

CHALLENGES OF DEVELOPING A COMPETITION REGIME IN CARICOM

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Over the last two decades, Caricom countries have gone through a fairly rigorous process of trade liberalisation, privatisation, deregulation and fiscal reform, as part of Structural Adjustment programmes linked to IMF/World Bank loans and debt rescheduling. As such, many of the economic inefficiencies that had arisen from the import-substitution/state intervention phase of the 1960s and 1970s have been removed. These former British colonies have had parliamentary democracies based on the Westminster system since gaining independence in the 1960s and 1970s. As the concept of 'good governance' gained currency over the last decade, the political system has increasingly come under scrutiny. While, no doubt, there are glitches in the system, and the pervasive drug problem puts the societies under great pressure, for the most part, Caricom countries are secure democracies.

However, despite the courageous efforts of these micro-economies to restructure their economies and societies, they find themselves being increasingly marginalised as globalisation processes render them less and less important to their trading partners. Preferential treatment for commodity products that are the mainstay of many of their economies are being withdrawn. The region has responded to this marginalisation by deepening the integration process towards a Caricom Single Market and Economy (CSME). An important instrument to ensure that there is free flow of goods and services in the CSME has been the development of a Caricom Competition

Policy, contained in Protocol VIII amending the Treaty of Chaguaramas. Heads of Governments have signed Protocol VIII, and it must now go through the process of ratification in the parliaments of member states.

Within the next year or so, therefore, all members of the CSME will have to legislate and implement competition laws. Caricom will have to set up a regional Competition Commission to deal with cross-border anti-competitive practices, while member states must develop the institutional framework for implementation. Jamaica already has a Fair Trading Act and a Fair Trading Commission, though the emphasis of that regime has so far been on consumer protection. While St. Vincent has enacted a Competition Law (essentially copying Jamaica's), it has not as yet been promulgated, and there is nothing in place for implementation. Trinidad and Tobago has a draft Competition Bill that has not been tabled in Parliament as yet. The rest of the region has not even started the process.

The region also has to respond to extra-regional pressures to develop competition regimes. At present, negotiations on the FTAA Agreement includes a chapter on competition policy. Future negotiations with the EU includes competition policy. And there is the thrust by some countries, particularly European, to negotiate a competition policy regime in the WTO. Technocrats in the region must respond to these multiple challenges. In fact, the response to this point has been less than satisfactory, and this is because there is so little knowledge and understanding of competition law and policy. As such, there was no input from Caricom countries into the discussions in the WTO Working Group on Trade and Competition Policy until recently (June 2000) when Trinidad and Tobago tabled a paper on the concerns and

issues faced by smaller economies. Little, if any, attention has been focussed on the pending negotiations with the EU, as it relates to competition policy. And attendance by Caricom countries at the FTAA-NGCP meetings has been very poor. Only three countries (Jamaica, Bahamas and Trinidad and Tobago) have sent delegates. The reason for this is two-fold. In the first instance, countries are strapped for funds to support these multiple poles of negotiations, and have to therefore prioritize. The second reason feeds on the first. Attention is given to those areas that are of obvious importance - agriculture, market access, services. Competition policy, little understood as it is, does not make the priority list, and so members leave it to the Regional Negotiation Machinery to represent them.

For those of us who have developed a fair understanding of competition law and policy, many questions remain unanswered. We do not, for instance, know how competition law and policy will function in a small economy - or rather, a micro-economy - in which the market structure is so different from the larger, more developed and more integrated economies where competition law emerged and became established. Given the prevalence of the drug trade, how is market structure and competition affected by money laundering? Are there cultural business practices that need evaluation for relevance? Is regulatory captive a high risk in small economies given the ease of access to the corridors of power? These uncertainties present obstacles to the full embrace of the regime, and therefore a part of the competition advocacy thrust in the micro-economies of Caricom should be the research that is required to understand market structure and its influence on the way competition policy functions.

While privatisation has taken place, this was done without having competition regimes in place to ensure that competition principles were applied in the process. This is primarily because IMF/WB structural adjustment programmes imposed privatization without the wisdom of requiring the introduction of competition law and competition principles in the process. In small economies, capacity of local entrepreneurs are not sufficiently large to allow for local acquisition of large firms that are being privatised. As such, privatisation in most cases mean de-nationalisation, and this has caused public concern. There is concern that competition policy will lead to increased market access by foreign firms, to the detriment of local firms. The best way to deal with these concerns is to do research and demonstrate the effects.

We are therefore facing a situation in which ignorance and the derived uncertainties cloud the way forward. Competition policy is being introduced from top down, with little knowledge of the market structures and behavioural patterns that will be affected by it, and without the human resource to staff Competition Authorities, the Judiciary, and to service private firms. Clearly, a serious program of technical assistance is needed to ensure that the competition regime is introduced into a receptive and sustainable environment.

The most pressing of needs is the training of personnel to staff the Commissions and the Judiciary. It is extremely important that the business sector have confidence in the technical competence of the Commission's staff, and in the transparency and fairness of the procedures. Without that, the competition regime could easily become a "lame duck", lacking the support and respect of the stakeholders. At present, apart from Jamaica, there are few if any lawyers, judges,

economists and trade experts who also have competence in competition law. Yet we need to staff a regional commission and commissions in some thirteen member-states.

Not only is technical and professional training required, and with urgency, but ways have to be found for the staff to gain experience rapidly. There are two ways in which this can be done: firstly, doing internships in more established Competition Authorities, and secondly, by being exposed to the past experiences of other agencies.

And once the Competition Authorities are set up and are functioning, there is need for continuous training through seminars and short training workshops targeted at the Commission's staff as well as the Judiciary. Such training workshops should not be done willy nilly. Rather, there should be a structured approach, which would provide certainty and continuity to the process. The proposed technical assistance institution, to be based in Panama, could provide these needs by offering a continuous and structured set of programs delivered by regional experts. Moreover, an added benefit of this forum would be the bringing together of technical staff from Competition Commissions from all parts of the hemisphere, who can learn from each other's experiences. Such cross-fertilization accelerate the process of gaining experience and understanding of the implementation process, including the challenges and modalities of competition advocacy.

The process of introducing competition principles into regulatory systems is a new and difficult one, and training and exposure to the experiences of other countries will be needed. Micro-economies, in particular, are constrained because of economies of scale considerations, and monopolies are inevitable in several industries, particularly

essential services. Governments have traditionally supplied these services, and subsidised them where possible. The process of privatisation has left the consumer with less sympathetic providers. Training of staff of regulatory and competition commissions would be needed in order that consumer welfare is factored into the regulation by maximising competition opportunities.

There is need for technical assistance in the process of setting up the institutional framework to administer the competition regime. Supervisors have to be trained to manage the Commissions, but additionally, key personnel from other Ministries need exposure to the basics of competition law and policy so that cooperation between the Commission and other Departments of government could be engendered. There is a need to equip the institutions and train personnel in the use of computers and the setting up and upkeep of databases as well as the access to other data bases. The Caricom Competition Authority, in particular, will need to develop expertise in managing close cooperation with authorities in member states.

Being small open economies, dominated by foreign capital, many of the serious cases would involve multinational corporations whose income and power are greater than the governments of these small islands. When Competition Authorities have been set up and are functioning, it would be extremely useful if technical staff from more experienced Commissions were to assist those in new institutions in cases that are particularly difficult, or which involve powerful multinational corporations. This would not only help to facilitate the resolution of the case at hand, but would also provide valuable guidance and training to the staff of the new institutions.

All in all, then, the Caricom region is one at the brink of establishing competition regimes, but with little knowledge of the law and its implementation, and lack of financial and human resources needed to realise this objective. More than anything else, what is needed is training of lawyers, judges, economists, trade experts and regulators of utilities, the financial sectors and others. Moreover, such training is needed immediately, has to be structured and should allow for cross-fertilisation of experiences from different countries in the hemisphere, so that the process of learning could be accelerated. There is no doubt that competition regimes will enhance the economic performance of countries in the region, but this can only happen if regimes are effective and command the respect of the stakeholders. Competence of staff is key to achieving this goal.