

Competition Policy, Consumer Protection, and Economic Disadvantage[†]

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I. INTRODUCTION

In 2007, the People's Republic of China adopted its first competition law and joined a roster of over 100 nations that have enacted competition statutes. Until recent decades, the majority of these jurisdictions, like China, had relied entirely or completely on central planning to organize their economies. Judging from the status of current competition law drafting projects, the list seems likely to grow by a few countries each year.

For those of us of a certain age, these events are most improbable. An episode from my undergraduate years in the early 1970s suggests why this is so. My study of economics began with the traditional introductory survey course. The required readings included *The Great Ascent*,¹ Robert Heilbroner's influential analysis of economic development. Heilbroner admonished countries with democratic political institutions and market economies to accept the inevitability that central planning was the only suitable course for what were called Third World nations to achieve substantial economic growth.²

My instructor wrote his Ph.D dissertation for Heilbroner and revered his advisor's views. The final examination included a heavily-weighted question that directed students to discuss the most

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likely and beneficial path for economic development in the Third World for the remainder of the twentieth century. I told the examiner exactly what he wanted to hear and stepped three favorably-graded credits closer to the baccalaureate degree.

I sometimes wonder what would have happened if had written something along the following lines on that examination in 1971: "By the year 2000 the Soviet Union will dissolve. Its former republics and the nations of what we now call the Warsaw Pact will embrace sweeping, market-oriented reforms. The Berlin Wall will fall by the end of the 1980s and the two Germanys will be unified under the liberal political and economic institutions of West Germany. The European Union soon will enlarge its membership to add countries as Hungary and Poland, as well as newly independent states such as Estonia, Lithuania, and Slovenia. Greater reliance on market-based economic systems also will encompass numerous countries in Africa, Asia, the Indian Subcontinent, and Latin America. Among these will

finished. There is an active debate about whether the market reforms of recent decades have set out the right path for economic progress.³

The debate over market reforms in formerly planned economies has raised three basic questions about competition law and its place in market reform.⁴ First, is competition law a distraction from more urgent reform priorities? Does the creation of a competition policy system wrongly divert attention from the development of other institutions that (e.g., mechanisms that facilitate the creation and enforcement of commercial contracts) make stronger contributions to economic growth?

Second, are competition laws modeled on the statutes of countries with well-established market economies prone to misapplication in the circumstances in which most transition countries will implement them? For example, will merger control provisions or controls on abusive behavior by dominant enterprises inevitably become mechanisms by which frail and politically buffeted competition agencies reestablish the type of state orchestration of the economy that market reforms were designed to eliminate?

The third question is whether the market rivalry that competition laws seek to stimulate makes truly useful contributions to economic development.⁵ Does the implementation of a competition law help reduce poverty? Or does the execution of the competition law in a transition economy become little more than an exercise by which elites in the civil serve and the private sector shuffle paper with little concern for the alleviation of economic misery?

This Essay discusses how well-conceived competition policies can serve the poor and reduce barriers that reinforce economic

3. Extensive treatments of this issue appear in *TOWARD PRO-POOR POLICIES: AID, INSTITUTIONS, AND GLOBALIZATION* (Bertil Tungodden et al. eds., 2003).

4. See William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 *CHI-KENT L. REV.* 265, 286–301 (2001) (discussing debate over value of competition law as law reform ingredient in transition economies).

5. For an excellent discussion of the place of competition law as an instrument of poverty reduction in developing countries, see Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 *SW. J. L. & TRADE AM.* 211 (2007).

disadvantage.⁶ It first identifies some of the phenomena that competition policy programs usefully can address to improve the welfare of economically disadvantaged populations. The Essay then describes how consumer protection programs can complement competition policy measures by punishing and deterring serious fraud. The paper concludes with reflections on the broader

the category of work can be profoundly creative forms of expression. A society that places the fewest unnecessary barriers in the path of the realization of these talents is likely not only to be more prosperous but might achieve higher levels of personal satisfaction, as well.

A. Focal Points for Competition Law Enforcement and Advocacy

In the discussion below, I focus on areas in which increased competition and the removal of artificial barriers to the entry of new entrepreneurs and the expansion of small enterprises can generate particularly strong benefits for the economically disadvantaged. Economic performance in areas such as communications, public

flower market. The growing of ornamental flowers had become a promising area of new entrepreneurship in Morocco, with Europe providing the main source of demand. Researchers found that the growers, many of them small enterprises, faced at least three serious obstacles in getting their products to European destinations.

The first was a transport cartel. The trucking operators who carried the flowers from the farms to Morocco's main airports in Casablanca and Rabat colluded in setting their rates. The second was a cartel of freight forwarders who packaged and processed shipments at the airports. The third obstacle consisted of government policies that limited the number of air carriers that served European cities. This three-stage system of restrictions artificially raised the delivered price of the flowers and reduced the sales that Moroccan growers otherwise would have achieved.

In jurisdictions such as Indonesia and Mexico, one of the greatest sources of improved economic performance has been the introduction of competition into the commercial airline sector. Mexico is a large country. Until recently, a state-owned enterprise provided all domestic service. The incumbent carrier's high rates meant that only comparatively wealthy business operators or individual citizens could fly. Owing to the advocacy of the Competition Commission of Mexico (CCM), the country chose to permit new carriers to compete for service on domestic routes. Competition has reduced fares and improved service. This increases the ability of business managers to visit suppliers and customers. With lower fares, Mexican citizens can take airplanes when the only affordable way to make a long journey to visit friends or families within the country was an unspeakably difficult bus ride.

3. Banking

Another example concerns the banking sector. We interviewed representatives of Morocco's major banks and learned how the banks set interest rates for savings accounts and loans. Every week or so, representatives of the principal banks would meet and agree about the rates to be paid to depositors and the rates to be charged to borrowers. Not only did the banks agree not to compete to persuade individual consumers to create savings accounts, they also artificially raised the

rates that commercial firms—including small business operators—would have to pay to obtain loans.

Direct controls on the formation of new businesses tend to be still more severe in the case of financial services. In many cases in transition economies, these controls go well beyond the prudential requirements that most jurisdictions impose to ensure the integrity of the banking system. Too often the excessive restrictions seek to protect incumbent enterprises, especially state-owned institutions, as an end in itself. This diminishes rivalry in the provision of financial services, including competition to devise lending terms and instruments of interest to new or small enterprises.

Our project in Vietnam showed how unnecessary restrictions on entry into financial services harms the owners of small enterprises. It is possible for small firms to enter and enjoy some measure of success without recourse to such basic financing tools as a line of credit from a bank. An entrepreneur can accumulate funds to get started from family members, friends, and customers. These means can help raise perhaps a hundred thousand dollars or more, but they are inadequate to obtain the million-dollar loan that permits a significant expansion of operations.

We spoke in Hanoi to the owner of a ~~firm~~ shop that had repai Twerao7og60015 -1.153 TD0.000.
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associations, have used concerns about quality control to prohibit all advertising for professional services, to bar price competition, and to impede the use of trained para-professionals to perform various tasks.¹¹

The restrictions recited above have the tendency to raise the price and limit the availability of the services in question. For the higher

number of students who could receive preventive dental care. The FTC successfully challenged the State Board's policy on the ground that it contradicted a state law that authorized fluoride treatments without the immediate supervision of a dentist. The Commission emphasized that adherence to the State Board's policy would have denied the students treatments without ensuring attainment of any quality of service objective.

affected the development of the U.S. economy. Two examples come to mind from the 20th century. The first will perhaps be familiar to those who have lived in the St. Louis area or studied the history of the American aerospace sector. In the late 1930s James McDonnell set out to establish a producer of aircraft parts and subassemblies in St. Louis. The field already was occupied by a number of prominent private companies, such as Boeing, Curtiss-Wright, Grumman, and Lockheed, and government-owned design bureaus at that time played a major part in the design and development of combat aircraft. McDonnell eventually approached James McRoberts, the namesake of a St. Louis law firm and asked him to incorporate his new firm. Apologizing that he could not compensate McRoberts or his firm lavishly for this service, McDonnell said he would remember their generosity if things turned out well. And well they turned out. McRoberts filed the simple incorporation documents for the McDonnell Aircraft Company in Maryland and began a relationship that served the engineer and his outside counsel splendidly for decades to come.

Suppose that, instead of using the quick and austere registration process for the State of Maryland, the incorporation laws had obliged James McRoberts to show that his client's idea was neither redundant nor improvident. A redundancy check might have knocked McDonnell out because significant incumbent private firms and government-owned bodies already occupied the field amid a catastrophic economic depression. However energetic, hard-working, and determined the creator of the proposed McDonnell Aircraft Company might have seemed, the registration committee might have concluded that he was not up to the job and ought to be apply his talents in other pursuits. It would have appeared improbable that the proposed enterprise, which would being its operations by serving as a mere subcontractor to the well-known system integrators of the time, someday would design and produce, among others, the Phantoms, Eagles, Hornets, and Mercury spacecraft that would become legends in America's aerospace history.¹³

13. On the history of the McDonnell Aircraft Company and its successor enterprise, McDonnell Douglas, see BILL YENNE, *MCDONNELL DOUGLAS—A TALE OF TWO GIANTS* (1985); William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas*

entered what seemed to be the main working area of the shop, which contained a small number of copiers and other machines in obvious disrepair. We asked the owner how his business survived. He took us into the back room, which bustled with activity. Large charts on the wall indicated the location of and assignments for a fleet of trucks that the owner operated as an informal adjunct to his copying firm. "The copying business is properly registered and is subject to tax rates of about ninety percent. It makes no money and reports no earnings," he said. "The copying firm is the front for my trucking business, which is not registered and is the main source of my income."

We learned that well over two-thirds of trucking in Benin was conducted by "informals" whose presence the state had to tolerate lest the transport sector in the country collapse. Seen one way, this

marketplace by preventing serious fraud. False advertising and deceptive marketing practices can damage the capacity of honest

occupy the lower strata of the income distribution. The language

I interviewed some of the weavers and asked them what they thought of their new line of work. Many commented favorably on their success and welcomed the change that had taken them from the rice paddies to the looms. One woman captured a theme that ran

In our lives as consumers, it is difficult to have repeated enjoyable encounters with a product or service without having some respect for the people who create and provide it. As those encounters increase, I have faith that the respect will grow as well on both an individual and aggregate level.