

DEVELOPMENTS IN COMPETITION POLICY IN CARICOM: EXPERIENCES AND FUTURE CHALLENGES

INTRODUCTION

This presentation is on what is happening in Jamaica; and by necessary implication what is happening in the CARICOM region, regarding competition policy. CARICOM, as we all know, by now, refers to the Caribbean Community and Common Market and comprises, for the large majority, island states which fit squarely into that eclectic group of countries referred to variously as LDCs or least developed countries; smaller economies or developing countries.

LEGAL FRAMEWORK

The topic of competition policy in the region has to be discussed with reference to chapter 8 of the Revised Treaty of Chaguaramas under which the CARICOM Single Market and Economy is established. Under this chapter each member state of CARICOM is required, among other things, to:

- (i) establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition;

It is to be noted however, that to date only Barbados and Jamaica have established such authorities. Trinidad is on its way. The region recognizes that the bulk of member-states might be unable to set up competition authorities. This is an economic reality. Thus, the proposed CARICOM competition Commission is expected to operate as a domestic Commission for such states as are unable to establish domestic agencies; and as a regional Commission to deal with cross-border issues. Similarly the CARICOM competition legislation will have dual application.

- (ii) take the necessary legislative measures to ensure consistency and compliance with the rules of competition.
- (iii) provide penalties for anti-competitive business conduct.
- (iv) take effective measures to ensure access by nationals of other member states to competent enforcement authorities, including the courts, on an equitable, transparent and non-discriminatory basis.

It is provided that a member state shall require its national competition authority not only to co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct and the exchange of information relating to such conduct, but also to co-operate with the regional Commission in achieving compliance with the rules of competition.

Although the focus is specifically on competition policy within CARICOM, it must be acknowledged that even in the absence of formal arrangements, member-states can do much to co-operate with countries outside of the region to detect and deal with cross-border anti-competitive activities. Recently in Jamaica the Fair Trading Commission received complaints from a Jamaican national, living in Canada. The informant complained that two Canadian Universities which had advertised certain academic courses in a Jamaican newspaper, was guilty of false and misleading advertising. Since the Jamaican Competition Act does not have extra-territorial effect, we wrote to the Canadian Competition Authority and asked that body to pursue the matter. Thus, the conduct of a Canadian entity overseas could be examined by the Canadian Authorities.

ASPECTS OF COMPETITION POLICY

1. Control of Mergers

This is an area of concern, globally and currently there seems to be a mix of policies within the region, regarding mergers and acquisitions. We go from Jamaica, whose legislation contains no provisions addressing this issue, to Barbados, whose statute requires only that a register be maintained, to the draft CARICOM competition legislation which provides extensively for merger control. It is the view of many that given the size and fragility of most of the firms existing in the various member-states, it is necessary for some firms to be strengthened through mergers, so as to be able to compete with foreign firms. The Regional Negotiating Machinery (RNM) proposed in August 2001 that by way of balancing the scales in global trade, a regime of special and differential treatment be established for CARICOM countries, for a period of ten years. It was proposed too that such smaller economies be allowed to establish export conglomerates for the said ten year period, without being considered to be guilty of anti-competitive practice. These proposals are viable to the extent that the developed countries are moved to make those concessions.

2. Abuse of Dominance

Competition Agencies in the Region have to be prepared to take aim at the dominant enterprises in the various member-states. Such enterprises will not be graciously handing over market power to new entrants. They are expected to fight to retain their dominance; and to conduct business as usual. We have seen the behaviour of Cable & Wireless in Jamaica, after liberalization of the Telecommunications sector. The Commission has to be able to keep abreast of technological developments so as to be able to detect and deal with attempts by erstwhile monopolies in the various sectors to abuse their position of dominance. It is so easy for the Competition Agency to be viewed as “public enemy No. 1”

The FCA sets out the types of activities, which would amount to an abuse of dominance, but it does not establish such behaviour to be a breach per se. The Commission is required to go further and determine whether that abuse has had, is having or is likely to have the effect of “lessening competition substantially in a market.” Member-States, and indeed the Regional Commission might wish to ensure that their legislation draws from another experience, e.g. the European Union, where abuse of dominance per se is a breach.

Further, thresholds need to be established in the region. Currently, the thinking at the FTC is that an enterprise is dominant if it controls 50% market share. This might not always be so but the point is, as a region we need to be looking more seriously at policy matters such as these:

3. Relationship between competition and other issues, like:

- (i) consumer protection
- (ii) anti-dumping

Currently, the FCA contains extensive provisions related to consumer protection, and indeed the bulk of the complaints reaching the Commission are consumer complaints. At the same time there is a fully established government entity set up to deal with consumer issues. Should there be a merger of the FTC and the Consumer Affairs Commission? Alternatively, should consumer protection provisions be removed from the FCA?

Similar questions could be raised in respect of anti-dumping. It is acknowledged that dumping is essentially predation, which may be dealt with as such under competition policy and law. It is worth exploring too, the extent to which anti dumping law should contain elements of Competition Law. This discussion is actually taking place in the

Negotiating Group on Competition Policy in the Free Trade Area of The Americas (FTAA).

DISPUTE SETTLEMENT

This issue is addressed under chapter 9 of the Treaty, but has direct relevance to the issues arising under Chapter 8. The globalized market must give rise to increasing numbers of cross-border disputes. Chapter 8 requires that each member-state take measures to ensure access by the nationals of other member-states to competent enforcement authorities, including the Courts.

This is where the Caribbean Court of Justice becomes relevant to this discussion. Because the relationships among the CARICOM member-states are governed by Treaty; and treaties are governed by international law, private individuals and firms, except under certain specific circumstances, will not have access to the Caribbean Court of Justice (CCJ), which is to be established under Chapter 9. It is States that are the subject of international law. The CCJ will have final responsibility for the interpretation and application of the provisions of the Treaty, of which Chapter 8 is a part. What seems to be emerging then is that whereas individuals and firms will be able to have cross-border disputes of a competitive nature addressed by the Regional Competition Agency, appeals to the Court against any decision of the Regional Commission will have to be taken and pursued by the individual's or firm's member-state.

The four cases in which an individual could go directly to the CCJ are:

- (a) when the CCJ has decided that a benefit or right conferred by the revised Treaty on a Member State is designed to directly benefit these persons;
- (b) where these persons have established that they have been prejudiced in the enjoyment of this right or benefit;
- (c) where the Member State which should have brought a claim on behalf of a person or company has declined or omitted to do so, or has expressly consented to allow the persons concerned to bring the claims instead of the Member State entitled to do so; and
- (d) where the CCJ has decided to allow the person to pursue the claim in the interest of justice.

It is hoped that the CCJ will become operational by 2003. That body will play a major role in engendering certainty, transparency and equity in

the Region. To the extent that investors require an environment in which their rights can be impartially preserved, the economic survival of the Region is tied up with the timely establishment and efficient functioning of the CCJ.

CHALLENGES

The efficacy of any competition agency, whether domestic or regional depends on a number of factors, among which are:

- (i) public awareness of the benefits of competition
- (ii) the strength of the legislative framework within which the agency operates
- (iii) the capacity of the agency to perform its functions

While it is true to say that the Jamaican consumer is becoming increasingly aware of his rights as a consumer (evidenced by the increasing numbers of consumer complaints reaching the Fair Trading Commission (FTC)) there is much ground left to cover.

The situation regarding the receptivity of businesses to the concept of competition seems to be much less heartening. In some quarters the Commission is seen as a hindrance to business. There is as yet no “culture of competition” in Jamaica and in the region. Public education is therefore critical.

The relevant law needs to properly facilitate the work of the Competition agency. In its current form the Jamaican Fair Competition Act (FCA) allows the Commissioners to perform the dual role of investigating and adjudicating – interpreted by the local Court of Appeal to be a breach of natural justice. It is currently being amended to remove this disability. As member-states learn from each other's experiences, everyone need not fall into the same traps.

CONCLUSION

Developing countries are faced with real impediments to the effective implementation of competition policy. The underdevelopment of financial and credit markets and the low levels of technical and business knowledge that exist often hamper market entry and improvements in productivity over time. Where there is an absence of the pre-conditions which would ensure that markets, if left to themselves, would generate effective competition, competition policy and law become even more important. It is by this means, that restrictive business practices can be

prevented and a favourable environment for the development of competition can be assured. National and international competitiveness will also be promoted.

Without extensive technical assistance, these countries will be unable to operate competition agencies which will function effectively, as advocates for competition and as enforcers of competition law.