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Enforcement of competition law in CARICOM: Perspectives on challenges to meeting regional and multilateral obligations

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ENFORCEMENT OF COMPETITION LAW IN CARICOM: PERSPECTIVES ON CHALLENGES TO MEETING REGIONAL AND MULTILATERAL OBLIGATIONS

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INTRODUCTION

The focus of this paper is to raise some issues that have implications for coherence between the competition law regimes at the multilateral level, in particular the General Agreement on Trade in Services (GATS) obligations, and that existing at the regional level made operative through the existence of FTAs. The particular FTA addressed here is CARICOM under the Revised Treaty of Chaguaramas, although the tentative observations made go beyond this FTA.

Enforcement of competition law in CARICOM is governed by domestic, regional and multilateral regimes. For the most part the regimes are compatible in terms of the similarity of substantive rules such as rules against abuse of dominance, against agreements substantially lessening competition in markets, and assorted restrictive business practices.

However, some dissimilarity exist regarding substantive rules, and the appropriate standard for investigating particular prohibitions; with respect to the latter, whether, for example, a rule of reason or per se approach is to be adopted.

In Barbados, for example, sections 20-21 of the Fair Competition Act, 2002 provide for a regime to govern mergers. Similarly, in Trinidad and Tobago, sections 13-14 of the Fair Trading Act, 2006, address anti-competitive and qualifying mergers. By contrast, the Fair Competition Act, 1993 of Jamaica has no explicit merger provision. Similarly, the Revised Treaty of Chaguaramas that is the foundation for a common competition policy in CARICOM has no explicit merger provision as one of the obligations that is to be included in the domestic legislation CARICOM members.

Differences in the appropriate standard to examine presumptively anti-competitive conduct may be seen in practices such as tied selling. Under section 17(2) the Fair Competition Act in Trinidad such a practice can be governed by a rule of reason standard. Contrastingly, Jamaica has both a rule of reason and per se provision to address tied selling.

Notwithstanding these differences, a flexible interpretation of either the Revised Treaty or domestic legislation can narrow these differences. In the case of mergers, for example, Article 177(1)(a) of the Revised Treaty requires members to prohibit as anti-competitive business conduct, '*agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community'*. Similarly, section 17(1) of the Fair Competition Act of Jamaica governs agreements which contain

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provisions '...*that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market'.*

A flexible interpretation of the term 'agreements' as governing any agreement that affects competition or is likely to affect competition in the Community or within the domestic market can be applied to a merger.

Therefore, the operation of competition law at the domestic and regional levels presents opportunities for convergence, but also challenges with respect to a common approach to addressing anticompetitive conduct. Opportunities for convergence arise in cooperative arrangements regarding information sharing, and technical assistance for development of the appropriate institutional structure and technical expertise to conduct investigations and enforce competition laws.

There are also other challenges to convergence. Jurisdictional issues may arise with respect to the appropriate balance to be struck between competition and regulation regarding particular sectors; within an FTA, whether a regional competition authority should have jurisdiction over conduct with takes place within one territory, but with no visible spill over effects to another member, but which conduct may prevent access to that domestic market by another member.

EXISTING CHALLENGES

Challenges identified at the domestic level with regard to the enforcement of a Community Competition policy in CARICOM include the following:

1. Amendments to existing legislation to pass constitutional muster.
2. Amendments to existing legislation to provide appropriate balance between intellectual property (IP) rights and competition law.
3. Challenges with respect to resolution of jurisdictional issues (local and regional).
4. Judicial review of agency determinations
5. Challenges with respect to meeting international obligations while giving effect to the provisions of the Revised Treaty.

Amendments to existing legislation to pass constitutional muster.

In some jurisdictions amendments to existing legislation are required to ensure consistency with domestic constitutional provisions. The merging of investigating and adjudicative functions, for example, has been held to be in violation of constitutional law principles of natural justice, notwithstanding provisions in the legislation that permits review of agency determinations regarding anti-competitive conduct. Similar provisions exist in other CARICOM countries that have the effect of merging investigative and adjudicative functions, although there is no reported decision that has declared such provisions unconstitutional.

For instance, the Fair Competition Act of Jamaica (FCA) has been found to be deficient with respect to meeting certain constitutional provisions, in particular section 20(1) with respect to the question of natural justice. It is not entirely clear whether resolution of this problem must necessarily be met by the court's recommendation, that is, that either a court conducts the hearing contemplated in the Fair Competition Act (FCA) or an independent tribunal be established to conduct such hearings. In any event, either of these options is likely to present resource challenges.

Challenges regarding amendments to provide for an appropriate balance between Intellectual Property Rights and Competition.

Finding the right balance between intellectual property (IP) rights and competition is one of the central challenges of competition law. On the one hand, IP rights confer exclusive use of an IP right to the rights holder for a minimum period for the enjoyment of that right to the exclusion of others. On the other hand, competition law is concerned with ensuring that the competitive process is not harmed by the exercise of such rights.

Neither the Revised Treaty nor the Fair Competition Act of Jamaica provides for this balance to be struck. For instance, Article 179(3) (b) of the Revised Treaty provides that an enterprise shall not be treated as abusing its dominant position if it shows that it '*reasonably enforces or seeks to enforce a right under or existing by virtue of a copyright, patent, registered trademark or design'*.

Similarly, section 3 of the Fair Competition Act of Jamaica (FCA) exempts from its application '*the entering into of an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent or trademark*'.[1]

The significant difference between the two provisions is the inclusion of a 'reasonableness' standard in the Revised Treaty for examining conduct that may constitute an abuse of dominance, but there is little guidance on what factors to take into account or the weight to be given to factors identified for a determination of whether otherwise abusive conduct is to be classified as such notwithstanding the enforcement of IP rights.

This may mean that the limited flexibility identified in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for balancing these rights may not be exploited under the current competition regime. For example, Article 40 of the TRIPS Agreement allows for competition principles to restrain certain abuses such as exclusive grant back conditions, conditions preventing challenges to validity, and coercive package licensing.

On the other hand, there are other CARICOM jurisdictions that attempt to strike some balance between IP rights and competition. For example, section 16(4) of the Barbados Competition Act, 2002 provides that "*an enterprise should not be treated as abusing its dominant position...(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (b) impedes the transfer and dissemination of technology'.*

Challenges with respect to jurisdiction

Jurisdictional challenges at the local level

Jurisdictional challenges may also arise at the local level. Here the question concerns the balance to be struck between competition and regulation. In some legislation express reference is made to competition principles to govern a particular sector. For example, section 5 of the Telecommunications Act, 2000 provides for the Office of Utilities

[1] Section 3(c) of the Fair Competition Act, 1993. Section 20 (2) (b) of the Fair Competition Act also provides a similar exception with respect to an allegation of an abuse of dominance.

Regulations (OUR) to refer matters to the Fair Trading Commission where after consultation with the FTC it determines that the matter:

(a) is of substantial competitive significance to the provision of specified services; and
(b) falls within the functions of the Fair Trading Commission under the Fair Competition Act.

In other cases there may be no such reference, but also no provision in the legislation governing a particular sector that expressly excludes the sector from competition principles. The position that has been taken in such cases as occurred in **Jamaica Stock Exchange v. the Fair Trading Commission**[2] is that the conduct of a self regulating body governed by statute is not open to challenge, as to whether that conduct is motivated by an anti-competitive intent or has an anticompetitive effect, if said conduct is consistent with the statute governing the self-regulating body. Whatever the merits of this position, this may have implications for international obligations, if liberalization commitments have been made with respect to a particular sector, but there is no corresponding amendment to domestic legislation to ensure compliance with those obligations.

In the case of *Mexico-Measures Affecting Telecommunications Services*,[3] (Telmex decision), for example, a WTO Panel ruled that Mexico's regulatory body's authorization of a price-fixing arrangement with respect to the price to be paid for the termination of incoming southbound calls to Mexico was an anti-competitive practice that breached the GATS Agreement. The regulatory body's authorization of the conduct as a legitimate demarcation of the zone between competition law and regulation was disregarded.[4]

Jurisdictional challenges at the regional level

At the regional level one of the central questions for determination to establish the jurisdiction of the Community Commission (CC) in a particular matter is when may a competition issue be said to have cross-border implications. Articles 173 and 174 of the Revised Treaty seem to establish that the primary concern of the CC in exercising jurisdiction in competition matters is whether the anti-competitive conduct complained of involves cross-border effects.

For example, Article 173 of the Revised Treaty (with respect to the function of the CC) provides that:

The Commission shall:

(a) *apply the rules of competition in respect of anti-competitive cross border business conduct*;[5]
(b) promote and protect competition in the Community and coordinate the implementation of the Community Competition Policy; and
(c) perform any other function conferred on it by any competent body of the Community.

[2] Supreme Court Civil Appeal No. 92/97, *Jamaica Stock Exchange vs. Fair Trading Commission*, per Forte P., p.12.
[3] *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/R, hereafter, the *Telmex* case.
[4] *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/R, hereafter, the *Telmex* case.
[5] Emphasis added.

Article 174 of the Revised Treaty (with respect to the powers of the CC) provides that:

Subject to Articles 175[6] and 176[7], the Commission may, in respect of cross-border transactions or transactions with cross-border effects, monitor, investigate, detect, make determinations or take action to inhibit and penalize enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME.

The Revised Treaty does not define what constitutes cross-border effects or cross-border transactions. This may conceivably include conduct that has an effect in the market of another Member state where the firm engaging in the allegedly anti-competitive conduct also sells in the market of that other Member. This notwithstanding, delineating what conduct does or does not fall within the 'cross-border effects' or 'cross border transactions' category may be difficult to unravel in practice.

For example, it is conceivable that an allegedly anti-competitive conduct that takes place within one Member state and engaged in by a firm that sells only in the domestic market of that Member state may have cross-border effects. This may be the case where the effect of the allegedly anticompetitive conduct prevents entry to the market by firms of other Member states.

Indeed, the single market concept embraced by the Revised Treaty makes it difficult to distinguish between exclusively domestic conduct and conduct that has an effect on another Member state or conduct that affects the operation of the single market since the economic space created by the single market concept would also include the domestic market of a Member state.

Moreover, competition law concepts such as actual and potential competitors,[8] when used in the context of determining whether a firm has abused its dominance in the context of a single economic space, would not necessarily be limited to actual or potential domestic competitors. Given the internal liberalization requirement for FTAs, it is to be expected that fewer barriers to internal trade would make it easier for firms from a Member state to enter the market of another Member state.

In the EU context, were guidance to be sought there, the European Court of Justice has rendered a liberal interpretation to what constitutes an effect on the trade of another Member in the Community. In one case it held that:

...it must be possible to foresee with a sufficient degree of probability in the basis of a set of objective factors of law or fact that it may have an influence direct or indirect, actual or potential on the pattern of trade between Member States such as might prejudice the aim of a single market in all the Member Sates.[9]

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[6] Article 175 of the Revised Treaty also provides for cross-border effects as a trigger to the exercise of the CC's jurisdiction with respect to a Member state's request to it that an investigation be conducted.

[7] Article 176 also has cross-border effects as a trigger for the exercise of the CC's jurisdiction in terms of the requesting a national competition agency to conduct a preliminary investigation into allegedly anti-competitive conduct.

[8] The concept of potential competitors refers to firms that do not sell in a market but would do so if the market price were higher or if the cost of doing business were lower. This concept does not require that the firm be in existence at the time of the alleged anti-competitive conduct. See, for example, Richard A. Posner, Economic Analysis of Law, (4th edn.), 1992, p.303.

[9] This test was first stated in Case 56/65 Societé Technique Minière [1966] ECR, 235, 249, 251, and reiterated in Consten and Grundig [1966] ECR, 299, 341.

This liberal interpretation means any actual or potential effect on cross-border trade that is envisaged by the allegedly anti-competitive conduct would be caught as likely to affect trade within the single market Community.

In an apparent effort to avoid protracted disputes on this jurisdictional issue, the Revised Treaty provides for such matters to be resolved by way of consultation in the event that there is disagreement as to the exercise of jurisdiction between the CC and a national competition agency[10], and for COTED to make a decision on the issue where consultations have not resolved the disagreement.[11]

Judicial Review of agency determinations

Judicial review proceedings are contemplated in national competition agency determinations in those CARICOM Member states that have instituted competition laws. The law to be applied in a particular case may be difficult to discern if the dispute concerns a question that has not been addressed by the CC. Where the matter has been addressed by the CC but was not referred to it by the Member state faced with a similar matter, the issue arises as to whether the jurisprudence developed there should be taken into account, in the absence of a domestic provision to give direct effect to such rulings. Article 174(6) of the Revised Treaty provides that Member States "*shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdiction*". It is not clear whether this to be done in such a way that all determinations should have direct effect or only those involving a particular Member. The presumption in international dispute settlement regimes, however, is that decisions are binding on only to the parties to the particular dispute.

The Caribbean Court of Justice Original Jurisdiction Act of 2005 (CCJ Act) contemplates that questions like these may be referred to the CCJ for a ruling that can then be enforced by an order from the CCJ. But the legislation affords much discretion to the judge in determining whether these questions ought to be referred at all, particularly if the position is taken that the local dispute does not involve cross-border issues that implicate the application of the provisions of the Revised Treaty. Section 7 of the CCJ Act of 2005 provides, for example, that:

7(1) Where a court or tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the Court or tribunal concerned may, before delivery of its judgment in the matter in writing request the designated authority to refer the question to the Court for an advisory opinion to be given.

The discretion here is considerable, presumably covering situations where the court makes a determination whether the interpretation or application of the Revised Treaty is in issue to one where, even if it is in issue, a determination can be made as to whether the resolution of the issue involves the application of the Revised Treaty.

That this considerable discretion can have far reaching implications for enforcement of a Community competition policy is not far-fetched given the position taken by some local courts. For example, in **FTC v. Jamaica Stock Exchange**, the Court of Appeal of Jamaica

[10] Article 176(4) of the Revised Treaty.
[11] Article 176(5) (b) of the Revised Treaty.

held counter-intuitively (albeit obiter[12]) that the local stock exchange in Jamaica, the only entity offering that service, cannot be said to be limiting competition 'when there is no evidence of the appellant[13] being in competition with anyone else'.[14] The Court of Appeal, per Panton JA, continued:

"The facts indicate that the field is wide open for the development of another stock exchange. However, there is no evidence of any such entity being even on the horizon. In the absence of such evidence, it is at least unfortunate that the respondent is alleging that the appellant is impeding that maintenance or development of effective competition to itself. The question of competition can only arise if there is another entity, real, or potential, that can offer competition".

In other words, the surprising position is taken that when there is only one player in the market, an issue of competition does not arise.

A similar misunderstanding arises in respect to the approach to market dominance. In **Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd**.[15] the claimant sought an order to extend an interim injunction to prevent the defendant from closing its accounts, claiming, inter alia, that there are serious triable issues with respect to the defendant abusing its dominant position in breach of section 19 of the Fair Competition Act of Jamaica (FCA). The Court, however, found no evidence that the defendant bank could be in a dominant position.[16] The court observed further that:

"There is, however, evidence that there are five other commercial banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors in the market under the Fair Competition Act; and secondly, was abusing it in relation to the Claimant".[17]

Here the Court did not consider that the relevant market would have to be determined at trial and that given the market share of the Defendant together with the fact that there are other small players in the market, that a triable issue could therefore arise that the Defendant is dominant in the market.

By contrast, the Court of Appeal, per Morrison JA, seemed to have taken a more enlightened approach of the issues to be addressed in a case involving section 19-20 of the FCA since the **Stock Exchange** decision. It opined that it could not conclusively hold that there is no serious issue to be tried, for the purposes of extending the injunction, given the Defendant's market share in excess of 30%,with only one bank similarly circumstanced in a field of six banks, but also because section 19 of the FCA is not a legal term of art, but a provision that involves the intersection of law and economics for which expert evidence

[12] The Court of Appeal held that the Fair Competition Act does not apply to the Jamaica Stock Exchange.
[13] The Appellant here being the Jamaica Stock Exchange.
[14] P. 66.
[15] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd*, Claim No. 2008 HCV 00118, April, 2008.
[16] Ibid., p.18.
[17] Ibid.

would have to be provided to make judgments on concepts such as 'a position of economic strength' and 'effective constraints'.[18]

It is however unclear at this point whether the local courts will ultimately adopt the guidelines suggested by the FTC in cases involving abuse of dominance.

COMPETITION LAW AS OTHER RESTRICTIVE REGULATIONS OF COMMERCE (ORRCS) AND OTHER REGULATIONS OF COMMERCE (ORCS)

The question of whether competition law can be classified as ORRCS or ORCS becomes relevant in the context of obligations to b met regarding the establishment of free trade agreements (FTAS).

The idea that competition law can be an ORRC is perhaps counter-intuitive since it is regarded by and large as a market liberalizing device, reducing or eliminating private barriers that undercut market access commitments. This can be seen from provisions on abuse of dominance, proscription of agreements that substantially lessen competition in a market, and merger notification and review provisions.

Conceptually we may regard competition law as an ORRC for the purposes of the internal liberalization requirement if they are GATT inconsistent with core obligations such as MFN or national treatment. The original formulation of GATT 1947 did not address domestic competition law principles and the appropriate legal obligation is therefore to be found in GATS, in particular Articles VIII and IX. For example, Article VIII (1) and (2) provide as follows:

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments;
2. Where a member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

Article IX, on the other hand, covers practices that restrain competition but which are not covered by Article VIII.

At the very least, these provisions require that WTO Members should put competition laws in place to address these concerns in order to avoid the costly procedure of dispute settlement at the multilateral level where there is an abuse of a monopoly position.[19]

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[18] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Supreme Court Civil Appeal no. 40/2008, July 2008, p.34.

[19] This view accords with Article XVI.4 of the WTO Agreement that provides that a WTO Member "*is to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements*". With regard to the specific discipline of competition law, the contrary view may be that there is no duty to implement competition laws since there is no multilateral agreement to this effect. However, Article VIII of GATS does not require that there be a multilateral agreement on competition law as a precondition for a WTO Member to ensure that a monopoly service supplier does not abuse its dominant position. In any event, it would be difficult to conceive of this requirement being met (i.e. ensuring no abuse of a monopoly position) without the promulgation of some body of law designed to determine if and when a particular conduct constitutes an abuse of a dominant position.

Therefore, we may take as a convenient starting point of our analysis that competition law as an ORRC is such if it violates or is inconsistent with the specific obligations in GATS, namely Articles VIII and IX. Here, inconsistency is addressed in terms of a conflict between domestic competition laws and international obligations. Conflict can be seen in terms of a regulation authorizing what another forbids. By contrast, conflict may be defined as existing whereby one law requires what another forbids. In WTO jurisprudence it is the latter formulation of conflict that is accepted.[20]

In the context of domestic competition law this may arise whereby the law requires sectors for which multilateral commitments (for our purposes commitments made specifically under GATS) have been made to be shielded from the obligations incurred.

In the case of the first version of conflict mentioned (a law authorizing what another forbids), this can arise whereby the law permits sectors for which multilateral commitments have been made to be shielded from domestic competition law through the use of broad exempting provisions that are not necessarily sector specific as in the latter formulation of conflict. For example, blanket exemptions for otherwise anti-competitive conduct that is in pursuance of the protection of intellectual property rights.

Exempting provisions are subject to interpretation as to the exact scope of their application moreso than a law specifically excluding certain sectors from its application. In this sense an exemption can be seen as permitted violation and not a required violation.

Whether the application of these exemptions amount to a breach of WTO obligations for the purpose of determining when and under what circumstances domestic competition law can be deemed ORRCS depends to a large extent on the distinction between mandatory and discretionary legislation. As articulated in the case of *United States-Sections 301-310 of the Trade Act of 1974*[21] mandatory legislation refers to legislation mandating a breach of WTO law and can be challenged as such; discretionary legislation, on the other hand, reposes discretion in the executive as to whether the application of the law will breach WTO rules, and can only be challenged when applied.

Therefore, the application of the domestic competition law with exempting provisions would be required to determine whether the scope of the exemption is absolute and by extension whether such legislation may be seen as ORRCS.

If classifiable as an ORRC, would domestic competition law have to satisfy the internal liberalization requirement for substantially all trade under GATT Article XXIV or GATS Article V, regarding substantial sectoral coverage; or would the elimination of competition law as an ORRC arise only in respect of obligations incurred under GATS Article VIII and IX?

This is an unresolved question. The inconsistency between the internal liberalization requirement under GATT Article XIV and that under GATS Article V can be resolved by the Interpretive Note to Annex IA to the WTO Agreement that provides that 'in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA to the Agreement establishing the World

[20] See for example, *Guatemala-Antidumping Investigation regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted November 25, 1998, paras. 14.29-14.36 and 14.97 to 14.99; *United States-Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted August 23, 2001, paras. 52 and 62.
[21] *United States-Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, December, 22, 1999.

Trade Organisation (referred to in the agreements in Annex IA as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict'.

Therefore, GATS Article V would prevail over GATT Article XXIV to the extent of any inconsistency.

SCOPE OF SUBSTANTIAL SECTORAL COVERAGE

The scope of the substantial sectoral coverage under GATS Article V permits the exclusion of sectors, assuming that no specific multilateral commitments were made for them. To be consistent with GATS obligations therefore, domestic exempting provisions have to relate to the GATS sectoral exemptions.

It is noteworthy that the typical domestic competition law exempting provision does not refer to sectoral coverage but is drafted in broad language that is often not sector specific.

Therefore to the extent that the exemptions are broader than the sectors for which commitments have been made the exempting provisions may be deemed an ORRC for the purposes of the internal liberalization requirement, which, by extension, would require reform of the exempting provision.

COMPETITION LAW AS ORCS

Turkey-Textiles defines ORCS broadly in the following terms:

'While there is no general agreed definition between Members as to the scope of this concept of 'other regulations of commerce', for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms 'other regulations of commerce' could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phyto-sanitary, customs valuation, antidumping, technical barriers to trade; as well as other trade related domestic regulation, e.g. environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept'.[22]

It is significant that the definition makes no distinction between border regulations and those governing internal sale of goods and services. These must not be higher or more restrictive than what existed before the formation of the FTA or customs union.

Where no competition law existed before the formation of the FTA or customs union, it may be difficult to argue that the introduction of competition law after its formation is more restrictive than what existed before. This conclusion warrants a comparison a competition law before that would have been non-existent, and secondly, competition law by its nature and scope as trade liberalizing and its inclusion after the formation of a customs union or FTA would not be presumptively trade restricting. In this sense the idea of competition law being an ORC not to be more restrictive to parties external to the FTA would likely not arise.

[22] *Turkey-Textiles*, Panel Report, para. 9.120.

However, one notable exception is where a country in an FTA is negotiating to be included in another FTA or customs union. In this event, the competition law in existence to be compared with competition law that is the result of modification (.eg. where harmonization is required because of a commitment to a common competition policy). Here, the harmonized competition law should not be more restrictive than what existed before. This arises if it is more GATS inconsistent than what existed before.

In sum, competition law may be deemed an ORRC or ORC. If the former, it is to be eliminated with regard to sectors for which liberalized commitment have been made at the multilateral level under GATS; if an ORC, on the other hand, it is to be no more restrictive than what existed before the formation of a FTA or customs union.

Concluding remarks

In concluding, the competition provisions of the Revised Treaty represent an opportunity for convergence of Community and domestic competition law. To this end, the Community Commission is charged with the responsibility of giving effect to this harmonization project.

There are however several challenges to meeting this objective. Legislative amendments must not only provide for the enforcement of Community provisions, but require the appropriate institutional structure to safeguard against constitutional challenges.

Similarly, the enforcement of Community competition policy presents opportunities for convergence of competition policy at the multilateral level, given the many FTAs that now incorporate competition provisions. Nonetheless, challenges are posed with respect to meeting such obligations and those included in the WTO. This dialogue continues as the multilateral system grapples with an unprecedented increase in FTAs and what this means for the future of the multilateral trading system.