices that are considered normal business practice, and acceptable, could be deemed to be anti-competitive under a competition regime.

Competition advocacy, that is, the role of the Competition Authority in influencing policies of government ministries to be pro-competition, is important for creating synergy between government policies and the competition regime. However, this has to be done with total sensitivity towards the development goals of the society, which may, in fact, run counter to the liberalization and competition agenda. This can only be achieved if there is a two way process through which government technocrats are sensitized to the objectives and instruments for protecting competition in the market and the welfare-enhancing benefits to be derived from implementing a competition regime, but also, competition enforcers are educated in development economics. They should be exposed to an understanding of

- the risks to developing countries of indiscriminate liberalization and a critical evaluation of the extent to which liberalization could serve the development goals of the country
- systemic processes in the global economy that work against development goals
- the socio-economic and socio-political issues of primary importance to the society
- the development goals of the society and ways to achieve these, given the macro trading and economic environment

This would hopefully sensitize staff of competition authorities to the balance
that must be struck in small economies to achieve selective liberalization and introduction of competition. This would advance developmental goals of wealth creation and its retention in the economy, employment creation and poverty alleviation.

The Competition Authority or Fair Trading Commission may be exposed to regulatory capture by the private sector, that is, influencing the decisions of the Commission in their favour through personal contacts with investigators, Commissioners or politicians who can influence the work of the Commission. Such has been the experience of several Latin American and African countries, India, and Pakistan, among others. It is therefore very important to build into the institutional framework precautionary measures to pre-empt such capture. Peru has several such measures constraining the freedom of staff

• to accept gifts

• to declare assets upon assumption of a job in the Commission

• to restrict disclosure of information gathered in an investigation and other such activities that could compromise the work of the Commission.

This is even more important in small economies where the intensity of personalized relationships across the society and ease of access to politicians and technocrats make it a certainty that there will be repeated attempts at regulatory capture.

Providing the Commission with financial security that is de-linked from the political decision-making process is very important. Similarly, autonomy and independence from political interference is necessary, though a balance has to be struck so that government authority and clout backs the Commission in its fledging years, until it builds up credibility, respect and inspires fear in the business community. A point to note also is that the penalty for breach of the law has to be sufficient to hurt the offending firm, and provide a serious disincentive to further anti-competitive conduct. In small economies, dominated by MNC, it may be best to calculate the fine as a percentage of yearly turn over, so that all firms could be equally penalized, regardless of size.

It is necessary to have staff that is adequately trained in the law, in detecting anti-competitive conduct, and in conducting investigations. The staff also needs to be trained to promote a culture of competition in the society, facilitate transparency in the work of the Commission, issue directives to guide the private sector in interpreting the law, and engage in appropriate competition advocacy. The role of technical assistance from staff of more mature Competition Commissions is critical to building up the pool of human resource needed, and this process is ideally started prior to the passing of legislation.

The route taken by the Barbados government provides a good example to follow. The Fair Trading Commission was set up well in advance of the passing of the competition law (at least three years), and regulation of utilities was brought into the Commission as a start of its anticipated functions. Staff for the competition division was hired and this
facilitated access to technical assistance for training of staff. In effect, when the competition law was finally proclaimed, the competition division of the Commission was up and running immediately, albeit at a modest level. If a country has only a draft law to show for its efforts to introduce a competition regime, access to technical training is not easily accessible, and targeting the training of staff is not possible. CARICOM countries are well advised to follow this example, but also to put a retainer on staff for five years, with a penalty of repayment of cost of training, in order to prevent rapid turnover of staff as has been experienced in other developing countries, including Jamaica.

By bringing Regulators and Competition Commissioners within the same institution, the Barbados government pre-empted the emergence of problems experienced in several countries of conflicts between Regulators and the Competition Commission. The two divisions are forced to work closely together and understand each other’s remit. Regulators of other sectors, such as financial services, should be directed into collaboration with the Competition Commission through institutional mechanisms such as requirements to meet regularly, and modalities for consultation in cases where there may be a competition issue. Demarcation of jurisdiction should be clearly defined in order to avoid conflict (such as the one in South Africa where the Central Bank and the Competition Commission went to court over claims of jurisdiction in a merger case). While there has been no outright conflict between regulators and the Commission in Jamaica, the demarcation of lines of jurisdiction is hazy and instruments for institutional cooperation are not present. This leaves the way open for conflict, which could only discredit the institutions in the eyes of the public.

The Commission must have freedom to exercise prosecutorial discretion so that it can target the more important cases, that is, those that are hurting the economy most. With limited resources in small economies, this is very important. It is critical, as part of the process of building the reputation of the Commission, to target cases that have meaning for consumers, and that are straightforward and easy to win. This would foster understanding of how the law could work for the benefit of the society, but also give time to the Commission to build expertise. Otherwise, the Commission may find itself losing a case to a high profile actor, and losing credibility. This is precisely what happened in Jamaica when the Commission, in one of its earliest cases, investigated the Law Association for breach of the Fair Trading Act, and not only lost, but by Court ruling, the Association is now exempt from the Act.

Finally, CARICOM countries need to consider the incentives that may be required to encourage resident multinational corporations (MNCs) to cooperate in investigations by submitting information that is requested. The experience in some developing countries is not encouraging. Power asymmetry allows some MNCs to ignore requests for information from the FTC. In Zambia, for instance, a law had to be passed making non-cooperation in investigation punishable by incarceration, before the Commission was able to get information from the local subsidiary of Coca Cola. Given
that foreign direct investors control the largest sectors of economies in CARICOM countries, this problem of lack of cooperation would most likely be encountered, and should be addressed in the drafting of the law, and also be factored into the negotiation of cooperation agreements, ensuring that there are instruments for assistance in investigation of MNCs.
SHAPING COMPETITION LEGISLATION TO THE NEEDS OF SMALL OPEN ECONOMIES: THE CASE OF CARICOM

Taimoon Stewart

The findings of the study on competition issues undertaken in CARICOM countries confirm that even in micro-economies that are open to imports and foreign direct investment, anti-competitive conducts can be found in the non-tradable sector. Moreover, there is persistence in concentration of wealth in the hands of the descendents of the plantocracy, leading to dominance in product markets and abuse of dominance. It was also found that in the non-tradable sectors, mergers leading to excessive concentration or monopolies could be harmful. This paper therefore argues that CARICOM countries would benefit from introducing competition legislation that includes prohibition of anti-competitive agreements, abuse of a dominant market position and merger control regulation. However, findings of the research point to the need to shape the legislation to address the specific types of anti-competitive conducts found, differentiating for welfare-enhancing cooperation amongst firms and addressing socio-economic/socio-political issues.

Anti-Competitive Agreements

Collusion was found to be unlikely in the micro-economies, given an aversion to cooperation and reluctance to disclose information found amongst family firms. This may not be as pronounced in Trinidad and Tobago and Jamaica, where the economies are larger and more complex. Moreover, it could be extremely difficult to prove collusion, barring written evidence, given the culture of small societies, with close personal relations amongst business rivals. Small economies may have difficulty emulating the example of the Leniency programme of the United States because the intensity of personal relationships in small economies may make whistle blowing abhorrent and socially unacceptable, and could even prove to be dangerous in societies burdened by the drug trade, money laundering and associated crime. However, having a prohibition of anti-competitive agreements could, in itself, be a disincentive.

Price-fixing by Trade Associations is part of the business culture inherited from the past, which persists openly because of an unawareness of the anti-competitive nature of the act. Such trade associations (e.g., Bakers’ Associations, Shipping Agents) should be alerted to the potential illegality of their conduct, and monitored for continued collusion. Disciplining other associations, such as Taxi Associations...
in Tourist economies, could be problematic in many of the territories because of the political and socio-economic fall-out that could result. Moreover, transference of entrepreneurial opportunities in the transport sector to the wealthy tour operators, concentrated in the hands of the entrenched capital holders, could cause social implosion, particularly when there is a racial divide manifested in wealth distribution.

It was also found that welfare-enhancing cooperation for the purpose of Research and Development (R&D) towards innovation was less likely in very small economies since productive activities are largely limited to commodity production and tourism services while other production activities do not stimulate R&D and innovation because the conditions necessary for successful innovative activities are not present in small economies (scale, sophisticated consumers, integrated economies with services linked to production, technological clustering etc.) In Trinidad, where there is a degree of light manufacturing, there is little investment in R&D. While there are possibilities for innovation that could be stimulated by providing the enabling environment, particularly in information technologies industries, this must be targeted in public policy, and barring that, one should recognize that there is no automatic link between strong competition in the market and innovation in small economies.

Cooperation amongst small firms was evident, however, to achieve economies of scale in importation and retail of products. This business conduct was found amongst newly migrant ethnic groups (Chinese, Taiwanese, Indians), and is culturally derived. A similar phenomenon was witnessed in the late 19th to mid-20th centuries with the migrant Chinese and Syrian communities in Trinidad, Guyana and Jamaica. These groups are challenging the incumbents, usually from the plantocracy class, providing more competition and benefits are flowing to consumers. They should be exempt from the law under the de minimus clause. Indeed, there is precedent for this. The United States Virgin Islands Anti-monopoly Law explicitly exempts “the establishment of formal agreements between small entrepreneurs engaged in the retail sale of the same or similar commodities for the purpose of bulk purchase of those commodities in order to meet in good faith, competition of businesses with substantially larger sales volumes.” The gross income of such businesses should not reasonably exceed $250,000, and they should not employ more than 12 persons.

**Abuse of a Dominant Market Position**

Very high concentrations in product markets were found in these economies, both as a result of efforts to achieve minimum efficient scale and because of the unequal distribution of wealth derived from historical circumstances. Moreover, the lines of division amongst importers, distributors and retailers are very diffused. Abuse of a dominant market position is more likely to occur, particularly in the import/distribution/retail trades and downstream tourism services, in which Destination Management Companies that could squeeze smaller players out of the market through exercise of market power. Interlocking directorates are prevalent
in these economies and seemingly are used to ensure the continued control of the economy by the dominant elites.

Foreign investors control the major economic sectors, such as extractive industries, tourism and export agriculture in Belize, for instance, and abuse of market power has been experienced in the past. The current case of Foreign Oil Companies in Trinidad by-passing downstream local service providers merit investigation for anti-competitive conduct, though in most cases, investment policy allows for by-passing of local content. Cross border anti-competitive conduct was evident. For instance, International Tour Operators are controlling the global tourism trade vertically and extracting most of the surplus value, while squeezing those operators at the lower end of the product chain. International cartels have been investigated by the US and EU revealed that their operations have been worldwide (e.g., the Vitamin Cartel). There is no doubt that the activities of international cartels adversely affect these economies. Strong cooperation agreements may go some way to assisting these economies in dealing with anti-competitive conducts of foreign enterprises.

**Merger Control Regulation**

The research showed that despite the validity of smallness and economies of scale arguments against Merger Control Regulation (MCR), evidence of the need for MCR in the non-tradable sector was found. For instance, in Belize, one bus company, through allegedly predatory behaviour, succeeded in effecting a hostile take over of the other five companies on the country-wide route and once the monopoly was achieved, raised fares, leading to riots. In Barbados, a group of firms hastened through a merger before the proclamation of the Fair Trading Act because they were aware that the merger could be prevented because of excessive concentration. A subsequent march on the Fair Trading Commission by dairy farmers pointed to possible abuse of the dominant market position that was achieved through the merger. CARICOM countries may want to consider introducing merger control regulation, setting thresholds at a level that could catch the larger local firms, and using criteria for evaluation that include investigating whether efficiencies could be achieved through the merger that counters diseconomies of scale. For example, mergers in the banking sector could lead to better conditions for competition between larger entities, and positive consumer benefits. At present, the sector is over-banked, and there is little room for competition so that incumbents prefer to resort to cooperative behaviour that allows everyone to survive.

**Summary**

Competition law in small economies should:

- Include provisions proscribing anti-competitive agreements, abuse of a dominant market position, and merger control regulation
- Allow for exemption of small and medium-sized enterprises
- Recognize that the Leniency programme may not work and
may even be dangerous to whistle-blowers in these small economies, saddled as they are with businesses that are conduits for drug money laundering

- Target trade associations but also be sensitive to the socio-economic fall-outs, such as dealing with taxi associations in tourist economies

- Recognize that the excessive concentrations in these economies are derived largely from inherited wealth within the plantocracy class, and the accompanying reproduction of inequitable distribution of wealth

- Therefore target abuse of a dominant market position as the most important aspect of competition law enforcement and incorporate public inter-
est issues in evaluation of cases

- Consider the merits for the region of the US Virgin Islands law that prohibits vertical integration of importers, distributors and retailers. This may be difficult, though, given the fuzzy barriers that exist now, and the small size of market. However, it should be investigated to see how it works in the US VI

- Have a lower threshold for determining dominance than what exists in developed markets

- Have a threshold for MCR that is low enough to catch the dominant local firms but introducing criteria in evaluation of cases that are sensitive to the need to achieve minimum efficient scale in order to compete successfully.
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