INTRODUCING AND IMPLEMENTING
COMPETITION LEGISLATION IN
SMALL ECONOMIES:
SOME CONSIDERATIONS

Taimoon Stewart

This policy paper looks at the processes involved in drafting legislation, taking it through the stages of consultation, parliamentary approval and enactment, developing the institutional framework and taking the first steps in implementation. The information is derived from empirical data collected in CARICOM countries, but also draws on lessons from the experiences of other developing countries.

Before competition legislation is drafted, there should be a study of the market to determine market structure and business culture and how these impact on competition in the market. This would allow drafters to target the specific problems in the relevant economy, rather than copy the law from developed economies that were formulated to address different economic structures and business cultures. This would allow drafters to target the specific problems manifested in that economy, and address peculiarities that may exist because of the small size of the economy. An accompanying policy paper to this project, “Shaping Competition Legislation to the Needs of Small Open Economies: The Case of CARICOM,” provides some initial guidelines drawn from empirical work conducted in selected CARICOM economies. The findings point to the need for proscribing anti-competitive agreements, abuse of a dominant market position and merger control regulation, but each tailored to specific circumstances found in small economies.

An important lesson learnt from the Jamaican experience, as well as other developing countries, is to have the draft law critically examined by experienced international competition experts. There is a dearth of skilled lawyers and economists with sufficient expertise and experience in implementation of competition law in CARICOM. It is therefore insufficient to have this done in-house. Loopholes need to be identified that could lead to challenges by private sector lawyers in the enforcement of the law. This could bring the law and the enforcement institution into discredit, as happened in Jamaica. The Jamaican Fair Competition Act did not separate the functions of the investigative arm from the judicial arm in the Fair Trading Commission, a loophole that led to a legal challenge based on breech of natural justice, and subsequent
Supreme Court ruling in favour of the complainant. The Fair Trading Commission has been crippled as a result, while the law is revised to correct this flaw.

Informed consultations on the draft law with the private sector and civil society could ease the passage of the law. The emphasis here is on "informed consultation." This is because in CARICOM countries there is little or no understanding of the law and the implications for various stakeholders of the enforcement of the law. Therefore, consultation requires a workshop format, in which the provisions of the law are explained, with case examples from other jurisdictions to enhance understanding, before soliciting views on the draft law. Otherwise, there would be little interest in the consultation, and very little useful feedback, as was experienced in Trinidad and Tobago.

Providing a proper groundwork for understanding competition law will also contribute to the development of the institutional framework through influencing change in the habits and practices of the business sector towards a culture of competition. This is urgently needed in CARICOM countries. Interviews conducted in six CARICOM countries revealed that the business sector and consumers had little or no knowledge of competition law and the potential gains for themselves of its introduction (except in Jamaica where there has been a law since 1993). Moreover, many practices that are considered normal business practice, and acceptable, could be deemed to be anti-competitive under a competition regime.

Competition advocacy, that is, the role of the Competition Authority in influencing policies of government ministries to be pro-competition, is important for creating synergy between government policies and the competition regime. However, this has to be done with total sensitivity towards the development goals of the society, which may, in fact, run counter to the liberalization and competition agenda. This can only be achieved if there is a two way process through which government technocrats are sensitized to the objectives and instruments for protecting competition in the market and the welfare-enhancing benefits to be derived from implementing a competition regime, but also, competition enforcers are educated in development economics. They should be exposed to an understanding of

- the risks to developing countries of indiscriminate liberalization and a critical evaluation of the extent to which liberalization could serve the development goals of the country
- systemic processes in the global economy that work against development goals
- the socio-economic and socio-political issues of primary importance to the society
- the development goals of the society and ways to achieve these, given the macro trading and economic environment

This would hopefully sensitize staff of competition authorities to the balance
that must be struck in small economies to achieve selective liberalization and introduction of competition. This would advance developmental goals of wealth creation and its retention in the economy, employment creation and poverty alleviation.

The Competition Authority or Fair Trading Commission may be exposed to regulatory capture by the private sector, that is, influencing the decisions of the Commission in their favour through personal contacts with investigators, Commissioners or politicians who can influence the work of the Commission. Such has been the experience of several Latin American and African countries, India, and Pakistan, among others. It is therefore very important to build into the institutional framework precautionary measures to pre-empt such capture. Peru has several such measures constraining the freedom of staff

- to accept gifts
- to declare assets upon assumption of a job in the Commission
- to restrict disclosure of information gathered in an investigation and other such activities that could compromise the work of the Commission.

This is even more important in small economies where the intensity of personalized relationships across the society and ease of access to politicians and technocrats make it a certainty that there will be repeated attempts at regulatory capture.

Providing the Commission with financial security that is de-linked from the political decision-making process is very important. Similarly, autonomy and independence from political interference is necessary, though a balance has to be struck so that government authority and clout backs the Commission in its fledging years, until it builds up credibility, respect and inspires fear in the business community. A point to note also is that the penalty for breach of the law has to be sufficient to hurt the offending firm, and provide a serious disincentive to further anti-competitive conduct. In small economies, dominated by MNC, it may be best to calculate the fine as a percentage of yearly turnover, so that all firms could be equally penalized, regardless of size.

It is necessary to have staff that is adequately trained in the law, in detecting anti-competitive conduct, and in conducting investigations. The staff also needs to be trained to promote a culture of competition in the society, facilitate transparency in the work of the Commission, issue directives to guide the private sector in interpreting the law, and engage in appropriate competition advocacy. The role of technical assistance from staff of more mature Competition Commissions is critical to building up the pool of human resource needed, and this process is ideally started prior to the passing of legislation.

The route taken by the Barbados government provides a good example to follow. The Fair Trading Commission was set up well in advance of the passing of the competition law (at least three years), and regulation of utilities was brought into the Commission as a start of its anticipated functions. Staff for the competition division was hired and this
facilitated access to technical assistance for training of staff. In effect, when the competition law was finally proclaimed, the competition division of the Commission was up and running immediately, albeit at a modest level. If a country has only a draft law to show for its efforts to introduce a competition regime, access to technical training is not easily accessible, and targeting the training of staff is not possible. CARICOM countries are well advised to follow this example, but also to put a retainer on staff for five years, with a penalty of repayment of cost of training, in order to prevent rapid turnover of staff as has been experienced in other developing countries, including Jamaica.

By bringing Regulators and Competition Commissioners within the same institution, the Barbados government pre-empted the emergence of problems experienced in several countries of conflicts between Regulators and the Competition Commission. The two divisions are forced to work closely together and understand each other’s remit. Regulators of other sectors, such as financial services, should be directed into collaboration with the Competition Commission through institutional mechanisms such as requirements to meet regularly, and modalities for consultation in cases where there may be a competition issue. Demarcation of jurisdiction should be clearly defined in order to avoid conflict (such as the one in South Africa where the Central Bank and the Competition Commission went to court over claims of jurisdiction in a merger case). While there has been no outright conflict between regulators and the Commission in Jamaica, the demarcation of lines of jurisdiction is hazy and instruments for institutional cooperation are not present. This leaves the way open for conflict, which could only discredit the institutions in the eyes of the public.

The Commission must have freedom to exercise prosecutorial discretion so that it can target the more important cases, that is, those that are hurting the economy most. With limited resources in small economies, this is very important. It is critical, as part of the process of building the reputation of the Commission, to target cases that have meaning for consumers, and that are straightforward and easy to win. This would foster understanding of how the law could work for the benefit of society, but also give time to the Commission to build expertise. Otherwise, the Commission may find itself losing a case to a high profile actor, and losing credibility. This is precisely what happened in Jamaica when the Commission, in one of its earliest cases, investigated the Law Association for breech of the Fair Trading Act, and not only lost, but by Court ruling, the Association is now exempt from the Act.

Finally, CARICOM countries need to consider the incentives that may be required to encourage resident multinational corporations (MNCs) to cooperate in investigations by submitting information that is requested. The experience in some developing countries is not encouraging. Power asymmetry allows some MNCs to ignore requests for information from the FTC. In Zambia, for instance, a law had to be passed making non-cooperation in investigation punishable by incarceration, before the Commission was able to get information from the local subsidiary of Coca Cola. Given
that foreign direct investors control the largest sectors of economies in CARICOM countries, this problem of lack of cooperation would most likely be encountered, and should be addressed in the drafting of the law, and also be factored into the negotiation of cooperation agreements, ensuring that there are instruments for assistance in investigation of MNCs.