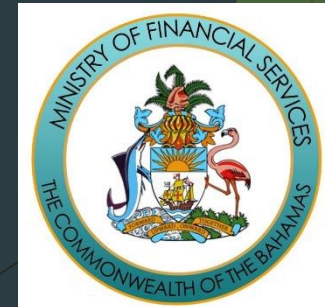


Presentation on Competition Law Diagnostics Report: Legal Inventory and Economic Mapping

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Legal Inventory and Economic Mapping: Defined

- ▶ A diagnostic assessment of the *status quo ante* in law, policy and existing market dynamics is essential.
- ▶ Legal Inventory: Catalogue laws on statute books that touch/concern economic activity in the Bahamas
 - ▶ Do they inhibit or enhance competition law and/or policy?
- ▶ Economic Mapping: Assess Market Structure, Market Player Conduct, Government Policies, Consumer Price Levels for GDP-Contributing Sectors
 - ▶ Is there evidence of anticompetitive Conduct or Policies?
 - ▶ Considerations to Boost Levels of Competition and Consumer Welfare?

Legislative Review Cont'd

- ▶ Method of Assessment:
- ▶ The law limits access to suppliers, by granting them exclusive rights to supply; limit their ability to gain market entry, limit or reduce their incentive to compete or their ability to set prices;
- ▶ Consumers are limited in product choice, access to information, have their ability to switch between companies inhibited, given asymmetrical knowledge of the market, have limited or no aftermarket service or are subject to exploitative prices;
- ▶ The law requires the acquisition of special rights, authorisation process, licenses or permits to gain entry to a market in The Bahamas where the objective is to protect existing market players and result in limited choice and higher prices to consumers;
- ▶ The existence of statutory monopolies or state-owned enterprises prevents access to essential facilities or infrastructure;
- ▶ Subsidies and concessions or tax credits/preferences are applied in a fair, transparent and non-discriminatory manner;
- ▶ The law creates a geographical barrier or *de facto* market division;
- ▶ The law sets standards for product quality which acts as an advantage or disadvantage to competitors on a market;
- ▶ The law raises the cost of production for some market players relative to others;
- ▶ The law manifests a barrier to entry into a market in The Bahamas.

Summary Review of the Legal Inventory Report: Legislative Review

- ▶ Price Cap Regulation: Price Control Act (Cap 339-1); Price Control (Gasolene and Diesel Oil) Reg. 2011; Import Control Regulations Act 1955
 - ▶ Limit seller's ability to set prices;
 - ▶ Prices are set, low cost suppliers are prevented from winning a market share by providing better value to customers;
 - ▶ Maximum prices are set, the limitation to suppliers to set appropriate prices is proven to limit the supplier incentives to innovate and to provide higher quality services.
- ▶ **TO DO:** These price and supply control systems should be given close consideration by the competition authority and **ideally should be abolished by the government, allowing for free entry into markets.**

Summary Review of the Legal Inventory Report: Legislative Review

▶ Licensing Regulation

- ▶ This can be legislation that creates a closed licensing framework, authorisation or permit application process. It may also be legislation that denies licensed market entrants to access to essential facilities/infrastructure/equipment owned by incumbent market players, such as ports, submarine cables, towers, etc.
- ▶ **Legislation that creates exclusive rights to supply, limits access to consumers or geographic regions, or removes the possibility for consumers to have choice in product or service and lower prices.**
- ▶ **TO DO:** alternative approach would be to abolish such systems, highlight the governments' new competition-friendly approach in education/advocacy campaigns and afford target-tied concessions or tax advantages to businesses.

Summary Review of the Legal Inventory Report: Legislative Review

Essential Facility/Access

- ▶ laws inhibit access to, or create non-discriminatory access to, necessary inputs:
 - ▶ equipment, financing/capital, licensing, permit, concessions and subsidies, ports, satellites, cell towers, sub-marine cables, light posts/power lines, water, sewer and gas lines or essential facilities or other infrastructure. The foregoing types of “access” parameters/infrastructure are usually called essential facilities. In competition law, the essential facilities doctrine is a doctrine of competition law which has the effect of allowing third party to access essential transmission networks or other expensive equipment and facilities to third parties at a fair and reasonable price thereby effecting more competitive market structures.
 - ▶ **TO DO: Adopting the essential facilities doctrine as part of a competition policy strategy or the law itself** can be an important measure that overcomes barriers to entry such as regulation, inability to achieve economies of scale, etc.
- ▶ E.g: **Ports Authorities Act 1962, Airport Authority Act 2000 and Grand Bahama (Port Area) Investment Incentives Act 2016; Post Office Act**

Summary Review of the Legal Inventory Report: Legislative Review

- ▶ Subsidies/Tax Waivers: Certain tax and concession measures create distortions in the business environment.
- ▶ Large businesses have a sense of entitlement to preferential treatment by the government given their important role in the economy, such as permits for imports or duty waivers, or preferential loans, this without doubt would create distortions among businesses.
- ▶ TO DO:
 - ▶ All private businesses, similarly situated, are to be subject to the same terms of qualification for a tax-break or concession and once they fulfil the requisite terms can access them.
 - ▶ Commitment to publishing the terms of qualification and ensuring that they are fairly administered.
 - ▶ Same rules apply to SOEs: E.g. BahamasAir Holdings; BEC, Water and Sewerage Corp, etc.
 - ▶ Laws Impacted: Procurement (Financial Administration and Audit Act 2010; Public Works Act; Industries Encouragement Act, Hotels Encouragement Act, Development Loans Act, Grand Bahama Port Area Investment Incentives Act 2016

Competition Authorities

- Statutory bodies established under the Competition legislation
- Importance of legal tradition: Common Law v. Civil Law.
 - Impact on structure
 - Impact on competition law procedure:
 - Natural justice: due process and fairness
 - Separation of powers
 - Rules against bias
 - Impartiality

Competition Authorities

- Need to ensure observance of Constitutional rights when applying competition law:
 - The right to have legal counsel;
 - The right not to have legal proceedings against one unduly delayed;
 - The right to a fair hearing;
 - The right to due process which the courts have construed as having the same meaning as the right to “protection of law” which necessarily means the right to fairness, a hearing, the right to access evidence and to put forward a defense;
 - The right not to be deprived of property other than by due process;
 - The right to be consulted;
 - The right to have the competition authority give reasons for a decision (substantive or procedural);
 - A right to a remedy for the violation of human rights.



Competition Authorities

- Ultra vires:
 - the main way in which the judicial branch can curtail the excesses of action and abuse of power by those occupying public office, say for example, a Commissioner or the Director of the CATC;
- Procedural v. Substantive:
 - Procedural: examples -
 - warrantless search;
 - conflict of interest..
 - Substantive: no power to act under the statute.



Competition Authorities

- Other principles:
 - Sound administration
 - Proportionality
 - Accountability
 - Lawfulness
 - Access to documents
 - Legitimate expectations
 - Legal certainty
 - Protection of confidential information
- **Agency funding:** free from political interest, private interest and regulatory capture.

Civil Rules of Procedure

Civil rules of procedure become relevant in competition law cases in two instances:

- (i) when the competition authority exercises its remedial powers to act upon the finding of an infringement and
- (ii) where the legislation grants locus standi to private parties to bring an competition law case for any damage the private party has suffered.

Appropriate Enforcement Agency Design and Structuring

- All sections of the legislation dealing with the institutional design of the agency must be in conformity with the fundamental tenets of Constitution and any related doctrines in case law on which the constitution is premised.
- Certain fundamental common law doctrines are considered to be constitutional tenets or fundamental principles of law that underpin the Constitution:
 - constitutional supremacy;
 - the limitation of Parliamentary power;
 - the fundamental rights provision;
 - the power of judicial review;
 - the principle of natural justice;
 - the ultra vires doctrine; and
 - the doctrine of separation of power.

Appropriate Enforcement Agency Design and Structuring

- Cases: *Hinds v. R* and of *Jamaica Stock Exchange vs. Fair Trading Commission*
- Separation of Powers: the executive, judicial and legislative branches of government must be separate as regards administration and functioning.
- The institutional design of the competition authority must comply with the Constitutional requirement to separate the investigative arm (which carries out an executive function) and adjudicative arm (which carries out a judicial function) of the competition authority.
- Common Law jurisdictions with a competition law regulatory framework tend to utilise a bifurcated model which is intended to observe the common law doctrines and constitutional precepts requiring the elimination of bias, observance of procedural due process, independence and separation of the bodies charged with investigation and adjudication of competition law.

Appropriate Enforcement Agency Design and Structuring

- The **bifurcated model** can be observed through the use of a:
 - **bifurcated agency model** where the competition agency divides itself into separate departments or bodies charged, respectively
 - with enforcement (usually styled as the Commission); and
 - with adjudication (usually styled as a Tribunal);
 - or the **bifurcated judicial model** whereby the competition agency investigates and lodges a complaint before the court for adjudication and enforcement of a remedy,
 - or where the agency investigates, reaches an administrative finding and applies to the Court for an enforcement of a decision and the issuance of an enforcement remedy.
 - a sharp divide between investigative and adjudicative functions by employing different personnel to carry out those functions and by observing firewalls in their case management and communication systems or by appointing an independent observer like a hearing officer.
- **Integrated model is observed:**
 - Non-commonwealth agencies tend to follow a model known as the integrated model whereby the Commission or several bodies within the Commission are responsible for investigation/enforcement and adjudication.¹⁴

Judicial Appeal in Competition Law Cases

▶ Administrative Decisions

- ▶ Decisions made by a Government Minister, Government Department, or a statutory authority are called administrative decisions. Some administrative decisions can be challenged in a court or tribunal.
- ▶ Competition Agency Decisions are Administrative Agency Decisions
- ▶ An appeal of Administrative Agency Decision is a call for an Independent Review of the Decision made by the Authority/Agency.

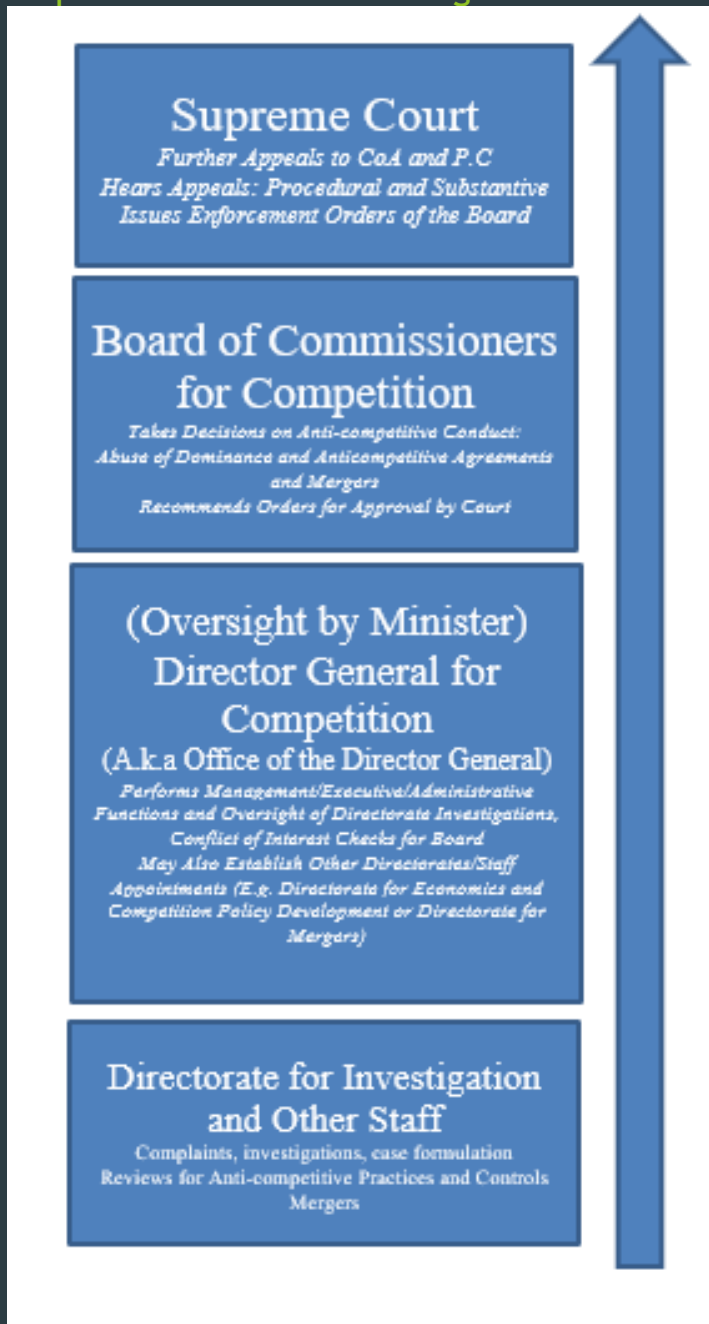
Two Types of Review/Appeal: De Novo/Merits Review and Judicial Review

-Merits Review: considers all the evidence and decides whether or not a correct and preferable decision should be made. Also called a “de novo” appeal. This means that the Court/Tribunal puts itself in the shoes of the original decision-maker and considers all the evidence from a fresh perspective.

-Judicial Review: Court looks at the lawfulness of the decision-making process and whether the decision followed the correct legal process. Result: Decision quashed/ and Authority forced to re-make the decision according to the law; e.g. error of law had

Judicial Review and Agency Models

- ▶ **Integrated agency model/E.U/European Commission:** reviews before the Community Courts are conducted in a very deferential manner: fact-finding is taken as complete, there is very little examination of the legal issues as applied to the facts and there is a large amount of rubber stamping of agency/Commission decisions.
 - ▶ **judicial review is very limited way: verifying whether the competition agency acts in the manner prescribed by its rules and guidelines without more. Decision may lower or increase fines.**
- ▶ **Bifurcated agency/bifurcated judicial model/Common Law/Kenya/South Africa/India:** review by the courts are conducted **de novo** or the Courts are the first point of issuance of orders or other enforcement remedies. Also given judicial review for some decisions. Reviews/Appeal



Summary of Economic Mapping Report: Status of Competition in Key Sectors

- ▶ Essential Services: Telecommunications/Electronic Communications
 - ▶ Atleast Four Operators Mapped.
 - ▶ Fairly Liberalised Sector- **BUT New Entry Can Be Encouraged Because There is One Operator with SMP**
 - ▶ Improved service and wider spread access to technology
 - ▶ Active regulation by URCA
 - ▶ Benefits of competition are manifest: consumer choice, better service
 - ▶ **To Do: Continued Regulation of Operators with SMP**

Summary of Economic Mapping Report: Status of Competition in Key Sectors

- ▶ Essential Services: Electricity, Water and Gas
- ▶ Monopolistic feature of these sectors have influenced the **high tariff rates for services : high input and production costs, technical and non-technical losses.**
- ▶ BUT: Both natural and acquired monopoly can be regulated by the competition authority to give rise to the indicators of consumer welfare.
- ▶ **TO DO: Liberalisation—Diversification of Electricity Supply—Updated Competition Policy Approach** Designed for the Sector.
 - ▶ E.g For Water: Possible to shift to decentralisation of government responsibility for sector/increasing privatisation of the sector
- ▶ **TO DO: Regulation of Mergers of Foreign Entities with SMP Status**
 - ▶ E.g. North American Investors and Foreign Capital means local gas needs met by foreign companies whose mergers presently go unregulated in the local sphere

Summary of Economic Mapping Report: Status of Competition in Key Sectors

- ▶ Consumer Goods
 - ▶ Small geographic area/landspace and small population results in high reliance on imported products.
 - ▶ Very little local production
- ▶ TO DO: For Agricultural products, Competition regulator to investigate the **existence of concentration at the processing stage entails high buyer power which could potentially be used to exploit upstream producers/growers or vertical integration that could be used to prevent market entry of new players.**
- ▶ Competition Policy: Are there policies or private arrangements or association arrangements in the some sub-sectors (agriculture, beverage, food processing, etc.) that replace the market system altogether and thus is at odds with a functioning competition regime? If so, commit to eliminating those policies.

Summary of Economic Mapping Report: Status of Competition in Key Sectors

Transport Sector

- ▶ Well- Developed Infrastructure to Support Ground Transportation (3500 km of roads/highways)
- ▶ Six Airports and 23 Seaports
- ▶ **BUT: Transport costs are high!!!**
- ▶ **Possible reasons**
 - ▶ G'ment still recouping 1990s infrastructure investment costs
 - ▶ Unevenly applied concessions/tax-waiver schemes
 - ▶ Low import trade volumes
- ▶ **TO DO:**
- ▶ Encourage Entry/Diversification of SMP Operators
- ▶ Apply policy of non-discrimination (on tax waiver/subsidies)

Summary of Economic Mapping Report: Status of Competition in Key Sectors

- ▶ Insurance
- ▶ High Market Penetration and Entry Levels: vehicles, life and home insurance
- ▶ Significant Improvement in Regulation
- ▶ TO DO: **Competition Policy Designed to Allow for** potential to expand especially through significant efforts by the **Government to transform the islands into a major offshore insurance center.** Furthermore, the Government in cooperation with the private sector have made available the requisite legal, regulatory and professional infrastructure to facilitate expanding offshore life insurance sector.

Thank you!

Questions? Comments?

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