Competition And Regulatory Institutional Structures In Micro-states

"The Case Of The Caribbean"

Abstract

The liberalisation and privatisation movement which started in the United Kingdom and New Zealand in the 1980s was intended to remove detailed government control from otherwise competitive markets. In promoting reform of infrastructure industries in developing states, country institutions and sector governance play an important role. Most reforming developed and larger developing countries have tended to adopt USA or UK institutional frameworks and policies, especially for the management of competition matters and the regulation of utility industries. These governance structures and policies are now being called into question, particularly as to their suitability for small developing countries, where problems of economies of scale make it difficult to finance and sustain several agencies. The regulatory institutions of the larger Caribbean states historically have been modeled off the UK and US approaches. More recently the smaller countries of the OECS and Barbados have rejected these institutional structures and have opted for hybrid agency frameworks demonstrating new and innovative solutions to the institutional problems of small and micro-states. What has been emerging is a typology of two institutional arrangements, that of multifunctional and multinational with the former combining the functions of competition and utility regulation and the latter involving the use of a single regulator by several sovereign states.

Key words: competition commission, regulatory agencies, small states, hybrid regulatory structures.

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Introduction
The paper looks at institutional issues as they relate to competition and regulation in the Organisation of Eastern Caribbean States (OECS) as these small states strive to accommodate liberalisation of telecommunications in the sub-region, as well as the institutional issues as Barbados seeks to establish a new framework to manage competition and regulation in the public utility sector. Since 1990, some 120 developing countries have entered a reform phase of their infrastructure which has involved a paradigm shift from state ownership and centralised control to one of private ownership, public regulation and market-oriented structures, supported by competition policies. These changes have been driven by technological progress and creative market structures. For much of the last century state ownership of public utilities was the preferred institutional option in both developing and developed countries outside the USA and the Caribbean. In the face of evidence of *'government failure'* the emphasis in public policy globally has switched from direct state ownership to private ownership and public regulation. Public regulation is the means by which the state seeks to ensure certain forms of private sector behaviour. Economic regulation is associated with correcting market failure.

Modern notions of regulation calls for an entity that operates at arms length or independent of the regulated firm, government and powerful consumer interest groups, applying a set of specific rules, ex-ante that defines acceptable conduct and imposing sanctions for non-compliance. Regulation is determined to be justifiable in the utilities and infrastructure industries for reasons of market failure, natural monopoly, information asymmetry and externalities. Regulation is expected to improve social welfare and create the right environment for investments, especially in developing countries.

Competition authorities and law are management tools that limit the conduct of economic actors as well as shaping the structures of business organisation so as to ensure that the benefits of competition are not frustrated by the erection of restrictive and anti-competitive practices. It does so by limiting abuse of market power by dominant firms, by prohibiting cartelistic activities and by restraining mergers and other types of cooperative conduct that would harm social welfare. Competition laws invariable state the behaviour in which economic agents should not indulge. In contrast, industry regulatory laws are more prescriptive and tend to set out the conduct which is permitted.

The extension of the market economy and the allocation of a wider role of private sector in the production of goods and services in economic development have been the underlying reason for the emergence and proliferation of competition agencies, especially in developing countries. In 1991, when Jamaica contemplated the introduction of a competition authority there were only about 12 such bodes in the developing countries. All the major bilateral and multilateral donor agencies now ascribe a central role to the private sector, not only in economic development but also in poverty reduction, as exemplified in the UK pro-poor growth approach. Private sector development and competition are inextricable linked as a central theory of economics and competition is deemed to play a central role in improving allocative and productive efficiency. Whether it is change of ownership from public to private or competition which matters most in

improving economic efficiency is still the subject of much debate. In fact regulation in the case of the monopoly utilities is supposed to play the role of surrogate competition.

Despite the centrality of competition in economic theory the way it is considered to work in facilitating economic development and its meaning differs widely. The concept of perfect competition, freedom of entry and exit and equilibrium has been the standard theoretical construct for economic analysis with profound influence on competition policy and law.

More recently two schools of thought have been shaping competition policy; the *neo-classical* structure, conduct and performance approach stating that market behavior and performance are related strictly to market power and that the degree of competition is determined in relation to the notion of perfect competition and the *evolutionary approach* which does not take the view that in all situations market power can be interpreted as harmful to competition. For the Evolutionary School dynamic efficiency is more important than static efficiency.

The implication for small developing economies is that simple transfer of institutional regimes from industrialised countries, which traditionally have focused on structural remedies, may be inappropriate. In small economies monopolies and oligopoly may have to be accommodated in that such structures may be more efficient and the focus may well have to be on conduct remedies and the removal of government imposed market restrictions.

Reforming Competition and Regulatory Institutions

In the Caribbean the infrastructure industries of telephone and electricity have almost from inception been created and controlled by the private sector under the model of franchised monopoly and public regulation, except for the 1970s when the larger islands nationalised their utilities based on the principles of democratic socialism. Public regulation has been a standard feature in the Caribbean since the 1960s. The market changes have therefore accommodated liberalisation and privatisation. The question in the Caribbean, given the small size of the countries has been *what should be the appropriate institutional structures to accommodate competition agencies and industry regulatory authorities?*

Many countries have introduced separate institutions for competition management from that of utility regulation. In many cases, national constitutions define the allocation of responsibilities between tiers of government, and even in the absence of binding rules, most governments are jealous of their prerogatives and is thus reluctant to cede authority that they have historically enjoyed **(Smith, 2000)[1].**

Some of the challenging issues in the case of competition management, have been whether competition and consumer protection matters should fall under the same governance structure, whether the same institution should handle investigative and prosecutorial, as well as adjudicative functions or whether adjudication should fall under a separate body. In Germany, all the competition functions of administration and

enforcement of rules fall under one agency, with the courts in most instances performing the adjudicative duties. Some countries such as Brazil, Canada, and Chile have separated investigation and prosecution from adjudication and the imposition of penalties, i.e. separation of the executive functions from judicial powers. In Jamaica where the roles are combined the courts have ruled that the integration of the investigative and adjudicative functions is a breach of the rule of natural justice. In small states where the problem of economies of scale arises, there may be the need to integrate competition and regulatory functions under one institutional framework in order to reduce costs and secure operational efficiencies.

The goals of competition and regulatory agencies do not exist in isolation and must take account of existing political, economic and social institutions, practices and customs. The design of new structures must be sensitive to the institutional endowment. The aim of Jamaica's telecommunications regulatory structure in 1987 was precisely to focus attention on the regulatory arrangements necessary to sustain high levels of private investment (Spiller and Sampson, 1994)[2]. Later (Levy and Spiller 1996)[3], in the seminal text, after reviewing four other telecommunications frameworks (Chile, Britain, Argentina and the Philippines, along with that of Jamaica concluded that *regulatory mechanisms evolve in different countries according to a country's institutional endowment.*

One of the main challenges of structuring utility regulation has to do with whether to provide for several industry specific agencies to cover each of the separate industries of electricity, water and sewerage, gas, airports, ports, telephone and land transport, or whether to provide for one multi-sector agency, for example a communications regulator or a single multi-sector regulator covering all the infrastructure industries. Several countries, in their liberalisation and privatisation reform programmes separated the institutional structure for utility regulation from competition management.

Jamaica, Trinidad and Barbados were three of the first developing countries to establish multi-sector regulatory bodies outside the state utility institutional structure found in the USA. In fact in the Caribbean, the larger countries of Jamaica, Trinidad and Tobago, Guyana and Barbados have operated multi-sector regulatory agencies for over half a century; much longer than most other countries developed or developing. Jamaica established a single body, the Jamaica Public Utility Regulatory Commission (JPUC) in 1965 to regulate electricity and telephone. Before this, ad hoc Rate Boards preceded the JPUC and were used to set telephone and electricity rates. Trinidad and Tobago went further and the Public Utility Regulatory Commission was established in 1960s to regulate both pubic utilities and public passenger transport. Jamaica created a separate agency, the Public Passenger Transport Board to regulate urban public passenger transport.

Very few developing countries had experiences of utility regulation at the commencement of the liberalisation process in the 1990s. Additionally, unlike the USA, most countries have no formal code of administrative law, and often there is weak protection of property rights. Most countries commenced the utility reform programme

with the liberalisation of the telephone industry. The reforms in the telecommunications sector required very little structural changes and in most instances government only permitted private entry in the new cellular telephone markets, as most governments were still not prepared to cede state control over the incumbent fixed line operator, i.e. abandonment of state ownership and its replacement with private ownership.

The path for public economic regulation has been led by the telecommunications sector followed by electricity. This accounts for the widespread proliferation of industry specific telecommunications regulatory bodies in transition and reforming developing counties. Their degree of independence varies from one of exercising advisory responsibilities to that of being decision makers over economic and technical standards, with residual responsibilities such as the granting of licences entrusted to ministers of government or in the case of conflicts and disputes, the courts or specialised tribunals. Their adoption has been an historical accident, rather than by design. Today there are well over 100 telecommunications industry specific regulatory agencies in the world; whereas in the water sector state ownership continues to dominate with few instances of independent regulatory bodies regulating water utilities.

The UK has been the country often associated with industry specific regulation. Littlechild, the UK's main policy advisor in 1993 settled on an industry specific regulatory structure. In fact the UK did not commence with a grand regulatory design; the regulatory structure and policies emerged out of the reality that the UK faced a transition from public utility monopolies to private monopolies. In fact from Littlechilds perspective, regulation was expected to be temporary and would not be needed in the long run. The primary arguments for industry specific approach have been the potential to provide industry-specific expertise and focus, to diversify the risk of institutional failure and to provide greater opportunity for innovation.

Countries that have considered comprehensive liberalisation and privatisation of their utilities have tended to look at their *governance structure* from a more comprehensive and cost effective vantage point and have adopted either multi-sector regulators or a single across the board agency. In the case of the multi-sector structure, the countries that have adopted this approach are the state regulators of Brazil, the state and federal regulators of Australia, and the national regulators of Costa Rico, Jamaica, Panama, Bahamas, Trinidad and Tobago, Rwanda and Bolivia. The arguments for multi-sector structure are savings in resources and hence costs, the opportunity to facilitate learning across common issues, such as tariff setting and interconnection, reduction in the risk of "capture," reduction in the risk of political interference and reducing the risk of economic distortion due to inconsistent decisions on common issues and the ability to deal with issues arising from the increased blurring of the traditional sector boundaries (Smith and **Gray, 1997).**[4] Multi-sector agencies can also be structured to provide for specialised technical divisions to address the specialised technology concerns of the individual industries. Countries that have followed the sector approach are Chile, Colombia, Hungary, and Mexico and the USA at the Federal level.

An interesting development in Jamaica has been that although the philosophical underpinning of the regulatory institutional framework in Jamaica in 1991called for two multi-sector authorities, one for regulated monopoly utility industries and the other for the regulated financial sector, there has been a drift away from this original approach, mainly from powerful interests being able to influence decisions to favour a particular group. The result has been a proliferation of agencies both in the financial and utilities sector, separate and apart from the Fair Trading Commission. In 2003, there was a further attempt at fragmentation when the Ministry of Commerce, Science and Technology sought to remove telecommunications regulation from the Office of Utility Regulation and to create a new communications regulatory body, ostensibly to secure more control over the regulatory agency by the sector Minister.

Competition and Regulatory Authorities in Small States

The establishment of competition and utility regulatory agencies in small states presents many new challenges, particularly due to their size and problems of economies of scale. The institutional arrangements that have been adopted in the developed and larger developing countries have been found to be inappropriate, calling for innovative approaches. These approaches however have respected the principle of *regulatory independence.* **Minoque, (2004)**[5] however asks if we truly create independent regulatory agencies with discretionary powers, who then will control them - who regulates the regulator and mediate any conflicts of interest between their action and the broader public concerns?

The question is what constitutes a small economy? **(Gal, 2001)**[6] **and (Gal, 2003)**[7] defines a small economy as: *an independent sovereign economy that can support only a small number of competitors in most industries when catering to demand*. This definition is said to reflect certain characteristics: highly concentrated nature of most industries, particularly manufacturing and mining, high entry barriers and below efficient scale levels of production or sub-optimal levels of production. In small economies, industries have to be more concentrated to benefit from minimum scale economies. *The smaller the economy the more the concentrated the industry structure is likely to be*. Small population limits the size of demand and the number of firms that can efficiently service the market and hence tend to display monopolistic or oligopolistic tendencies. Hence natural monopoly, single firm dominance and oligopolies tend to be strong characteristic features of small economies.

The problem of economies of scale also arises in the establishment of the regulatory framework. Larger economies are in a better position to introduce several sector specific regulatory agencies without serious cost penalties. Smaller economies face the problem of minimum scale economies. The balance between productive efficiencies and competitive considerations is the most important feature which distinguishes small economies from large economies. The presence of concentrated market structures and high entry barriers often require that competition polices in small economies focus more on conduct rules rather than structural remedies.

Any definition of a small economy will be arbitrary and in fact countries can be placed on a continuum according to their size. *In the Caribbean small economies are taken to be countries with population of under 350,000 citizens*. There are many other small economies outside the Caribbean; Malta (350,000), Jersey (90,000), Liechtenstein (50,000) etc. Dhanjee, (2004)[8] contends that Gal's definition of size is incomplete and questions whether all economies meeting Gal's definition have enough in common to benefit from their concentration levels and entry barriers.

Hybrid Regulatory Agency for Telecommunications in the OECS Sub-region

The Organisation of Eastern Caribbean States (OECS) consists of nine countries as follows; Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines, Montserrat, British Virgin Islands and Anguilla. The single most defining characteristics of these countries is their *small population*, which range from 47,000 in St. Kitts and Nevis to 161,000 in St. Lucia and can be described as micro states. The total population of the five states (there are nine OECS Countries and five ECTEL States) amounts to 500,000 people with (St Kitts approximately 45,000, Dominica 80,000, and British Virgin Islands (BVI) 110,000. Per capita incomes range from US$3,400 in St. Vincent and the Grenadines to US$9,000 in Antigua and Barbuda. GDP growth has averaged 4.1% per year during 1980-2003, compared to 2.9% as the world average for micro states.

The OECS was formed in 1981 through the Treaty of Basseterre, and is part of the wider Caribbean Community and Common Market (CARICOM). At the signing in 1981 there were six member states. Membership has since expanded to nine states – Anguilla, Antigua and Barbuda, BVI, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.

The OECS is administered by a central secretariat and the islands share a single common currency, the Eastern Caribbean Dollar ($2.70 ECD = 1 USD). The operation of the currency is overseen by the Eastern Caribbean Central Bank. The British Virgin Island uses the US Dollar. The islands also share a common supreme court, the Eastern Caribbean Supreme Court.

Telecommunications was the first of the utilities to be considered for reform in the region commencing in 1998 when five members of the Organisation of Eastern Caribbean States – Dominica, St. Kitts & Nevis, Grenada, St. Lucia, and St. Vincent came together to establish a common regulatory framework for the telecommunications sector. The process of reform culminated in the establishment of the Eastern Caribbean Telecommunications Authority (ECTEL) – the first multinational telecommunications regulatory authority in the world – to facilitate the harmonisation of the regulatory regime. The authority was established under treaty with the support of World Bank financing.

The 1998 Agreement committed the five governments to a set of wide ranging telecommunications reform agenda, including the creation of a pro-competitive legal and regulatory framework, harmonisation of laws, negotiations with the incumbent monopoly

provider to terminate exclusive agreements and the establishment of a regional regulatory body. ECTEL was established under treaty in 2000 to fulfill the last obligation. The role of this new body was to design a transparent and investor friendly licencing and regulatory regime to be implemented at the national level, to manage number and frequency allocations in each of the member states, and to create a forum for the coordination of OECS telecommunications policies and regulations. At the state level, national telecommunications commissions were to be created to carry responsibility for implementation of regulations and policies with the technical assistance of ECTEL.

The documents establishing the Eastern Caribbean Telecommunications Authority are the Regional Agreement and the Eastern Caribbean Telecommunications Act of 1999. They provide a framework for incorporation of the legislation into the national laws. In fact Section 4 of the Act states that the provisions of the Agreement shall have the effect of law in the participating counties. This is the principal executory provision of the Act, whereby Parliament exercises its legislative authority to implement into national laws the various provisions of the international obligations undertaken by the executive. New telecommunications acts were introduced, beginning with St. Kitts in 2000. In 2001, the agreement was reached between ECTEL and Cable and Wireless (C&W) to terminate the company's monopoly rights in the region, with the result that new licences were first issued to new entrants to the telecommunications market in 2002. The first cellular competitor started offering services at the beginning of 2003.

The deficiencies of the telecommunications sector at the time were seen to be the exclusive provision which C&W held and which covered all the main services within the sub-sector. These included public switched telephone networks and cellular, unbalanced tariff that were not cost based, allowing for excessive monopoly profit, quality of services well below expected standards (actually except for waiting time for connection and some breaks in service. the quality of service was costly but acceptable). The laws, licences and agreements, were ambiguous, outdated and very restrictive, permitting low returns to the governments in terms of licence fees, dividends from joint venture arrangements and taxes and fees for the use of the radio spectrum. If the region was to take advantage of information technology, including the use of Internet as a medium to serve the general population, then major changes, both legal and institutional were needed.

The governments of the sub-region came to the conclusion that telecommunications was a critical element in economic development process and that there was the need to dismantle the monopoly structure in telecommunications and to introduce competition. Up to 1998, none of the countries had national regulatory agencies. The telecommunications incumbent in several of the states in 1998 controlled interconnection, the provision of leased line, numbering and the use of the radio spectrum.

The Establishment of Eastern Caribbean Telecommunications Authority

ECTEL was established in May 2000 by the governments of five of the OECS states. It acts as a regional telecommunications regulatory advisory body. Its primary objective is to assist the National Telecommunications Regulatory Commissions (NTRCs) in the contracting states to promote market liberalisation and telecommunications competition

in their respective territories. The NTRCs interface with users and provide help to manage the licensing process. ECTEL also advises the NTRCs on policy, types of services, licensing, and tariff setting and on the management of universal services.

As currently structured, ECTEL though an entity under the umbrella of the OECS has significant measure of autonomy and was not configured as a bureaucratic arm of the OECS in the sense that the Eastern Caribbean Drug service operates ECTEL's institutional structure comprises a Council of Ministers, (the telecommunications ministers of the ECTEL states), and a Director General of ECTEL, an ex-officio member, and a Board of Directors. The executive function ensures that the sovereign concerns of each individual member country will be respected by ECTEL in the performance of its functions. The Board of Directors comprises one member or an alternative from each of the member state, appointed by the telecommunications minister of each state for a term of one year, and is responsible for establishing the rules and procedures consistent with the Treaty.

In addition to the Board, there is a Permanent Secretariat, headed by a Managing Director, who administers the affairs of the agency on a day-to-day basis. This mechanism assures a measure of independence of the Board, although it is likely that Ministers will have an input into the Heads of Government decision-making process. The independence creates a political balance between the council of ministers, which has overall policy responsibility. The Managing Director serves a term of three years which is subject to renewal. He, or she, is appointed by the Director General of OECS, in consultation with the Board.

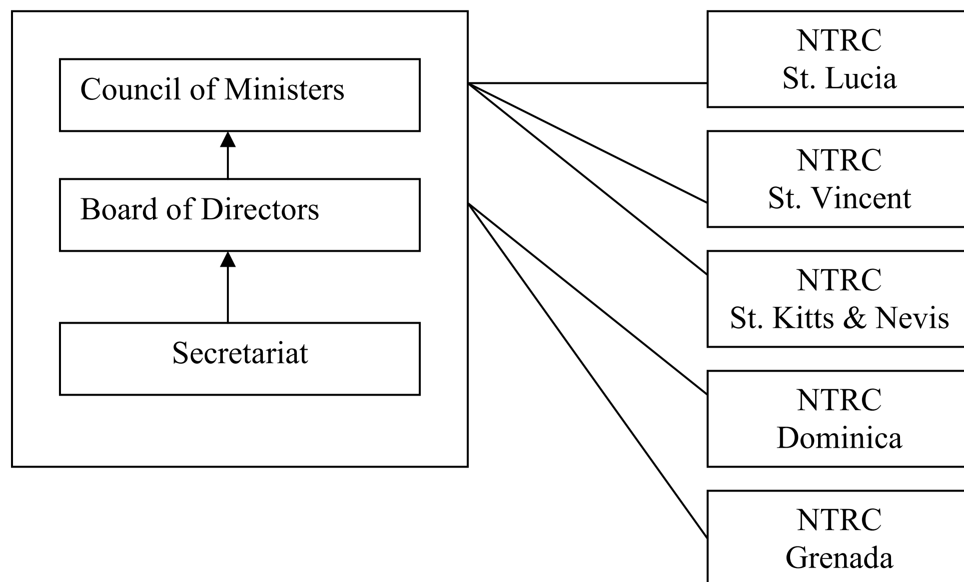
The various functions of ECTEL can be grouped into several categories according to the level of discretion exercised by the authority (**Booz-Allen & Hamilton, 1999).**[9] In a number of cases ECTEL has independent jurisdiction. These matters include the preparation of harmonised regional radio spectrum plans; preparation of tender documentation; monitoring licence compliance; and issuing administrative directions to licensees found to be out of compliance. In some cases, the Minister must have received a recommendation from the Authority before taking an action. These include the award of licences from short lists of approved bidders. Other matters which ECTEL may issue recommendations include proposed regulations and technical standards for the approval of terminal equipment.

ECTEL also regulates competition matters within the telecommunications sector. In other cases, ECTEL and the national commissions share an overlapping jurisdiction that requires that matters must be coordinated between the regional and national levels. In the case of enforcement of action, it may be that ECTEL staff in the course of monitoring licence compliance discovers a possible violation. The results of the investigation would be shared with the national commission's staff, and a coordinated concurrent investigation might ensue. Enforcement matters would then be handled by the national commissions, which might call on ECTEL staff as witnesses under the particular national law.

At the national level, one for each state, NTRCs carry out the regulation within the respective member country, covering telecommunications, electronic broadcasting, and the radio spectrum. Each Commission is made up of five commissioners appointed by the respective state's telecommunications minister and the organisational structure is represented below.

The NTRCs issue licences, investigate and resolve disputes, monitor anti-competitive practices in the telecommunications sector, and manage the universal services fund. In There is a statutory requirement however to carry out their duties based on the advice of ECTEL. The national regulators must consult with ECTEL.

Chart One
Telecommunications Institutional Governance Structure



Source: Abhas K. Jka and Castalia Strategic Advisors (2005) "Caribbean Infrastructure Assessment", Caribbean Country Management, World Bank, Washington, Report No. 29680, p.74

The Initial Effects of the Reforms

A major industry feature of the member states is that they were characterised by a single monopoly across the region, the UK based Cable and Wireless Ltd. (C&W). For years C&W provided high cost services, low levels of access and operated with little or no industry regulation. ECTEL was born out of the need to break out of the C&W monopolisation of telecommunications in the region and to ensure a coordinated approach, as well as to provide for uniform standards in dealing with C&W West Indies Ltd over liberalisation and regulatory matters.

ECTEL has had significant impact on telecommunications liberalisation in the region. An early success was the renegotiation of the existing exclusivity arrangements with the incumbent; Cable and Wireless which were due to run until 2000 in St. Lucia, and 2024 in St. Kitts and Nevis. It has been helping to bring about cost based tariffs (tariffs are still negotiated and the studies to determine the cost basis have yet to be finalised), new interconnection procedures and the early termination of the exclusive licensing arrangements. The changes were not introduced without some pain. After first threatening to exit the region if the markets were opened to competition, C&W eventually agreed to phased liberalisation in 2001, informed by the Jamaican experience which is based on phased liberalisation over a three year period. This is an example of the way in which regional cooperation has allowed each country to combine and leverage their resources and positions when dealing with a large transnational company.

Jamaica was able to have negotiated a three phased liberalisation programme with Cable & Wireless in 2000. Phase one of the liberalisation process provided for the introduction of VSAT-based bi-directional call centers and competition in the cellular market. Phase two provided for the introduction of competition in the domestic land line and international services. The third and final phase provided for the liberalisation of the remaining telecommunications services. Despite these changes the Jamaican market has only been transformed from a monopoly market structure to that of a oligopoly, with C&W and Digicel accounting for more than 85 % of market share.

With the passage of new licences in the OECS region to C&W in 2000/1, all services have since been liberalised (the monopolistic market structure existing in the OECS is due to other reasons). Cable & Wireless has mobile and fixed licences in all states; Digicel has mobile licences in Grenada, St Vincent and St. Lucia. AT&T Wireless had licences through a Holding Company in all five States but their shares in the several companies were subsequently sold to Cingular. Cingular’s equity shares were later transferred to Digicel. A French company; Orange has licences in Dominica, with CariGlobe operating in St Kits and Marpin Telecoms, a Dominica based cable television service provider is now offering telephony services in the islands in competition with Cable and Wireless.

The World Bank (2005)[10] reported that the new regime has been successful in increasing access to telecommunications services, promoted growth in the mobile market and facilitated competition in other services, including fixed line and internet. Some fourteen entrants were granted licences to provide fixed and mobile telephone services and an additional 114 licences were issued in other areas in 2004. The regional cellular penetration rate increased from 2.3 % in 2000 to an estimated 63% in 2004. The increases in network capacity and competition have resulted in lowering of prices for most services. Average prices for calls from the region to the USA fell by more than 70% over the period up to 2004. Tariffs for example in St Vincent and the Grenadines declined from CE$ 4.90 to EC$ 1.65 over the period 1998/2003, while domestic tariffs fell to EC$ 0.17/minute to over the same period. The weighted average fall in tariffs was estimated by the World Bank to be 34 %. The Bank also estimated that ECTEL-wide consumer benefits amounted to US$ 20 million per year and the macro-economic benefits in

foreign direct investments in the sector increased from EC$108 million in 2001 to EC$254 million in 2003, reaching an annual flow of US$94 million in 2004. In addition to increased investments there were increased levels of employment in the sector.

ECTEL's presence has provided the basis for an independent, transparent and unified regulatory structure, which has served as an incentive to investments and increased competition in telecommunications in the sub-region. Without ECTEL it is unlikely that each country acting on its own would have had sufficient bargaining power to force changes upon C&W and able to secure and finance the necessary expertise needed to handle the negotiations. This is against the traditional background where transnational companies came to represent the interest of the Caribbean states in the telecommunications sector. These powerful producer interests in the past were able to use their superior powerful resources to outgun national regulators in any conflict situation and ensure that polices were enunciated to their benefit **(Lodge and Stirton 2002, p .418)[11].**

The most important institutional regulatory innovation introduced by the OECS is the creation and development of a hybrid authority, which operates both as the telecommunications sector regulator and telecommunications competition body, serving several small independent developing states. The structure allows for the relatively small sector regulator in the member state to draw on the centralised expertise at the sub-regional level and in so doing benefit from economies of scale and highly specialised expertise, which would not have been possible at the national level. This must be the only example of a single regulatory and competition body serving several sovereign states.

The ECTEL model draws on the regional institutional experiences of the OECS Secretariat, a common currency, regional aviation authority, the University of the West Indies and the OECS judicial system. The OECS is now examining whether ECTEL should be restructured into a multi-sector body to regulate telecommunications and electricity. Although there is still evidence of market power in maintaining prices on average higher than other parts of the Caricom region the initial treaty and regional regulatory framework provide strong evidence of benefits of a regional approach to telecommunications reform, especially for small developing countries that can benefit from sharing the fixed costs of regulatory institutions.

The Case of Barbados: Competition and Regulatory Governance Structure

The population of Barbados is just under 270,000, about a tenth of the size of Jamaica, however, Barbados has a per capita income of just over US$ 10,000, almost four times that of Jamaica. The economic base of the country has been first sugar, and more recently, tourism. Average annual growth rates in GDP during the 1990s have been in the range of 3 to 4% per annum.

When Barbados came to establish competition policies and law, there was no experience other than Jamaica in the region to act as a road map. The country however, had the experience of regulating both telephone and electricity going back to 1955. In fact the enactment of competition laws remained largely an OECD phenomenon until the beginning of the 1990s. **Singh (2002)[12]** stated that only 16 developing countries had

introduced competition laws up to 1990. Since then some 80 counties have, or are in the process of enacting competition legislation. Competition policy was not a priority for developing countries in the era of widespread state ownership. The adoption of liberalisation policies in the mid-1990s however highlighted the need for a solid competition policy framework and law. **Dhanjee (2005)**[13] also contend that competition policy in the Caribbean is externally driven and that there is deep rooted skepticism about competition policy and its relevance to Caribbean states.

Background to Utilities Regulation in Barbados

The two major domestic telephone and electricity companies at the beginning of the progress of the island towards self-government and independence in the 1950s were controlled by foreign investors. The other public utility and infrastructure enterprises were owned and controlled by the state. Unlike Jamaica, Barbados did not nationalise its electricity and telephone utilities in the 1970s, with the result that utility regulation remained uninterrupted until 1998, when new set of polices were introduced.

The background to the introduction of the Public Utilities Act in Barbados (chap. 282) of 1955 was based on the need for the state to regulate the two foreign privately owned utilities. The legislation mandated the establishment of a Public Utilities Board of Barbados (PUB) and this Board came into being in 1955, based on the institutional governance structure of the public utility commissions at the state level in the USA. The Act required the utility rates of the two monopoly industries to be fair and reasonable, while simultaneously allowing for fair rates for the consumer and reasonable returns for the service providers. Historically, rate determination was based on the USA rate base rate of return formula, determined at quasi-judicial public hearings, which at times could last for as long as one year.

The analysis of regulatory governance in developing economies immediately encounters several difficulties **(Minoque (2004)**[14]. Except for the Caribbean the concept of regulatory governance and the regulatory state are still relatively new and are generally the product of post-privatisation deregulation phase of neo-liberal economic reform.

The history of regulating utilities in the Caribbean has been one of tension to resolve the problem of fair rates to the consumer and reasonable returns to the investor. The traditional rate of return regulation provided no incentive to the utility provider to improve efficiency. With the move to wider privatisation and liberalisation of the utilities and infrastructure sectors, it was recognised that a new paradigm of regulatory control was needed to meet the more market-oriented approach being taken by the policy makers to meet the dictates of the economic development in the region.

Barbados in seeking to develop its regulatory institutional framework like the OECS also adopted another hybrid innovative institutional initiative designed to deal with the institutional handicaps of small states and problem of small economies. The Fair Trading Commission was created replacing the Public Utilities Commission. The Commission is more than a multi-sector body it can best be described as a multi function authority, the nearest other authority to it being the Australian Competition and Consumer Commission

which manages competition, consumer protection, price surveillance and economic regulation, especially at the federal level in Australia.

Competition in Barbados

There are varying reasons which has led to the development of competition polices in different countries. For instance, historically, antitrust policy and law in the USA was motivated by the need to protect consumers from price fixing trusts; while in the case of the EU competition policy is driven by the goal of a common European market. Japan's competition policy was enacted under pressure from the USA, whilst South African competition legislation is driven by the desire to spread ownership amongst the historically disadvantaged black people and the legacy of apartheid **Adhikari, R. and Malathy Knight-John (2003)[15].** The need for Barbados to establish a national authority towards the end of the 1990s with responsibility for the promotion and maintenance of competition was driven to a large extent by the country's commitments under the regional integration agreements. As part of Chapter 8 of the revised Treaty of Chaguaramas under the Caricom Single Market and Economy (CSME), member states are required to establish and maintain a national competition authority to ensure consistency and compliance with the rules of competition. Up to 2005, only Jamaica, Barbados and St Vincent had passed such legislation and Saint Vincent is yet to establish its competition authority. Jamaica had established a competition authority; the Fair Trading Commission in 1993 prior to the treaty obligation, and its policy decision was internally driven.

Additionally, there are also the telecommunications services commitments, which have been incorporated in the General Agreement in Trade and Services (GATS) in 1997, requiring countries to move to progressive liberalisation of their telecommunications market. Barbados is a signatory to GATS. Further, there is anticipation of obligations which may emerge out of the World Trade Organisation (WTO) discussions regarding the inclusion of competition policy in WTO mandates and the possible introduction of a multi-national framework competition agreement. **Gutierrez (2003)[16]** argues that regulation in Latin America and the Caribbean comes from new institutional economics and that the measure to create new regulatory entities must be understood as efforts to strengthen the regulatory environment and to reduce transaction costs and not necessarily to increase regulation per se.

Like in most developing countries, historically there has been a lack of a culture of competition in Barbados. Further, there is a lack of understanding among the business community as to the purpose of competition. Barbados, like the rest of the Caribbean, has had a long history of deeply entrenched merchant and landed class that has dominated commercial activity for hundreds of years. These interest groups see the implementation of competition policy and law, which focus on prohibition of restrictive business practices, such as bid rigging, exclusive dealing contracts, tied selling, resale price maintenance, price fixing, and the right to collude and create cartels as state intervention, eliciting tacit resistance to the new policy measures and the obligations of competition law. These groups argue (as was the case in Jamaica in 1993) that in small economies where opportunities for economies of scale are weak in several industries, there is the

need to build monopoly enterprises as industrial champions to compete on the global market. It is for this very reason the merger control clauses were removed from the Jamaican Fair Trading Act in 1993.

The New Institutional Framework for Competition and Utility Regulation in Barbados

Barbados took the unique position in 2000, in that the policymakers decided not to establish separate institutions for the management of competition matters and utility regulation, rejecting the historical approach established by countries such as the USA and the UK. The concerns were that of the administrative costs of establishing and operating several institutions, ensuring consistency of policy application, the difficulties of finding sufficient qualified technical staff in Barbados to manage several agencies and the problem of control over several agencies.

A major constraint to effective regulation in the Caribbean region is the availability of regulatory professionals in the quantity and quality of the rapidly expanding regulatory agencies. The scarcity of specialised regulatory skill; lawyers, economist, engineers, accountants and financial analysts is proving to be a major constraint **(Downes and Husband, 2003)**[17]**. T**he importance of human capital to regulatory agency operational effectiveness is inextricably linked to an understanding of what makes regulation possible and effective

The Fair Trading Commission under the Fair Trading Act of 2000 was established to carry responsibilities for both management of competition matters and the regulation of the utilities. The Commission is mandated to administer and enforce several distinct pieces of legislation listed as follows:

(1) The Fair Competition Commission Act (Enabling Act) Act 2000 ("FTC Act"),
(2) The Utilities Regulation Act 2000 (this Act also repealed the Public Utilities Regulation Act, 1955),
(3) The Fair Competition Act 2002,
(4) The Telecommunications Acts of 2001,
(5) The Consumer Protection Act 2002.

In enforcing the several Acts, the Commission seeks to: -

> "ensure efficiency in the operation of regulated utility companies, promote competition in the sectors and safeguard consumer welfare.

The FTC Act gives the Commission administrative, prosecutorial, quasi-judicial and investigative powers to enable it to achieve the stated objectives. The Commission is made up of a Board of nine part-time commissioners appointed by the Minister responsible for consumer affairs, inclusive of a Chairman who must be an Attorney-at-Law of at least 10 years standing, or a person who has held high judicial office. The Board has the power to appoint the Chief Executive Officer. The Commission is financed from subventions from Government, levies and fees, and grants.

The FTC Act, together with the Utilities Regulation Act (URA), provides the framework which guides the Commission in the regulation of utilities in Barbados. Under the URA the Commission currently regulates domestic and international telephony services, electricity and natural gas. The URA gives the Commission the power to establish the principles for rate discovery, setting maximum rates, setting and monitoring service standards, to hear and adjudicate on complaints and disputes related to these utilities. The Commission also has the powers to make rules after consultation with the service providers and the minister.

In the case of the telecommunications sector regulation is effected jointly with the Minister of Energy and Public Utilities. The Commission is the principal body regulating interconnection matters in the partially liberalised telecommunications market, including interconnection rates and standards for interconnection. Currently, the mobile market is liberalised and future plans call for the liberalisation of domestic fixed wireless market and the international telecommunications market.

The Telecommunications Act also provides for the establishment of Access Deficit Charge and in this regard the Commission must consult with the co-regulator the Ministry of Energy and Public Utilities when enforcing policies established by that Ministry. The Commission currently regulates Cable and Wireless (Barbados) Ltd. in the telecommunications sector and Barbados Light and Power in the electricity sector. The Commission tries to maintain "chinese walls" with respect to information on investigation. The different division of the Commission however, readily draws on and accesses the skills, knowledge and resources of each other.

The Consumer Protection Act came into force in 2003. The Act deals with unfair contracts and unfair consumer trading practices, such as dual pricing, bait advertising, tied selling, misleading advertising, and pyramid selling. The Commission is required to operate within the policy framework set by the minister responsible for Commerce, Consumer Affairs and Business Development.

It is too early to assess the performance of the Commission and the problems it will face in having one agency with the responsibility to fix price, and at the same time carrying the power to prosecute traders for price fixing. In Jamaica, it was the competition agency, on a number of occasions that challenged some of the practices accepted by the industry regulator in the evolution towards competitive market.

Other Experiences of Innovative Institutional Arrangements

New Zealand and Australia provide the most novel experiences of the developing countries. Both countries have used a single agency for both utility regulation and the administration of competition policy and of competition law.

Beginning in 1989, with the reform of the telecommunications sector, New Zealand introduced a system of regulation called "*light handed regulation"* of utilities, relying primarily on the Commerce Commission, the competition body and on competition rules.

New Zealand adopts economy-wide competition rules to deal with misuse of market power and actions which seek to weaken competition. With respect to industry specific regulatory rules the principal mechanisms for regulation are information disclosure rules. New Zealand relied heavily on the courts to adjudicate competition matters and on either the Commerce Commission or private parties to bring legal actions for contravention of the Competition Act. The same approach has been adopted for the power and gas industries.

The New Zealand approach incorporates several distinctive elements, the merits and ability to replicate these in Barbados are considered to be open to question. New Zealand has the distinct advantage of a strong body of case law and judicial precedents in the field of competition law, coupled with this the country has had over 40 years experience of administering competition laws.

Following the liberalisation of telecommunications in 1989, New Zealand corporatised its telecommunications operation and privatised the company in 1990 without establishing an industry specific law or an independent industry regulatory agency. Instead disclosure rules on financing and pricing information and a reserved rights clause; the Kiwi Share required the Telecom, the incumbent operator to meet certain universal obligations and to provide interconnection on a fair and reasonable basis.

The Clear Communication interconnection case which involved lengthy and costly court proceedings, which went on appeal to the Privy Council in London, (New Zealand's final court of appeal) demonstrated the major drawback of using competition law to deal with interconnection competition issues. This case started in 1991 and lasted until 1995 only to have the Privy Council refer the matter back to the courts in New Zealand. Following extensive reviews of the telecommunications industry reform process New Zealand eventually found it necessary in 2001 to create industry specific regulatory rules and a telecommunications regulator, a Telecommunications Commissioner, albeit within the framework of the Commerce Commission to deal with access disputes and universal services obligations **(OECD 2002, p. 267)[18].** Most developing countries however are not blessed with New Zealand's institutional endowment.

An alternative approach is to entrust the administration of industry specific law and rules on pricing and interconnection to the economy-wide competition body, rather than creating a specialised industry regulator. Australia's telecommunications reform which commenced in 1987 when full liberalisation and open competition was introduced illustrates this approach. Prior to 1992 Telestra was the wholly government owned provider of telecommunications services in Australia. In 1989 government transferred the regulatory function for the sector from Telestra to Austel, an industry specific regulator. A second carrier's licence was issued to Optus in 1992 creating a duopoly. Austel's role was earlier in 1991 expanded to include the industry's competition matters. The Australian Competition and Consumer Commission (ACCC), which then existed, handled mainly consumer protection matters.

With the opening of telecommunications to competition in 1997, the industry was brought within the reach of the economy-wide competition law. In order to avoid proliferation of regulatory bodies and to facilitate the transition to a competitive market, telecommunications industry regulation was entrusted to ACCC, as were the access and interconnection regimes for other essential infrastructure facilities, such as power and gas. The ACCC has been mandated to administer the Fair Trade Practices Act which was introduced in 1974 to address economy-wide competition matters. ACCC also carries price surveillance responsibilities where competition is deemed to be weak and quality of service monitoring in respect of airports, which are within the purview of the federal government. Australia decided against the New Zealand approach of not providing for industry specific laws and introduced telecommunications industry specific rules in the Fair Trade Practices Act to complement the existing economy-wide competition provisions. Both competition and certain aspects of economic regulation in Australia (in the case of essential facilities and network industries) are handled by ACCC as a single competition agency.

The ACCC concentrates on competitive conduct matters and other industry regulatory matters, which carries implications for competition and leaves the more detailed industry regulatory issues to other national industry regulators or regulators at the state level operating across several industries, such as the Victoria Office of Regulator General and the New South Wales Independent Pricing and Regulatory Tribunal. These regulators handle economic and technical regulation at the state level, except that in the case of telecommunications all regulation matters are handled by federal bodies. In addition to ACCC and the state level regulators there are also other regulators performing economic regulatory functions, such as the granting of licences.

The National Competition Council (NCC) carries the mandate to establish the rights of access to the regulated essential infrastructure facilities. The ACCC administers the general third party access regime which is applicable to any asset declared to be an essential service by the portfolio minister, upon the recommendation of the National Competition Council. Such asset must normally display natural monopoly characteristics. Where rights of access are permitted the ACCC assumes the role as arbitrator of last resort to arbitrate on access disputes and may determine the final terms of access, including access prices where the parties fail to reach commercially negotiated settlement. An access regime is also provided to cover gas transmission pipeline and its implementation also falls under the responsibility of ACCC.

Since 1999 ACCC also assumed the role as transmission regulator for the electricity industry. In addition to the National Competition Council, there is the Australian Competition Tribunal (ACT), which is an appellate body, with the powers to review the decisions of the ACCC. The ACCC is not responsible for technical regulation, as this is dealt with by the Australian Communications Authority (ACA) which administers the regulatory functions relating to licencing of carriers and service providers, setting technical standards, management of the spectrum, regulating numbers and handling universal service arrangements.

Third party access, competition and conduct rules are the subject of specific telecommunications industry provisions in the Trade Practices Act. More recently a new national energy regulator has been created. The end result is that from July 2005, there is a new Australian Energy Regulator (AER), a separate and independent legal entity, but also a constituent part of the ACCC. A memorandum of understanding sets out the relationship between AER, ACCC and the Australian Energy Market Commission.

The Australian regulatory framework is a multiple of several structures and is very complex, involving the separation of regulatory duties between competition, technical and economic regulation and between state and federal regulation, running the risk of overlap and jurisdictional disputes. It is argued that technical regulation requires ongoing monitoring and the application of sector specific expertise that generally has little direct relevance to competition matters. The separation of technical regulation from general competition matters was introduced to recognize this factor. The desire to avoid distorting competition through subjecting competition matters to very different regulatory regimes also supports the case for general as opposed to sector specific agencies. The general approach provides for consistency, certainty and fairness in universal application of competition law as against separating economy-wide competition matters from industry competition matters. It enhances ACCC's authority, reduces the risk of 'regulatory capture' and minimises duplication and waste.

Conclusion

Assigning competition matters and certain economic regulatory functions to the same agency provides the opportunity to take advantage of synergies between competition matters and economic regulation and also to take advantage of synergies between both functions and access regulation. In may respect industry regulation in the telecommunications sector today is applied competition policies.

This structure provides for combining several policy instruments in the same agency increasing the chances that they will always be applied complementarily, rather than at cross purpose. More importantly, the Australians argue that where the intention is to manage the transition to even greater competition in an industry like telecommunications, where natural monopoly features has more or less disappeared then the general competition agency approach should provide a better solution than sector specific regulation which has an interest in maintaining access and economic regimes long after they are needed and preserving a self-serving bureaucracy. The competition authority will be more attuned to pursuing static and dynamic economic efficiency than a sector regulator and these are the principal reasons for introducing competition. It would enable the government to more readily convince prospective investors of its intention to a competitive telecommunications market (Davidson (2002)[19].

The Barbados regulatory and competition governance structure draws heavily on the Australian approach. In fact the team of advisers which was called to write the rules and to establish the Barbados Competition Commission came from the ACCC. It is important however to note that the two structures are different. Where a country borrows policy measures from elsewhere and is ignorant of the different institutional endowment it could

be plagued with operational problem. Barbados also hopes to avoid the problems encountered with the New Zealand model by establishing specific legislation for each industry and mandating the Competition Commission to enforce these legislation, concurrent with its responsibility for the wider competition and anti-trust matters.

Whilst Barbados has taken the route of a single agency, powerful interest groups are working in Jamaica to dilute its multi-sector structure. There are significant inter-country variations in the contours of competition and regulatory institutional governance structures. The differences reflect the county's institutional endowment and the strengths of special interest groups that capture the system for their rent seeking motives. The OECS and Barbados do present new public policy options, especially for small states questioning some of the claims in support of sector specific regulatory structure.

Two types of hybrid institutional framework appear to be developing; the first seeks to address the needs of several small independent states, the OCES multinational sectoral model, whilst the second provides for a multi-function agency, the New Zealand and Australian model and to some extent reflect the Barbados approach**.** The two models have been designed to recognise that country size, especially at the lower end of the size continuum is a constraint in the design of competition d regulatory institutional structures.

An extension of the multi-national approach may well be that of a multi-sector structure involving the regulation of telecommunications, electricity and water. Regulation of the electricity sector is becoming more and more an urgent matter for the OECS and extension of ECTEL to cover electricity may well be a more economic and practical solution. The principle of regional cooperation in utility regulation and telecommunications competition matters have enabled ECTEL member states to efficiently manage their scarce and meager resources and to effectively leverage the inter-member country network, resulting in increased overall benefits to all the countries.

ECTEL's presence has provided the basis for an independent, transparent and unified regulatory structure, which has served as an incentive to investments and increased competition in telecommunications in the sub-region. Without ECTEL it is unlikely that these small states acting on their own would have had sufficient bargaining power to force changes upon the multinational incumbent operator. Each county, acting on its own would not have been able to secure and finance the necessary expertise needed to handle the negotiations.

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