

# Competition Policy in CARICOM

## Introduction

The topic of competition policy in the CARICOM 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:

- 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.

- Take the necessary legislative measures to ensure consistency and compliance with the rules of competition.
- Provide penalties for anti-competitive business conduct.
- 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.

## Two 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. Mr. Ivor Carryll, Programme Manager, of the Single Market and Economy CARICOM Secretariat, speaking in Panama City at CLICAC's March 2002 conference on Competition Law and Policy: Post Doha Agenda was doubtful whether such provisions will actually be enforced. It was the view of the Jamaican law makers at the time of the drafting of the Fair Competition Act (FCA) and continues to be the view of many, that given the size and fragility of most of the companies existing in the various member-states, it is necessary for some companies to be strengthened through mergers, so as to be able to compete in the global marketplace. This is not a popular view in the developed world; and time will reveal the extent to which a regime of special and differential treatment for CARICOM countries will be accommodated. The Regional Negotiating Machinery (RNM) has proposed that such a regime be established for a period of ten years. It was proposed too that smaller economies be allowed to establish export conglomerates for the said ten year period, without being considered to be guilty of anti-competitive practice.

### 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. Competition agencies have to be able to keep abreast of technology, so as to be able to detect and deal, in a timely manner, with attempts by dominant companies to abuse their position of dominance. It is 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 draw 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, at the FTC an enterprise is presumed to be dominant if it has a market share of 50% or more. This might not always be so; the point is, the region needs to be looking seriously at policy matters such as these.

### **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 companies, 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 companies 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 company's member-state.

The four circumstances under which individuals could go directly to the CCJ are:

- 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;
- where these persons have established that they have been prejudiced in the enjoyment of this right or benefit;
- 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, instead of the Member State entitled to do so, to bring the claims; and
- where the CCJ has decided to allow persons 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.

### **Conclusion**

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

- public awareness of the benefits of competition
- the strength of the legislative framework within which the agency operates
- the capacity of the agency to perform its functions

While it might be 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)) the receptivity of businesses to the concept of competition does not seem to be keeping pace. The Commission is seen in some quarters as a hindrance to business. There is as yet no "culture of competition" in Jamaica or in the region; and public education is therefore critical.

The relevant law needs to properly facilitate the work of the competition agency. In its current form the Fair Competition Act (FCA) has certain deficiencies, which are being addressed by amendment. It is an understatement to say that the enforcement of competition law anywhere is only as strong as the enforcement capabilities of the weakest link. As we in Jamaica seek to strengthen the relevant legislation, it is hoped that as they merge, competition legislations around the region will prove to be the effective tools that they need to be, for the proper enforcement of competition.

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, regional and international competitiveness will also be promoted. ■