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NOTE

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Introduction

This paper discusses exemptions and exceptions granted to industries and certain types of economic activities and/or business transactions under competition law in a selected sample of developing and advanced industrial economies. A distinction is made in the use of the terms "exemption" and "exception" as they are generally applicable in the context of competition law policy. The term *exemption* refers to being "excused or free from some obligation to which others are subject". An *exception* is to be "excluded from or not conforming to a general class, principle, rule, etc."[1] However, it may be noted that while the terms "exemption" and "exception" (also "exclusion") have specific meanings within the context of particular national legal systems, they are often used interchangeably.[2]

For greater clarity, some examples may be useful. In some countries State-owned and operated enterprises are exempted from the purview of competition law, while private sector firms are not. Similarly, in some jurisdictions mergers and acquisitions (M&As) by firms that lead to market dominance or substantial lessening of competition may be prohibited, whereas in certain cases and/or jurisdictions exceptions for selected M&A transactions may be made if there are efficiencies or other offsetting benefits. In addition, the exemptions may be sectoral in nature and cover specific industries such as airlines and electricity supply or they may be non-sectoral and cover certain functional types of economic

[1] These definitions based on Funk & Wagnalls Standard Dictionary, 1991.

[2] See World Trade Organization, "Exceptions, Exemptions, and Exclusions Contained in Members' National Competition Legislation", document WT/WGTCP/W/172 (2001). This document contains a useful summary table which provides a bird's-eye view of various country and sectoral exemptions from and exceptions to competition law in different jurisdictions. See also Barry E. Hawk, "OECD Trade Committee study of the Sectoral Coverage (and Limitations) of Competition Laws and Policies" OECD, 1996. Mimeo.

arrangements such as specialization and rationalization agreements, and the development of product standards.[3] Generally speaking, exemptions tend to be broader in scope, as is the case with sectoral or industry examples, whereas exceptions tend to be more narrowly focused, often determined on a case-by-case basis, applying a rule-of-reason approach such as in selected M&A transactions and specialization agreements that while resulting in the lessening of competition may still be in the public interest. This paper discusses these various types of situations, which are described and illustrated in greater detail below. It should be noted that this paper is not intended to be an exhaustive survey of exemptions and exceptions contained in competition law(s) of different jurisdictions. The focus is on commonly found examples and discussion of the underlying rationale for having exemptions and exceptions to the broad application of competition law and policy.

While "best practice" advice suggests that competition law policy should apply to all sectors and firms in the economy engaged in commercial economic activity, in practice various types of exemptions and exceptions are granted for social, economic, and political reasons. The granting of exemptions and exceptions does not necessarily imply the weakening of competition law enforcement. Indeed, it may well be that such instances are necessary for furthering the objectives of competition law policy. For example, virtually all competition laws strictly prohibit horizontal price agreements between competitors, as they tend to lessen competition. However, various forms of non-price horizontal agreements do not necessarily have the same effect and may be in the public interest if inter-firm cooperation results in standardization of products, improved quality and increased information, so that consumers

[3] See UNCTAD, "Consultations on Competition Law and Policy: The Scope, Coverage and Enforcement of Competition Law and Policies and Analysis of the Provisions of the Uruguay Round Agreements Relevant to Competition Policy, and Their Implications for Developing Countries", Document TD/B/COM.2/EM/2 (1996).

have better choices. A review of such exemptions and exceptions, and the underlying rationale, is useful for re-evaluating the coverage of competition laws in some countries, and may also serve to guide other countries in the process of adopting or revising existing competition legislation.

The ensuing discussion is organized along the following lines. Section I discusses the general nature and scope of competition law policy, and the extent to which exemptions from and exceptions to its application may or may not be desirable. Section II describes the coverage of competition laws in a selected sample of countries. Section III focuses on the types of exemptions and exceptions that have been granted in different countries, and their underlying economic or other rationale(s). Section IV offers some conclusions and general policy recommendations.

I. The nature and scope of competition law policy

"Best practice" advice recommends that competition (antitrust or antimonopoly) law should be a *general law of general application;* that is, the law should apply to *all sectors* and to *all economic agents* in an economy engaged in the *commercial* production and supply of goods and services. In this regard, both private and public (i.e. State) owned and operated enterprises should be subject to the same treatment.

The interdependent nature of economic activity

There are fundamental legal and economic reasons for advancing the recommendation that competition law policy should be generally applicable. Entities engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality and non-discriminatory treatment under the law. Such an approach will result in greater predictability and consistency in the interpretation and application of the law, and promote more transparency, accountability and confidence in the legal and other institutions responsible for the implementation of the law. It would foster "due process" under the law.

The economic reasons relate to the interdependent nature of economic activities conducted in different markets, and the promotion of allocative efficiency. Conditions prevailing in one market can affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other. Exemptions from the application of competition law in one sector may perpetuate or induce distortions that can affect the efficiency of economic activity conducted in other sectors. Indeed, various industries and markets for goods and services tend to be "seamlessly" interconnected even when the linkages are not directly obvious because of the role that price and

profit signals play in the redeployment of resources across different lines of economic activity.

An important function of competition law policy is to prevent private restrictive business practices and public policies that may unnecessarily impede the redeployment of scarce resources from lower- to higher-valued uses. For example, a policy of insulating specific industries from competitive pressures may enable incumbent firms to restrict output, charge higher prices and earn greater profits, which in turn can result in several direct and indirect adverse economic effects. For consumers, there may be less choice, and transfer of income to producers in the form of higher prices paid. For industries that rely on the particular good or service as an input in their own production processes, the higher prices charged will likely lead to higher costs and undermine the relative competitive position of the firms in the markets they serve. These markets may not necessarily be solely domestic in nature. They could be markets for exports or markets in which the firms compete against imported products, and foreign-exchange earnings or savings may be forgone. The higher prices and profits that generally result from restricting competition may also take away resources, create shortages and/or redirect resources from the production of other goods and services. Even if the production and sale of a given product have no demand or substitution linkages with the production and sale of another product, there may be linkages through the common pool of resources (such as labour and capital) that firms in both industries may be reliant on. Distortions in one market may "ripple" through to other sectors of the economy. For example, insulating the domestic steel producer from competitive pressures may result in higher steel prices, which may in turn result in higher costs for the automobile and construction industries, and other industries that use steel as an input. Because of the artificially higher profits earned in the steel industry, the firms may be more willing to pay higher wage rates, and bid away labour from other industries,

creating labour shortages or resulting in higher costs of production for other goods and services. Moreover, steel companies that have the comfort of assured domestic markets for their products will have fewer incentives to be innovative unless there are other offsetting measures imposed upon them. Thus, it should be recognized that the granting of exemptions and/or policies insulating any given sector (or firms) from competition are likely to have other direct and indirect adverse effects on the economic system as a whole. Whether the costs of such exemptions and exceptions or policies are outweighed by the benefits needs to be carefully assessed.[4]

Interface between competition law policy and other government economic policies

Although the process of competition forces firms to become efficient, and offer a greater choice of products and services at lower prices, these may not be the sole reasons for Governments to enact competition legislation. Competition law policy in several countries is based on a

[4] The concept of the interdependent relationship between different sectors, firms and/or economic agents (basically referred to as "general equilibrium" analyses in standard microeconomic theory) dates back to the late 18th century writings of F. Quesnay (*Tableau économique et maximes générales du gouvernment économique*, Paris, 1758) and the subsequent writings of economists such as Walras, Pareto and Leontiev. In a general equilibrium framework, overall efficiency and the total economic welfare of society are maximized when conditions of "perfect competition" prevail in each and every area of economic activity conducted in the economy – a theoretical proposition which in the real world does not exist. Alternative theories of the "second best" have been put forward by economists R.G. Lipsey and K. Lancaster ("The General Theory of Second Best" *Review of Economic Studies* XXIV,1956-57), which recognize that distortions may prevail in some sectors of the economy. In economic policy-decision making, it is not easy to apply a general equilibrium framework in the matter of dealing with exemptions, and it is more practical to assess, on a case-by-case basis, the exemptions in such a way as to avoid unnecessary restrictions on the process of competition.

multiple set of values that are neither easily quantifiable nor reduced to a single economic objective. These values may reflect a society's wishes, culture, history, institutions and other factors that cannot be ignored nor should necessarily be ignored.

A survey of the objectives of competition policy over time and across several countries indicates that the nature and scope of competition law policy tends to vary. In some countries, such as Canada and New Zealand, the primary objective of the competition legislation is to maintain and encourage competition, with emphasis being placed on the promotion of economic efficiency. In other jurisdictions, such as the United Kingdom, emphasis is placed on "public interest" – a broader concept than that of competition alone. In the United States the enforcement of competition laws has increasingly focused on consumer welfare and economic efficiency. However, this has not always been the case. When the Sherman Act was enacted in 1890 (and for much of the 20th century), there was an explicit preference for "pluralism" in terms of diffusion of economic power. There was also a tendency towards protection of small business and local economies. In the European Union, priority is given to economic or market integration and prevention of dominance by large firms. In Germany, as in several other member States of the European Union, preserving or ensuring freedom of individual action and economic freedom is viewed as being important among the objectives of competition law policy.[5] In several developing countries, the spectrum of different objectives of competition law can be observed. For example, in Colombia, which is a small open economy, emphasis is placed on economic efficiency. In Indonesia and the Russian Federation, the law includes concerns regarding fairness, diffusion of economic power and safeguarding small and medium-sized enterprises.

[5] For further discussion of the objectives of competition law, see chapter I of the World Bank and OECD, "A Framework for the Design and Implementation of Competition Law and Policy" (1999).

In several former centrally planned economies of Central and Eastern Europe, the competition laws have objectives and approaches which emulate those of the European Union – in part because of the aspirations of these countries to become members of the European Union.

In addition to the differences in objectives and weights assigned to various economic and societal goals, competition laws also have an extensive interface with other government policies. The nature of this interface may be such that the aims of different government policies can be complementary, or in conflict with competition. In areas such as privatization, international trade, investment and regional development policies, there are often conflicts with the objectives of competition policy. In several countries, Governments have privatized State-owned enterprises with exclusive or monopoly rights so as to obtain a higher sale price and/or attract foreign investment. And import controls or investment restrictions are instituted in order to protect domestic firms, deterring new entrants and foreign investment.[6]

The differing goals of different government policies give rise to tensions regarding the priority assigned to competition law policy vis-à-vis the Government's other economic policies and objectives. This leads to questions regarding (i) the extent to which competition law policy

[6] Until the recent economic-financial crisis, the Republic of Korea for example, had various restrictions on foreign ownership. In non-strategic companies, foreign ownership had previously been restricted to a maximum of 10 per cent. This was changed to 33 1/3 per cent of stock without the approval of the company's board of directors, and subsequently this ceiling completely removed. Restrictions on foreign participation in State-owned enterprises have also been relaxed. As a result of these various policy changes, including increased application of its competition law, gross foreign direct investment on a disbursement basis increased in the Republic of Korea from nearly $3 billion in 1997 to $5 billion in 1998. Foreign direct investment commitments for 1999 reached nearly $15 billion. In the *decade* prior to the crisis, foreign investment in the Republic of Korea totalled at best $4 billion!

objectives should be accorded priority, and (ii) if exemptions and exceptions are deemed necessary, what is their underlying rationale, the parameters of the exemptions and exceptions, and whether the stated policy objectives can be attained by means that are less restrictive of competition.

II. Exemptions and exceptions under competition laws of selected jurisdictions

A survey of selected countries indicates that most competition laws either exempt specific sectors and/or types of economic activity, and/or have provisions for the granting of such exemptions in given situations. It is worth observing that there generally tend to be fewer exemptions in countries which have recently adopted competition laws (mainly developing and transition market economies) as compared with more industrialized nations. However, this could be reflective of the fact that in many of the less developed countries, effective implementation of competition law has yet to take place. And various businesses are likely to be still unaware of the potential impact that competition law can have on their economic activities, and lobbying for exclusions from the application of competition law may yet take place. Indeed, casual observation suggests that in more advanced industrial countries, exemptions granted from competition law have generally tended to evolve and expand over time because of specific issues and cases confronted in the application of the law, and the resulting lobbying by business. In addition to legal and economic reasons, various historical, cultural and political factors have played a role.

The review of different competition laws suggests that a wide range of exemptions and exceptions have been granted by various jurisdictions. The most common sectors where types of economic activities are exempted are labour, agriculture and transportation. There are also exclusions from competition law in sectors such as financial services, energy, telecommunications (including postal services) and media/publishing. These are discussed in greater detail below.

Industrialized country competition laws

Canada and United States were among the first nations to enact specific

competition legislation dealing with anti-competitive business practices (in 1889 and 1890 respectively). Over time, the scope of the competition laws in these two countries has been broadened significantly and special exemptions have been carved out in response to changing economic conditions and/or lobbying by special interest groups. For example, in Canada, as late as 1976, the competition law provisions did not apply to the services sector of the economy, or to Crown (State-owned) corporations. And until the competition law was amended, regulations governing the activities of commercial banks, airlines, professional bodies (such as lawyers, doctors and accountants) and infrastructure services (such as electricity and telephone) did not address competition concerns.

In the United States, a report by the Department of Justice published in 1977 identified 16 separate areas which were exempted from the antitrust laws, covering such diverse economic activities as agriculture, energy, transportation, banking and insurance, newspapers, learned professions and baseball. While the overall "patchwork" of exemptions was recognized as arising from "history and political chance", in many areas the report questioned their continued justification and credibility. In most cases the exemptions were found to have a "special interest flavour…and tend to be of direct concern only to the interests protected by it from competition that would otherwise exist".[7]

As the law stands in Canada, the provisions of the Competition Act have exemptions for:

- Collective bargaining, which permits employees to form unions or groups to negotiate wages, and other conditions of employment;
- Associations of fishermen to negotiate terms regarding buying

[7] See Report of the Task Group on Antitrust Immunities, United States Department of Justice, January 1977. Quotations are from pages 4–8.

and processing of fish; and travel agents to negotiate prices and commissions paid for domestic flights (to counter the monopoly or near-monopoly position of the domestic airline);
- Underwriting of insurance and securities;
- Amateur sport to form leagues, teams.

Provisions also exist for trade associations and business firms to exchange statistics, develop product standards, define terminology, engage in cooperative research and development (R&D), restrict advertising expenditures, adopt common weights and measures, packaging, etc.

In addition, with notification and prior clearance, firms are permitted to form export cartels with the objective of increasing exports, or enter into specialization and rationalization agreements in order to achieve economic efficiency.

In all the above areas, the exemptions apply only if they do not lead to violation of other provisions of the law. For example, if the trade association exchanges statistics that allow price fixing agreements amongst its members, it will be considered illegal use of the exemption and the firms will be subject to prosecution under the relevant provisions of the law.

Limited exemptions are also provided for professional sports, financial institutions' activities, and products covered by intellectual property laws (patents, copyrights and trademarks). However, as in the case of the above-mentioned examples, these exemptions cannot be used to violate specific provisions of the Competition Act. For example, financial institutions cannot get together and set the deposit/loan interest rates and other service charges to customers (except for transactions outside Canada); professional sports organizations cannot impose unreasonable terms and conditions or limit the opportunities of

individual players, but can form leagues and enter into franchise agreements that may be necessary in order to maintain a reasonable balance among teams, and participate in international agreements for that purpose. In a similar vein, the statutory monopoly position granted to products under the patent law may be withdrawn or amended if a firm engages in illegal business practices.

Economic activities permitted or covered by regulations/laws of other federal and provincial bodies (i.e. State actions) are also generally exempt from the application of competition law. Competition law does not take precedence over other government-enacted legislation. However, the exemption(s) are subject to interpretation as to whether the practices in question are or were intended to be specifically permitted. For example, if professional bodies such as lawyers and accountants are permitted to have self-regulation over their business affairs, the enabling law delegating this authority must make it clear that it permits setting of fees, restricting of entry and the like. If this is not the case, the competition law provisions apply, and there is no protection accorded to illegal business practices.

While there are different underlying reasons for each area, the basic thrust of these exemptions is to facilitate the legitimate exchange of information, reduce risk, counterbalance uneven bargaining or economic power, permit cooperation and foster innovation so that the markets can function better and more efficiently.

Canada's competition law also contains an "exception" for mergers and acquisitions (M&As) which may result in substantial lessening of competition but also have *offsetting* economic efficiencies that may benefit the economy as a whole. One of the principal objectives of Canada's competition law is to promote economic efficiency. In this connection a balancing or "trade-off" framework has been developed in

the legislation and elaborated upon further in the competition authority's Merger Enforcement Guidelines. Briefly, the approach adopted is described as a "total welfare approach", which takes into consideration both the consumer surplus (welfare) and the producer surplus, and balances them against the negative effects (such as reduced output, higher prices and resulting deadweight loss) arising from the M&A transaction. Under this approach, the argument is advanced that a "dollar in the hands" of producers should be treated the same as a dollar in the hands of consumers, and that to do otherwise one would be making interpersonal comparisons and subjective value judgements about what is fair and equitable. If the M&A results in higher prices for consumers, and higher profits for producers, this in and of its self is not bad so long as there are real efficiency gains. However, the transacting parties must demonstrate that the efficiencies cannot be realized by less anticompetitive alternative means such as a joint venture or specialization agreement. In addition to economic efficiencies, the competition authority may take into consideration whether the M&A will result in increased real value of exports.[8] It may be noted that Canadian merger policy is not without controversy and difficulties in applying this approach. There has to date been one case where the Competition Tribunal (the adjudicative body for competition cases) has permitted a merger on the grounds of the efficiency exception, but the decision is currently under judicial review.[9] It is in stark contrast with the approach adopted by the United States (discussed further below), which gives priority to "consumer surplus".

As previously indicated, in the United States there are extensive sets of

[8] See Canadian Competition Bureau, "Merger Enforcement Guidelines" (1992). The Canadian MEGs can be downloaded from the Competition Bureau's website: www.strategis.ic.gc.ca/.

[9] The Commissioner for Competition vs. Superior Propane. See the above-mentioned website and the Competition Tribunal website, www.ct-tc.gc.ca for further details.

exemptions. While the Sherman Act (1890), the Clayton Act (1914) and other legislation do not list them, specific areas for the exemptions have been defined by court and congressional actions. The areas cover agriculture, defence mobilization, energy, export trade associations, government enterprises, insurance, labour, learned professions, marine insurance, newspaper joint operations, resale price maintenance, small business concerns, sports, State actions, and transportation by air, ocean and surface. In addition, various measures, regulations and laws permit the formation of trade associations, exchange of statistics, development of product standards and cooperation in R&D (the latter under the National Research Cooperative Act, 1984). Exemptions are also provided for selected aspects of intellectual property rights dealing with products covered by patents, copyrights and trademarks.

A detailed discussion of all the exemptions provided under United States antitrust policy falls outside the scope of this paper.[10] However, the reasons for some of the exemptions that appear unique to the United States are discussed below.

Newspaper joint operating arrangements. Pluralism and diversity of views is a hallmark of a well-functioning democracy, and in the United States various laws and regulations have been instituted to prevent undue concentration in the media industry. Mergers and acquisitions between and amongst newspaper publishers and broadcast companies are scrutinized not only under the antitrust laws but also under laws and regulations dealing with television and radio. However, in 1970 the Newspaper Preservation Act was passed which exempted certain joint operations of newspapers in order to foster the survival of (generally smaller) newspapers in economic distress by permitting the combination of printing and other business operations while maintaining independent

[10] Moreover, this has already been covered by the Department of Justice's report, (see note 7).

editorial and reportage functions. The standards for allowing such combinations are less stringent than those under the "failing company defence", which are applied in merger and acquisition cases dealing with companies facing bankruptcy in other declining sectors of the economy. It should noted, however, that this exemption does not extend to pricing of newspapers, advertising rates, distribution and other such activities where antitrust law provisions would normally apply.

Professional (baseball) sports and broadcasting. As a result of a historic Supreme Court decision in the 1920s, it was ruled that professional baseball did not fall within the scope of the federal antitrust laws as it was not a "trade or commerce" and that the inter-state nature of ball games and movement of ball clubs/players was merely an incidental part of the sport. Other professional sports such as football and basketball are similarly exempted by this court interpretation. During the 1960s, the Sports Broadcasting Act granted antitrust immunity to certain joint agreements among professional football, baseball, basketball and hockey leagues concerning the selling of rights for the telecasting of their games. Critics have questioned these exemptions, for which no cogent economic arguments or evidence are presented. In recent years, the congressional authorities have raised the issue of removing these exemptions, especially during the strike by baseball players over salaries (which tend to be very high by any comparative standard), share of stadium gate and broadcasting revenues, and when local team games are "blacked out" from television.

Horizontal mergers and acquisitions. In addition, United States enforcement policies allow for a "defence" (exceptions) to be made for horizontal mergers and acquisitions, which while resulting in substantial lessening of competition have significant efficiency gains that cannot be realized otherwise through less anticompetitive means such as a joint venture. As previously mentioned, the consumer welfare or surplus standard is used in the United States to judge whether such M&A

transactions should be permitted.[11] United States enforcement policy and court cases in this regard have interpreted this exception very strictly. Generally speaking, the merger cannot result in lower output and the efficiency gains must be not only credible but also of such a magnitude that prices are not likely to increase. Moreover, the efficiency gains must be passed on to the consumer in the form of lower prices and/or improved quality and choices. To date, there has been no case where the efficiency defence in a M&A transaction has been accepted.[12]

The European Union under Article 81(3) of the Treaty of Rome can grant exemptions from certain agreements and practices if they have significant countervailing benefits, either on their individual merit or through the application of a "block exemption". A block exemption relates to certain categories of agreements and to agreements in specified sectors. Only the European Commission can issue exemptions, which must be notified for clearance (except in the case of those matters covered by block exemptions). If an agreement or practice is not notified and authorized, it is subject to investigation and prosecution under the competition provisions of the Treaty.

[11] See Federal Trade Commission and Antitrust Division, Department of Justice, "Horizontal Merger Enforcement Guidelines" (1997), which can be downloaded from the website www.usdoj.gov or the website www.ftc.gov/.

[12] The "efficiency defence" came into play in a recent case, FTC v. H.J. Heinz Co. et al (US Court of Appeals, District of Columbia, 2001), relating to the acquisition of another baby food manufacturing company, namely Beech-Nut. However, while the lower court refused the FTC's request for a preliminary injunction against the merger, and significant efficiencies arising from the merger were identified, the appeals court disallowed the merger on competition grounds. See www.ftc.gov/ftc/antitrust and www.11.georgetown.edu/Fed-Ct/dc/opinions for further information.

Individual exemptions. There are two positive and two negative conditions that must be met for an individual exemption to be granted.

The positive conditions require that the agreement:

- Contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- Allow consumers a fair share of the resulting benefits.

The negative conditions are that the agreement:

- Not impose restrictions on firms that are not indispensable to the attainment of the above-listed objectives; or
- Give rise to the possible elimination of competition in a substantial part of the market of the products in question.

Block exemptions. The European Commission has issued a series of block exemptions for certain types of business practices and economic sectors in order to reduce the number of notifications, and the regulatory burden imposed on both the Commission staff and business firms. The block exemptions that have been granted cover exclusive distribution and purchasing arrangements, R&D cooperatives, patent and know-how licensing, and specialization agreements.

In each of the exempt areas, clauses are listed that define what may be legally incorporated or prohibited in the agreements. For example, a joint-venture agreement between firms may contain a "non-competition clause" if it is "indispensable" to the success of the venture, otherwise it may be viewed as collusion to limit competition. Similarly, a block exemption may permit territorial restrictions of sales by firms for a period of time but not allow any other restrictions of competition.

The Commission has issued a number of exemptions covering transportation (road, inland waterways, air and marine), insurance, and

agricultural sectors, and also computer reservation systems and motor vehicle distribution and licensing. Export cartels are also exempted in so far as they do not restrict exports and/or competition in the common market.

In contrast to the Canadian and United States approach, where exemptions are based either on specific laws and legal provisions, and/or on court rulings, the European Commission approach to granting exemptions is through administrative actions. The exemptions can be time-bound and can be reviewed and amended by the Commission itself. The European Union does not have provisions for granting exceptions to M&As that may result in dominance on the grounds of economic efficiencies.

The United Kingdom's new Competition Act (1998) has provisions for granting exemptions on a similar basis as contained in Article 85(3) of the Treaty of Rome. The Director General of Fair Trading may also impose conditions on a parallel exemption or vary or cancel the parallel exemptions that may be granted by the European Commission. The exemptions are time-limited, and can have an effect earlier than the date on which they are granted. The provisions of the Competition Act apply to public bodies or undertakings in so far as they engage in commercial economic activities. Enterprises or sectors covered by specific legislation may not be subject to the provisions of the Competition Act if certain activities are explicitly permitted which may tend to restrict competition. However, the Director General may make representations or call for the review and amendment of such laws in the interest of promoting competition. In this connection, it is noteworthy that even though recently privatized and deregulated economic activities such as the provision of water, power and telecommunications services are subject to oversight by different regulatory bodies, the provisions of the Competition Act still apply. The United Kingdom's Competition Act

continues to exempt certain medicaments and books from the resale price maintenance (RPM) provisions. The law does not contain an exception for mergers on efficiency grounds. However, the Minister of Trade and Industry may override the decision of the competition authority if the M&A transaction is deemed to be in the public interest.

EU member countries such as *Belgium, Italy, Norway, Spain* and others also have time-bound exemptions which are granted if, for example, they improve supply conditions in the market which lead to substantial benefits to consumers, improved quality of products, technical and technological progress and international competitiveness. The exemptions must be proved to be strictly necessary and not eliminate competition in a substantial part of the market.

Australia's competition legislation (Trade Practices Act, 1974) provides the Australian Competition and Consumer Council (ACCC) with extensive powers for maintaining and promoting competition. Aside from the exemptions granted in areas similar to those in many other countries, such as international liner cargo shipping and collective bargaining agreements, the ACCC has extensive oversight responsibilities for competition matters in the provision of telecommunication and other infrastructure services, which, as noted above, do not always fall under competition laws of other jurisdictions. Recently, the application of the Trade Practices Act was extended to cover certain operations of the Government's postal services monopoly, which was previously exempted. The Act is otherwise generally binding on Crown (government) agents.

New Zealand's Commerce Act (1986) also exempts agreements relating to international shipping, wages and working conditions, joint purchasing and promotion, intellectual property rights, product standards, export cartels and the like. As in the case of Australia, the law applies to Crown (government) enterprises. Provisions also exist for

authorization of such specific exemptions as may be deemed necessary. In addition, the New Zealand law allows an exception to be made for M&As that may result in substantial lessening of competition but result in net benefits to the public. Net benefits have been interpreted to cover economic efficiencies and not social benefits.[13]

Japan's Antimonopoly Act applies to all industries. However, it has exemptions covering natural monopolies/infrastructure industries relating to "railways, electricity, gas or any other business constituting a monopoly by the inherent nature of the said business" (Article 21), and intellectual property rights and cooperatives for agricultural and consumer products that are governed by other laws or regulations. In addition, there are provisions for exempting cartels for exports, depressed industries, and small and medium-sized enterprises. Japan also exempts some pharmaceutical and cosmetic items from the prohibition of the RPM provisions. The exemptions require notification and authorization by Japan's Fair Trade Commission (JFTC) or the relevant authorities established under other laws. The cartels currently exempted from the Antimonopoly Act are being reviewed by the relevant ministries and agencies from the stand-point of abolishing them in principle, under Japan's regulatory reform programme. With respect to M&A transactions, Japan's competition law policy does not contain an efficiency exception. However, efficiency arguments are administratively taken into consideration in the determination of substantial lessening of competition and other horizontal agreements.[14]

Developing and transition market economies' laws

Since the 1990s more than 40 developing and transition market

[13] See OECD Round Table No. 4: "Efficiency Claims in Mergers and Other Horizontal Agreements", OECD/GD (96) 65 1996.
[14] Ibid.

economies have revised competition laws or adopted them for the first time. A synoptic overview of the nature and scope of the laws, and the exempt areas specified, in a selected sample of these countries is presented below.[15]

Algeria and Morocco. In both of these countries the competition laws apply to all spheres of economic activity in both the private and public sectors. In Algeria, the Competition Board may not take action against agreements that are not designed to hamper free competition and/or to constitute a violation of other provisions of the law. This would cover agreements relating to professional bodies, exchange of information, cooperatives, trade associations and the like. Morocco has a similar general approach in defining the scope of application of its legislation. However, natural monopolies established under other laws and regulations, including areas subject to price controls, are exempt. Also exempt are special situations requiring government interventions due to a natural or other crisis (domestic or international) for a period of up to six months. Such interventions must be justified and authorized by the Competition Council.

Bulgaria, Croatia, Czech Republic, Lithuania, Poland, Romania, Slovakia and Ukraine. These former centrally planned economies have, in varying degrees, similar approaches to competition policy, which in some cases explicitly reflect Articles 85 and 86 of the Treaty of Rome. For example, these clauses have been incorporated into the Croatian Competition Law. The laws apply to all enterprises with provisions for granting exemptions for specific types of activities or matters covered by other legislation. However, the Bulgarian law states that the Law on Protection of Competition is neither subordinated to, nor limited by,

[15] This material is drawn from different issues of a recurrent publication of the UNCTAD secretariat entitled "Handbook on Competition Legislation", which contains the texts of, and commentaries on, competition legislation provided by UNCTAD member States.

intergovernmental agreements. Hungary's competition law, which also extends to State enterprises and regulated industries, requires in the case of agricultural products the Minister of Agriculture to ensure that the economic advantages outweigh the disadvantages resulting from restrictive practices. Subject to market share thresholds, exemptions are also granted to temporary acquisitions of control or ownership by financial institutions, insurance companies, financial holdings, and investment companies or property-managing organizations. The Czech Republic, Lithuania, Poland, Romania, Slovakia and Ukraine tend to more generally exempt economic activities mandated by other laws and regulations.

Chile, Colombia and Venezuela. Chile's Antimonopoly Law (Decree-Law No. 211, 1973) applies to every kind of goods and services, without exception, regardless of whether the entities are large or small to medium-sized enterprises in the private or public sector. However, restrictions maintained and authorized by pre-existing laws on aspects of business in such areas as banking services, intellectual and industrial property, production and trade in saltpetre, iodine, copper, petroleum, transport, charting and coastal traffic continue to be respected. Colombia's competition law provisions (Decree No. 2153, 1992), similarly apply to all commercial economic activity, without prejudice to the powers assigned in current legislation to other authorities. In this respect, exemptions are provided to R&D cooperatives, public infrastructure services and the financial sector among others. In addition, Colombia's competition law allows for exceptions to be made for mergers and acquisitions that may have overriding efficiency and other public interest benefits. Venezuela's competition law also applies to all sectors and enterprises in the economy. As in other jurisdictions it contains provisions for authorizing exemptions but requires that they benefit consumers or users, and be least restrictive of competition. Under Venezuela's law, the President of the Republic and/or the

Ministerial Council can after hearing representations made by the Superintendent for the Defence of Free Competition, override or authorize a particular business practice.

The approach to exemptions in other developing countries such as Côte d'*Ivoire, Jamaica, South Africa, Turkey and Zambia* among others surveyed for this paper tends to be very similar. In essence, economic activities or arrangements permitted under other enabling laws and regulations are largely exempt, as are areas such as collective bargaining, agricultural marketing cooperatives, liner shipping, insurance and other financial sector activity, and export cartels.

III. The rationale for, and major types of, exemptions

The brief overview of the competition legislation of various countries in the preceding section suggests that there are more similarities than differences in the general approach to exemptions. While some economies such as the European Union describe the general conditions for granting exemptions, others tend to be more specific by listing particular sectors or activities, such as in Canada and the United States. Nonetheless, the economic activities that are generally granted or eligible for exemptions can be said to fall into at least four categories:

(i) Exemptions aimed at balancing unequal economic or bargaining power;
(ii) Exemptions aimed at addressing information, transaction costs and "collective action" problems;
(iii) Exemptions that reduce risk and uncertainty;
(iv) Special sector and interest group demands.

1. *Exemptions aimed at balancing unequal economic or bargaining power*

Collective Bargaining. Several jurisdictions exempt workers' collective bargaining activities to form unions or group together to negotiate wages and other employment conditions. Such an exemption is aimed at counterbalancing the superior economic power and bargaining position which most firms/employers have vis-à-vis individual workers, and preventing exploitation of labour. While the increased wage costs of collective bargaining activity will increase costs of production, firms will not necessarily be able to pass on these costs in the form of higher prices for the goods produced if there is effective competition prevailing in the market(s). Moreover, firms will tend to have incentives to adopt more efficient methods of production. Herein lie some tensions with the broader objectives of competition policy, if as a result of labour demands

the adoption of new machinery, technology and organizational methods is prevented or delayed. Economic efficiency, innovation and dynamic change may be impeded. Such tensions are likely to be more prevalent in developing and transition market countries where less capital-intensive techniques and production processes are used. The collective bargaining exemption can also be abused if trade unions engage in secondary boycotts such as preventing the purchase of inputs from or selling products to firms with different trade union membership, "feather-bedding" of jobs which require less time or fewer workers, and/or unreasonably preventing the necessary employment of workers and independent contractors. It may be noted in passing that in not all situations are workers and employers necessarily in conflict with each other. Various economic studies point to the fact that wage rates paid by entrenched monopolists tend to be high, and make it difficult for new entrants to hire workers on a competitive cost basis. Unions are aware of this and share in the monopoly profits of the incumbent firms. Competition authorities need to be cognizant of such risks and prevent the misuse of the collective bargaining exemptions.

Agriculture, dairy, fishing and forestry. Exemptions for these sectors have been generally introduced in various countries in order to help ensure that farmers, fishermen and forestry workers receive "fair" and "stable" prices for their products and labour. The seasonal nature of their activities, the cycles in production and harvesting, and the social objectives of ensuring viable farming, fishing and forestry communities are also among the reasons for the exemptions. In addition, with the advent of large processing firms in these sectors, the relative weak bargaining position of individuals engaged in these activities could be exploited. The formation and exemption of cooperatives and marketing boards were seen as possible corrective measures. The cooperatives can enable their members to bargain more effectively for higher prices for their products, and cooperate in such areas as processing, transportation,

storage, standards and marketing to exploit available synergies and efficiencies not likely to be attained on an individual basis. However, individual cooperatives should still be regarded as businesses, and subject to competition law provisions if they conspire with other cooperatives and non-members to restrain trade and/or monopolize the market. In recent years, questions have arisen regarding the economic efficiency and pricing of agricultural and dairy products' marketing boards and cooperatives. Individual farmers have little incentive to be competitive if prices paid are "guaranteed". Alternative approaches can be designed so that individual producers compete to sell their output within the cooperative or marketing board framework.

Small and medium-sized firms, and purchasing or buying groups. The increased concentration in several types of industries has given rise to firms' "monopsony" market power. This can be countered by permitting the formation of purchasing or buying groups, which generally consist of small and medium-sized firms. Under such arrangements, the members can have countervailing bargaining power and obtain lower prices. Through the consolidation of purchasing decisions, transaction costs of doing business as well as potential economies of scale and scope in purchasing by the buying firms, and in production by the seller, can be exploited. For these reasons, purchasing or buying groups do not contravene competition law provisions unless they are used as a vehicle to engage in collusion and other anticompetitive business practices in downstream markets.

2. *Exemptions aimed at addressing information, transaction costs and "collective action" problems*

Collection and exchange of statistics and credit information, and development and adoption of standards. Information is an important factor in facilitating efficient trade and exchange, and so is the

development, adoption and marketing of products of given standards of size, quality and other such attributes. Without information, there may be higher costs of doing business, mistakes and unnecessary risk and uncertainty. The lack of standardization can adversely affect interchangeability in the use of products, economies of scale and scope, and expanding market demand. There are few if any incentives for individual firms to engage in such activities, which serve the common good, because of high individual costs and "free-rider" problems. Exempting trade associations and firms engaged in collecting and disseminating relevant information, and promoting standards, with the proviso that this will not result in the violation of the other provisions of competition law, can thus serve to enhance economic efficiency and consumer welfare.

Intellectual property rights. The exemption accorded to intellectual property rights (IPRs) is one of the more complex areas of competition law and policy. Protecting and conferring statutory monopoly rights in respect of patented, trademark and copyright products is aimed at creating incentives not only for inventive activity but also for the early disclosure of inventions, and the diffusion of new ideas, products and production methods. Through such incentives, technological change and progress can be fostered and result in dynamic economic efficiencies. However, a careful balance has to be struck. Since exemptions in this area grant statutory monopoly rights to firms in respect of the IPR protected product(s) and exclude coverage of such matters as the prices that can be charged, the licensing of the product, geographical markets, and exclusive dealing, the firms can potentially abuse their dominant market position. In such cases, provisions need to be in place for withdrawing or limiting the exemptions. Many jurisdictions have published guidelines and legal provisions that delineate permissible and

prohibited practices under the competition law.[16]

Learned Professions. Exemptions for various professional occupations such as lawyers, physicians and accountants are granted on the grounds of ensuring qualified and ethical services. However, experience demonstrates that professional bodies frequently limit competition by erecting barriers to entry; for example, they set preferential standards and qualifications, prevent even informational advertising and fix fees. Given that most professional services are non-tradable and, in the case of medical services, entail non-discretionary expenditures, the consumer welfare consequences can be quite significant. Except for ensuring minimal qualifications and standards of services, exemptions for professional bodies are not justifiable on economic grounds.

3. *Exemptions that reduce risk and uncertainty*

Insurance, investment brokerage and banking services. The exemptions granted for underwriting insurance and securities, and other selected activities of financial institutions such as consortium lending, are granted so as to reduce risk and uncertainty. However, these exemptions do not extend to pricing of insurance or security brokerage services, or to setting of interest rates and service charges by banks. Although in many jurisdictions financial institutions are completely exempted from the purview of competition legislation on the grounds of "systemic stability" or the "specialized nature of the industry", there are no sound economic reasons for doing so. Given the central role played by financial intermediation, savings and investment in the economic development process, it is important to ensure a competitive financial services industry.

[16] See UNCTAD (1996), op. cit., and the UNCTAD secretariat report "Competition Policy and the Exercise of Intellectual Property Rights" (TD/B/COM.2/CLP/22) for further discussion of IPR exemptions.

R&D cooperatives. R&D activity can be highly uncertain and risky, and require large investments over extended periods of time. Moreover, such activity, essential for technological progress and economic development, may not take place if firms fear that antitrust actions may arise against cooperative R&D joint ventures. Exemptions for R&D activities are therefore, generally speaking, justifiable. Cooperation and competition between firms are not necessarily in conflict with each other. In industries such as pharmaceuticals and electronics, firms cooperate in R&D but compete vigorously against each other in the pricing and sale of their respective products. In most instances, the exemptions are time-limited and necessary only as long as the cooperative or joint venture activity is envisaged. As in other situations, the exemptions can be withdrawn and member firms prosecuted if the R&D cooperative has served the purpose of engaging in illegal activities in violation of the competition laws.

4. *Special sector and interest group demands*

In a number of jurisdictions, exemptions are granted for "special" sectors such as energy, liner shipping, air, trucking, professional sports, small business and government enterprises. In most of these cases there are no credible economic bases for exempting these sectors or types of economic activities from competitive pressures. This view also holds for many "natural monopolies", which while being regulated by separate bodies are insulated from the application of competition law principles. Developments in technology, organizational methods and applied economics suggest that alternative pro-competition approaches to these sectors are feasible. For example, privatization, deregulation, structural changes and the introduction of competition in several countries in the airline, power and telecommunication sectors have increased productivity, lowered prices and improved services. Arguments

advanced for exemptions by specific industry groups (as against generic types of business arrangements) should almost always be treated with suspicion.

IV. Conclusions and recommendations

This overview of exemptions granted to specific types of economic activities and sectors under the competition laws of various countries suggests that there are more similarities than differences between jurisdictions. In almost all of the economies reviewed, the competition laws apply to both public and private sector enterprises, and exempt areas that are covered by other government legislation and regulations. In many instances, exemptions can be authorized on a time-limited basis and/or can be amended or removed they result in violations of the substantive provisions of competition law. However, there are some notable differences as well. In some of the more established competition law regimes, especially the United States, there is a patchwork of exemptions that have evolved through court proceedings and legislative actions responding to special interest groups. In many cases, there is a recognized need to re-evaluate these exemptions.

Exemptions from the application of competition laws may be justified on various grounds, such as reducing risk and uncertainty, facilitating innovation, collection and dissemination of information, and counterbalancing unequal bargaining power. However, as Governments need to respond to such needs, it may be useful to adopt certain basic procedures and principles in the granting of exemptions. In this regard, it is suggested that:

(i) Exemptions should be granted on a limited-time basis with a "sunset" clause and provisions for periodic review.

(ii) The review of exemptions should include analysis of their impact on economic efficiency and consumer welfare, and in a cost-benefit framework identify the "winners" and "losers", and whether indeed there are overriding benefits that serve the consumer or broader economic interests.

(iii) The exemptions should be granted after public hearings with the participation of the interested and affected parties.

(iv) The exemptions should be as least restrictive of competition as possible. In many areas, particular exemptions and/or exceptions dealing with infrastructure industry such as power, telecommunications and transportation, alternative less anticompetitive approaches are feasible.

(v) Exemptions should be generic in nature, relating to types of economic activities or arrangements, and be less industry- or sector-specific.

With such principles, the number, nature and scope of the exemptions and exceptions will tend to be more limited, and the procedures more accountable and transparent. There will also tend to be greater policy and economic coherence.

Annex

Exemptions in selected competition laws

COUNTRY	Algeria	Brazil	Costa Rica	Côte d'Ivoire	Indonesia	Jamaica	Thailand
R&D Cooperation					X		
Standardization					X	X	
IPR use					X	X	
State enterprises			X		X		X
SMEs						X	
Trade unions						X	
Cooperatives					X		X
Efficiency	X	X		X			X
Competitiveness/ national economic interest		X		X			
Public interest						X	
Ministerial regulation					X	X	X
Other legislation				X			
International agreements					X	X	

Source: UNCTAD secretariat

The above table has been prepared by the UNCTAD secretariat under its own responsibility, and does not engage the responsibility of the author of this report. For the purpose of this table, no distinction has been made between exemptions and exceptions, and the term "exemption" is used to refer to both. The table identifies key exemptions in the competition

laws of selected developing countries, including exemptions relating to certain types of agreements (relating to R&D cooperation, standardization and intellectual property use) or persons (small and medium-sized enterprises, trade unions and cooperatives), as well as general exemption criteria (efficiency enhancement, competitiveness or preponderant interests of the national economy, public interest, ministerial decision, or acts to implement other legislation or international agreements). The table indicates the existence of an exemption only in general terms; to ascertain its precise scope and limits, it would be necessary to refer to the text of the relevant law. A specific transaction may be exempted on different grounds. In particular, it is important to note that the table identifies only exemptions explicitly granted by the competition laws of these countries; in many cases, even where a competition law does not explicitly grant an exemption, the economic analysis used in applying the law may lead to the grant of an exemption in an individual case. This may apply, for example, to the competition laws of Algeria, Brazil and Côte d'Ivoire, which provide – subject to certain conditions and in terms similar to those of the Treaty of Rome – for exemptions for agreements, practices or mergers which contribute to economic or technical progress. But the table does not purport to provide a complete list of the explicit exemptions in the competition laws of these countries; thus, for example, no mention is made of exemptions granted for agreements relating to exports, since, explicitly or implicitly, all of these laws apply only to practices affecting national markets. The laws which have been covered for the purposes of this table are the following:

- Algeria – Ordonnance no. 95-06 du 23 Chabâne 1415 correspondant au 25 janvier 1995 relative à la concurrence;
- Brazil – Federal Law No. 8884 of 1994 on the Competition Defence System;
- Costa Rica – Ley de Promoción de la Competencia y

Defensa Efectiva del Consumidor, Ley No. 7472 de 1995;

- Côte d'Ivoire – Loi no. 91-999 du 27 décembre 1991 relative à la concurrence;
- Indonesia – Law No. 5 Year 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition;
- Jamaica – The Fair Competition Act 1993;
- Thailand – Competition Act B.E. 2542 (1999).

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