The New Competition Tool in the Caribbean

Exploring new horizons in the competition law enforcement of small market economies

Position paper

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Abstract

Competition law enforcement in small Caribbean economies such as Curaçao and Aruba remains limited in scope and precision, often restricted to detecting infringements and issuing non-binding recommendations. This limits authorities' ability to address structural market issues, particularly in concentrated sectors including telecommunications and banking. This study proposes the adoption of the New Competition Tool (NCT) to enable proactive market investigations and the imposition of market-wide remedies even in the absence of firm-specific infringements. The study draws on a combination of a literature review, comparative legal analysis, stakeholder interviews, and sector-specific case studies. It examines how structural market features such as scale economies, network effects, and switching costs, can suppress competition in ways that fall outside the reach of traditional enforcement tools. Structured in five parts, the report sets out the competition challenges unique to small economies, introduces the NCT, applies it through sectoral case studies, and outlines a legislative path for its implementation in the Caribbean context. By expanding the toolkit available to competition authorities, this study contributes a practical model for improving competition outcomes in small market economies.

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I. Characteristic competition problems arising in small market economies

The advent of competition law in the European Union has over time reached new horizons, shaping legal frameworks in various regions such as the Caribbean. Notably, the competition laws of Curaçao and Aruba have been influenced by its Dutch counterpart, which in turn stem from EU competition law principles. Curaçao officially enacted its Competition Ordinance on September 1st, 2017, followed by Aruba on January 1st, 2024. Both islands are small economies with distinct market structures that differ substantially from those of larger EU Member States, which underscores the importance of tailoring competition policy to unique challenges faced by small market economies. The seminal work on this topic is Michal Gal's book Competition Policy for Small Market Economies, the logic on which this chapter is premised.

1.1 Structural constraints of small economies

A small economy is defined as "an independent sovereign economy that can support only a small number of competitors in most of its industries."[1] Market size is determined by elements such as population size, population dispersion, and openness to trade.[2] Most notably, a small population size inherently results in limited demand.[3] As of 2023, the population of Curaçao totalled 155,826 while Aruba's population totalled 108,027[4]. This limited demand constrains the number of firms that can operate at minimum efficient scale (MES) within the domestic market — MES being the lowest level of production at which a firm can produce at the lowest average cost and operate efficiently.[5] The 'basic handicap', as Gal coins it, of small economies is the large size of MES production relative to demand, which give rise to three key economic characteristics: high entry barriers, high industrial concentration levels, and below MES levels of production coupled with low levels of specialisation.[6] The latter characteristic implies that firms in small economies often fail to achieve the levels of production necessary to exploit economies of scale in order to reduce costs and produce more efficiently.[7] As a consequence, markets tend to become highly concentrated, as the number of firms capable of operating at MES is intrinsically low.[8] Such concentrated markets remain uncontested as they are shielded by high entry barriers and the necessity of producing at a scale that captures a significant share of local demand in order to achieve minimum costs.[9] An aggravating economic constraint to growth present in both Aruba and Curaçao is the scarcity of human capital, particularly skilled labour.[10] A 2025 survey conducted by the Chamber of Commerce of Aruba revealed that 62% of responding firms cited labour shortages as a major constraint in their respective industries.[11] Likewise, in 2023, the Hotel and Tourism Association of Curaçao highlighted labour shortages as an increasingly pressing issue, not only for the hospitality sector but for the economy at large.[12] Historically, both islands have relied on successive waves of immigration to supplement their workforce and sustain economic activity.[13] Additionally, with land areas of just 193 km^2 and 444 km^2 respectively, Aruba and Curaçao face inherent natural resource and land limitations. Limited access to distribution channels represent a significant barrier to entry. For instance, the Aruba Fair Trade Authority (AFTA) has identified the prevalence of exclusivity agreements between wholesalers and importers in the food market as a contributing factor to stifled competition.[14] Finally, government regulations can also impede market entry to certain industries. These can take the form of burdensome licensing procedures, preferential treatment in public procurement, or restrictive tax policies. Taking taxation as an example, an aggregating factor to the weakened competitive plane in Aruba is reflected in the Belasting op Bedrijfsomzetten (BBO) turnover tax

[1] Michal Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) 1.
[2] ibid 2.
[3] ibid.
[4] Central Bureau of Statistics Curaçao, 'Population' <https://www.cbs.cw/population>; Central Bureau of Statistics Aruba, 'The development of the population of Aruba in the last 50 years' <https://cbs.aw/wp/index.php/2022/11/24/test-births/>.
[5] cf Gal (n 1) 16.
[6] ibid 15.
[7] ibid 23.
[8] ibid 18.
[9] ibid 21.
[10] ibid 22.
[11] Chamber of Commerce and Industry Aruba, 'Results Labor Shortage Survey' <https://arubachamber.com/pages/results-labor-shortage-survey/>.
[12] Antilliaans Dagblad, 'Derde partij nodig naast KLM en TUI' (10 May 2023) <https://antilliaansdagblad.com/nieuws-menu/curacao/27595-derde-partij-nodig-naast-klm-en-tui>.
[13] Ruud H. Koning, 'Current and future issues in the Aruban labor market' (2006) University of Groningen 6.
[14] Aruba Fair Trade Authority, 'Food Products Market Study' (2004) 3, 30. <https://www.afta.aw/wp-content/uploads/2024/09/AFT_report-market-research.pdf>.

system. Under this cumulative tax regime, BBO is levied at each stage of the production process without the ability to deduct BBO already paid,[15] which — as AFTA has previously pointed out — results in higher prices for consumer goods as the tax burden accumulates with each transaction.[16] However, the analysis did not account for the effect of the tax system in encouraging vertical integration. The BBO regime creates strong incentives for vertical integration as firms operating across multiple stages of the supply chain internally are able to avoid inter-company taxation. For example, while a supermarket would pay BBO when purchasing goods from a third-party supplier, a vertically integrated supermarket that controls its own supply chain avoids taxation on internal transfers as it would not constitute a sale. This effect of the tax system on firm structures negatively impacts the likelihood of entry of smaller firms at the lower part of the supply chain, and further reinforces the dominant position of incumbents.

1.2 The competitive landscape in concentrated markets

Together, the three aforementioned economic characteristics affect the effectiveness of competition, leading to structures which raise competition concerns such as natural monopolies, single-firm dominance, and oligopolies.[17] While both natural monopolies and single-firm dominance involve the presence of only one firm in a given market, and both incur the same costs, their origins differ.[18] Natural monopolies typically emerge in industries where high start-up costs and significant economies of scale make it inefficient for more than one firm to operate;[19] in such cases, the dominant firm tends to extract excessive profits without passing on efficiencies to consumers.[20] By contrast, single-firm dominance can arise from a number of factors, such as the production of a superior product, technological advantages in the production or distribution process, or additional entry barriers.[21] Oligopolies differ in that the market contains more than one firm, but nevertheless, usually only a handful of firms that collectively supply a large share of the market as they are shielded by high entry barriers.[22] While this market structure can support effective competition and deliver socially efficient outcomes, it also carries the risk of prompting two potentially problematic scenarios.

1.3 The interpersonal nature of market coordination

The first is the incentive for explicit collusion: where Firm A and Firm B agree, for instance, to collectively fix their prices rather than undercutting each other in an effort to gain market share. This type of anti-competitive behaviour is facilitated in an oligopolistic market structure, especially within small economies where business and personal relationships often overlap into a 'close-knit business elite'. In these settings, a small circle of top executives and shareholders frequently interact, increasing the likelihood of mutual understandings that discourage competition and preserve existing market dynamics.[23] Competition becomes too personal. This phenomenon is evident in Aruba and Curaçao where familial and ownership ties between major firms are common; whether that be through common or cross-ownership between different firms (business lens) or simply through interpersonal relations such as the marriage between two families owning different firms (social lens). Through the business lens: shareholder of Firm A may be disincentivized to allow the firm to compete aggressively with Firm B, in which she also holds shares. Through the social lens: the owner of Firm A may choose not to engage in fierce competition with Firm B as it is owned by his wife's family. The interdependence these vested interests create, either through the business lens or the social lens and especially through social affiliations, cultivates an environment that incentivizes competitors to collude.

The second scenario is where firms engage in tacit collusion, i.e. "businesses implicitly coordinate their behaviour without an agreement or communication".[24] In such cases, firms align their actions based on mutual understanding and anticipation of future responses.[25] In other words, firms will refrain from lowering prices to avoid provoking

[15] Grant Thornton, 'VAT (BTW) for Aruba: Why and How?' (2024) <https://www.grantthornton.aw/publications/aruba/vat-for-aruba-why-and-how/#:~:text=Additionally%2C%20the%20BBO%20rate%20was,example%20is%20set%20at%2010%25.&text=In%20a%20VAT%20system%2C%20every,charged%20by%20the%20previous%20stage.>.
[16] cf Food Products Market Study (n 14) 32, 33.
[17] cf Gal (n 1) 28.
[18] ibid 31.
[19] ibid 28.
[20] ibid 29.
[21] ibid 31.
[22] ibid 32.
[23] ibid 155.
[24] Paul de Bijl, 'Misconceptions about tacit collusion' (ACM 2024) <https://www.acm.nl/en/publications/blog-paul-de-bijl-misconceptions-about-tacit-collusion>.
[25] ibid.

retaliatory price cuts from competitors, which would lead to an overall decline in industry profitability. Firms in an oligopoly understand that it is better for business in the long run to maintain the status quo and not disrupt one another's operations, in other words, avoiding 'rocking the boat'. Tacit collusion is especially sustainable in markets with high entry barriers, few competitors, and the promise of continued profitability.[26] Intuitively, the less firms whose moves one has to keep track of, the easier it is to act accordingly. These conditions are pronounced heavily in small market economies such as Aruba and Curaçao.

1.4 Designing smart competition policy in the face of inevitable concentration

A potential but overly simplistic solution might be to simply increase the number of market participants. However, in small economies, a certain degree of industrial concentration may be unavoidable in order to achieve productive efficiency, rendering such solution undesirable.[27] Accordingly, competition policy in small market economies should focus on mitigating the harmful effects flowing from high levels of concentration while fostering dynamic competitive forces.[28] To that end, Gal proposes a more stringent policy toward collusive behaviour, exclusionary practices by monopolies, and ensuring the disclosure of accounting and profit information by dominant firms.[29] She notes that, "given that the market's invisible hand has a much weaker self-correcting tendency, the costs of improper competition policy design and application of competition laws might be higher in both the short and long run."[30] To manage enforcement efficiently, competition authorities must prioritise cases carefully.[31]

[26] ibid.
[27] cf Gal (n 1) 52.
[28] ibid 54.
[29] ibid.
[30] ibid 5.
[31] ibid 7.

II. The 'New Competition Tool' as a complement to the traditional pillars of competition law

The three traditional pillars of competition law worldwide through which competition authorities exercise their enforcement powers are: (1) the prohibition of cartel agreements, (2) the prohibition of abuse of dominance, and (3) merger control.[32] In Curaçao and Aruba, however, there is a notable distinction: while concentrations must be notified to the respective competition authorities, the authorities are not yet empowered to clear or block mergers outright. The commonality underlying these three pillars is that each enforcement action requires conduct on the part of the firms.

2.1 Where the traditional pillars fall short

To prohibit an agreement, for example, the authority would naturally need evidence — such as email correspondence — of Firm A and Firm B agreeing that A will only operate pariba di brug (South-end of the island) while B will only operate pabou di brug (North-end of the island), ensuring they do not compete with each other in these territories. Similarly, a finding of abusive conduct by a dominant firm requires evidence that Firm A actively engaged in exclusionary practices, such as using predatory pricing to drive new entrants out of the market. For an authority to enforce merger control, it presupposes that Firm A and Firm B intend to merge into a new company that could significantly reduce competition, for instance by creating or strengthening a dominant position. Thus, in all three cases, enforcement hinges on the existence of an infringement involving firm conduct. Yet even this conduct-based enforcement faces challenges. Firstly, detection of a cartel agreement is already difficult given their secret nature which is exacerbated by facilitating factors in a small island such as executives often sharing close personal or social ties. Additionally, leniency applications are the driving force in uncovering cartels, whereas neither Curaçao nor Aruba have adopted leniency programmes yet. Even in jurisdictions where leniency programmes have been rolled out, their success depends on the likelihood of detection and the severity of penalties; many Latin American countries have seen limited success due to a deficiency in these two.[33] This underscores the importance of authorities in increasing their detection methods to boost ex officio investigations.[34] Secondly, there might be contracting or business practices by firms that do not quite reach the 'dominant' threshold but that nevertheless have the same effect. Even with dominant firms, some of their practices are difficult to address under the current pillar, particularly when it comes to protection of intellectual property rights and other conduct that might bypass regulations. Lastly, tacit collusion is impossible to address under the current cartel pillar as it requires an agreement, which tacit collusion precisely lacks.

But more fundamentally, a lack of effective competition in a market is not only attributable to the conduct of firms. Oftentimes, it is the very features inherent in a market that preempt it from fostering a healthy state of competition. In other words, market features can produce anti-competitive outcomes regardless of infringements. Some of these market features include: scale economies, switching costs, consumer bias, network effects, and asymmetric information.[35]

2.2 Market features beyond firm conduct that undermine competition

Problems of scale economies comprise high fixed and entry costs. Here, the sole incumbent continues to charge excessive prices and earn supra-normal profits, while potential entrants refrain from entering due to the inability to recover their sunk costs in a monopoly environment where prices might be driven down to marginal cost.[36] In other words, a new entrant will be dissuaded from entering the market due to the high fixed set-up costs. These

[32] In the Competition Ordinance of Curaçao, these can be found in: Chapter 3 [Article 3.1(1)] anti-competitive agreements, Chapter 4 [Article 4.1(1)] abuse of dominant position, and Chapter 5 [Article 5.2(1)] concentrations.<http://ftac.cw/wp-content/uploads/2017/12/20171205-Informal-English-translation-national-ordinance-on-competition.pdf > | In the Competition Ordinance of Aruba, these can be found in: Chapter 2 §1 [Article 2.1(1)] anti-competitive agreements, Chapter 2 §3 [Article 2.7(1)] abuse of dominant position, and Chapter 3 [Article 3.1(1)] concentrations <https://www.afta.aw/wp-content/uploads/2023/10/AB-2020-no.-103.pdf>.
[33] OECD, 'Detecting Cartels for Ex Officio Investigations' (DAF/COMP/LACCF 2024) 15.
[34] ibid 17.
[35] Massimo Motta and Martin Peitz, 'Intervention triggers and underlying theories of harm: Expert advice for the Impact Assessment of a New Competition Tool' (European Commission 2020) 7.
[36] ibid 9.

circumstances are especially prevalent in small market economies such as Curaçao and Aruba. Network effects present another structural challenge. These arise when the utility of a consumer for a product or service increases with the number of other consumers using the same product or service. This is best evidenced amongst social media platforms where platforms such as Facebook become more appealing as more friends and family join the network, or in financial services such as credit cards where widespread adoption by consumers incentivises merchant acceptance of that card, thereby reinforcing user utility.[37] The problem with network effects is that they typically lead markets to 'tip', meaning that once a firm has gained significant market share, it becomes exponentially difficult for rivals to compete, resulting in de facto monopolies.[38] Switching costs, consumer bias, and asymmetric information all relate to limitations in consumer decision-making. Switching costs refer to the financial or procedural burdens consumers face when changing providers. For example, when a bank imposes administrative fees to close an account or when a telecom provider delays the technical process allowing a consumer to switch providers.[39] Asymmetric information arises when firms possess more information than their consumers, making it difficult for the latter to compare products from different firms effectively.[40] Consumer bias can affect consumers' choice through their willingness to pay, quality biases, and search biases, which further weaken competitive pressure.[41] As firms lack the incentive to adequately educate consumers, and consumers in turn are reluctant to search for alternatives or have an erroneous perception of the quality or substitutability of products, "market demand becomes less sensitive to price differences and the oligopoly market features higher markup than if consumers correctly understood quality of the market."[42]

These market features, amongst others, lead to anti-competitive outcomes independent of firms creating such an effect through their own conduct (although their conduct may aggravate such effects).[43] Traditional competition law tools are unfit to remedy such market failures alone. For this reason, jurisdictions around the globe have introduced in recent years a new tool to address these structural problems. These instruments go by different names: in the UK this is referred to as a 'market investigation', in Germany as a 'sector inquiry', in South Africa as a 'market enquiry', and in the European Union (although not yet adopted) the proposal for its introduction is referred to as the 'New Competition Tool' (NCT). While the Netherlands has similarly yet to implement such a tool, the Dutch Authority for Consumers and Markets (ACM) has publicly advocated for its adoption in the past year while also adopting the NCT terminology.[44] Reportedly, the Dutch Minister of Economic Affairs has expressed openness to the idea but wishes to first carefully balance competing interests. Given the conspicuous legislative and institutional ties between the Netherlands and the Dutch Caribbean islands and considering that the competition laws of Curaçao and Aruba are largely modelled after Dutch competition law, and by extension EU law, this paper will focus on the EU version of the NCT. Accordingly, this paper will follow the NCT terminology throughout, drawing primarily on preparatory studies solicited by the European Commission that outline the tool's intended makeup.

2.3 Addressing structural competition problems with a 'New Competition Tool'

In abstract terms, the NCT is defined as "a market investigation instrument designed to address structural competition problems and to determine a solution together with firms as a potential instrument for enforcing competition policy."[45] At its core, the NCT would enable competition authorities to impose market-wide (or individual) remedies without the establishment of an infringement. Essentially, NCT remedies would have the potential to correct market feature malfunctions and obviate the establishment of illegal conduct of firms. The NCT would occupy an intermediary space between competition law and sectoral regulation. It would combine elements of competition law (goal of protecting existing and promoting new competition, focus on anti-competitive outcomes) and sectoral regulation (ex-ante intervention, focus on features of the market as opposed to individual conduct).[46]

[37] ibid 10.
[38] ibid 12.
[39] ibid 16.
[40] ibid 17.
[41] ibid 20.
[42] ibid 21.
[43] ibid 8.
[44] Martijn Snoep, 'Updating competition enforcement' (ACM 2024) <https://www.acm.nl/en/publications/blog-martijn-snoep-updating-competition-enforcement>.
[45] Mario Draghi, 'The future of European competitiveness: Part B: In-depth analysis and recommendations' (European Commission 2024) 303.
[46] Heike Schweitzer, 'The New Competition Tool: Its institutional set-up and procedural design' (European Commission 2020) 5.

Employment of the NCT would require that an 'adverse effect on competition' is established where market features are found to prevent, restrict, or distort competition, but which cannot be adequately addressed through existing competition rules.[47] Structural competition problems fall into two categories: (1) where market features combined with firm conduct create a threat for competition, and (2) where the market structure, characterised by a high level of concentration and entry barriers, fails to deliver competitive outcomes due to its systemic failures.[48] In practice, the UK equivalent of the NCT has been resorted to in markets where competition was weakened by oligopolistic market structures, consumer switching inertia, and governmental policy and economic regulation that stifled competition.[49] The structure of NCT proceedings would follow four stages. First, a scoping phase would be undertaken to gather preliminary market information and assess whether competition concerns exist.[50] Second, an opening decision would outline the initial findings, define the scope of the investigation, and explain why the NCT would be a more appropriate tool to use in this instance.[51] Third, an evidence gathering phase would take place, with its design depending on whether remedies are likely to be applied market-wide or to specific firms.[52] A defining element of this phase is the active involvement of stakeholders who would be consulted to help determine the appropriate and effective course of action.[53] Finally, the procedure would end with the competition authority issuing remedies which could be structural, behavioural, or a hybrid of the two.[54] In essence, the NCT would be 'a regime of small-scale ex ante regulation.'[55] The main features of the tool would be the authority's ability to impose market-wide remedies, consultations with external expert panels and sectoral regulators, sunset clauses on remedies, a participative approach with respect to stakeholders, and the ability to turn recommendations into obligations. The NCT is envisioned as an additional pillar to traditional competition enforcement. It bears noting that the NCT differs from a mere market study, which the competition authorities of Curaçao and Aruba have already carried out in the past.[56] Market studies are primarily geared towards finding a potential infringement or gaining insights into market dynamics with their conclusions confined to non-binding recommendations.

2.4 Institutional concerns and democratic legitimacy

Although close cooperation between a competition authority and the relevant sectoral regulator in the context of the NCT proceedings is encouraged, admittedly, there are concerns of the tool suffering a democratic deficit. Because competition authorities lack input legitimacy as they are not elected bodies, bestowing powers on them to impose far-reaching remedies without the finding of an infringement could be interpreted as regulatory overreach or de facto rule-making. There is a lack of input legitimacy as the public does not vote for the board and staff of the competition authority. This raises questions about accountability, especially when the NCT is applied in sectors traditionally under the mandate of certain Ministers. Such concerns hold merit and warrant further scrutiny before the tool in question can be implemented. Successful implementation will require transparent consultation and legal safeguards to ensure a careful balance between regulatory ambition and institutional legitimacy.

[47] Richard Whish, 'New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK s market investigation tool' (European Commission 2020) 16.
[48] Pierre Larouche and Alexandre de Streel 'Interplay between the New Competition Tool and Sector-Specific Regulation in the EU' (European Commission 2020) 9.
[49] cf Whish (n 47) 35.
[50] cf Schweitzer (n 46) 20.
[51] ibid.
[52] ibid 21.
[53] ibid 6.
[54] ibid 35.
[55] ibid 17.
[56] Curacao: Competition Ordinance Article 2.14(2); Fair Trade Authority Curaçao, 'Rapport sectoronderzoek levensmiddelensector' (2024) <https://ftac.cw/wp-content/uploads/2024/11/Rapport-levensmiddelen-FTAC.pdf> | Aruba: cf Food Products Market Study (n 14).

III. Industry case studies

Two industries will be evaluated to depict how the NCT might be useful in practice. Section A will be devoted to the telecommunications sector while Section B will examine the banking sector.

A. Telecommunications

3.A.1 Background

The shift in Europe from state-owned monopolies to open competitive markets is most clearly illustrated in the liberalisation of the telecoms sector.[57] This development influenced similar reform in Curaçao in the early 2000s, where after nearly a decade of litigation a new market entrant was granted a court-ordered license to operate a telecoms network.[58] Today, Curaçaos telecom market comprises four providers: Flow,[59] Digicel,[60] AquaTel,[61] and TeraMobil.[62] Flow, formerly United Telecommunication Services, was state-owned until 2019 when the government sold its shares.[63] AquaTel is now the new state-owned telecoms enterprise having entered the market in 2025, owned through Aqualectra N.V., the island's government-owned utility company.[64] The Regulatory Authority of Curaçao, a multi-sectoral independent supervisor, regulates the providers of services and products in the telecommunications sector, amongst other sectors.[65] In Aruba, a different picture is painted. Aruba's constitutional change in 1986 led to the creation of SETAR, the island's national telecom provider, originating through the merger of the former state-run telegraph (Landsradio) and telephone (Telefoondienst) service companies previously headquartered in Curaçao.[66] The following legislative history ensued.[67]

	Objective	Pertinent provisions
1992 *Landsverordening Telecommunicatiebedrijf Aruba*	Established SETAR as a government-owned legal entity responsible for managing and developing telecommunication services in and from Aruba	Article 3(3) entrusts SETAR the responsibility of installing and operating telecom infrastructure
1994 *Landsbesluit voorwaarden cellular verkeer*	Set the rules for Aruba's mobile cellular network	Article 2(1) grants SETAR the exclusive right to operate the cellular network in Aruba
1996 *Telegraaf- en telefoonverordening*	Established a legal framework for the installation, operation, and regulation of telegraph and telephone systems in Aruba, covering issues from licensing requirements to usage restrictions and enforcement	Article 2 states that a government-issued license is required for anyone, other than the government, to install and operate telecoms networks

The 1992 and 1994 Ordinances buttressed the exclusive authority of SETAR over both domestic and international telecommunications, including all necessary infrastructure such as submarine cables. While the 1996 Ordinance established a broader legal framework that could theoretically allow for fair competition through licensing requirements and regulatory oversight, such an outcome would depend entirely on the manner in which the

[57] Commission Staff Working Document 'Europe's Liberalised Telecommunications Market - A Guide to the Rules of the Game' (ETSI) <https://portal.etsi.org/erm/kta/harmstd/userguide-en.pdf>.
[58] Karel Frielink, 'Liberalisation in the Dutch Caribbean', (2009) <https://www.curacao-law.com/2009/03/21/liberalization-in-the-dutch-caribbean/>.
[59] James Barton, 'Liberty Latin America acquires UTS shares from Curaçao government' (Developing Telecoms 2019) <https://developingtelecoms.com/telecom-business/operator-news/8433-liberty-latin-america-acquires-uts-shares-from-curacao-government>; UTS, 'C&W expands capabilities in Dutch Caribbean through combination with UTS' (2019) <https://www.uts.cw/about-us/press-releases/UTS-%20Flow-become-one>.
[60] Bnamericas, 'Digicel buys CT' (2005) <https://www.bnamericas.com/en/news/Digicel_buys_CT>.
[61] Curaçao Chronicle, 'New Telecom Company AquaTel Officially Established' (2025) <https://www.curacaochronicle.com/post/main/new-telecom-company-aquatel-officially-established/>.
[62] Paul Lipscombe, 'Curaçao to get new telecom operator after TeraMobil is granted license' (Data Center Dynamics 2022) <https://www.datacenterdynamics.com/en/news/curacao-to-get-new-telecom-operator-after-teramobil-is-granted-license/>.
[63] cf Barton (n 59).
[64] cf Curaçao Chronicle (n 61).
[65] Regulatory Authority of Curaçao <https://rac.cw/>.
[66] SETAR, 'History' <https://www.setar.aw/setar-history/>.
[67] *Landsverordening Telecommunicatiebedrijf Aruba* AB 1992 no. GT 1 <https://cuatro.sim-cdn.nl/arubaoverheid2858bd/uploads/0910gt92.001.pdf>; *Landsbesluit voorwaarden cellulair verkeer* AB 1994 no. 13 <https://cuatro.sim-cdn.nl/arubaoverheid2858bd/uploads/0910ab94.013.pdf>; *Telegraaf- en telefoonverordening* AB 1996 no. GT 2 <https://www.douane.aw/wp-content/uploads/2017/06/Telegraaf-en-telefoonverordening.pdf>.

government implements the Ordinance. When the government owns the dominant (and at this point, sole) player on the market while simultaneously controlling the licensing regime with full discretion, it risks granting advantages to its own enterprise under vague legal justifications such as 'public interest' or 'non-compliance'. Although the legal framework appears neutral, if the licensing process is not transparent, independent, or impartial, it can be wielded as a tool to legally entrench a monopoly. SETAR's infrastructure, including the in-ground fibre-optic networks, was built and funded by the government. In this context, government ownership and regulatory control are deeply intertwined giving rise to an inherent conflict of interest.

Undeterred by this arrangement and inspired by the liberalisation of the telecoms market in Curaçao, the former Minister of Justice applied for internet and mobile network licenses in 1998. The government initially dismissed the bid, citing procedural issues and a lack of technical expertise on behalf of the applicants. In response, the applicants enlisted telecom firm Ericsson, which had already penetrated the market in Curaçao, to assist in preparing a proposal. Ericsson, with its expertise in dismantling telecom monopolies across the Caribbean, offered strategic and financial support. In 2002, the Aruban court ordered the government to issue a license to the applicants with the backing of Ericsson, and simultaneously instructed the transformation of SETAR into a corporate entity. After the court order, Ericsson was ultimately unable to follow through with the planned 'lease to buy' agreement, and thus proposed Digicel (a separate telecoms provider) to assume Ericsson's role. Digicel agreed to the offer and paid the licensing fee to enter the market. The following legislative history ensued after the court order.[68]

	Objective	Pertinent provisions
2002 *Landsverordening aanvang werkzaamheden SETAR N.V.*	Governed the transition of the national telecommunications company SETAR into a private limited liability company.	Article 3(2) all assets and property used by the original government telecom service are transferred to SETAR N.V. in exchange for shares issued to the Aruban government Article 2(3) major changes to SETAR's objectives, capital structure, or governance must be approved by a two-thirds majority in the Aruban Parliament Article 4(1) lands used by the telecom service are granted to SETAR N.V. under long-term lease
2003 *Landsbesluit telecommunicatierechten*	Set up the financial framework for telecommunication concessions, licenses, and spectrum usage in Aruba, resulting in a comprehensive telecom licensing fee structure	(Articles 1, 2, 3) entities must pay a one-time fee to the government when applying for a license to operate a telecom network (Afl. 7.200.000,- for a mobile telephone network) plus annual licensing fees

Since 2003, the government of Aruba has retained full ownership of SETAR, rendering it a publicly-owned company.[69] Upon Digicel's entry into the market, the prices of telecom products and services fell drastically, according to anecdotal evidence, to which SETAR purportedly responded by bundling their telephone and internet products. Claims have been made that SETAR furthermore refused to co-locate and interconnect at the time. To date, certain short numbers within SETAR's system remain inaccessible from Digicel lines. Connectivity can be established either through fibre optic cables or through frequency, with fibre being the preferred method as frequency may be interrupted. Digicel claims that SETAR denies access to its fibre and infrastructure at large. As a result, Digicel relies on microwave technology, which is not only less stable but also adds an extra layer of cost to their operations as 1 megahertz costs 98.000 afl.-, compared to virtually no cost for fibre-based connections. A lack of fibre connection also means that Digicel cannot provide certain services to hotels on the island. Another point of contention is the submarine cable connecting Aruba to the rest of the world, which Digicel claims SETAR has never opened access to. In fact, all of the submarine cables with a landing point in Aruba are either wholly or partly owned by SETAR: Alonso de Ojeda installed in 1999,[70] Pacific Caribbean Cable System installed in 2015,[71]

[68] *Landsverordening aanvang werkzaamheden SETAR N.V.* AB 2002 no. 125 <https://cuatro.sim-cdn.nl/arubaoverheid2858bd/uploads/0910ab02.125.pdf>; *Landsbesluit telecommunicatierechten* AB 2003 no. 83 <https://cuatro.sim-cdn.nl/arubaoverheid2858bd/uploads/0910ab03.083.pdf>.
[69] cf SETAR (n 66).
[70] https://www.submarinecablemap.com/submarine-cable/alonso-de-ojeda
[71] https://www.submarinecablemap.com/submarine-cable/pacific-caribbean-cable-system-pccs

and the CELIA expected to be installed in 2027.[72] Though Digicel has constructed its own standalone network, it still lacks one essential component: a microwave link connecting to Curaçao to route international traffic.

3.A.2 Competition problems

Over the years, SETAR has shifted from a government agency with a legal monopoly to a publicly-owned company with a dominant position in the market. Although there is no publicly available information on market shares, an AFTA report has preliminarily classified SETAR as holding a dominant position.[73] The issues that the aforementioned developments result in are those of scale economies, switching costs, and regulatory barriers.

On the issue of scale economies, SETAR's infrastructure was publicly funded and allegedly later amortised, reducing marginal costs. As SETAR does not provide a right of access, any new entrant would need to invest significantly in fixed set-up costs for infrastructure-building in order to operate on the island, creating a considerable disadvantage. In fact, allegedly, a third provider had entered the Aruban market at one point with CDMA technology by targeting tourists for roaming but exited the market after essentially going bankrupt — demonstrating the steep costs of entry.

On the issue of switching costs, an important deterrent in switching providers is found in the lack of number portability obligations in Aruban law, meaning that SETAR customers would not be able to retain their phone number if they were to switch to Digicel, or vice versa. Consumer bias on the aesthetic presentation of phone numbers also plays a role, with SETAR numbers beginning with a '5' while Digicel numbers begin with a '7'. Additionally, consumers face costs in the form of navigating the cumbersome process of terminating their contracts such as having to visit the offices of their telecom provider in person at times that coincide with their working schedules, to then wait for hours on end to be attended. These costs dissuade consumers from going through the effort of switching providers.

Finally, government regulation likewise constitutes an immense entry barrier for potential entrants. The government, as both regulator and shareholder in the dominant market player, has a vested interest in protecting the entrenched firm SETAR, a significant source of public revenue.[74] Without structural separation between these roles, new entrants face an uneven playing field.[75]

3.A.3 NCT relevance

There are three potential avenues through which to tackle the competitive concerns.

1) An overhaul of the legislation on telecoms
2) AFTA imposing interim measures on SETAR under the abuse of dominance pillar
3) NCT

1) Regulation

Ideally, the competition issues would be mitigated under a regulation that cements certain rights, as has occurred in other liberalised telecoms markets worldwide. For instance, the EU Directive establishing the European Electronic Communications Code[76] demands that each Member State implement ex ante market regulation including the imposition of access and interconnection obligations.[77] Access obligations indicate the making available of facilities or services to another undertaking for the purpose of providing electronic communications services[78]. Interconnection is a specific type of access implemented between public network operators by means of the physical and logical linking of public electronic communications networks in order to allow the users of one undertaking to communicate with users of another undertaking. Other obligations include the promotion of competition and ensuring number portability between providers.[79]

[72] https://www.submarinecablemap.com/submarine-cable/celia
[73] AFTA, 'Allocation and fee model mobile telephony frequency range' (2024) 5 <https://www.afta.aw/wp-content/uploads/2024/11/Allocation-and-fee-model-mobile-telephony-frequency-range-1.pdf>.
[74] 24ora, 'Setar N.V. has paid the government 5.5 million florins' (2022), <https://english.24ora.com/setar-n-v-has-paid-the-government-5-5-million-florins/>.
[75] OECD, 'Recommendation of the Council on Competitive Neutrality' (OECD/LEGAL/0462 2021).
[76] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L321.
[77] ibid Article 5(1)(a) and Article 3(2)(a).
[78] ibid Recital 27.
[79] ibid Article 3(2)(b) and Art. 5(1)(g).

However, this is unlikely to happen in Aruba. A former Minister has pointed to a chronic shortage of legislative attorneys in the country, meaning that by the time legislation is passed, it may already be outdated. More pressingly, the clear conflict of interest gives the government little incentive to reform a market that benefits its own financial interest. However, it is to be expected that the state would refrain from acting as it must be borne in mind that the telecoms liberalisation in Europe was driven by the EU institutions logically aiming to remove unfair advantages Member States gave to their national telecoms companies.[80] In reality, moving the regulatory functions of telecoms to independent bodies actually represented the overarching project of eliminating competitive distortions in the internal market. Such driving force is not present in Aruba as there is no supranational polity imposing and monitoring these changes. Reforming the outdated telecoms laws, along with other inefficient regulations, should continue occupying an item in the agenda of Aruba's legislature — but the political and institutional will to enact such change appears to be low.

2) AFTA

The second option is for AFTA to take enforcement action towards SETAR under Article 2.7(1) of the Competition Ordinance which prohibits abuse of dominance.[81] However, remedies under this pillar can only target the dominant firm (SETAR), without the ability to address systematic market-wide issues. Additionally, Article 2.8(1) allows for interim measures, but these are also firm-specific. With AFTA being such a young authority with only one year of activity under its belt, it must be afforded the time and space to act accordingly. But given the clear market dysfunction, AFTA could place the telecoms sector in its enforcement policy, especially given its unique position to act where the government has created a regulatory lacunae.

3) NCT

Thus, the first option may not be realistic or could take years to implement, while the second option is not as effective at combating the root of the problem. A more effective and holistic approach would be the adoption of NCT remedies. After carrying out a market investigation and identifying the pertinent competition problems, AFTA would be able to impose remedies on the entire market. In fact, AFTA has already made two key recommendations for the telecoms market.[82] First, the authority has recommended that SETAR grant third parties access to their networks at cost-oriented rates. Second, it has recommended that SETAR share their infrastructure such as antenna sites, based on similarly cost-oriented rates. However, these recommendations remain non-binding with the hope that the legislature will implement them eventually. With the NCT, AFTA would have been able to turn these recommendations into obligations immediately. In the same report, AFTA had also recommended that the Directie Telecommunicatie Zaken (DTZ) be responsible for setting and monitoring these measures in consultation with AFTA. Independence and objectivity from a government agency regulating a state-owned entity, however, seems dubious. Placing AFTA, instead, as the sole party responsible for imposing the necessary remedies would place an additional fence between these conflicting interests.

Under an NCT approach, AFTA could impose the following remedies:

1. Interconnectivity = linking of telecommunications networks so that customers of one network can communicate with customers of another network
2. Universal access = non-discriminatory and transparent access to essential network infrastructure
3. Redundancy = involves running alternative instances of core network services and building duplicate network infrastructure so that if one company has a failure, it can redirect the service through another company
4. Number portability = enables mobile phone users to retain a mobile telephone number when changing the mobile network operator
5. Cost-allocation rules = how the costs of shared infrastructure and services are divided among operators, to ensure fairness and anti-competitive pricing
6. Co-location = the use of a single location by multiple companies to house numerous serves and other networking apparatuses

[80] cf Commission Staff (n 57) 7.
[81] *Mededingingsverordening* AB 2020 no. 103 <https://www.afta.aw/wp-content/uploads/2023/10/AB-2020-no.-103.pdf>.
[82] cf AFTA (n 73) 20.

B. Banking

3.B.1 Background

In late 2024, customers of Aruban banks shared on social media email notifications from their banks announcing the gradual replacement of their current hybrid debit cards (Maestro and Mastercard debit enabled) with Mastercard debit-only cards through 2025. The announcement also mentioned that the rate for all other local banks' Mastercard debit and/or Visa debit transactions would increase from 1.5% to 2%, claiming that the increase for debit card transactions would cover 'additional features like online payments and enhanced security.'[83] The raise in card transaction fees sparked public outrage online and rekindled long-standing dissatisfaction and distrust in local banks. In response to the criticism, the Aruban Bankers Association released a united statement from all local banks whereby they shifted responsibility for the card transition and associated fee increase on to Mastercard, the multinational company itself.[84] The association tried to placate consumers by indicating that the change from Maestro to Mastercard debit was part of a broader global rollout, not specific to Aruba. Months later, the local trade association Comerciantenan Uni Aruba (United Merchants Aruba), issued a public call for dialogue between merchants, the Aruban Bankers Association, and the government to arrive at a solution that would ensure that the costs resulting from the fee increase would not fall disproportionately on merchants and ultimately consumers.[85] These events revived public concern about the lack of effective competition in the banking sectors in Aruba and Curaçao.

Currently, five local commercial banks operate in Curaçao,[86] and four in Aruba.[87] As illustrated in the table below through green highlight, most of these institutions are affiliated either through shared ownership or corporate group structures, creating substantial overlap across the two islands. Particularly in Aruba, the commercial banking sector can be characterised as an oligopoly.

Curaçao	Aruba
Banco di Caribe N.V.	Banco di Caribe Aruba N.V.
Maduro & Curiel's Bank N.V.	Caribbean Mercantile Bank N.V.
Orco Bank N.V.	Aruba Bank N.V.
APC Bank N.V.	RBC Royal Bank Aruba N.V.
Vidanova Bank N.V.	

A previous study on the state of competition in the banking sector in Aruba concluded that the banking market is highly concentrated, dominated by a few commercial banks, with significant entry barriers, and observable distortions of competition.[88] The interest spread in Aruba is among the highest in the Caribbean, suggesting limited market competition which is leading to high bank profitability.[89] As a result, the study recommended that more competitive dynamics are needed to improve efficiency and lower consumer costs.

3.B.2 Competition problems

There are several competitive concerns arising from the commercial banking market.

[83] https://www.facebook.com/share/p/15HbcBZjUN/
[84] 24ora, 'Asociacion di banco di Aruba: Ta Mastercard ta cobra e "fee" pa uzo di un carchi internacional' (2024) <https://24ora.com/asociacion-di-banco-di-aruba-ta-mastercard-ta-cobra-e-fee-pa-uzo-di-un-carchi-internacional/>.
[85] Bon Dia, 'Comerciante Uni ta haci yamado pa bin cu solucion urgente pa situacion di debit y credit card fees' (2025) <https://www.bondia.com/comerciante-uni-ta-haci-yamado-pa-bin-cu-solucion-urgente-pa-situacion-di-debit-y-credit-card-fees/>.
[86] Centrale Bank van Curaçao en Sint Maarten, Registry of supervised institutions as per December 31, 2024, <https://cdn.centralbank.cw/media/supervision/20250129_registry_of_supervised_institutions_as_per_december_31_2024.pdf?>.
[87] Centrale Bank van Aruba, Supervision - List of financial institutions under the supervision of the CBA, <https://www.cbaruba.org/financial-institutions-under-supervision-of-the-central-bank/>.
[88] Koert van Buiren, Cees van Gent and Angelique J.M. van der Voort, 'Op weg naar effectieve mededinging in Aruba' (SEO Economisch Onderzoek 2013) 31.
[89] ibid 42.

Explicit collusion amongst the four banks in Aruba, three of which are present in Curaçao as well, has been cited by several interviewees as manifested in a decades-old booklet made publicly available by the Aruban Bankers Association whereby all local banks fixed their rates. When asked to comment on this allegation, the Central Bank of Curaçao (CBCS) admitted that they have a material concern of collusion amongst local banks despite not currently possessing evidence to support that belief. The Central Bank of Aruba (CBA), on the other hand, indicated serious doubt that this claim is true and denied possessing any information about a banking cartel. If a price-fixing cartel did, in fact, exist in the past but went underground (stopped publishing the booklet) and subsequently disbanded — this would not equate to an end of the cartel as cartels can continue functioning on auto-pilot. Even if the alleged booklet is no longer in circulation, this does not preclude the continued adherence to its contents. Maintenance of the status quo or coordinated behaviour may persist and be sustained through institutional memory or informal understandings, particularly through trade associations which are fertile grounds for cartelization. This would not constitute the first instance of anti-competitive practices amongst commercial banks in Aruba: a study found that an agreement between the Aruba Bankers Association containing fixed interest rates proposed to a potential client pointed to the formation of a cartel on the interbank market.[90] However, as there is no material evidence verifying the claim of the booklet, it must be not be relied on for analysis. This preliminary conclusion, nonetheless, does not rule out the concern of tacit collusion, i.e. where "businesses implicitly coordinate their behaviour without an agreement or communication".[91] The features of the banking market — oligopolistic, high entry barriers, homogenous products, and high transparency — facilitate firms in keeping track of each others' practices and replicating them accordingly.

A significant entry barrier in this sector is the granting of licenses by the Central Bank of Aruba in order for a firm to operate as a financial institution.[92] While regulatory oversight is appropriate in a sector as sensitive as banking, this will nevertheless result in existing firms remaining entrenched. In addition to the approval necessary from the Central Bank of Aruba, foreign banks face other entry barriers: paying a foreign exchange commission which raises costs and battling consumer bias as locals prefer to bank domestically.[93] This bears mentioning as the high concentration level in the market is reinforced by such high entry barriers.

Lastly, surveys show that consumers refrain from switching between commercial banks,[94] possibly due to the associated switching costs and barriers. As there are transaction delays of 2-3 days between banks, employees prefer banking where their employer banks for payroll expediency. The Central Bank of Aruba itself acknowledges these frictions as constituting higher barriers than would be the case in other countries such as the Netherlands.[95]

3.B.3 NCT relevance

The NCT, which aims to address structural competition issues such as tacit collusion, particularly where existing regulations are ineffective or inapplicable,[96] can be a suitable remedy option within the banking sector in Aruba and Curaçao. While it is advised that the competition authority work closely with the Minister of Finance, the Central Bank, and other stakeholders, if a structural competition problem is found in the banking sector, implementation of the remedies should remain in the hands of the competition authority.[97] The focus on identifying the problem and proposing tailor-made solutions in cooperation with stakeholders could result in a more proactive and inclusive approach, above all taking into account the low number of competitors. In order to arrive at a conclusive list of the most fitting remedies to impose, a market investigation would first need to take place to reveal what the competitive issues at stake are. Inspiration can be drawn from previous NCT-style investigations into the banking sector across different jurisdictions.

In South Africa, the enquiry revealed unveiled a number of competition issues found in the banking industry, beginning with its oligopoly structure as the sector was dominated by four major banks which together controlled approximately 95% of the personal transaction account market.[98] This tight-knit oligopoly allowed the banks to

[90] ibid 39.
[91] cf Bijl (n 24).
[92] *Landsverordening toezicht kredietwezen* AB 1998 no. 16, Article 2 <https://www.cbaruba.org/readBlob.do?id=8598>.
[93] cf van Buiren (n 87) 35.
[94] ibid 39.
[95] ibid 37.
[96] cf Larouche and de Streel (n 48) 22.
[97] ibid 28, 29.
[98] Panel of the Banking Enquiry, 'The Banking Enquiry: Report to the Competition Commissioner by the Enquiry Panel' (Competition Commission South Africa 2006) 54.

exercise significant market power, limiting effective competition. Some of the entry barriers included that new entrants faced high regulatory costs, expensive infrastructure requirements, and the challenge of overcoming customer inertia and brand loyalty.[99] On the demand side, a lack of consumer awareness and engagement meant that consumers often did not understand or scrutinise their bank charges, making the demand for retail banking services relatively inelastic and weakening competitive pressures.[100] Among some of the recommendations made by the enquiry were that the banking association develop minimum standards for the disclosure of product and price information,[101] that measures be implemented to reduce search costs and improve the comparability of banks' product offerings and prices,[102] and that measures to assist customers in switching be developed.[103]

In the UK, a market investigation into the personal banking sector found that there was an adverse effect on competition due to the unduly complex charging structures and practices by banks, their failure to adequately explain them, coupled with customers' reluctance to switch to another bank.[104] The recommended remedy entailed that banks be required to ensure that certain types of communications with customers be made easy to understand and to inform customers of their ability to switch. In a subsequent market investigation into the retail banking sector, the investigation established that banks do not compete hard enough to win or retain individual customers, in addition to new and smaller market entrants facing expansion barriers.[105]

Although the Netherlands has yet to implement an NCT-style tool, a 2024 report on the Dutch savings market reiterated similar findings of serious competition concerns. The market was found to be highly concentrated, with three major banks dominating a significant portion of the market while offering savings rates that consistently lagged behind the European Central Bank's key interest rate.[106] This oligopolistic structure, coupled with market features such as high transparency, product homogeneity, and symmetry among the dominant players, likely facilitated tacit collusion.[107] Additionally, the reluctance of consumers to switch banks is driven by low awareness of alternative savings products and a bias in favour of major Dutch banks.[108] Thus, the recommendations of the competition authority focused on lowering barriers to switching for consumers.[109] Some of those include: disclosure obligations, encouraging the use of comparison websites, prohibiting the tying of payment and savings products, and IBAN portability and interoperability.[110]

Whether there is an undetected cartel or tacit collusion, the anti-competitive effects remain the same. While a competition authority may not be able to directly impose changes on the fees banks charge, by facilitating consumer switching through NCT remedies, they can indirectly pressure banks to compete more actively on other dimensions, such as innovation, the development of more user-friendly banking apps, improved customer service, and overall value offered to consumers.

[99] ibid 55-58.
[100] ibid 67.
[101] ibid 498.
[102] ibid 499.
[103] ibid 500.
[104] cf Whish (n 47) 52.
[105] ibid 60.
[106] ACM, 'Report: Competition on the Dutch savings market' (ACM/UIT/622124 2024) 8, 23.
[107] ibid 29.
[108] ibid 44.
[109] ibid 45.
[110] ibid 6, 7.

IV. Considerations of the legislative framework for NCT implementation

Implementation of the NCT in Curaçao and Aruba would require either amending their respective Competition Ordinances or passing an entirely new law. The UK has two of the three traditional competition law pillars enshrined in the Competition Act of 1998, separate from their NCT-equivalent in the Enterprise Act of 2002.[111] Part 4 of the Enterprise Act grants not only the country's competition authority but also the sectoral regulators the discretion to make market investigation references. In practice, the work of the investigation is carried out by a team at the competition authority[112]

This approach differs from more recent developments across multiple jurisdictions that have instead opted to simply amend their respective regulations containing existing competition laws. In late 2023, the German legislature amended the Competition Act to grant the competition authority remedial powers at the conclusion of a sector inquiry (NCT equivalent).[113] South Africa similarly amended their Competition Act to add 'sector inquiries' after having pulled a manoeuvre to carry out the inquiry even though there was no explicit legal basis. The Competition Commission of South Africa achieved this by interpreting a section 21 of the Act liberally, which "said that one of the Commission's functions was to implement measures to increase market transparency".[114] In a subsequent amendment "inserted new provisions to the Competition Act to grant the Commission remedial powers available at the end of a market inquiry." The Netherlands is likely to follow this same route as the local competition authority is currently arguing for an update of the Dutch Competition Act by way of two amendments, one of them being the statutory power to impose NCT remedies.[115]

In the name of expediency, and in line with the advice of a former Minister of Justice and AFTA, it is recommended that the NCT be incorporated by means of amending the existing Competition Ordinances in Aruba and Curaçao. Such an amendment granting NCT powers must constitute its own chapter as it is imperative that it remains outside the context of a violation and separate from the three traditional pillars. The procedure could entail a market investigation, followed by an interim report possibly with the appropriate remedies already fleshed out, a participatory process where stakeholders could provide their input, and ultimately a final order.

[111] cf Whish (n 47) 6.
[112] ibid 7.
[113] Jens-Uwe Franck and Martin Peitz, 'Germany's new competition tool: sector inquiry with remedies' (Journal of European Competition Law & Practice 2024).
[114] cf Whish (n 47) 45.
[115] cf Snoep (n 44).

V. Conclusions

Of importance for smaller competition authorities is the need to establish clear enforcement priorities. Given the current legal frameworks in Curaçao and Aruba, it is essential to focus efforts on areas that have a direct impact on consumers. AFTA has emphasised that the authority's focus lies in lowering barriers to entry and protecting new entrants — an approach considered more effective than focusing solely on cartel enforcement. Indeed, small market economies present particular competition problems, many of which could be more readily addressed through the implementation of NCT remedies.

At present, once a market investigation is conducted, authorities are limited to two courses of action: determining whether there has been an infringement of competition law (i.e. cartel agreements and abuse of dominance), or issuing non-binding recommendations to the legislature. Introduction of the NCT would allow competition authorities to adopt a more proactive role in re-engineering competitive conditions as opposed to merely reacting once an infringement has been found. A market investigation and its accompanying remedial tools are the answer to guiding firms toward more competitive outcomes.

The NCT would be especially fruitful in two types of industries. First, in sectors suffering from inadequate or outdated government regulation, such as telecommunications. While comprehensive sectoral reform in telecoms remains the ideal solution, in practice, sectoral regulation on the islands suffers from a lack of civil servants, prolonged timelines, and overly narrow regulatory scopes. By the time legislation is enacted, market conditions may have already shifted, rendering the intervention less effective. Thus, the NCT offers a means of bypassing politicisation and regulatory inertia to ensure true liberalisation in the telecoms sector through the hands of independent competition authorities. Second, the NCT is highly applicable in oligopolistic industries such as banking, where concerns of both explicit and tacit collusion persist. The NCT derives a unique advantage in its ability to target market features that lead to a lack of competition without requiring the establishment of an infringement. The remedies to this end are appropriate given that they are not punitive nor retroactive, and the process is not accusatory in nature. Instead, remedies focus on future conduct, are market-wide, and involve the participation of firms. This participatory aspect fosters compliance as it allows for market players, consumer interest groups, and other stakeholders to exercise their voice. In utilising NCT remedies, the priority for authorities should begin with low-hanging fruit, such as number portability, to bolster public perception and deliver outcomes to consumers on what truly matters to them. This approach also eases administrative burdens.

Ideally, the NCT would be introduced through amendments to the existing Competition Ordinances in Curaçao and Aruba, via a new chapter separate from existing provisions on cartel agreements, abuse of dominance, and merger control.

Concerns of regulatory overreach could be quelled with procedural safeguards, such as granting the Minister of Finance a veto power and including sunset clauses which would allow the relevance and efficacy of the remedies to be re-evaluated every 5-10 years. Current safeguards already exist, particularly in Aruba where the independence of the competition authority is reinforced through the appointment of board members from outside the political sphere of the country. Additional safeguards could include the creation of a supervisory board or board of trustees, serving as a second governance tier to protect the primary board from political interference.

It must be borne in mind, however, that the culture of competition law in both of the islands is still in a nascent stage — as such, it might be premature to discuss the NCT at this time. For reference, the process of embossing competition law in the Netherlands spanned more than a decade and initially encountered significant resistance. Nonetheless, this study could serve as a foundational resource to support and advocate for the future adoption of the NCT in Curaçao and Aruba, when the time is right.

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