

# Introduction

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There has been an explosion in new competition legislation in the past 20 years. This is in response to enormous changes in political thinking and economic behaviour that have taken place around the world.

There are now more than 100 systems of competition law in the world; several others are in contemplation. Competition laws will be found in all continents and in all types of economy – large, small, continental, island, advanced, developing, industrial, trading, agricultural, liberal and post-communist.<sup>1</sup>

There are many explanations for the adoption of these new competition laws. In some cases international trade agreements contained obligations on a particular state to pass competition legislation: this was a feature of negotiations between what is now the European Union (EU) and numerous countries – for example, in Central and Eastern Europe which subsequently went on to become full members of the EU – and also of the Free Trade Agreement entered into between the United States (US) and Singapore in 2003. The International Monetary Fund (IMF) and the World Bank have often made the adoption of competition legislation one, among many others, of the conditions for the availability of loans. The United Nations Conference on Trade and Development (UNCTAD) has, for a long time, been an advocate of competition legislation. In some jurisdictions one finds that, although there is no general competition law, there are nevertheless sector-specific competition rules for the operators of utilities, in particular in the telecommunications sector: Hong Kong and the United Arab Emirates are examples of this. So, for a variety of reasons, the competition law ‘genie’ is out of the bottle and new laws have recently been passed or are in contemplation in various parts of the world, including Malaysia, the Philippines and Ecuador.

The introduction of competition laws gives rise to significant problems: it is by no means clear that a ‘one size fits all’ approach is appropriate or

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<sup>1</sup> R. Whish, *Competition Law* (Oxford University Press, London, 6th edn, 2009) 1.

reasonable, since different countries and different types of economy have their own susceptibilities and peculiarities. There has been a tendency on the part of some of the more established members of the competition law club to advocate powerfully for the adoption of their own standards with little sensitivity to local conditions and needs; UNCTAD has perhaps been more adroit than most in trying to adapt laws to the specific 'receiving' jurisdiction.

Not only does the adoption of competition law require consideration to be given to the appropriate substantive rules for any particular country. There are numerous other problems. Do the conditions for successful implementation of the law exist: is it possible to establish competition agencies that are sufficiently independent of political or business influence? Are sufficient resources available to those agencies to apply the law? How should they use the resources that they do have?

It would be reasonable to say that competition laws in new jurisdictions have not always worked well. For the ASCOLA Conference at King's College London in July 2011 we challenged a group of scholars to investigate new competition jurisdictions and to suggest ways in which more effective systems of competition law could be created, either through reshaping their competition policies or improving upon their institutional framework. We then invited the attendees at the conference to challenge the ideas raised in these papers. The audience consisted of a cross-section of the competition law and policy community: people working in international organizations helping new jurisdictions to implement their laws, officials from the authorities in these new jurisdictions, academics and practitioners. This book is composed of the papers (and the ensuing discussions) that resulted from our challenge.

The conference had four sessions; the ensuing book is similarly made up of four parts:

- Challenges and Obstacles to Adopting Competition Laws;
- Institutional Challenges and Choices: Deterrence;
- The Global Perspective; and
- Teaching and Researching Competition Law and Economics in New Competition Jurisdictions.

We will introduce them briefly here, before handing over to the authors themselves. Each session was led by an academic and had a commentator that has been active in competition enforcement or aiding the enforcers.

Part One, 'Challenges and Obstacles to Adopting Competition Laws', was led by Professor David Lewis. In Chapter 2 of this book, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow', Heba

Shahein investigates the role played by existing competition regimes in generating new competition regimes. Heba contrasts two comparative law perspectives; she asks whether new jurisdictions should only adopt competition laws from those with similar cultural, economic, historical and legal traditions (Montesquieu/ Freund), or whether we can ignore this context when adopting new laws (Watson). Through the lens of three ideal-type models – the cut and paste, contextualized and tailor-made – she examines these theories from a competition perspective in several jurisdictions, which include China, Indonesia, South Africa and Turkey. Each model has advantages and disadvantages and Heba explores these too.

Michelle Chowdhury's chapter, 'The Political Economy of Competition Law Reform in New Jurisdictions' (Chapter 3), asks what factors determine the demand for and supply of competition enforcement. Although many jurisdictions have adopted competition laws, several have not been implemented well or have had a big impact on the economies involved. In seeking to understand why this is, Michelle believes that much effort is focused on examining the competition authority's ability to supply 'competition services'. However, insufficient efforts are devoted to the demand from the public and firms for competition enforcement. Focusing on the demand side is also important, says Michelle; the public often have no connection with competition law in new jurisdictions. They do not understand its goals and this may mean that the authority has little democratic support and may well be underfunded as a result. In addition, we need to understand the efforts of those who might stand to lose from the application of competition laws. These groups may further undermine the demand for competition enforcement for their own (as opposed to society's) gain. Michelle suggests several ways of increasing the demand for competition enforcement.

In Chapter 4, 'The Dynamics of Competition Policies in Small Developing Economies: The Central American Countries' Experience', Claudia Schatan brings to bear over 20 years of experience in the region and demonstrates how difficult it is to import competition systems from other countries which do not share the same history, economic conditions and social circumstances with the receiving state. She looks at this region, applying the theoretical insights raised by both Heba and Michelle, and drawing out several factors that she considers to be important to improve the regulatory framework in Central America.

Ulla Schwager then provides a personal critique of these three pieces based on her experience in UNCTAD's competition division. She provides an interesting practical discussion of Heba's theoretical premises, noting that, in UNCTAD, significant efforts are made to understand the underlying context of each jurisdiction that it seeks to help. There is a tension, though, as too much deviation from well-established competition principles

can cause significant implementation challenges. With regard to Michelle's chapter, Ulla adds that the reforms advocated there often require a coordinated approach from several stakeholders and so, important as they are, these changes can be difficult to achieve.

The second session (Part Two), 'Institutional Challenges and Choices: Deterrence', was led by Professor Michal Gal. It focused on deterrence. In her opening remarks, Michal helpfully takes us back to Becker's underlying theory of deterrence.<sup>2</sup> He argued that laws deter if the probability of sanction (the probability of detection and punishment multiplied by the size of the sanction) is higher than the expected gain from the illegal activity.

In the first chapter in this part (Chapter 5), Javier Tapia discusses 'Increasing Deterrence in Latin American Competition Law Enforcement Regimes'. Current deterrence efforts, he notes, aim to expand the level and range of competition law sanctions (for example, prison) and encourage more resources for the competition authority. This often depends upon legislative intervention, which can be slow. However, in Latin America, Javier argues, powerful business interests are often aligned with political elites (competition agencies are prone to capture) and the human capital is often underdeveloped from a lack of training. This makes it hard to detect and then 'correctly punish' violations. Gal agrees that matching enforcement tools to institutional capabilities is important. In such circumstances, and in addition to legislative reform, Javier suggests that focusing on smaller, incremental improvements may have more impact. For example, one might give the competition agencies more effective detection tools (such as leniency programmes) and tools that increase clarity (such as fining guidelines). Such changes should, he hopes, help to develop the social, cultural and moral norms (echoes of Chowdhury), and increase predictability and due process.

Perhaps another way of increasing deterrence is to augment the number of competition enforcers. Clifford Jones argues – in 'Deterrence and Compensation in New Competition Regimes: The Role of Private Enforcement' (Chapter 6) – that, in new jurisdictions, deterrence is often insufficient because fines for, and the detection rates of, anti-competitive arrangements are too low. Clifford advocates allowing private as well as public enforcement in new competition jurisdictions in order to combat these shortfalls; other benefits are compensating victims and a saving in

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<sup>2</sup> G. Becker, 'Crime and Punishment: An Economic Approach' (1968) 16(2) *Journal of Political Economy* 168. This argument has been applied specifically to the competition law context by W.M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *University of Chicago Law Review* 652.

government enforcement costs. Although he considers several issues in introducing private enforcement into new jurisdictions (for example, does it lead to over-deterrence, how can it be encouraged, and when should it happen), one of the key critiques is that Clifford's chapter largely builds on the United States experience. How relevant is this experience to new jurisdictions, Gal asks? If the law is not clear and if the parties and enforcers are inexperienced, private enforcement may not be ideal. Bad cases and incompetent parties may create bad law. This might impact upon public enforcement too. So Gal advocates introducing private enforcement only at the later stages of the development of the competition regime (or at least introducing it in stages which relate to the complexity of the law).

The third chapter in this part (Chapter 7) examines 'Enforcement Priorities for New Agencies: Lessons from South Africa on the Deterrence of Cartel Conduct'. Here, Keith Weeks builds on the impressive South African cartel experience to argue that strong competition law and good institutions are necessary but not sufficient conditions for a strong enforcement regime. Keith suggests that new jurisdictions should primarily focus on three areas: (i) a predictable and transparent leniency process; (ii) making prioritization more transparent (both in terms of substance – for example, cartels – as well as for specific sectors of the economy – for example, food and health); and (iii) clarifying the quantum of penalties. Gal agrees that prioritization is important, warning against falling into the merger trap and becoming so overwhelmed by the number of notifications that one does not have time for anything else (Keith suggests that this happened in the early days of the South African regime). By focusing on certain important sectors, one might increase the incentives of cartelists in these areas to make use of the leniency programme, as well as generating political support for the competition regime. This may then free public resources to concentrate on other industries, over time.

The third session (Part Three), led by Professor David Gerber, offers a more global perspective, particularly in relation to merger control (selected because of its importance and in order to limit the discussion to manageable proportions). The first paper was delivered by John Fingleton, Office of Fair Trading (OFT). He provided a fascinating insight into mergers and new jurisdictions, based on his time in the Irish Competition Authority and his current leadership of the International Competition Network. We agreed that, given the pressures upon his time, he would not produce a chapter for this book.

The last few years have seen an unprecedented rise in cross-border mergers. In this period, merger laws have also proliferated. At a time when foreign direct investment is ever more important, Manish Agarwal, in Chapter 8, asks 'Does Implementation of Merger Regulation Impede

Inbound Cross-border Mergers?’ The answer seems obvious but, counter-intuitively, Manish concludes that national merger regimes do not impede competitively benign inbound cross-border mergers. He suggests that this is because effective merger regimes may generate large enough savings in the acquisition price for foreign acquirers, which may outweigh the cost of legal advice on these issues for them. Gerber rightly points out that, if this is correct, it is a significant result as it shows that merger law helps to encourage mergers by foreign firms into the country, not the other way round.

The last chapter in this part (Chapter 9) is by Marco Botta. He investigates ‘The Impact of Multi-jurisdictional Concentrations on the New Competition Law Jurisdictions: A Case Study on Brazil’. Marco notes that more experienced competition authorities often do not feel the need to cooperate with those in new jurisdictions. His chapter investigates several strategies that can be adopted by new jurisdictions to try to ensure that their interests are not ignored by the merging firms.

We hope you enjoy this book. It was a great experience to organize the conference and we enjoyed the debate that these papers have generated. We hope that the considerable work product reflected here will be useful to students, practitioners, competition authorities and academics. Not only do the ideas outlined here have a strong theoretical basis, but they have been tested by the arguments and insights of experienced functionaries from competition authorities from around the world, as well as institutions such as UNCTAD and the Organization for Economic Co-operation and Development (OECD), which kindly encouraged their staff to participate in this event.

The conclusions presented here are myriad. The authors and commentators have exercised their wit and wisdom to produce a series of practical and yet well-founded solutions to many problems faced by those working in the competition regimes of new jurisdictions. That said, the ingredient that new competition jurisdictions might need most is patience and a unity of purpose. This is reflected in the paper of John Davies, and is a theme that is highlighted in Bill Kovacic’s keynote speech. Both speakers argue that capacity building is vital in new jurisdictions and that it is precisely this that takes time. In part, capacity building will come from a strong and vibrant academic community, to nurture and encourage those who will work in this field from around the world. The final part, and the last chapter presented here, discusses ‘Teaching and Researching Competition Law and Economics in New Competition Jurisdictions’. It asks how we could all help to provide the support that academics in the new jurisdictions need.

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