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# The Objectives of the Competition Policy of the CARICOM Single Market and Economy and Their Importance to the Development of a Coherent and Comprehensive Body of Substantive CSME Competition Rules

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The Revised Treaty of Chaguramas (RTC), which entered into force on 1 January 2006 between 15 Caribbean States, aims at establishing the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME). A vital element of the RTC is the establishment of the CARICOM's competition policy and law as well as a system for enforcement of competition law at both Community and national levels. At the time of writing, CSME competition policy and law are at the nascent stage and therefore a discussion relating to the objectives of CSME competition law and policy is essential bearing in mind that their determination is vital to the framing of a coherent body of substantive competition law. This article first, identifies the possible objectives of CSME competition policy and law by examining the relevant provisions of the RTC and second, suggests their ranking with a view to achieving the wider political and economic goals set out by the RTC. The article posits that two objectives should be given priority in the enforcement of CSME competition law: first, the objective of creating and maintaining the CSME and second, the objective of protecting consumers.

## I. INTRODUCTION

The first comprehensive attempt of Caribbean States at regional integration took place in 1973 when four Caribbean States: Barbados, Jamaica, Guyana and Trinidad and Tobago signed the Treaty Establishing the Caribbean Community and Common Market (CARICOM) at Chaguaramas. Subsequently 11 more Caribbean States became Contracting Parties to that Treaty. The 1973 Treaty of Chaguaramas provided for the free movement of the factors of production and for the co-ordination of many policies. It was described by Professor Duke Pollard as 'little more than an optical illusion in terms of positive enforceable rights and legally binding obligations'.[1] Revision was necessary in order to deepen regional economic integration and to respond to the challenges of globalization. This need was acknowledged by the Heads of Government of the Member States of the CARICOM in 1989 at a Conference held in Grand Anse which decided to establish the CARICOM single market and economy. As a result, the 1973 Treaty of Chaguaramas was replaced by the Revised Treaty of Chaguaramas

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1 Pollard, 'Governance Structure of the Caribbean Community', 4. A paper presented at the inaugural seminar of the Caribbean Academy for Law and Court Administration held from 6 to 10 December 2010 in Trinidad and Tobago.

(RTC), which entered into force on 1 January 2006, establishing the Caribbean Community including the CARICOM Single Market and Economy.

One of the vital elements of the RTC is the inclusion, under its Chapter Eight, Part One, of competition policy and law as areas of competences of the CARICOM. Chapter Eight also provides for the establishment of a system for enforcement of competition law. This system comprises the CARICOM Competition Commission (CCC), which was inaugurated on 18 January 2008, the Caribbean Court of Justice (CCJ), which was established on 16 April 2005, and national competition authorities. At the time of writing the enforcement system is in the process of construction and no decision of the CCC or the CCJ has been delivered in competition matters.

Identification, and more importantly, the ranking of the objectives of CSME competition policy with a view to establishing which of them are the most important to the achievement of the general objectives of the CSME is essential to the framing of a coherent body of substantive competition rules. Indeed, Chapter Eight of the RTC and, in particular its Part One which concerns rules of competition, will be interpreted in the light of those objectives, which CSME competition policy will strive to achieve whilst not forgetting the wider political and economic goals set out by the RTC. Accordingly, on some occasions, conduct of enterprises[2] operating within the CSME will be regarded as lawful or unlawful depending upon which of the objectives of the CSME competition policy is being given priority. This point is well illustrated when one compares US antitrust law with EU competition law. For example, the priority given by the EU competition authorities (i.e. the European Commission, and European Court of Justice (ECJ)), to the objective of integrating the markets of the Member States and thus creating an internal market has resulted in some business conduct of firms being condemned under EU law whilst the same conduct is perfectly lawful under US antitrust law.

There is no doubt that Chapter Eight RTC will be interpreted in the light of the objectives of the CSME. This is supported by the statement made by the CCJ in *Trinidad Cement Limited (TCL), TCL Guyana Incorporated (TGI) v The State of the Co-operative Republic of Guyana*,[3] in which the CCJ recognized that the RTC is, in many instances, ambiguous, unclear and imprecise, and that this is to be expected bearing in mind that it constitutes a compromise of conflicting national interests and divergent perspectives. In the above case, the CCJ explained that in interpreting the RTC it intends to have recourse to Article 31 of the Vienna Convention on the Law of Treaties. That article states 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose'.

The CCJ has said that it does not intend to place undue reliance on a literal approach to the interpretation of the RTC and that it will give preference to the teleological method

[2] The concept of "enterprise" is defined in Article 1 RTC as meaning "any person or type of organisation, other than a non-profit organization, involved in the production of or the trade in goods, or the provision of services".

[3] [2009] CCJ 1 (OJ).

which focuses on object and purpose whilst paying attention to such factors as the intention of the Contracting Parties, the historical context, the subsequent conduct of the contracting parties, etc. Obviously, in the context of the RTC, the teleological approach is the most appropriate as it will infuse common sense and flexibility into the interpretation of a very complex treaty. Indeed, literal interpretation of the provisions of the RTC relating to competition law is inappropriate for many reasons.

First, the provisions of the RTC on competition law are written sparsely and contain general admonitions. Even when Article 177 RTC provides a non-exhaustive list of anti-competitive arrangements and abuses it requires the enforcement authority to specify the elements of those offences. This can only be done in the light of the objectives of CSME competition law.

Second, many words used in the RTC can have many meanings depending on the objectives that CSME competition law intends to attain. For example, 'promotion of competition', may be understood as referring to the maintenance of economic opportunities for small and medium sized undertakings, or as the promotion of consumer welfare in the economic sense, or as the imposition of a limitation on concentration of economic power, or as referring to the protection of competitors or as promoting economic freedom and ensuring fairness.

Third, in competition law proscribed conduct can rarely be discerned from a literal interpretation of the words used in the RTC. This is because their meaning is often deeply embedded in economic concepts such as those of 'a market' or 'consumer welfare'. Further such concepts can have various meanings depending upon which economic theory is used to interpret them. Therefore, not only does the meaning of the relevant economic concepts have to be defined but also the methods of applying them. This can only be done in the light of the objectives which the CSME seeks to attain.

The first part of this article focuses on the identification of the objectives of CSME competition policy. In the second part an attempt is made to suggest the ranking of those objectives at this time when competition law is in its nascent stage in the CSME. The legal implications for enterprises carrying out their economic activities within the CSME (or outside the CSME in a situation where such activities have detrimental effect on trade between the Member States of the CARICOM) of the suggested hierarchy of objectives on the interpretation and application of the substantive competition rules, contained in Chapter Eight of the RTC, are also assessed.

## II. OBJECTIVES OF CSME COMPETITION POLICY

Competition policy can be defined as comprising measures and instruments used by governments (or regional integration organisations such as the European Union (EU) or the CARICOM) to influence conditions of competition that exist in a market. This may include well-motivated articulation of competition issues in industrial policy, trade policy, investment policy, service policy and consumer policy as well as enactment of competition law. R Whish rightly points out that competition policy does not exist in a

vacuum but 'is an expression of the current values and aims of society and is susceptible to change as political thinking generally'.[4]

Competition law is a vital part of competition policy. Competition law has been defined by A Jones and B Sufrin as being 'concerned with ensuring that firms … operating in the free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally'.[5] More specifically competition law prohibits arrangements between firms which restrict competition, abuses of market power by dominant firms and the creation of anti-competitive mergers. In the light of the above definition of competition policy it is clear that competition policy has a broader scope than competition law in that competition policy encompasses all aspects of government action (or of the actions of a supranational organization such as the EU) that affect the conditions under which firms compete in a particular market and that competition law is a servant of competition policy. Business conduct which competition law allows or prohibits will very much depend on the objectives pursued by the relevant competition policy.

Examination of the RTC reveals that CSME competition policy may pursue many objectives. It is submitted that they can be divided into three categories: the overarching objectives set out in the Preamble to the RTC, the general objective expressly stated in Article 169(1) RTC, and the specific objectives laid down in Article 169(2) RTC.

## A. The overarching objectives

Preambles to legislative acts or international treaties, although non-binding, are usually an important source of inspiration for courts in the interpretation of the substantive provisions of such instruments. The Preamble to the RTC is no exception. It is good guidance for determining the intention of the Contracting Parties to the RTC. Indeed, it contains statements made by them elucidating the objectives of the RTC. Those statements, in fact, encapsulate the overarching objectives that the Contracting Parties seek to attain.

In recital 1 of the Preamble the Contracting Parties, recalling the declaration of Grand Anse and other decisions of the Conference of Heads of Government, agree on their commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States.

The objective of creating a unified market and economy is vital taking into account that the *reason d'être* of the CARICOM is to establish the CSME through which other general objectives stated in Article 6 RTC can be achieved. Therefore, it can be assumed that any policy, including competition policy, should be formulated in such a way as to

[4] Whish, *Competition Law*, 5th ed, London: LexisNexis, 2003, 17.

[5] Jones & Sufrin, *EU Competition Law*, 4th ed, Oxford: OUP, 2011, 1.

ensure the creation and maintenance of the CSME. The achievement of this objective is enhanced by recital 6 which states that optimal production by economic enterprises requires the removal of barriers to the free movement of capital, labour and technology in the CSME. The importance of creating a fully integrated market is further emphasized in recital 9 which states that such an integrated and liberalised internal market 'will create favourable conditions for sustained, market-led production of goods and services on an internationally competitive basis'. Accordingly, any business conduct which jeopardises the establishment and the proper functioning of the CSME should be regarded as anti-competitive.

Recital 5 of the Preamble may be relevant to the identification of the objectives of the CSME competition policy as it states that the Contracting States are conscious of the need to promote in the Community the highest level of efficiency in the production of goods and services especially with a view to maximising foreign exchange earnings on the basis of international competitiveness, attaining food security, achieving structural diversification and improving the standard of living of their peoples.

It is submitted that recital 5 suggests that efficiency in the economic sense should be one of the main objectives of CSME competition policy. Recital 12 of the Preamble recognizes 'the potential of micro, small and medium enterprise development to contribute to the expansion and viability of national economies of the Community and the importance of large enterprises for achieving economies of scale in the production process'. The interpretation of recital 12 is not easy. Does it mean that CSME competition policy should protect small and medium sized enterprises from competitive pressures? However, recognition of the importance of large enterprises makes any assumption that small and medium sized enterprises should be shielded from competition for their own sake rather doubtful. Perhaps, recital 12 implies that small and medium sized enterprises should only be protected when they are as efficient as large enterprises, i.e. in a situation where large enterprises are not competing on merits but are using anti-competitive business conduct to eliminate smaller rivals or erect barriers to entry to the relevant market.

Recital 21 states that the contracting parties are conscious that 'disadvantaged countries, regions and sectors will require a transitional period to facilitate adjustment to competition in the CSME'. It is submitted that the impact of this recital on CSME competition policy is that special exemption from the application of CSME competition law will be granted to disadvantaged countries, regions and sectors. This is confirmed in Article 183 RTC which imposes an obligation on the Council for Trade and Economic Development (COTED), a body of the CARICOM, to develop and establish rules on competition within the CARICOM, including special rules for particular sectors, and gives COTED the power to exempt any sector, or any enterprise or group of enterprises from the application of CSME competition law if public interest so requires.

Recital 23 is restated in Article 169(1) RTC which sets out the main objectives of CSME competition policy (see below).

Recital 24 states that the Contracting parties are convinced that 'the application and convergence of national competition policies and the cooperation of competition authorities in the Community will promote the objectives of the CSME'. Recital 24, therefore implies that national competition policies are expected to follow CSME competition policy or, at least, not hinder the achievements of the objectives of CSME competition policy.[6]

## B. The general objective of CSME competition policy set out in Article 169(1) RTC.

The goal of CSME competition policy is set out in Article 169 (1) RTC which states that: 'The goal of the Community Competition policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct'

If looked at superficially it would seem that the CSME competition policy has only one objective, i.e. that of ensuring that benefits expected from the creation of the CSME are not endangered by anti-competitive business conduct. The issue that arises in this context is how to identify the expected benefits. In doing this the relevant recitals of the Preamble to the RTC, in particular recital 1 which refers to the objective of achieving an integrated market and economy within the CARICOM States, and Article 6 RTC which sets out the general objectives of the Community, may be of assistance. One can argue that the 'general objectives' are to be understood as the benefits mentioned in Article 169(1) RTC. If this reasoning is accepted then it can be submitted that for the purposes of competition policy the following objectives set out in Article 6 RTC are of relevance:

(a) improved standards of living and work;

(b) full employment of labour and other factors of production;

(c) accelerated, co-ordinated and sustained economic development and convergence;

(d) expansion of trade and economic relations with third States;

(e) enhanced levels of international competitiveness;

(f) organization for increased production and productivity;

(g) the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description.

The above quoted objectives suggest that CSME competition policy will be used to serve social, employment, industrial and trade policies. If this occurs it will, however, be detrimental to the coherence of competition policy and difficult, if not impossible, to implement in practice given that the various objectives of the CSME are likely to

[6] This is expanded upon in Article 170 RTC on Implementation of Community Competition Policy.

conflict with each other. For example, a merger[7] may lead to the loss of employment and thus be contrary to Article 6(b) RTC but, at the same time, may enhance the level of international competitiveness of the new enterprise and contribute to the expansion of trade and economic relations with third States in accord with Article 6(e) and (f) RTC.

It is submitted that the relationship between competition policy objectives and other objectives mentioned in Article 6 RTC should be that of mutual support. Each should contribute to the development of the other and there should be no conflict between them. For example no sound industrial or trade policy can be achieved without the support of a competition policy. However, in some areas, where a conflict is likely to arise, e.g. employment policy, the best approach would be to exclude the latter from the scope of application of competition law. This approach is evident in Article 168 RTC which states that rules of competition do not apply to, inter alia, arrangements for collective bargaining on behalf of employers or employees for the purpose of fixing terms and conditions of employment. Further, the definition of an 'enterprise' contained in the RTC makes clear that non-profit making entities are not enterprises and are therefore excluded from the scope of CSME competition law. Indeed, the objectives of the excluded areas are best advanced by using policies other than competition policy (See Part III, A).

### C. The specific objectives of CSME competition policy as laid down in Article 169(2) RTC

Whilst the RTC sets out multiple objectives within its competition policy, Article 169(2) RTC focuses on the specific objectives which are normally pursued by competition law in a free market economy. Paragraph 2 of Article 169 RTC states that in order to achieve the general goal of the Community competition policy set out in Article 169(1) RTC the Community shall pursue the following objectives:

(a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;

(b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and

(c) the promotion of consumer welfare and protection of consumer interest.

Each of the above mentioned objectives is examined below.

[7] The RTC contains no provisions on merger control. However, following a meeting of representatives from the CARICOM Member States held on 24 October 2010 in Barbados, an agreement was reached that merger review provisions should be enacted at both the Community level and at national levels. See 'Merger Review to be Implemented in the CSME', (2011) 15 Competition Matters, Jamaican Fair Trading Commission, 4.

1. The promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce.

Article 169(2)(a) RTC sets out two objectives. One is to promote and maintain competition and the other is the enhancement of economic efficiency in production, trade and commerce. Each is of them is commented upon separately below.

a. The objective of promotion and maintenance of competition

The words 'promote' and 'maintain' taken together mean that one of the objectives of competition law will be to ensure that competition is maintained and encouraged within the CSME, i.e. that CSME competition law has as its objective the protection of competition. It is important to note that the objective of protecting competition is common to all systems of competition law but its meaning differs depending upon the objectives that the particular competition law aims to achieve. Therefore, in order to avoid confusion the meaning of the words 'the promotion and maintenance of competition' under the RTC needs to be clearly established.

In the EU until the reform of EU competition law,[8] commenced in 1999, the objective of protecting competition was understood as 'the protection of individual economic freedom of action as a value in itself, or vice versa, the restraint of undue economic power'.[9]

This approach was inspired by the ordoliberal school of thought which was born in Germany in the1930s and further developed by scholars associated with the University of Freiburg during the Nazi regime in Germany.[10]

The ordoliberal influence on the interpretation of EU competition law, mainly on Article 101of the Treaty on the Functioning of the European Union (TFEU) (which prohibits anti-competitive agreements, decisions and concerted practices) and on Article 102 TFEU (which prohibits abuses by dominant firms) was that these Articles were not interpreted in the light of the objective of achieving economic efficiency, but as requiring that private power must be limited and controlled by the EU enforcement authorities in the interest of creating free and fair political and social order.[11] The result of this, as A Jones and B Sufrin emphasised, was that 'EU law has often been

[8] On this topic see: Gerber, 'Fifty Years of European Community: Two Forms of Modernization in European Competition Law', (2008) 31 *Fordham Int'l L.J*, 1235.

[9] Möschel, 'Competition Policy from an Ordo Point of View', in Peacock and Willgerodt (eds) *German Neo-Liberalism and the Social Market Economy*, London, Macmillan, 1989, 149.

[10] Ordoliberalism was a political and economic philosophy which served as the base for the post World War II recovery of Germany and the era of a Wirtschaftswunder or 'wonder economy' in Germany. Although Ordoliberalism defended capitalism it assigned a crucial role to the state which was expected to create an appropriate legal environment for the economy and to maintain a healthy level of competition by taking active measures to foster competition. In particular, the state was to ensure that monopolies and oligopolies would not acquire power which would not only negate the advantages offered by the market economy but also undermine good government given that strong economic power could be transformed into political power. See: O'Donoghue and Padilla, *The Law and Economics of Article 82*, Oxford, OUP, 2006, 9.

[11] Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Promotheus*, Oxford, Clarendon Press, 1998, 244-51.

interpreted and applied to protect competitors themselves rather than the competitive process, to favour small and medium-sized enterprises, to keep markets open and to achieve "fairness"'.[12]

b. The objective of enhancement of efficiency in production, trade and commerce.

The reason why competition must be promoted and maintained is that competition is good for firms and is good for consumers. So far as competitors are concerned, when they compete with each other, instead of colluding, they are encouraged to innovate given that the market rewards those who introduce new and better products and are under pressure to achieve the lowest level of costs and prices in order to meet consumer needs more efficiently than their rivals. For consumers competition is good because it preserves consumer choice and allows the purchase of products at the lowest price.

According to economists the process of competition creates three efficiencies in the market, i.e.

- Productive efficiency. This occurs when the economy is utilizing all of its resources efficiently by producing maximum output from minimum input, i.e. goods and services are produced at the lowest cost possible and, as output would decrease, price would be restored to the competitive level.
- Allocative efficiency. This occurs when there is an optimal distribution of goods and services, i.e. when goods are produced in the quantities desired by consumers.
- Dynamic efficiency. This is concerned with how well a market delivers innovation and technological progress. A firm is dynamically efficient if it can respond quickly to changing economic circumstances. Dynamic efficiency leads to lower costs, or new products or improved products.

On a market in which the three efficiencies are maximized there is no need for competition rules because the market is perfectly competitive and cannot be improved by the application of competition rules.[13] It achieves economic efficiency in that it maximises the aggregate consumer and producer's welfare.

Monopolies and oligopolies are regarded as neither productively efficient because they can reduce the output to make greater profit nor allocatively efficient as they are less sensitive to consumer's demand than monopolistically competitive firms. However, many economists argue that such firms are dynamically efficient as they are the only ones that can allocate the supra-normal profits they gain, to research and development and thus in the long-run bring innovation that benefits consumers.[14] A counter-argument is that monopolies have no incentive to innovate. As to monopsonies, they are productively inefficient, because they cause production to fall below the competitive

[12] See n 5 above, 44.

[13] Pindyck & Rubinfeld, *Microeconomics*, 7th ed, London, Person Prentice Hall, 2009, 271-274.

[14] Schumpeter, *Capitalism, Socialism and Democracy,* 3rd ed, New York, Harper, 1962.

level. In both a monopoly and a monopsony there is a dead-weight loss of consumer and producer surplus.

In the Caribbean context, economic conditions deriving from the small size of economies of Caribbean islands, and historical circumstances which are responsible for unequal distribution of wealth result in markets in the CSME being dominated by monopolies and oligopolies. On the one hand, small economies are constrained by lack of economies of scale in production, export, distribution and infrastructure. For that reason dominance may be inevitable and more efficient than fragmentation of the relevant market which may result in waste of resources and loss of international competitiveness. On the other hand, business profitability should be an important factor in the enforcement of competition law in the CSME because of the limited availability of investment capital. Indeed, in the Caribbean, profits are both a source of, and an incentive for, investment given high interest rates on loans, poorly developed capital markets, and limited public resources to provide investment subsidies or even tax credits. For many economists, for example, J. Brodley, dynamic efficiency "provides the single most important factor in the growth of real output in the industrial world".[15] He posits that dynamic efficiency is far more important than static efficiency, i.e. allocative and productive efficiency. Singh argues that in small economies dynamic efficiency, rather than static efficiency should be given priority[16] whilst Dhanjee considers that:

> 'there is little empirical evidence that, in developed countries, large firm size or higher concentration are generally associated with innovation activity – but it is not clear whether this would necessarily be the case in developing countries which, in any event import a higher proportion of the technology they use than do the larger developed countries'.[17]

He suggests that in the Caribbean context, the giving of priority to dynamic efficiency over static efficiency should depend on the type of innovation, and whether the matter is one of its creation, introduction into a country, or diffusion.

In the light of the above, Article 169(2)(a) RTC poses a great challenge to the enforcement of CSME competition law. It requires the determination of which of the three efficiencies should be given priority in seeking the attainment of the objectives of the CSME given that the attainment of all three efficiencies is almost impossible. Making the determination involves the assessment of both the trade-off between allocative and productive efficiency and the trade-off between static efficiency and dynamic efficiency. For a decision to be made on the matter of which efficiency is more

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[15] J Brodley, 'Proof of Efficiencies in Mergers and Joint Ventures', *Antitrust Law Journal*, 64 (1966): 581. Criticism by Prof J Brodley of the enforcement of US antitrust law in the 1980s has been acknowledged and incorporated into a new approach to different types of efficiencies and their respective contributions to wealth creation and resource distribution by the US FTC.

[16] Singh, Multilateral Competition Policy and Economic Development – A Developing Country Perspective on the New European Community Proposals, UNCTAD /DITC/CLP/2003/10.

[17] Dhanjee, The Tailoring of Competition Policy to Caribbean Circumstances: Some Suggestions, (2004) Caribbean Dialogue, 40

crucial to the achievement of the objectives of competition law it is necessary to decide whose welfare competition law wants to maximise, that of society as a whole or that of consumers (see below).

2. The prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market.

The objective of prohibiting anti-competitive business conduct is impossible to achieve without first identifying what business conduct should be regarded as such. This can only be done in the light of the objectives which CSME competition law intends to attain.

3. The objectives of the promotion of consumer welfare and protection of consumer interest.

Article 169(2)(c) RTC sets out the two objectives mentioned in this subheading. Each is examined below.

a. The promotion of consumer welfare.

It is important to clarify the meaning of 'consumer welfare' in particular in the light of its usage by the economists from the Chicago School. Professor Bork, one of that School's most eminent representatives defined the meaning of 'consumer welfare' as follows: consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare is, in this sense, merely another term for the wealth of the nation.[18]

Professor Bork's usage of the expression 'consumer welfare' differs from that used in traditional economics in which consumer welfare means consumer surplus i.e. the difference between the amount that a consumer is willing to pay for a product or service relative to its market price. A consumer surplus occurs when the consumer is willing to pay more for a given product than the current market price. The concept of consumer welfare is a means of measuring the aggregate benefit that consumers obtain from buying a product or service in a market.

Bork's interpretation of 'consumer welfare' in traditional economics means 'total welfare' or 'social welfare' both of which refer to the aggregate of consumer surplus and producer surplus.[19] Any increase (decrease) in total surplus is reflected in an increase (decrease) in social welfare (also referred to as the total welfare standard).

Economists are divided as to which standard, the total welfare standard or the consumer welfare standard, should be applied in the enforcement of competition law. Some, in particular those associated with the Chicago School, prefer the total welfare

[18] Bork, *The Antitrust Paradox, A Policy at War with Itself*,, NY, Basic Books, 1978, 107-08.

[19] Producer surplus refers to producer's gross profit on the product, see Motta, *Competition Policy Theory and Practice*, Cambridge, Cambridge University Press, 2004, 18.

standard, others, such as J Brodley, are in favour of the consumer welfare standard. According to Brodley:

> 'if consumer welfare is to serve as an operational principle of antitrust law, it must refer to the direct and explicit economic benefit received by the consumers of a particular product as measured by its price and quality. Using the more precise language of economics, consumer welfare can be defined as consumer surplus.[20]

The above definition of consumer welfare entails that any conduct which reduces consumer welfare should be condemned as anti-competitive.

Some economists argue that it does not matter which standard is applied because the distinction between the two standards is blurred given that many businesses are owned by shareholders, many of which are pension funds. As a result, the maximisation of total welfare equates to the maximisation of consumer welfare.

Notwithstanding the above, in economics the distinction between the total welfare standard and the consumer welfare standard is important because the choice of welfare standard affects the entire assessment of efficiencies. The matter to be considered when the choice is being made is whose welfare the competition law wants to maximize, i.e. that of consumers or that of society as a whole.

If the consumer welfare standard is applied competition law is concerned with the transfer of surplus from producers to consumers. Therefore, any business conduct which prevents wealth transfer is anticompetitive. An example of this occurs where a monopoly charges consumers monopoly prices instead of competitive prices. The consumers suffer loss in the form of a wealth transfer to the monopolist. When the consumer welfare standard is applied competition law prohibits business conduct which allows producers to capture consumer surplus.

The total welfare standard is only concerned with loss of efficiency and takes no account of the redistributory effects of efficiency gains, i.e. it is not concerned as to whether wealth is shifted to consumers or to producers so long as society as a whole benefits. Therefore, competition policy based on the total welfare standard will focus on efficiencies and does not require the transfer of efficiency benefits directly to consumers. For example, a merger between two competitors may increase efficiency in that it may reduce the cost of production and thus increase the total welfare but, at the same time it may create a monopoly and thus decrease consumer welfare in that consumers will have to pay higher prices for the product in question. Such a merger will be allowed under the total welfare standard but not under the consumer welfare standard. A further matter is that the consumer welfare standard has no concern for competitors, unless the business conduct of an offending firm also harms consumers. This is not the case when the total welfare standard is applied bearing in mind that the

[20] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress', (1987) 62 *NY University Law Review* 1020, at 1033.

aggregate welfare is the surplus of all producers, including competitors, and all consumers.[21]

The RTC does not define the concept of consumer welfare. Therefore, it is uncertain whether it refers to the total welfare standard or the consumer welfare standard as defined in traditional economics. Further, it does not specify the method for applying those standards.

b. The protection of consumer interest.

Article 168 RTC states that one of the objectives of CSME competition law is the protection of consumer interest. Consumers and their interests are normally protected by consumer protection laws the main objective of which is to ensure the ability of consumers to choose freely and effectively among the options available to them in terms of suppliers or brands available to purchase by shielding them from unfair, deceptive and fraudulent practices by businesses such as misleading advertising, double-ticketing, etc.

Both competition law and consumer protection law have the common goal of providing consumers with access to a wide range of competitively priced goods and services in the market place. Convergence of the objectives of competition law and consumer protection laws has, in some jurisdictions, resulted in entrusting enforcement of both to one and the same body, e.g. in the US the Federal Trade Commission, and in Barbados, the Barbados Fair Trading Commission. However, although competition law and consumer protection law share the same goal, the approaches to achieving that goal differ. Competition law focuses on the promotion of consumer welfare in the economic sense, whilst consumer protection law ensures that consumers have the necessary information to make informed choices. Obviously, consumers are the beneficiaries when consumer welfare is maximized.

The protection of consumers' interests in a way compatible with, or even superior to the existing approaches, is examined in Part III B below.

## III. THE PRIORITISATION OF OBJECTIVES OF CSME COMPETITION LAW

The rules on competition contained in the RTC are general and imprecise. The same can be said of US Anti-trust provisions and the main articles of the TFEU on competition. The US Supreme Court has described the language of the US anti-trust law as having 'a generality and adaptability comparable to that found … in constitutional provisions'.[22] This is one of the reasons why the US anti-trust provisions have remained unchanged for many years. The same can be said about the provisions on competition law set out by the EU. They have remained exactly the same for more than 50 years, i.e. since the entry into force of the treaty of Rome establishing the

[21] Obviously, when the harm to competitors is offset by the gain to the offending firm, then producer surplus will not be diminished.

[22] *Appalachian Coals, Inc v US*, 288 U.S. 344, 359-60 (1933)

European Economic Community. This is despite the fact that the Treaty of Rome has been amended many times, most recently by the Treaty of Lisbon which entered into force on 1 December 2009. The fact that no changes to treaties or statutes have been necessary can be explained by the fact that it is the interpretation of those provisions that is vital for the development of a coherent body of substantive competition rules. Indeed, in the EU and in the US the interpretation of competition law provisions has, with time, evolved in such a way as to reflect the changing objectives that the US government or the EU have sought to attain. This shows that it is imperative for CSME competition law to clearly assert what objective or objectives it wishes to pursue. This is vital for businesses which need to know with certainty what business conduct will be regarded as anti-competitive so that they can adjust their business strategies accordingly. Further, as Professor Bork stated: 'only when the issue of goals has been settled it is possible to frame a coherent body of substantive rules'.[23]

It can be seen from Part II of this article that many objectives, economic and non-economic, are mentioned in the RTC, including its Preamble. However, no competition law can pursue multiple objectives at the same time because various objectives of competition law conflict with each other and further this would lead to inconsistent application of competition law. Therefore, the prioritization of objectives of competition law is necessary. In the context of Caribbean integration, it is submitted that CSME competition policy should pursue two objectives, first, the objective of creating and maintaining the CARICOM Single Market and Economy and second, the objective of protecting consumers.

### A. The creation and maintenance of the CSME

The main objective set out in the RTC is the creation and maintenance of the CARICOM Single Market and Economy. The issue of whether CSME competition policy should be only about economics or whether it should support the objective of maintaining the CSME is debatable. At a national level, many States have decided that their national competition laws should focus on economic objectives and those broader policy objectives, such as industrial policy, regional development, the protection of the environment, and other public interests objectives, should be promoted through other instruments and laws. In this respect a survey conducted in 2003 by the Organisation for Economic Co-operation and Development (OECD) on the objectives of competition law and policy showed that when a country reaches a certain level of development it renounces the use of competition laws to promote broader policy objectives including public interest objectives. The survey emphasized two reasons for the increasing exclusion of non-economic objectives from the objectives of competition law, first, that broadly specified policy objectives can be ambiguous and as such used by strong private groups such as producers or workers to serve their own interests. Second, it has been recognized that non-competition policy mechanisms are

[23] See n 18 above, 50.

more appropriate than competition law to achieve non-competition policy objectives.[24] In particular:

> 'restricting competition in an attempt to achieve broader policy objectives will have inevitable anti-competitive side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be ineffective and socially wasteful'.[25]

It is submitted that CSME competition policy differs from national competition policies in that the CARICOM is not a State and therefore the objectives of its competition policy have direct relevance to the achievement of the goals for which it was established. The example of the European Union is instructive. EU competition law has been critical to the development and success of the internal market of the EU. The effectiveness of the prohibition of obstacles to the free movement of goods, people, labour and capital addressed to the Member States would have been devoid of any practical effect if firms were allowed to create private barriers to trade between Member States. The ECJ in *Établissements Consten Sarl and Grundig-Verkaufs-GmbH v Commission*[26] held that:

> 'an agreement …which might tend to restore the national division in trade between member states might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers'.[27]

Since the judgment of the ECJ in the above case it has been accepted that the fundamental objective of EU competition law is to ensure that business conduct does not partition the EU along national borders. On many occasions the ECJ and the European Commission have emphasised that the creation and maintenance of the internal market is the most important objective of EU competition law.[28] Although, with the reform of EU competition law new objectives have been set, i.e. the promotion of economic efficiency and consumer welfare,[29] this does not mean that market integration is no longer relevant. The objective of market integration has not been abandoned. The 2000 Commission Guidelines on Vertical Restraints provide that

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[24] OECD Global Forum on Competition, The Objectives of Competition Law and Policy, Note by the Secretariat, 29-Jan-2003, CCNM/GF/COMP(2003)3, 4.

[25] CCNM/GF/COM/WD(2003)17, at Para.1.2.

[26] Joined Cases 56 & 58/64, [1966] ECR 299.

[27] Ibid, paras 56 and 58-64.

[28] For example, see the IX Commission Annual Report on Competition Policy which stated that the first objective of competition law is to maintain open and unified the internal market, The European Commission, Brussels, 1979.

[29] See The White Paper on Modernisation of Rules Implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1.

> 'the protection of competition is the primary objective of EC competition law, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market. Market integration is an additional goal of EC competition law. Market integration enhances competition'.[30]

Further, the 2009 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty [Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings[31] provides that the Commission may intervene with regard to 'certain behaviour that undermines the efforts to achieve an integrated internal market'.

It can be said that nowadays in the EU the objective of market integration runs in parallel with the objective of the promotion of consumer welfare and efficient allocation of resources. When these two objectives clash it seems that, despite the Commission's policy statements which appear to assign a secondary role to the objective of market integration, the ECJ will support the objective of market integration rather than the objective of the enhancement of efficiency and consumer welfare. This conclusion is drawn from a recent judgments of the ECJ in *GlaxoSmithKline Services Unlimited v Commission,*[32] concerning the so called dual pricing schemes under which an undertaking operating on the pharmaceutical market had intended to charge different prices for pharmaceutical products depending on the destination of their supplies thereby reducing the scope for arbitrage (i.e. preventing parallel trade) and leading to the partition of the internal market.

In the above case, the ECJ decided that the General Court in *Glaxo-SmithKline Services Unlimited v Commission*[33] made an error in law when it ruled that the agreement at issue, which clearly intended to limit parallel trade in pharmaceutical products or to partition the internal market, could be regarded as restricting competition by 'object' in so far as it may be presumed to deprive final consumers of the advantages of effective competition in term of supply and price. This meant that the General Court required the Commission to establish that the restriction had to be to the detriment of final consumers in order to be regarded as restricting competition by 'object'. The ECJ held that there was no need to look at the effect of the agreement on consumers, i.e. there was no need for the Commission to carry out extensive effect analysis in respect of dual price arrangements in a situation where it could be inferred from the context and the circumstances of the agreement that its object was to partition the internal market. In this respect the ECJ held:

> 'The Court has, moreover, held in that regard, in relation to the application of Article 81 EC [Article 101 TFEU] and in a case involving the pharmaceuticals sector, that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to

[30] [2000] OJ C291/1, para. 7.

[31] [2009] OJ C45/2, para. 7.

[32] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, [2009] ECR I-9291

[33] Case T-168/01, [2006] ECR II-2969.

> frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty'.[34]

In the light of the EU's experience relating to the interpretation and application of the integrated market objective, it is submitted that the following practical consequences of the priority given to that objective will be likely to occur if it is adopted by the CARICOM countries.

First, under Article 177 RTC, which is similar in substance to Article 101 TFEU, not only anti-competitive horizontal agreements, but also vertical agreements, will be of concern to the enforcement of CSME competition law as they may result in the partition of the Community along national borders. It is important to note that Article 177 RTC does not expressly state that it applies to both horizontal and vertical agreements. In support of its application to vertical agreements it can be said that the various prohibitions refer to 'agreements between enterprises' and not 'agreements between *competing* enterprises'.

Second, if the integrated market objective is adopted by the CARICOM States any business conduct aimed at partitioning national markets according to national borders will constitute an infringement of CSME competition law (although such conduct may be justified under Article 177 (4) RTC). Further, if the EU's approach to the distinction between an 'infringement by object' and an 'infringement by effect' is accepted by the CSME competition authorities then any conduct which is contrary to the integrated market objective will be regarded as anti-competitive by its object and thus amount to a per se infringement of competition law. The similarity between Article 177(1) RTC and Article 101(1) TFEU which both expressly state that any anti-competitive conduct which has as its 'object or effect' the restriction of competition is prohibited, suggests that CSME competition law is likely to recognise the distinction between the 'object' and 'effect' of anti-competitive conduct.

Under EU competition law a distinction is made between the 'object' and the 'effect' of anti-competitive conduct. In *Société Technique Minière v Maschinenbau Ulm GmbH*,[35] the ECJ stated that the terms 'object' and 'effect' are to be read disjunctively. As a result, when the European Commission establishes that an agreement, decision or concerted practice has as its object the restriction of competition it is not required to assess whether that agreement, decision or concerted practice has restrictive effects on competition. The restriction of competition by object creates a rebuttable presumption that the conduct has anti-competitive market effects. Not only actual but also potential

[34] See n 32 above, para 61.

[35] Case 56/65, [1966] ECR 235.

anti-competitive effects are sufficient to trigger the application of the presumption. In *T-Mobile Netherlands BV,*[36] the ECJ stated that:

> 'the distinction between "infringements by object" and "infringements by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[37]

As a result, when the restriction of competition is an inevitable consequence of an agreement, decision or a restrictive practice, it will be regarded as having anti-competitive object irrespective of whether it has actually restricted competition or whether it has only the potential to have negative effect on competition. Obviously, any restriction which results in the partition of the internal market is anti-competitive by object, i.e. a per se breach of competition law.

Third, if any conduct aimed at the partitioning of the CSME is regarded as an infringement of competition law by object, this will obviously facilitate the CCC's task from the evidentiary perspective.

Fourth, the priority accorded to the integrated market objective may result in the condemnation of a welfare enhancing business practice. For example, imposition of discriminatory prices by a dominant undertaking without any legal or economic justification is an abuse under Article 102 TFEU. In *United Brands v Commission*,[38] United Brands (UB), a multinational US corporation, shipped bananas from its own plantations in South America to Rotterdam and Bremerhaven using its own fleet. In both ports unloading costs were almost identical. From those ports bananas were sold to distributors from different EU Member States, on a 'free on rail basis' at prices which differed substantially. UB explained that it fixed the prices taking into account what the market in a particular Member State would bear. The ECJ held that United Brands' prices were discriminatory because bananas unloaded in two Community ports on practically identical terms as regards costs, quality and quantity were sold to the customers at prices which differed considerably – by between 30 and 50 percent – from one Member State to another, although the services offered were identical in each case. The ECJ rejected the explanation submitted by UB and stated that differences in prices can only be justified on the basis of objective criteria such as differences in transport costs, taxation, customs duties, labour wages, and so on. Therefore, justification based on adverse distribution consequences is not acceptable under EU law. However, from an economic perspective, charging a uniform price in both Member States would result in a situation where consumers in a low income Member State would not be able to purchase the product at all and consumers in a high income Member State would gain nothing because they would be required to pay the same high price. Therefore, the prohibition of price discrimination would lead to the reduction of sales and consequently to a reduction of consumer welfare. It is to be noted that under US

[36] Case C-8/08, [2009] ECR I-4529.

[37] Ibid, para 29.

[38] Case 27/76, [1978] ECR 207.

antitrust law, which is not concerned with the objective of market integration, price discrimination is not an offence.

Fifth, some sectors of economy are particularly prone to the imposition of restrictions on parallel importers resulting in the partition of the internal market, e.g. the pharmaceutical sector or the car distribution sector. These sectors should be regarded by the CCC as priority enforcement targets. In order to ensure that competition is not distorted in those sectors the CCC should be proactive and should carry out extensive investigations.

Sixth, the European Commission considers that any anti-competitive conduct which results in the partition of the internal market constitutes a 'very serious' infringement of EU competition law and therefore merits the maximum permissible fine. This fining policy applies not only to cartels and dominant undertakings abusing their market power but also to parties to vertical agreements which result in the partition of the internal market.[39] It is submitted that a similar approach should be taken by the CCC.

Seventh, the market integration objective entails that when an agreement or business conduct is confined to one Member State it may, nevertheless, be of concern to EU competition law if it reinforces the compartmentalisation of the internal market[40] and thus affects trade between Member States. In this respect, the ECJ condemned vertical agreements, even though they were not oriented towards import or export, as being capable of affecting trade between Member States[41]. In *Raiffeisen Zentralbank Österreich AG and Others v Commission (The Lombard Club)*,[42] the General Court held that in a situation where an agreement/concerted practice covers the whole of the territory of a Member State, there is a strong presumption that it, by its very nature, has the effect of reinforcing the compartmentalisation of national markets, and thus is capable of affecting trade between Member States. In this case Austrian credit establishments involved in a cartel did not rebut this presumption, given that almost all Austrian banks were involved and their agreement covered a wide range of banking products and services, in particular deposits and loans. Thus it was capable of affecting trade between Member States.

In the context of Article 102 TFEU in *Manufacture Française des Pneumatiques Michelin v Commission (Michelin I)*[43] the General Court found that a loyalty rebate system confined to one Member State affected trade between Member States as it foreclosed competition from other Member States.

Eighth, the market integration objective is of the utmost importance in relation to a merger policy. On the one hand, mergers facilitate market integration in that firms from

[39] COMP/35.587 *PO Video Games*, COM/35.707 *PO Nintendo Distribution* and COMP/36.321 *Omega – Nintendo* [2003] OJ L255.

[40] Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR 977; Case 246/86 *Belasco* [1989] ECR 2117.

[41] *Brasserie Fire Insurance* (D) [1985] OJ L35/20 confirmed by the ECJ in *Case* 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405.

[42] Joined Cases T-259–264/02 and T-271/02, [2006] ECR II-5169

[43] Case T-203/01, [2003] ECR II-4071.

different Member States, by means of mergers and acquisitions, acquire a Community dimension and thus increase not only their Community competitiveness but also compete effectively on international markets. On the other hand, mergers may adversely affect the structure of the relevant market at the Community level by creating, or strengthening, a dominant position which would allow a newly merged firm to exploit consumers and may ultimately affect the fundamental values of a democratic society. For example, a merger under which all press would be controlled by one firm would affect the fundamental principle of democracy which requires the preservation of the plurality of the press. Indeed, as AP Jacquemin and HW de Jong stated: 'Private power can cross economic boundaries and poses the threat of an "extra market" power which can change the rules of the game in favour of the dominant corporations'.[44] Further, the application of the market integration objective to merger reviews would not only be fundamental to the achievement of the CSME but also would protect the Caribbean region from the transformation by dominant firms of their economic power into political power, would ensure that sensitive sectors (e.g. the oil industry) are not controlled by foreign powers and would support the industrial, social and other policies set out by the RTC. Finally the 2007 financial and economic crisis shows that tighter merger control is required to avoid situations where a firm becomes so powerful that its collapse has repercussions on the entire economy of a country, a region, or the global market.

The market integration objective may sometimes result in the prohibition of business conduct which is economically sound, and consumer welfare enhancing. Notwithstanding this, it is submitted that the achievement of a single market and economy in the Caribbean region should be given priority over other economic objectives. Even economists who are critical of the market integration objective in the EU do not suggest that its importance in the EU should be diminished or disregarded. Instead, they suggest that 'assessing the impact of commercial practices against the objective of the EC Treaty [the Lisbon Treaty] can be made both more transparent and more coherent by considering each goal separately'.[45]

## B. The protection of consumers

The interests of consumers should be at the forefront of any competition policy. However, the traditional approach based on the efficiency model has some deficiencies which a new approach, advocated by Averitt and Lande, appears to avoid.

The advocated new approach encompasses the efficiency model but goes beyond it. Averitt and Lande propose a 'consumer choice' approach as the unique goal of competition law,[46] i.e. competition law should ensure optimal consumer choice. According to them, the efficiency standard, which is based on an analysis of price and demand, i.e. it focuses on how prices co-ordinate the amounts produced and consumed

[44] AP Jacquemin & HW de Jong, *European Industrial Organisation*, London, Macmillan, 1997, 198-9.

[45] Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd ed, London, Sweet and Maxwell, 2010, 8.

[46] Lande, 'Consumer Choices as the Ultimate Goal of Antitrust', (2001) 62 UPitt LRev, 503.

in a perfectly competitive market, is inadequate to deal with non-price competition. Averitt and Lande describe the consumer choice approach as follows:

> 'It [the consumer choice approach] suggests that the role of antitrust should be broadly conceived to protect all the types of options that are significantly important to consumers. An antitrust violation can, therefore, be understood as an activity that unreasonably restricts the totality of price and non-price choices that would otherwise have been available'.[47]

Averitt and Lande consider that the consumer choice approach is superior to the price and efficiency paradigms because it recognizes that consumers do not just want competitive prices, they also want options.[48] According to them, the 'consumer choice' approach not only includes all the benefits of the application of the efficiency paradigm but goes beyond it as it truly promotes innovation, focuses on benefits and consequences of business conduct on consumers, is easy to understand and apply, and ensures better synergy between competition law and consumer protection law.

As to the methodology of the new approach, Averitt and Lande acknowledge that it is more complex to apply than the efficiency standard in that it would require a new layer of inquiry to be added to the traditionally used efficiency standard to reflect a new focus on consumer choice. However, such inquiry would only be required in a limited number of cases (around 5 %) and, as a result most cases would continue to be assessed in accord with the traditionally used efficiency standard. An inquiry would not be unduly difficult in terms of gathering the relevant information and in terms of its incorporation into the Herfindahls measure.[49]

The objective of preserving consumer choice has been acknowledged as one of the objectives of US Antitrust law.[50] Commissioner Rosch, from the US Federal Trade Commission in his speech before the American Bar Association's Antitrust Section in April 2010[51] endorsed the 'consumer choice approach' advocated by Averitt and Lande, as the goal of antitrust law. He pointed out the two main benefits flowing from the application of the 'consumer choice' approach, first, it 'provides a means that is still tethered to a demonstrable standard to analyze anticompetitive conduct in dynamic industries where there is intense non-price competition' and second, it brings the US closer to how the EU assesses anticompetitive business conduct.

It is submitted that the consumer choice approach is worth consideration by the enforcement authorities. It certainly shows the inadequacy of the currently used price

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[47] Averitt and Lande, 'Using the "Consumer Choice" Approach to Antitrust Law', (2007) *Antitrust Law Journal*, 182.

[48] Ibid, 178.

[49] Ibid, 237- 248.

[50] In *FTC* v *Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 106 S.Ct.2009, 90 L. Ed 445 (1986) the Courts stated that a horizontal agreement that limits 'consumer choice by impeding the "ordinary give and take of the market place", cannot be sustained under the Rule of Reason'.

[51] See: Rosch, 'Rewriting History, Antitrust Not as we Know it Yet', available at http://ftc.gov/speeches/rosch/100423rewritinghistory.pdf

and efficiency models in the enforcement of competition law. Further, it properly deals with non-price restraints and emphasises the value of dynamic efficiency.

It is also submitted that the protection of consumer interests, as an objective of CSME competition law, may be pursued by novel approaches, not necessarily copied from elsewhere, but appropriate to local conditions.

The local conditions are that all CSME countries are developing countries and thus suffer the usual constraints deriving from underdevelopment. Most of them are small, highly vulnerable economies with: limited availability of investment capital; excessive dependency on external sources for food and energy; a volatile rate of growth of GDP; limited natural resources; high transportation costs; and a limited range of exportable goods, i.e. bananas, sugar and tourism. Some of them have additional problems with the enforcement of law against smuggling, corruption, informal society, organised crime, etc.

The small size of most CSME countries, which prevents them from exploiting economies of scale, combined with the historical circumstances results in CSME markets being not only highly concentrated, but also in a high concentration of company management and ownership in the hands of relatively few individuals, most of whom are mainly descendents of the plantocracy, or foreign. Therefore, even if a firm has no market power in the relevant product market its owner is sufficiently powerful to prevent new entrants into, or to eliminate existing competitors in that market given his/her overall superior financial and economic resources in other markets, either vertically related or totally unrelated. Further, those who have wealth are often in a key position in the government. Additionally, business culture is based on family relations and networks, and in some CSME countries there is no legislation protecting consumers.[52] These factors alone lead to exploitation of consumers and necessitate the taking of a new radical approach to the protection of consumers in the CSME. From the above it can be seen that consumer protection policy and competition policy should enhance each other[53] and be used to create a fair, efficient, and accessible CSME consumer market.

## IV. CONCLUSION

The objectives of CSME competition policy have not yet been defined. Starting on a blank canvass has advantages. First, the CARICOM countries have the opportunity to create the ideal competition law enforcement system or at the least, a system which would not repeat mistakes made by more mature systems such as those of the US and the EU. Second, CSME competition law can easily incorporate the newest forms of economic thinking such as the consumer choice approach or elements of behavioural

[52] See T Stewart, 'The Role of Competition Policy in Regional Integration: The Case of the Caribbean Community', SALISES, UWI, available at http://sta.uwi.edu/salises/workshop/csme/paper/tstewart.pdf (accessed 20/1/12).

[53] On the interface between consumer protection and competition law, see Model Law on Competition (2010) - Chapter VIII, UNCTAD TD/RBP/CONF.7/L.8

economics,[54] or some new approach appropriate to local conditions, in the enforcement of competition law.

It is important to note that in the choice of the economic principles or of an economic theory to be applied in the enforcement of competition law it is necessary to take account of the local conditions. Therefore, the protection of consumers may require a strongly interventionist approach to the enforcement of CSME competition law on the part of the CARICOM. Indeed, in highly concentrated markets market forces cannot always be relied upon to regulate and wear down market power. In this respect, competition policies appropriate for a very large economy, as is the case of the US, where economies of scale do not limit the number of competitive alternatives available to most buyers, may not be appropriate to small economies with non-tradable goods and services[55].

Whichever objective or objectives the CARICOM states decide to embrace as appropriate to the requirements of the CSME, it is vital that the economic principles and theories to be applied to attain them are transparent, appropriately theorized and explained to all concerned, including businesses, consumers, law enforcement authorities and courts.

[54] See Ginsburg and Moore, 'The Jevons Colloquium: Behavioral Economics in Consumer Protection and Competition Law: The Future of Behavioral Economics in Antitrust Jurisprudence', (2010) 6 Competition Pol'y Int'l, 89.

[55] On this topic see: Gal, *Competition Policy for Small Market Economies*, Harvard, Harvard University Press, 2003.