COMPETITION POLICY AND LAW IN CARICOM: JAMAICA AND TRINIDAD AND TOBAGO

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This short paper seeks to focus on the salient differences between the approaches taken by two Caricom Member States, Trinidad and Tobago and Jamaica, in developing a Competition Policy and Law. Jamaica has a fully operational Competition Law in the form of the Fair Competition Act of 1993, while Trinidad and Tobago, on the other hand is in the process of developing such legislation.

In 1997 the Government of Trinidad and Tobago had issued for public comment a Green Paper entitled “A Competition Law for Trinidad and Tobago - A Proposal For A Fair Trading Act” together with a Legislative Brief. The Green Paper set out for public consultation the proposals to be included in future draft legislation entitled the Fair Trading Bill, which will be tabled for parliamentary debate in the near future. The Legislative Brief detailed the measures in the Green Paper that would be enacted into law. The Fair Trading Bill is at present undergoing the process of being drafted so that references to the Trinidad and Tobago Competition Policy will be confined to the proposals in the Green Paper.

The Trinidad and Tobago Green Paper shares with the Jamaican 1993 legislation certain conceptual approaches, but by and large, there are significant departures that warrant examination. The most noticeable dissimilarity is the absence in the Jamaican legislation of mergers as an activity to be regulated. Mergers are an aspect of the Trinidad and Tobago Green Paper and are defined as two or more enterprises ceasing to be distinct. Thus, the definition will include acquisitions and takeovers. A qualifying merger is one that will be susceptible to investigation, where the enterprises involved exceed TT$50 million dollars and of the merging enterprises, at least one must be located in Trinidad and Tobago. The TT$50 million threshold is one that is variable by ministerial decision. The question has been raised whether the foregoing threshold is one that is appropriate for mergers in a small island developing economy like Trinidad and Tobago. It is expected that decisions relating to this and other issues arising from the Green paper will be the product of vigorous parliamentary debate.

The Green Paper emphasizes at page 19 that mergers and acquisitions in themselves are a proper part of the competitive process and that the object of merger control is not to freeze the industrial structure in Trinidad and Tobago into a pattern of small businesses. The object of regulation, in this context, will be the anti-competitive effect of a merger or acquisition.

*The views contained herein are the personal views of the legal officer in the Trinidad and Tobago Ministry of Trade and Industry and Consumer Affairs.
i.e., an effect "that is likely to lessen competition in Trinidad and Tobago to any material degree" (see page 20). Mergers found to be anti-competitive will be ordered to be terminated or to divest part of their combined business or operations. Failure to comply with the order will incur substantial fines.

The Jamaican legislation, on the other hand, focuses to a greater extent on the conduct of business entities rather than their structure, and devotes more attention to the consumer protection element of anti-competitive behaviour, than does the Trinidad and Tobago Green Paper.

To be sure, both competition policies proscribe anti-competitive agreements (e.g., price fixing, production limitation, market share-outs, discriminatory treatment, sales subject to extraneous conditions). In the Jamaican scheme, such agreements may escape the rigours of the Act only if they satisfy certain listed conditions. One of those conditions is the stipulation that such agreements must contribute to the improvement of production or distribution of goods and services while allowing consumers a fair share of the resulting benefit. (Section 17(4))

The Green Paper advocates the prohibition of only those agreements that have as their objective or effect the monopolization of the market (page 28). Therefore, joint ventures, selective distribution agreements and restrictive vertical agreements that do not fix prices will not be caught by the prohibition against anti-competitive agreements.

Another area of contrast is consumer protection. The Jamaican Act considers both the business entity and the public in their role of consumer, and makes illegal agreements for collective resale price maintenance (Section 22), individual minimum resale price maintenance (Section 25), and agreements containing exclusionary provisions (Section 18). Other consumer-oriented conduct that is made illegal includes misleading advertisement (Section 37), baseless representations as to tests and testimonials (Section 38), double ticketing (Section 39), misleading advertisements of sales at bargain prices (Section 40), and sales above the advertised prices (Section 41).

By contrast, the latter-named offences that affect the interests of consumers are not addressed by the Trinidad and Tobago Green Paper. In this regard, the Green Paper makes the assumption that consumers may not easily recognize a competition issue and it asserts that there is a role to be played by the Consumer Affairs division of the Ministry of Trade and Industry and Consumer Affairs to protect consumers from the effects of anti-competitive behaviour and to represent their interests at the Fair Trading Commission, the proposed entity that would regulate competition in Trinidad and Tobago. (see page 31)

Interestingly, the two competition policies utilize different terminology to describe the situation where an enterprise by itself occupies such a position of economic strength that it can operate in the market without effective constraints from its competitors or potential competitors. To the foregoing definition, the Jamaican legislation applies the phrase 'dominant position' while the Trinidad and Tobago Green Paper prefers the term 'monopoly power.' In point of fact, there is no mention of the phrase 'dominant position' in the Trinidad and Tobago Green Paper. Regarding the term 'monopoly', the Green Paper, at page 10, asserts as follows:

In a small open economy, there will always be products of which there is only one local manufacturer. That does not make it a monopoly. Monopoly is a matter of power to set
prices or regulate output independently of competitive pressure. This does not depend simply on the number of firms in Trinidad and Tobago. Given a liberalized trade regime, competition from abroad can often be a powerful competitive discipline.

Both competition policies target the abuse of monopoly and proscribe certain categories of conduct. In the Green Paper, four exclusionary practices are listed as *per se* abuses, i.e., a practice condemned by the Act in its own right, as distinct from one which offends only when it is found on investigation to cause harmful effect (see page 11). They are: exclusionary vertical restrictions, loyalty discounts, predatory price discrimination and denial of access to networks. Also regarded as illegal is the imposition of vertical restraints on distributors by monopolies for the purpose of entrenching monopoly power, for example, exclusive supply, exclusive purchasing, restrictive terms, tie-ins and restrictions on the supply of parts required by competitors (see page 17). Abuses of similar effect are also the focus of the Jamaican legislation (see Section 20).

The Green Paper however establishes a threshold of 40% or more of market share as a pre-qualification for investigation of an enterprise suspected of monopolistic abuse (page 14). There is no such market share test in the Jamaican legislation. It would appear then that monopolistic abuse in the Trinidad and Tobago context may escape the rigours of the Act if the enterprise enjoys less than 40% of the market.

Regarding the institutional aspect of both schemes, both Jamaica and Trinidad and Tobago establish a Fair Trading Commission, which has as its general function to investigate cases of anti-competitive behaviour and to enforce competition law. The Jamaican legislation however sees a closer relationship between the executive arm of government and the Fair Trading Commission than is proposed in the Green Paper (see Section 5b and Section 9 of the Fair Competition Act). The Jamaican Act permits the Minister to request investigations by the Fair Trading Commission and to give that body such directions of a general nature as he considers necessary. By contrast, the Trinidad and Tobago Green Paper informs that the Trinidad and Tobago Fair Trading Commission will be a quasi-judicial body, acting independently of government so as to keep competition case work away from the political environment. (see page 7)

Regarding the powers of the respective Fair Trading Commissions, the Green Paper foresees a Fair Trading Commission with effective powers to, among other things, declare activities as *per se* abuses of monopoly power, to prohibit agreements, to order the termination of agreements and in general to prohibit anti-competitive behaviour (see page 7). The Trinidad and Tobago Green Paper, in addition, proposes the creation of a Fair Trading Tribunal that would hear appeals from the decisions of the Fair Trading Commission and to consider applications from the Fair Trading Commission for the imposition of fines or other remedies, such as price regulation, prohibitions against the voting of shares, divestment of assets or shares and the disqualification of a persistent offender from serving as a director. (see page 8)

The Jamaican Act does foresee the role of its ordinary courts in enforcing the provisions of the Act, but does not provide for a special court. The court in the Jamaican Act will, pursuant to an application by the Jamaican Fair Trading Commission, order the offender to pay a fine varying from $1 million to $5 million Jamaican dollars and to grant an injunction...
restraining the offender from engaging in conduct in breach of the Act.

As far as private rights to remedies under the respective policies, both provide for the possibility of damages to be paid to an injured party. The Jamaican Act imposes liability in damages for any loss caused to any other person by any anti-competitive behaviour and includes a statute bar after three years. The Green Paper confines that right to damages only in respect of anti-competitive agreements and there seems to be no time limitation for such a claim.

The Jamaican Act contemplates ‘authorizations’ of business activities that would otherwise be illegal under the Act where the Commission is satisfied that the activity is likely to promote the public benefit. Moreover, both competition policies contain exemptions from the application of their respective competition rules. The Jamaican legislation, at Section 3, sets out 8 areas of activity exempted from the coverage of the Act. Such areas include, among other things, arrangements for protection of employee rights and for collective bargaining, agreements relating to the use, licence or assignment of intellectual property rights, agreements authorized by the Commission in accordance with the Act, the activities of professional associations designed to develop professional standards, and such other business or activity declared by the Minister to be exempt. By contrast, the Trinidad and Tobago Legislative Brief identifies for exemption from the ambit of the Bill only the activities of professional and standardization bodies dedicated to maintaining standards and the protection and licensing of intellectual property. Patent rings are however not exempted. (see page 26)

Another area of divergence is the reference in the Trinidad and Tobago Green Paper to questions of anti-competitive conduct of public utilities in the context of the ongoing privatization of this sector. The recently enacted Regulated Industries Act governs the activities of public utilities and provides for a Regulated Industries Commission. The Green Paper proposes that the provisions of the Fair Trading Act on anti-competitive mergers would apply to utilities as to other enterprises and that the application of the Fair Trading Act to utilities would fall to the Regulated Industries Commission (see page 30). In addition, the Fair Trading Court will exercise appellate jurisdiction over both the Fair Trading Commission and the Regulated Industries Commission. In the Jamaican legislation, there is no reference to the activities of public utilities, therefore it is not certain whether the Jamaican Fair Competition Act applies to public utilities.

To summarize, one can reasonably conclude that the focus of the Jamaican Fair Competition Act is trained on business conduct and consumer protection issues. The Act avoids the competition issues arising from mergers and acquisitions and makes provision for a number of exemptions of a public interest nature. The Trinidad and Tobago Green Paper on the other hand proposes to regulate not only business conduct, but mergers and acquisitions and public utilities and in this way appears to be more ambitious than the Jamaican Act. There are fewer exemptions from regulation in the Green Paper and unlike the Jamaican Act, the Trinidad and Tobago competition policy seeks to insulate the regulatory entity from political influence by establishing an independent commission. The Jamaican Act however has the advantage of being in operation and the experiences gained in the implementation of that legislation should be of benefit to other Caricom states that are considering developing competition policies.