Introduction

Michal S. Gal and Mor Bakhoum

In its role of safeguarding the competitiveness of the market by monitoring and prohibiting anti-competitive conduct of economic actors, competition law is closely linked to markets. Markets, however, are not uniform in their characteristics. The degree of competitiveness and access to a given market determines to a great extent how far competition law and policy can go in correcting market failures and in restoring competition. Furthermore, a jurisdiction’s institutional, political and cultural characteristics influence the content and enforcement of competition law and policy. These characteristics are not static. They evolve and change over time, influenced, *inter alia*, by experience and learning.

The subject of how a country’s special characteristics affects its competition law and policy has attracted much discussion and research. More specifically, the emergence of scholarship dealing with competition law in developing jurisdictions over the past two decades provides useful insights on the specificities of developing jurisdictions that should inform their competition law and policy. While a lot of the discussion is knowledgeable and insightful, previous research projects generally focus on one or more issues or, more commonly, on one or more country or region, but do not provide a comprehensive analysis of competition law in developing jurisdictions. Furthermore, there is still an ongoing debate as to what kind of competition law and policy is most suitable for developing jurisdictions. For example, some advocates of the efficiency and consumer welfare-focused approach of competition law contend that developing jurisdictions do not need to re-invent the wheel. The well-tested competition principles applied for years in more mature jurisdictions such as the United States and the European Union should be the guiding light of their competition policies. Such principles should not be altered when applied in developing jurisdictions. An emerging scholarship disagrees with this approach and argues that the unique characteristics of developing jurisdictions matter when crafting and enforcing competition law. This is because, *inter alia*, while in developed jurisdictions usually the dynamism of the markets and the intensity of competition demand less intervention...
and allow for more reliance on the self-correcting capacity of the market, these conditions rarely characterize developing jurisdictions’ markets. Accordingly, the competition laws of developed jurisdictions do not necessarily offer an efficient model for the competition laws that should be applied in developing jurisdictions.

This book evaluates and largely supports this latter approach. It does so by putting the unique characteristics of developing jurisdictions at the heart of the analysis of which competition laws would best serve their needs. It aims to provide a broad analysis of the different factors that influence the adoption and implementation of competition laws in developing jurisdictions, the potential goals of such a law, the content of the legal rules and the necessary institutional features and political, ideological and legal conditions that must complement such rules. Hence, this book questions some fundamentals of the mainstream view of competition law as applied in developing jurisdictions. For example, it focuses on a most important and basic issue: what should be the goals of competition law in developing jurisdictions? Developed jurisdictions often argue in favour of efficiency and the enhancement of consumer welfare as the only and ultimate goals of competition policy. Some contributions in this book analyse whether this is also a valid approach for competition law in developing jurisdictions: Do the special characteristics of developing jurisdictions mandate some change in the goals that are ordinarily adopted in developed jurisdictions? Should consumer welfare be given primacy over total welfare when a country undergoes a period of rapid economic development? What role should be played, if any, by wider goals such as building a civil society, fighting corruption, implementing democratic structures, ensuring inclusive growth and implementing a policy of ethnic equality? Whether and to what extent should the distributional effects of competition law be taken into account?

The book also focuses on the effects of the characteristics and goals on the shaping of substantive rules. A fundamental issue relates to the tension between complex economic rules and the interest in effective enforcement of the law and legal certainty. On balance, developing jurisdictions may be in need of clearer rules that can be applied more easily. Other issues include, *inter alia*, the effect of the limited ability such jurisdictions generally have to tackle international anti-competitive conduct on the shaping of their laws; the effect of the goals on the substantive rules; the need to set rules that will specifically deal with the unique obstacles faced by developing jurisdictions to competition, such as rules that will clearly specify the limits of trade associations. The experience already gathered in developing jurisdictions around the world in enforcing their competition laws provide
invaluable lessons that can guide others, which many of the chapters of this book incorporate.

To answer these important questions the book integrates two interrelated and complementary areas of expertise. The first is development economics, which focuses on the key economic features that characterize most developing jurisdictions that influence competition law and policy. The second focuses on competition law and builds on the former in order to determine how those unique characteristics should inform competition law. In doing so the book combines and creates a dialogue between these two complementary areas of expertise: building from the insights of leading development economists, who discuss the main economic characteristics of developing jurisdictions that have an underpinning in competition law, competition law experts draw conclusions with a focus on how competition law should be implemented in developing jurisdictions and how it should be enforced. In so doing, the book frames an alternative vision of competition law that fits developing jurisdictions. Its conclusions confirm that ‘one competition law and policy size’ does not fit ‘all socio-economic contexts’.

The book comprises three parts. Part I provides an overview of the main characteristics of developing jurisdictions. While, of course, no two developing jurisdictions are alike, such countries share some basic features that affect competition law. At the same time, some of the chapters attempt to identify subcategories of developing jurisdictions which are relevant to competition law. Part II deals with select competition-related issues that often affect developing jurisdictions. Drawing from and building on the findings in Parts I and II, Part III discusses the implications of the characteristics of developing jurisdictions for competition law. This is how the three parts of the book relate to each other, reflecting the thought-provoking intellectual dialogue between development economists and competition law specialists who contributed to this publication.

In the opening chapter of Part I, Simon Evenett sets the stage by identifying the main economic characteristics of developing jurisdictions that are relevant for competition law and policy from a legislative and enforcement perspective. Eight economic characteristics of paramount importance are highlighted in the chapter: the importance of the agricultural sector; spending patterns (which are concentrated on food, housing and clothing); the importance of the informal sector in the economy; the existence of high entry barriers, in addition to barriers to import; and inefficient transportation infrastructures. These identified economic characteristics have important competition law and policy implications. For instance, Evenett stresses that, to the extent competition law aims at safeguarding consumer welfare, competition enforcers should pay particular attention
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to sectors and products where people spend most of their income. Given
its importance in the market of developing jurisdictions, the informal
economy should also not be ignored by competition authorities. As he
puts it, competition in the informal economy is still competition. The
analysis of the informal economy and its interface with competition law
and policy is further developed by Mor Bakhoum in his chapter dealing
with the informal economy. This has implications for how to approach
consumer welfare and consumer harm, as dealt with by Josef Drexl in his
chapter. This issue also exemplifies how the different contributions of this
volume are interrelated.

Ignacio De Leon asks which of the special economic conditions that are
characteristic of developing jurisdictions are of relevance to a competition
assessment, so that they should have priority in their competition law
and policy agendas. In particular, his contribution explores the economic
perspective around which the economic characteristics of developing
jurisdictions should be analysed in order to determine which competition-
enhancing policies might work best. His chapter questions the pertinence
of the efficiency and welfare approach which, traditionally, is the lens
through which economic features are analysed. Instead of focusing on
the structure of the markets (e.g. concentration in a given market), De
Leon approaches competition from the perspective of the ability of eco-
nomic actors to enter and compete in markets. This perspective takes into
account not only the market structure as such but different factors that
inform potential market players’ decisions. He identifies four relevant
economic factors (‘state control over the commanding heights of the
economy’; ‘the omnipresence of big players in the economy’; the ‘lack of
stable rule of law’; and ‘lack of innovation’) and analyses them against the
backdrop of a perspective of competition as a process of trial and error.
This access-to-markets approach is essential for developing jurisdictions
in order to increase the degree of competitiveness of their markets.

Although developing jurisdictions share common socio-economic fea-
tures, they are diverse and often face at least some different competition-
related challenges. This requires a differentiated approach when crafting
and enforcing competition rules. For the sake of more ‘preciseness’, it is
crucial to detangle the concept of ‘developing jurisdiction’. The contribu-
tion of Tamar Indig and Michal Gal undertakes such an exercise in order
to identify the specific challenges faced by different jurisdictions in view of
designing a most appropriate competition law and policy. They approach
the concept of a developing jurisdiction through the prism of market
competition by going beyond indicators such as the gross national income
per capita or growth rates and focusing instead on indicators such as the
quality of the infrastructure, institutional aspects, size of the markets and
geographical features. Furthermore, they shed light on less investigated features of developing jurisdictions which are nonetheless relevant for competition law, such as culture and gender inequality. These additional elements provide more insights and showcase how complex and heterogeneous competition-related features are in developing jurisdictions.

To further explore the argument that a country’s special socio-economic characteristics affect its competition law and policy, the next chapter focuses on a specific region. Diego Petrecolla, Esteban Greco, Carlos A. Romero and Juan P. Vila-Martínez focus in their joint contribution on the relevant economic structure of select Latin American countries and their interface with competition policy. Their contribution investigates the relationship between GDP per capita and competition policies. The authors find that while there is a positive correlation worldwide between GDP per capita and competition policies, this finding is not observed in Latin American countries. External factors such as high tariffs, low productivity and inequality limit this growth. The authors conclude that competition policy alone is not enough to generate growth. This suggests taking a transversal approach and considering all public policies that interface with competition law to take them duly into account. They also analyse the effectiveness of competition laws and regional agreements in fostering competition in Latin American countries, suggesting that they do not perform well their function, *inter alia*, because of the general context of competition.

The effects of a developing country’s unique characteristics are further exemplified by the example of China. China is a large and growing economy. Yet it only recently adopted a comprehensive competition law with the entry into force in 2008 of the Antimonopoly Law (AML). Ping Lin and Yue Qiao take us on the historical journey of the drafting of the Chinese AML, pointing out the underlying socio-economic considerations that have found their way into the law. The crux of the contribution consists in the main economic factors that shaped the AML. The objective of tearing down local and regional protectionism and creating a nation-wide market economy in China has led to the inclusion in the AML of a chapter dealing with administrative monopolies. This is a unique Chinese competition issue and the drafters of the law use competition law to deal with it. This exemplifies once again that competition law solves specific issues in the context where it is applied. Another relevant feature of the AML that reflects the specificity of the Chinese context is the industrial-policy dimension of its competition law and the importance of state-owned enterprises (SOEs). These features, reflecting the underlying philosophy of a socialist market economy, led to the interpretation of some provisions of the AML as tainted industrial policy. This raises concerns related to the treatment of
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Chapter 1: The institutional context

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Against the background of the first years of enforcement, the authors discuss the relevance of those concerns in practice. The institutions within the three-pillar enforcement structure of the AML are also discussed.

Part II of the book deals with select sector-specific competition-related issues which are relevant for developing jurisdictions. The opening contribution is of utmost importance since it deals with competition-related issues in the agricultural sector. The importance of this sector in the economy of developing jurisdictions was highlighted in Simon Evenett’s chapter. Based on three market studies conducted by the UNCTAD (tobacco cultivation in Malawi, rice production in Nicaragua and corn production in Mexico), which are characteristic of many other agricultural markets in developing economies, Ulla Schwager identifies three main characteristics that are relevant from a competition law perspective. First, the three markets are fragmented, with few large or medium-sized producers and a large number of smallholder growers. Second, there is a high level of concentration in the downstream markets, in contrast with the fragmented producers upstream. Third, there is also a high level of concentration in input upstream markets for agricultural production. As a consequence of these characteristics, agricultural producers face a double bottleneck upstream and downstream, which implies that they are price takers and are subject, *inter alia*, to buyer or supplier power. Based on this analysis, Ulla Schwager argues that in such markets developing jurisdictions should set the protection of competition as the goal of their competition laws instead of focusing on consumer welfare as their goal. This approach would protect not only ‘consumer welfare’, but also ‘producer welfare’. This argument is in line with Ignacio De Leon’s, Oliver Budzinski and Maryam Beigi’s, as well as Josef Drexl’s argument in favour of protecting the competition process in developing jurisdictions. From an enforcement point of view, Schwager sets out the different enforcement tools that competition authorities may explore in order to address the issue of buyer power. Merger control, the prohibition of abuse of dominant position, and the special treatment of agricultural cooperatives and associations are discussed among other instruments. Their potential and limits are highlighted.

In his contribution dealing with the informal economy and its interface with competition law and policy, Mor Bakhoum stresses the importance of informal markets in developing jurisdictions’ economies. Informal business dealing is an economic reality that competition authorities cannot afford to ignore. As economic actors, informal businesses have close ties with the formal market. Formal businesses can buy from businesses in the formal market and sell to firms in the informal markets. They can also...
compete with firms in the formal markets, especially in distribution. Mor Bakhoum argues that given the economic dependency that characterizes the economic relationship between firms with market power and informal businesses, it is important for competition law to protect informal businesses against exploitative practices from firms in a dominant position. Such practices may take the form of buyer power, as explained in Ulla Schwager’s chapter, as well as Michal Gal and Eleanor Fox’s contribution. Swift application of rules on abuse of dominance and rules against abuse of economic dependence could help achieve that objective. Mor Bakhoum does not share the view favoring a ‘punitive approach’ toward the informal economy for the supposed ‘unfair’ competition it creates to formal businesses by, for instance, not paying taxes. As opposed to the mere economic rationale that argues against the informal businesses given their inefficiencies, the social dimension of the informal economy has to be taken into account. Hence in developing jurisdictions, the informal market constitutes an economic safety net for many. They deserve protection against dominant undertakings as potential victims of anti-competitive practices. At the same time, anti-competitive practices that originate from the informal economy which may affect directly consumers have also to be dealt with by competition authorities in developing jurisdictions for their actions to be meaningful. Of course, there are practical obstacles to the intervention of the competition authorities. At a more fundamental level, Bakhoum contends that competition law could be used as a tool to afford better business opportunities for people active in the informal market. This is in line with Michal Gal and Eleanor Fox’s, as well as Ignacio De Leon’s, and Javier Tapia and Simon Roberts’ argument that the goal of inclusiveness is important in the context of developing jurisdictions.

A pernicious competition offence that affects consumers indirectly, especially in developing jurisdictions, is bid rigging in public procurement. Combined with ‘bid corruption’, which involves corrupt decisions in public auctions by public officials, the consumer is affected twice. In his contribution, David Lewis explores and analyses this unfortunate characteristic of many developing jurisdictions, based on evidence from different jurisdictions. These two forms of price fixing and market sharing conduct, which are outlawed by competition law, require particular attention from competition authorities in developing jurisdictions. Lewis suggests several solutions to overcome these forms of anti-competitive behaviour. As his chapter highlights, competition officials alone might not possess all the legal and practical tools to deal with bid rigging and bid corruption. He suggests a close cooperation between competition officials and authorities in charge of policing corruption in their efforts to overcome the phenomenon. In addition, strong enforcement of competition law, as proven by
The economic characteristics of developing jurisdictions, the South African case, might help deal with bid rigging and bid corruption. Different jurisdictions have come up with solutions and have created mechanisms and authorities to deal with bid rigging and bid corruption. Korea’s Bid Rigging Indicator Analysis System (BRIAS), Brazil’s Public Spending Observatory (OPD) and South Africa’s Special Investigating Unit serve as examples.

Whereas Parts I and II of the book are devoted to the analysis of the main economic characteristics of developing jurisdictions and some selected issues, Part III builds on these findings and discusses their implication for drafting and enforcing competition law.

In their joint contribution, Oliver Budzinski and Maryam Beigi focus on the limited competitiveness of markets in developing jurisdictions from a macro level. The chapter’s starting point is that from a societal point of view, there is still a lack of acceptance of competition as a ‘primary allocation device’ in many developing jurisdictions, in contrast with the more established jurisdictions of the United States and the European Union. The authors therefore question the appropriateness of the US and EU model for developing jurisdictions. They argue that instead of approaching competition law as a legal tool to protect competition in the markets, developing jurisdictions should, first, strive to have a competition law and policy that generates competitive markets. It is only when markets become competitive that they should, in the long run, protect the competition process.

In his contribution, David Gerber argues that the particular economic characteristics of developing jurisdictions require a different use of economic models in dealing with competition law cases. Gerber advises an adaptation of what he calls an economics-based model (EBM) to the context of developing jurisdictions. Gerber describes this model as a ‘competition law in which economics provides the basic norm of competition law and serves as a criterion of determining the lawfulness of a given practice’. Although this model has some potential advantages for developing jurisdictions in terms of guaranteeing efficient operation of an economy (benefiting consumers and producers and enhancing foreign direct investment), and preventing an unjustified interference with the economy, its use has to be tailored to the context of developing jurisdictions. Hence, common and known obstacles such as limited resources, lack of training and expertise and limited experience in the use of economic tools command an adaptation of the use of an EBM to developing jurisdictions’ constraints. This argument, that the level of complexity of the economic analysis should be tailored to developing jurisdictions’ specific characteristics, is also echoed in Michal Gal and Eleanor Fox’s chapter. Gerber puts forward interesting ideas that might be helpful for developing
jurisdictions’ competition authorities. He suggests: (1) the modification of the role of economics in competition law. Economics could be used as a descriptive tool and could serve as an instrument to interpret data; (2) narrowing the scope of application of economics and limiting it to only selected cases based on their importance; (3) reducing the intensity of the use of economics in, for instance, determining the existence of market power; (4) diversifying the economic tools and exploring the potential of development economics and institutional economics in the context of developing jurisdictions. While economics is at the center of competition law enforcement in developed jurisdictions, Gerber’s chapter not only gives a word of caution on the use of these tools, but also provides useful guidance to competition authorities on how to use economics while taking into account their constraints.

Josef Drexl argues for the need to contextualize the concepts of consumer welfare and consumer harm in developing jurisdictions. He provides a better understanding of those concepts by discussing, in a triptych, their meaning and role in competition law: consumer welfare as an economic concept, economic welfare as a goal of competition law, and consumer welfare as a criterion of restraint of competition in the form of ‘consumer harm’. This tridimensional function of consumer welfare is discussed against the backdrop of the experiences of the European Union and the United States. He also discusses the two main approaches to the concept of welfare: the total welfare standard and the consumer surplus standard. Whereas in the EU preference is given to the consumer surplus standard, US law is less clear about which consumer welfare standard to apply. As to the underlying goal, Drexl points out that in the EU consumer welfare is achieved as a result of the goal of protecting the process of effective competition in the market. This approach leads to multiple economic benefits including benefits to consumers. The third dimension of consumer welfare, ‘consumer harm’ as a criterion of competition law enforcement, reveals fundamental differences between the United States and the EU. Whereas in the United States a showing of actual consumer harm triggers competition law application, in the EU courts have rejected such a rule. Also in the EU, the goal of protecting the competition process as an institution guides the application of competition law.

Against this background, the chapter discusses the three meanings of consumer welfare from the perspective of developing jurisdictions. As an economic concept, the chapter advocates a dynamic approach to consumer welfare that promotes the emergence of efficient markets. This argument mirrors the call made by Oliver Budzinski and Maryam Beigi to first generate competition in developing jurisdictions before protecting it. As a goal, Drexl highlights the need to protect all market participants.
This could be achieved by protecting the competition process in line with the EU approach. This would protect all market participants – producers, consumers and people active in the informal markets – as also argued by Mor Bakhoum. From an enforcement point of view, this approach necessitates relying on the protection of the competition process, rather than considering consumer harm as a criterion for the application of competition law. This recommendation for developing jurisdictions mirrors the EU approach. However, the motivations are different: whereas the EU strives to create an open market in line with its integration goal, developing jurisdictions need to create sustainable development and inclusion of all members of society in the economic channels. This approach would also help protect both producers and consumers in highly concentrated agricultural markets, an important goal as suggested by Ulla Schwager in her chapter.

What are the overarching consequences of the economic characteristics of developing jurisdictions discussed throughout this book from a legislative and enforcement perspective? Michal Gal and Eleanor Fox draw those consequences. In their joint contribution entitled ‘Drafting competition law for developing jurisdictions: learning from experience’, they provide extensive and thorough guidance to policy-makers and competition enforcers in developing jurisdictions. With regard to the goals of competition law, given the characteristics of non-functioning markets in developing jurisdictions, the authors stress the importance of making markets work. This dictates using competition law in order to fight practices that create entry barriers. Gal and Fox do not limit the goals of competition law to the protection of the well-functioning of the markets. Of paramount importance in their argument is the objective of inclusive economic growth. This objective commands the need to safeguard economic opportunities for many by, for instance, using rules against anti-competitive market foreclosure. The authors contend that, from the perspective of developing jurisdictions, the goal of inclusiveness, combining equity and economics, is as important as efficiency – but, as they put it, ‘efficiency defined in terms of enabling the masses of people to participate on their merits in the economic enterprise’. This approach should lead to an ‘efficient inclusive development’. With regard to agreements in restraint of trade, the authors stress the need for a swift enforcement in developing jurisdictions given their proven harmful effects. In line with David Lewis’ contribution, they reiterate the need to tackle bid rigging. However, the law should also be flexible enough to allow, in some cases, a combination of competition and cooperation, especially for small firms, in order to achieve efficiencies and synergies. With regard to rules against dominance, the authors stress the importance of using such rules
as a weapon to make markets work. In this regard, they provide guidance on how to approach dominance in order to achieve the goal of inclusive growth and development. Application of rules against dominance should not undermine the freedom of firms for discounting, which is pro-poor. Buyer power is another concern in developing jurisdictions that rules against dominance should help to deal with. When crafting the law, rules should be simpler and enforcement-friendly. In addition to cartels and abuse of dominance, Gal and Fox provide substantial support on how the economic characteristics of developing jurisdictions should inform their merger law from a legislative and enforcement perspective. In terms of enforcement, the authors emphasize the potential of regional agreements for developing jurisdictions as well as the potential and limits of technical assistance.

The concluding chapter of this book focuses on a specific type of anti-competitive conduct: abuse of dominance. With market structures characterized by high concentration levels in certain sectors and high entry barriers resulting in limited competition, rules on abuse of dominance are of paramount importance in developing jurisdictions. Taking Chile and South Africa as examples, Javier Tapia and Simon Roberts show from a comparative perspective how well-designed and strictly enforced rules on dominance could guarantee access and competition in markets, thereby providing wider access to economic opportunities. Showcasing the Telecom sector, the authors demonstrate the importance of using rules on dominance in order to foster competition. However, institutions and enforcement approaches also matter. As exemplified by Chile and South Africa, similarities in the design of enforcement institutions do not necessarily lead to similar outcomes. These two countries have similar enforcement designs with both investigative bodies and an independent specialized tribunal dealing with competition cases. However, due to differences in the law and the procedural approaches, Chile has dealt with more abuse of dominance cases. Hence, the law in practice impacts the outcome of the cases from both a quantitative and a substantive point of view. The different cases dealt with by competition authorities in both Chile and South Africa evidence that ‘it appears that despite relatively small sanctions, the competition regime in Chile has reinforced the move toward liberalization and effective rivalry to the incumbent fixed-line operator, while in South Africa, despite much higher possible sanctions, the incumbent has been able to continue with conduct undermining rivalry’. Given the prevalence of dominant firms in many developing jurisdictions, as well as the boom in their Telecom markets, the swift enforcement of rules on dominance would be beneficial for consumers in terms of high-quality services at affordable prices.
This book is the second volume in the framework of a joint project on ‘Competition Law in Developing Jurisdictions’ led by Professors Josef Drexl, Eleanor Fox, Michal Gal and David Gerber. The first publication dealt with the issue of regional integration and competition policy in developing jurisdictions.¹ This publication is the result of a workshop organized at the University of Haifa in 2012 that was attended by development economists and competition law specialists. Interaction between academics and enforcers during the workshop also provided for complementary perspectives on the topic.

The editors wish to thank all contributors to this volume. The process of editing this volume has taken some time and concerted efforts. The editors wish to extend special thanks to Julia Molestina, who has collaborated intensively in the editing of this volume. Allison Felmy, as always, was very instrumental in polishing the chapters from a linguistic point of view. She always catches and corrects mistakes that pass under the radar of the authors.

The editors wish also to thank the Max Planck Society and the German-Israeli Foundation (GIF) for their financial support of the project ‘Competition Law in Developing Countries’.

¹ Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michal S. Gal and David J. Gerber (eds), Competition Policy and Regional Integration in Developing Countries (Edward Elgar, 2012).