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Notes on Institutional Challenges in Promoting Competition

The Barbados Experience

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Institutional Challenges in Promoting Competition
The Barbados Experience

1. INTRODUCTION


The Commission has responsibility for the enforcement of the:-

- Utilities Regulation Act 2000-30
- Fair Competition Act 2002-19
- Consumer Protection Act 2002-20; and
- Telecommunications Act 2001-36

2. BACKGROUND

The establishment of a national authority with responsibility for the promotion and maintenance of competition in Barbados was driven in the main by the country’s commitments under the regional integration arrangement - Caricom Single Market and Economy (CSME).

Chapter 8 of the treaty of Chaguaramas, which establishes the single market, requires that all Member States put in place the necessary legislative instruments to ensure consistency and compliance with the rules of competition. In addition member states are required to establish and maintain a national competition authority for the purposes of facilitating the implementation of the rules of competition. Barbados complied with these requirements with the introduction of the Fair Competition Act 2002-19 on (3rd January 2003) and the establishment of the Commission with responsibility for the enforcement of this legislation.
3. INSTITUTIONAL CHALLENGES
3.1 Lack of a Competition Culture

The implementation of the competition laws, though well researched, were introduced within a vacuity of understanding and history of competitiveness by stakeholders. This has brought with it tremendous overt challenges to the promotion and maintenance of competition domestically.

The lack of a culture of competition may be regarded as one of the primary challenges facing the Barbados Fair Trading Commission in its attempt to promote and maintain competition in Barbados. The lack of an understanding among large segments of the business community, with regard to the purpose of competition law and the benefits of more effective business competition, can portray itself in tacit resistance to the obligations and rules of the competition law.

Barbados, like most small Caribbean economies, has a long history of colonisation and social and economic class distinctions which have nurtured the development of a now deeply entrenched merchant class that has dictated and dominated the circumstance of commercial activity in the island for hundreds of years. Such interest groups are likely to see the implementation of a competition law and policy with its focus on the prohibition of anti-competitive practices such as bid rigging, exclusive dealing contracts, tied selling, and resale price maintenance as interference and meddling into activity that in their view has worked efficiently and effectively for several years. In this regard, these groups are apt to interrupt the focus of the process, with selective arguments and public comment as to the stifling and restrictive nature of competition rules on the practices of their businesses, its leading to a reduction in the level of domestic investment and on the ability of domestic business to expand and develop the economies of scale necessary to compete globally.
The response of the competition enforcement agency in this regard has been one of informing and educating. Through several presentations, in workshops, discussion sessions, the internet and the news media, the aim has been to educate the business community with the message that keen and healthy business competition is essential for the realisation of a certain degree of consumer wellbeing and overall economic development. This focus seeks to ensure that businesses are fully aware that anti-competitive conduct represents a threat to the realisation of these objectives and must therefore be removed as far as possible from the business activity.

3.2 Developing Confidence and Respect of Stakeholders
Like most other newly formed competition authorities the Commission, at this stage of its development, has to work to garner the confidence and respect that will encourage the necessary cooperation among the business community. In order for any competition agency to work effectively it must have the cooperation of the business community, it must be trusted by the members of the business community for transparency and impartiality. This is essential in enabling the competition authority to conduct investigations efficiently and expeditiously.

Competition authorities depend on a continuous supply of evidential and supporting information to understand and make determinations with regard to the effect of certain business practices on domestic competition. The Commission does have enforcement powers, which it can utilise therefore this information can oftentimes be demanded from enterprises, especially those that are the subject of an investigation. However unwillingness among competing firms, and
stakeholder associations and organisations, can sometimes lead to inordinate delays and difficulty in being able to complete an investigation expeditiously.

Again, the response to this concern by the Commission has been one of education and information. Performance and results however are viewed as a key means of gaining the respect and cooperation necessary to be effective and this can only come over time.

3.3 Wide Institutional Mandate

The structure of the Commission with responsibility for the administration of such varied legislation in utility regulation, consumer protection and fair competition, is unique. To fulfil this broad mandate the Commission has a staff complement of approximately 30 persons including administrative and technical officers. There are also 11 part-time commissioners with adjudicative responsibilities.

The major challenge for the Commission is the sufficiency of technical staff to manage the broad and varied technical agendas. Additionally, the commissioners are available to hear matters only on a part-time basis, which does not allow them to easily develop the specialist knowledge required for the enforcement of competition law.

The positive aspect of this institutional arrangement is the access and flow of expertise and information across the different divisions of responsibility. Whilst the Commission maintains “Chinese Walls” with respect to information on investigations, the different arms of the organisation readily draw on and access the skills, knowledge and resources of counterpart divisions. In this regard
sharing occurs in a much deeper and meaningful manner than across distinctly separate organisations.

3.4 Limited Expertise in Competition Analysis

The Barbados Fair Trading Commission suffers, like many agencies in small developing territories, from limited in-house competition expertise. The Commission has two economists along with a Director of Fair Competition assigned to work on Competition matters.

In order to build the capacity of Commission officers, utilised the expertise of the Australian Consumer and Competition Commission (ACCC). The ACCC, which performs similar functions to the Fair Trading Commission, provided an experienced officer trained in investigative procedures, who assisted the Commission in defining its procedures and guidelines for operation as well as assisting in managing ongoing investigations.

The Commission has made a concerted effort to have its officers exposed and trained in competition law and investigative techniques. These officers have also been encouraged to participate in a number of workshops and training programmes.

The limited number of staff available is a challenge, because it places severe strain on the organisation’s ability to respond readily to queries and complaints, requests for data, speaking engagements, and other appointments. There is no simple answer for this challenge, except that persons selected to work in this field must bring a measure of skill and commitment in order to be effective. The Commission will be seeking the assistance of international agencies and other
regulatory agencies for support in staff training and supplemental competition expertise.

3.5 **Co-operation with other local regulators**

The relationship of the competition authority with other regulatory agencies and the issue of jurisdiction must be addressed. Our experience has been that domestic regulators tend to be highly cooperative. Regulators are willing to share information, once allowed by the governing statute. The Commission has sought to meet other regulators in order to ensure clarity with respect to jurisdiction and to develop opportunities to share information on responsibilities, procedures, and policy. It is recognised that the scope of our various realms of authority must be clearly determined in order to avoid overlapping of effort and jurisdictional disputes.

Often other regulators will be privileged to information that may be the Commission’s determination of a specific investigation, or will have to approve a particular transaction before it can be undertaken. In these instances, it is extremely important for the different regulators to establish a set of rules for information sharing and notification for the streamlining of the entire process. Regulators must remain cognisant of the need for processes to appear seamless and deliberate in an effort to instil greater confidence and certainty within the business community.

3.6 **Legislation**

The Barbados Fair Trading Commission has, to contend with the challenge of giving effect to legislation that does not adequately address all of the realities of the jurisdiction. Some anti-competitive conduct may be dealt with by several
different sections of the legislation. In some instances the test or standard for
determination is different, e.g. one clause may suggest a de jure standard, whilst
another may require a rule of reason measure for a similar offence.

4. CONCLUSION

The challenges faced by the Barbados Fair Trading Commission will need to be
addressed in order to ensure effective administration of the law, and compliance
with international standards. Agencies at this stage of development must be
afforded institutional and resource based assistance. At the same time it is
important that the requirements placed on them for international sharing of
information and compliance standards be cognizant of the institutional
challenges.