

# Competition Policy and the OECS Sub-Region: *Insights for Regional and Hemispheric Trade Negotiations*

## ***Introduction***

In recent decades developments in the international economy as regards trade liberalization and globalization, have solidified the free enterprise nexus globally at the dawn of the 21<sup>st</sup> Century. The prevailing trend is for market forces to determine the production and the distribution of goods and services. However, because economic activity takes place under imperfect conditions (i.e. differences in size, resource constraints and limitations in productive capacity) the globalization process requires state intervention particularly in the area of competition policy and, more specifically, competition legislation. Effective competition policy mechanisms and related architecture promote economic development by facilitating efficiency in commerce, by ensuring consumers benefit from the increased efficiency, and by ensuring the gains from free trade are passed on to *all* constituents within an economy.

When implemented, competition legislation promotes competition allowing for efficient allocation of the resources within an economy. With the efficient allocation of resources consumers should have access to adequate supplies of quality commodities at the lowest possible prices. This notwithstanding, other objectives of competition legislation may include controlling concentration of economic power, promoting competitiveness in domestic industries, encouraging innovation, supporting small and medium enterprises, and encouraging regional integration.

Competition legislation, in general, addresses the behavior of enterprises by prohibiting certain business practices. Such practices include restrictive horizontal agreements (e.g. bid-rigging, price fixing and market allocation), acquisitions, abuses of dominant position, and restrictive vertical agreements (e.g. discriminatory pricing, re-sale price maintenance, reciprocal exclusivity, and predatory pricing). Further, competition legislation may seek to control the effect of certain business activities on market structure. Recognising that mergers and acquisitions as well as joint ventures may alter the structure of markets so as to limit competition, often such legislation controls these practices in order to prevent the creation of dominant firms, monopolies and oligopolies. An additional feature of competition legislation may be *exceptions* and *exemptions* to the application of their provisions. Generally, exceptions tend to be applied on a 'sectoral' basis while exemptions are applied, in most cases, to categories of 'practices'. Exceptions and exemptions<sup>1</sup> may apply to, *inter alia*,

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<sup>1</sup> There are varying reasons for the use of exemptions; one example is in the case of market failures where competition and market forces may not be the best tools to ensure maximization of economic efficiency. In such instances, exemptions from the application of competition legislation allow for the use of more appropriate tools such as direct regulation of prices or market entry. There has, however, been some basis for the review of use of across-the-board exemptions. In fact, there is an increased emphasis – in some jurisdictions - on applying competition legislation to all business practices that are *not* explicitly imposed on firms by statutory provisions. As a result, the onus is placed on the relevant competition authority to consider business practices and focus on those that have the highest probability of having anti-competitive effects and the least justification based on efficiency.

labor, regulated industries such as telecommunications, defense and agriculture, small and medium enterprises, and certain types of co-operative arrangements such as research and development joint ventures.

### *A Brief Look at Trade and Competition Policy in the WTO*

During the World Trade Organization (WTO) Singapore Ministerial, the issue of trade and competition policy was addressed. It was felt that while trade and investment across countries were becoming more liberalized, private anti-competitive practices may thwart the gains of liberalization. There was also some recognition of the fact that mutually supportive trade and competition policies may contribute to sound economic development and also, effective competition policies help to ensure that the benefits of liberalization and market-based reforms spill-over to all constituents. In light of this, the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established at the Singapore Ministerial Conference.

The WGTCP was established to consider issues raised by Member Countries relating to the interaction between trade and competition policies. It first met in July 1997 and has since addressed a wide range of issues and has received a large number of submissions from countries. At this initial meeting, the Working Group developed a Checklist of Issues Suggested for Study and in 1997 and 1998 the work of the WGTCP was organized around the issues contained in this Checklist. Its work focused on the following main elements of the Checklist:-

- The relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy; and their relationship to development and growth;
- Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including analysis of experiences with their application;
- The interaction between trade and competition policy, including consideration of the following sub-elements:
  - The impact of anti-competitive practices of enterprises and associations on international trade;
  - The impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
  - The relationship between the trade-related aspects of intellectual property rights and competition policy;
  - The relationship between investment and competition policy; and
  - The impact of trade policy on competition.

The Working Group issued a detailed report of the discussions on the subjects listed above in December 1998. This report documents the views expressed by Members regarding matters such as the mutually supportive relationship between trade liberalization and competition policy, the categories of anti-competitive practices that can negatively impact

international trade and investment, and the potential contributions of competition policies to economic development. Further, since 1997 the WTO, in co-operation with the United Nations Conference on Trade and Development (UNCTAD) and the World Bank, has organized four symposia on issues related to the work of the Working Group. In 1999 the Working group examined three other issues pursuant to a decision by the General Council of the WTO. These issues were:

- The relevance of the fundamental WTO principles of national treatment, transparency, and most-favored-nation treatment to competition policy and vice versa;
- Approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; *and*,
- The contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

Despite some Members' affirmation of the relevance of WTO principles to competition policy and the need for enhanced co-operation among Members in addressing anti-competitive practices, there remains a difference in opinion as to the need for action at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system. It is important to note that while some countries supported the development of a multilateral framework on competition policy in the WTO, which would support the implementation of effective competition policies in Member countries and reduce the potential for conflicts in this area, other countries questioned the desirability of such a framework and favored bilateral and/or regional approaches to co-operation in this area.

Finally, the issue of developing a multilateral framework on competition policy was considered at the WTO Seattle Ministerial Conference which was held in late 1999. However, Member Countries still maintained differing views regarding whether the WTO should in fact should create a framework to support the implementation of national competition policy by the countries or whether the issue was sufficiently examined at the technical level to warrant the commission of negotiations. There was some consensus that if there is to be forward movement on this matter any action taken should be credible and not merely an effort to save face. Additional work on the study and analysis of the issues is expected to be conducted by the WGTCP.

### ***Elements of the CARICOM Competition Policy Framework***

Competition policy imperatives are being pursued in a number of bilateral hemispheric agreements, including trade regimes with a number of partners such as the Free Trade Area of the Americas (FTAA) framework and the Caribbean Common Market (CARICOM) structure.

#### *The Objective of the CARICOM Competition Policy Regime*

The basic objective of the CARICOM competition policy regime (*Protocol VIII-Competition Policy, Consumer Protection, Dumping and Subsidies*) is to ensure the benefits expected to accrue

from the establishment of the CARICOM Single Market and Economy (CSME) are not frustrated by anti-competitive conduct. With the implementation of competition policy instruments and architecture it is expected that competition would be promoted and maintained in the CSME, consumer interest and welfare would be promoted, and there would be enhanced economic efficiency in production, trade and commerce.

#### *Rules of Competition*

With respect to rules of competition, the Protocol identifies the following as prohibited anti-competitive business conduct:

- (i) Agreements, decisions and concerted practices by firms that have as their object or effect the prevention, restriction or distortion of competition;
- (ii) Abuse of a dominant position in the market. A firm is considered to be in a dominant position if, by itself, or together with an inter-connected firm it has enough strength to enable it to operate in the market without effective constraints from its competitors or potential competitors.

#### *Prohibited Anti-Competitive Practices*

Practices that are considered anti-competitive and therefore prohibited by the provisions of CARICOM Competition Policy include the following:

- (i). Price Fixing: this practice involves suppliers in the same market entering into cooperative agreements where they establish prices and sales conditions;
- (ii). Limitation or control of production, markets, investment or technical development;
- (iii). Artificial dividing up of markets or restriction of supply sources;
- (iv). Applying unequal conditions to equivalent engagements. For example a major supplier to distributors in a particular market may restrict competition by offering favourable prices to distributor A and not so favorable prices to distributor B, thereby restricting competition between the distributors;
- (v). Tie-ins: this refers to suppliers forcing purchasers to buy goods they do not want as a condition to sell them those they do want, or producers may force re-salers or wholesalers to hold more goods than they wish or need;
- (vi). Denial of access to networks or essential infrastructure: An example would be in the telecommunications sector in the OECS where if the monopoly service provider is forced to compete with new firms it would be required to provide access to the necessary infrastructure so that the new firms can provide their service. Where the existing service provider denies access or charges very exorbitant prices for access, this would be considered anti-competitive;

- (vii). Predatory pricing: this refers to suppliers selling at very low prices (or supply intermediate inputs to competitors at excessive prices) in order to drive competitors out of business;
- (viii). Price discrimination: this refers to a supplier selling his product at one price in one market and at another price in a different market;
- (ix). Loyalty discounts or concessions: a supplier offers discounts or other inducements only to certain parties on condition that they do not sell someone else's products;
- (x). Exclusionary vertical restrictions: this involves a producer supplying certain distributors and guaranteeing not to supply to other distributors in the region. Also, a producer supplies on the condition that the distributor does not carry any other product;
- (xi). Bid-rigging: this is a practice where a group of enterprises set bidding prices among themselves in an attempt to underbid their competitors for contracts.

#### *Abuse of Dominant Position*

CARICOM Competition Policy also prohibits the abuse of a dominant position by a company. A company may be deemed to be abusing its dominant position where its actions prevent, restricts or distorts competition. Such action includes the following:

- restricts entry into market
- prevents or deters any enterprise from engaging in competition
- eliminates or removes any enterprise from the market
- imposes unfair purchase or selling prices or other restrictive practices
- involves tie-ins
- results in the exploitation of its customers or suppliers
- limits production

Evaluation of abuse of a dominant position would be conducted through a rule of reason process involving the following:

- definition of the relevant product and geographic markets
- the concentration of the firm which involves the analysis of annual sales volume, value of assets, and value of the transactions
- the level of competition in the relevant market through the analysis of the number of competitors, the production capacity, and product demand
- existing barriers to entry of competitors
- history of competition and rivalry between participants in the sector

This notwithstanding, a company will not be treated as abusing its dominant position if:

- ◆ Its actions result in increased efficiency in the production, provision or distribution of goods or services or result in the promotion of technical or economic progress and a fair share of the benefits are transferred to consumers;
- ◆ It enforces or seeks to enforce a right under intellectual property provisions such as copyright, patent, registered trade mark or design;
- ◆ If the effect of its action on the market is a result of superior competitive performance.

### ***Some Exceptions to the Rules and Provisions for an Institutional Framework***

#### *Exceptions to the Rules*

Activities undertaken by employees for self-protection or collective bargaining by employees or employers would *not* fall within the scope of competition rules. Also, the activities of professional associations whose standards are approved by the Competition Commission would not be subject to competition rules.

Another exception is that where anti-competitive business conduct of a firm has minimal effect on trade in the CSME, the rules of competition would not be applied. In the Protocol, this is the *de minimus* clause and would largely apply to micro-firms.

In some instances, the agreements, decisions and concerted practices by firms would fall outside the scope of competition rules where such activities have the effect of:

- improving production or the distribution of goods and services; *and*
- promoting technical or economic progress.

This exception only applies to such restrictions that are indispensable to the firm's attainment of the aforementioned objectives and competition is not eliminated in a substantial part of the relevant market for the good or service. The relevant authority, the Council for Trade and Economic Development (COTED) in this case, has the power to exempt sectors or enterprises or groups of enterprises in the public interest and to develop special rules for special sectors. In this regard, the Organization of Eastern Caribbean States (OECS)<sup>2</sup> countries can make a case for their small and micro-enterprises and also for their '*sensitive*' industries.<sup>3</sup>

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<sup>2</sup> The nine OECS Member States are Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines; Anguilla and British Virgin Islands are Associate Members of OECS.

<sup>3</sup> However, in the interest of integration and development such cases should also include the presentation of programmes for the strengthening of the respective enterprises and industries and a transition period after which the firms would be subject to the rules of competition. The transition period could be determined based on the relevant enterprise's share of and impact on the market for the commodity concerned. Further, the

At the time of its entry into force, the Protocol provided that all legislation, agreements and administrative practices that are inconsistent with the rules of competition must be notified to the COTED within 24 months. The Member States will then be required within 36 months of the Protocol's entry into force to establish a programme that provides for the termination of the proscribed legislation, agreements and administrative practices.

### *Institutional Framework*

The institutional framework for CARICOM's Competition Policy involves the appointment of a regional Competition Commission. This Commission would comprise seven members with skills in commerce, finance, economic-law, competition policy and international trade and will be appointed by the Regional Judicial Legal Service Commission (RJLSC). The Conference of Heads of Government will be the governing body of this framework while the Caribbean Court of Justice (CCJ) acts as the Court of Appeal, the RJLSC appoints and removes Commission Members, and the COTED performs functions of arbitration, development of rules and policies, determination of exemptions and special rules, and requesting investigation.

The third and fourth tiers of this framework are the CARICOM Competition Commission (CCC) and the National Competition Authorities. Responsibilities of the CCC include the application of the rules of competition, co-ordinating implementation of CARICOM Competition Policy, promotion of competition in the CSME, and performance of any other function designated by any competent body of the Community. At the national level, each Member State will be responsible for the enforcement of the rules of competition in their respective jurisdictions and for enacting legislation that:

- Ensures consistency and compliance with the rules of competition for CARICOM;
- Ensures the determinations of the CCC are enforceable in their jurisdictions;
- Affords the establishment of a national competition authority and facilitates the development of administrative procedures to enforce the rules of competition; *and*
- Provides penalties for anti-competitive business conduct.

### ***The Free Trade Area of the Americas (FTAA) Competition Policy Framework***

Work on the development of a Competition Policy for the FTAA is being conducted by the Negotiating Group on Competition Policy (NGCP). The first meeting of the negotiating group was convened in September 1998; while the most recent meetings in 2001 were convened in May and June, respectively. The NGCP will meet once again this July from 11-13, 2001, in Panama.

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treatment of Article 56 firms and OECS vulnerable firms would be determined through this provision for exemption.

The general objective of the Negotiating Group on Competition Policy is to *'guarantee that the benefits of the FTAA liberalization process are not undermined by anti-competitive business practices'*. Further, the NGCP seeks to advance work towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the conduction of anti-competitive business practices. It also aims to create mechanisms that facilitate and promote the development of competition policy and guarantee the enforcement of regulations on free competition among and within countries of the hemisphere.

The focus of the FTAA NGCP has been in the following areas:

- (a). Study of the issues related to Trade and Competition Policy, including Anti-dumping:

This issue has been rather contentious from the onset of the negotiations because of opposing views between the English-speaking and Spanish-speaking countries. The major concern expressed by the United States was that there should be no negotiation on the introduction of competition policy principles into anti-dumping procedures. On the other hand, the countries of MERCOSUR<sup>4</sup> and the Andean Community<sup>5</sup> have insisted on the exploration of the potential for such negotiation. The Tripartite Committee was responsible for providing information on the issues related to trade and competition policy and as a result produced a number of research papers on the subject. Despite this, the Negotiating Group historically did not engage in any significant discussion or debate on these issues. In light of the opposing views, the NGCP report to the Trade Negotiating Committee (TNC) reflected the contrasting positions of the groups of countries. CARICOM countries' position on the matter was that no additional time should be devoted to trade and competition policy issues in the context of the NGCP since it would be more appropriate for the matter to be addressed in the anti-dumping group. In addition, the Lead Negotiator on Competition Policy for the CARICOM countries has indicated a reluctance to maintain a strong position on the issue in opposition to the US and Canada since these countries have been supportive of issues related to smaller economies.

- (b). Study on Competition Policy in Smaller Economies:

With respect to this issue, the Tripartite Committee conducted two important studies on the special circumstances of smaller economies. The first study was on competition policy in CARICOM which reflected the provisions of an early draft of the current CARICOM Competition Policy (Protocol VIII). The second study focused on theoretical issues related to Competition Policy in smaller economies. It examined the cases of Singapore, Hong Kong and Taiwan and also looked at how smaller economies are treated in respect of competition policy in free trade areas.

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<sup>4</sup> Constitutes: Argentina, Brazil, Paraguay, Uruguay.

<sup>5</sup> Constitutes: Bolivia, Colombia, Ecuador, Peru, Venezuela.

CARICOM's position was that while both studies provided useful information, they did not address the critical issues that affect CARICOM's micro-economies. In response, the NGCP and the Tripartite Committee indicated an unwillingness to undertake empirical work and could only address more general issues. Recognizing the importance of keeping the issues of concern to smaller economies on the table and of exploring the special circumstances facing these economies, CARICOM decided to arrange a meeting of smaller economies and countries without competition laws in order to develop a research agenda that would meet the common needs of the respective countries. As a result of their discussions, CARICOM, Bolivia, Ecuador, El Salvador, Guatemala, Honduras and Nicaragua developed a number of questions that were subsequently accepted by the NGCP for exploration during the next phase of the negotiations. The questions are aimed at providing guidance for countries which are in the process of introducing competition regimes. The questions are as follows:

- By what means can the various constituencies in a country be convinced of the need for a competition law (the legislative institution, other government institutions, the private sector and consumers)?
- In legislating and implementing competition law, what are the priorities for small economies, given the constraints they face? What strategies can a new competition agency use to overcome budgetary constraints?
- How useful is the idea of a sub-regional competition law and policy for groups of smaller economies? Is it a useful option for countries in the Central American Common Market?
- How can competition principles be applied to the reform of regulated industries, and the privatization process?

(c). Technical Assistance Sessions:

These sessions take place immediately after the formal NGCP meeting and are organized and chaired by the Delegates. Some of the key issues discussed at these sessions include:

- The experiences of new competition agencies.
- Evaluation of draft competition laws by experts in the Group. During these sessions, participants were provided with insight into the interpretation of the law and the challenges of implementation.
- Application of competition principles to the regulated sectors (e.g., electricity and telecommunications). Special presentations on this issue were made by experts from Competition Authorities of the United States, Canada, Argentina, Brazil and other countries.
- The United States Antitrust office made a presentation on the process by which they gathered evidence on the activities of an international cartel and brought them to justice. Representatives of smaller economies became more aware of the power of cartels and the difficulties their respective countries would face in attempting to deal with such cartels on

their own. Emphasis was therefore placed on the importance of countries entering into functional cooperation agreements, including positive comity, in order to combat the negative business practices of cartels.

(d). The Draft Bracketed Text:

The provisions of the Draft Bracketed Text of the Chapter on Competition Policy in the FTAA include proposals for:

- The content of national/sub-regional regimes on competition law;
- The relationship between competition law and state regulated enterprises, official monopolies, state-owned enterprises and state aid;
- Institutional provisions for the implementation of the competition regime;
- Mechanisms for co-operation and exchange of information amongst the Competition Authorities of FTAA members;
- Dispute settlement
- Technical assistance for smaller economies and those without competition law;
- Transitional measures; and
- Definitions

*Having considered the CARICOM and FTAA frameworks for competition policy, this Brief will now speak to some of the challenges facing OECS Member States and provide insight into key areas that OECS policy-makers must give consideration with respect to the draft bracketed text of the Chapter on Competition Policy in the FTAA.*

***CARICOM Competition Policy: Issues and Challenges for consideration by OECS Member States***

- i. *Developing the necessary legal and institutional framework to give effect to the provisions of the Protocol:* Each Member State will be responsible for drafting and enacting its own competition law. Given the human and financial resource constraints in the OECS, the development of the required competition legislation and mechanisms will prove quite a challenge for the OECS countries. Further, with very limited experience dealing with competition law in the region as a whole, Member States may find it necessary to contract the expertise in order to fulfil this obligation. An alternative may be for the OECS countries to seek assistance in this area from the CARICOM Secretariat.

The Protocol does in fact speak to the 'establishment of institutions and the development and implementation of harmonised competition laws and practices by Member States...'. Bearing this in mind, one would anticipate that the CARICOM Secretariat would prepare draft model competition legislation to be adopted by the

Member States. However, the Protocol does not specifically address this so the burden would be on the OECS Member States to seek clarification on this matter and perhaps signal that they would prefer such an approach.

The government of St. Vincent and the Grenadines has already enacted competition law and the other OECS countries may find it useful to consider the approach used by this country in drafting its legislation. Also, OECS Member States may find it useful to review the experiences of Jamaica and Trinidad and Tobago in their work to establish competition laws in their respective jurisdictions. Of course, Member States could also benefit from adopting a common approach to the development of the required legislation and institutional arrangements.

*Recommendations:*

- The countries could agree to the adoption of a harmonised law drafted for the entire sub-region.
- Member States could review the St. Vincent and the Grenadines legislation with a view to adopting it.
- The OECS Secretariat through its Legal Officer could perform the role of advisor and co-ordinator of such a venture.

- ii. *Establishment of National Competition Authorities:* To facilitate the implementation of CARICOM competition policy and national competition laws, OECS Member States will be required to establish National Competition Authorities that will be responsible for enforcing the competition policy within their jurisdictions. This also will be a challenge for Member States since it will require the commitment of financial resources and also human resources that are adept at dealing with issues of competition law enforcement, competition rules and policy, business/economic law and also international trade. Limited financial resources in the OECS countries will make the establishment and funding of the National Competition Authorities quite a challenge. One consideration for Member States is perhaps the funding of the Authorities using fees and penalties collected from businesses that were fined for engaging in anti-competitive business conduct. While this may be an option for the Member States to consider, it still remains that at the outset, the initial cost of financing the National Competition Authorities may rest with the respective governments.

*Recommendations:*

- To deal with this challenge Member States could agree to the establishment of a single central OECS Competition Authority which would be responsible for enforcing CARICOM competition policy and an OECS Competition Law in the sub-region. The central body could be supported through a 'competition desk' based in the Ministry of Trade or Commerce in each Member State.

- A proposal for the structure and functions of an OECS Competition Authority could be developed by the OECS Secretariat for consideration and agreement by the Member States.  
Also, consideration would have to be given to how this central body would operate in terms of its authority to enforce competition law in the jurisdiction of the respective Member States. Indeed, OECS Member States would need to adopt legislation that would essentially give the power to the central OECS Competition Authority to enforce the competition law and impose penalties on businesses at the national level. Of course the issue of finance remains an important one for the Member States since they still would be required to make funds available to support the work of the sub-regional competition authority architecture.
  - The OECS Secretariat, in preparing a proposal for the structure and functions of the OECS Competition Authority should also develop budget proposals for its funding.
- iii. Financing the CARICOM Competition Commission: While the Protocol does not address the issue of financing the Commission, it is most likely the case that Member States will be responsible for providing the necessary resources for its function. It is anticipated that this would place an additional burden on the financial resources of Member States.
- iv. Merger Control: The Protocol does *not* speak specifically to merger control as an area of coverage for competition policy. However in Article 30(i), Sub-paragraph (c) of the first paragraph does prohibit ‘any other like conduct by enterprises’ that frustrate the anticipated benefits of the CSME. It is felt by some that since sub-paragraphs (a) and (b) of the first Paragraph of the Article deal with anti-competitive agreements between enterprises and abuse of dominant position, then (c) would cover any other anti-competitive conduct including mergers. There has been ongoing debate on this matter, but there has not been any clear edict on whether mergers will be subject to the provisions of CARICOM competition policy.

*Recommendation:*

The OECS Member States are encouraged to indicate to CARISEC what their position is on the matter. Doing so will be especially important since merger control is one aspect of the wider hemispheric negotiations for a competition policy.

- v. Training Arrangements and incentives need to be put in place to train the necessary human resources that would implement the competition legislation through the National Competition Authorities or, if the Member States agree to its establishment, the OECS Competition Authority. Lawyers, economists, trade specialists with an understanding of competition law, and judges will have to be trained in the area of competition law and policy. The Member States will need to provide this training or

seek technical and financial assistance to conduct the training exercises. It is expected that training would be provided at the regional level through the CARICOM Secretariat in collaboration with the University of the West Indies.

*Recommendations:*

- It would be to the OECS Member States' advantage to conduct an audit of the human resources in the sub-region who already have skills in these areas and also to identify those areas in which training would be needed and indicate this to the CARICOM Secretariat with a view to eliciting assistance for training.
  - The OECS Secretariat could assist Member States in identifying and accessing resources available at the international level for the provision of technical and financial assistance in developing skills in the area of competition law and policy.
- vi. *Public Education Programme:* Public education campaigns on the issue of competition policy will need to be conducted. Nationals of the Member States will need to be fully informed of the purpose and expected outcomes of competition law and policy. One essential group of stakeholders that should be targeted is the business sector. Chambers of Commerce, Manufacturing Associations, and Small and Medium Enterprise groupings will have to be informed of the effects of competition policy and also what would be expected of them in conducting their business activities. It is imperative that the business sector not only understands the purpose of competition policy but also supports the legislation and proposed practices.

*Recommendations:*

- Member States may consider public awareness programmes such as television and radio broadcasts, brochures/pamphlets providing easy to understand information on competition policy, national consultations on competition law and policy.
- The OECS and CARICOM Secretariats could provide assistance and support to the Member States in the national consultation and other efforts to inform the stakeholders about the importance and impact of competition law and policy.<sup>6</sup>

Finally, recently the CARICOM Secretariat indicated that it was in the process of preparing an action plan that would detail the activities that would need to be carried out at the national and regional levels to ensure implementation of the provisions of Protocol VIII. Upon its completion, the action plan will be forwarded to Member States. There may be some scope for the OECS Member States to adopt a co-ordinated and common approach to carrying out the activities identified in the action plan. The OECS Secretariat could play a role in coordinating Member States' activities.

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<sup>6</sup> Further, at the sub-regional level, informative articles on the various aspects of competition law and policy may be carried in the OECS Advocate.

***Key Areas of Consideration with respect to the Draft Bracketed Text of the Chapter on Competition Policy in the FTAA***

With respect to the Draft bracketed text of the Chapter on Competition Policy in the FTAA the following represent ‘*some*’ key considerations for OECS Member States:

- (a) Paragraph 1.3.3 of heading entitled: Exclusions and Exceptions, which reads as follows:

“[Any exclusions and exceptions from the coverage of national or sub-regional competition measures shall be transparent and [should] [could] be reviewed periodically by the Party or sub-regional entity to evaluate if they are [both] [strictly] necessary [and not broader than necessary] to achieve overriding policy objectives [of the Party]....”

**Comments:** The CARICOM position is that exclusions and exceptions should be allowed but that they must be transparent. With respect to the bracketed words ‘[should]’ and ‘[could]’, in reference to the periodic review of exclusions and exceptions, the more suitable word to be used is ‘[could]’ since it affords Member States more flexibility in determining whether or not to conduct the reviews. The use of ‘[should]’ in this context would indicate that Member States would be obligated to conduct the reviews while the use of ‘[could]’ in this context would indicate Member States may voluntarily conduct the reviews.

- (b) Paragraph 1.4 deals with Member States’ laws proscribing anti-competitive practices. It reads as follows:

“[The Parties agree that national or sub-regional laws will [, at a minimum,] proscribe [anti-competitive] practices [that have as their objective or effect to limit, restrict, falsify or distort free competition or market access and that affect trade between or within the Parties]. Anti-competitive practices include [collusion, conspiracy, and exclusion from the market of any economic agent.] anti-competitive agreements and in particular hard core cartels, abuse of dominant position in the market, [as well as anti-competitive mergers, acquisitions and concentrations.]]”

**Comments:** Where the paragraph speaks to ‘anti-competitive mergers, acquisitions and concentration’, the CARICOM negotiator will seek to keep this portion bracketed until the CARICOM region provides a clear indication as to whether merger control will be included in its own Competition Policy (Protocol VIII). At this point in time, Protocol VIII does not present a clear edict on the application or non-application of competition policy to mergers. Until a decision is made on this matter, the CARCIOM negotiator will retain reservations on the inclusion of mergers as part of a wider FTAA competition policy.

- (c) Paragraph 2.4.1 deals with State Aid and reads as follows:  
“[ The Parties undertake, in a time period to be determined, to [negotiate] [study] the treatment of state aids that could limit, restrict or distort competition and that could affect trade between Parties.]”

**Comments:** The CARICOM region, especially the OECS countries will need to give a clear indication as to whether they wish State Aid to be included in a Chapter on Competition Policy and therefore be subject to competition law. If it is to be included, Member States would need to carry out an audit of State Aid practices/provisions that may be anti-competitive and make arrangements for their removal. On the other hand, CARICOM could decide not to have State Aid as a part of the FTAA competition policy. However, in the case of the latter, CARICOM Member States would need to bear in mind that the regional economies could continue to be affected by larger countries’ State Aid arrangements that are anti-competitive. Indeed, the impact of CARICOM State Aid arrangements on larger economies of the Western Hemisphere would most likely be negligible.

- (d) Paragraph 3.1 of heading entitled: Institutional Provisions reads as follows:  
“Each Party shall establish or maintain an [appropriate] authority or authorities, at the national or sub-regional level, that has the responsibility to enforce measures related to the protection of competition.”

**Comments:** The OECS countries need to give a clear indication as to whether they would prefer the establishment of a single OECS Competition Policy Authority which would have responsibility for enforcing competition law. This sub-regional Competition Authority would be supported by the Member States via a Competition Policy Desk situated in the respective countries’ Ministry of Trade or Commerce.

Also included under the Institutional Provisions section are provisions for the establishment and function of a Competition Policy Review Mechanism. The CARICOM Member States need to determine whether such a mechanism should be established and if so what should be the scope of its functions. It should be noted that some areas of concern include whether Member States would have the human resource capacity and extra personnel who would contribute to the work of the Competition Policy Review Mechanism. Consideration will also have to be given to how often such reviews would be conducted.

While only one word in Paragraph 3.1 is bracketed, the rest of the section dealing with Institutional Provisions is bracketed. The remaining paragraphs of the section deal with issues such as the nature, scope and function of the competition authorities.

- (e) Paragraph 4.2 of the heading entitled: Mechanisms for Co-operation and for Exchange of Information reads as follows:  
“Parties will cooperate, as appropriate, and taking into account confidentiality provisions, on a bilateral, sub-regional

or regional basis, on matters relating to the enforcement of competition laws and the development of competition policies, including in the following ways:

4.2.1 [Notify other Parties, by means of specific notification procedures, when a competition law enforcement action may affect another Party's important interests, unless such notification harms the notifying Party's [important] interests;]

4.2.2 [Take into account the [important] interests of other Parties when enforcing competitions laws (negative comity);]

4.2.3 [Request by a Party's authority to another Party's authority to investigate and identify anti-competitive practices that affect important interests of the requesting Party and take appropriate measures with respect thereto (positive comity);]

4.2.4 Mechanisms for the exchange of information;

4.2.5 [Mutual legal assistance;] and

4.2.6 [Joint investigation in cases that merit it.]

**Comments:** Questions still remain as to the capacity of CARICOM Member Countries to meet requests for information in a timely manner. Where provision is made for the implementation of mechanisms for the exchange of information, the issue of the CARICOM countries' capacity should be taken into account.<sup>7</sup> In light of this, sub-paragraph 4.2.2 should ideally read with words to the effect: 'Mechanisms for the exchange of information depending on availability of resources and Member States' capacity' as opposed to merely 'Mechanisms for the exchange of information.'

(f) Paragraph 6.1 with heading entitled: Technical Assistance and Information Dissemination reads as follows:

“ The Parties [will work] [agree that it is in their interest to work] together in technical assistance activities related to the adoption and enforcement of competition laws and policies

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<sup>7</sup> This position is premised on the fact that requests for information would most likely be addressed by existing staff in government agencies such as Inland Revenue Departments, Ministries of Trade, and the Office of Attorneys-General. To the extent that competition policy arrangements result in Member States being inundated with requests from other countries, the staff of the various agencies may find the majority of their time being spent on meeting requests for information instead of conducting the more critical work of their respective national governments.

[to enhance the ability to fulfill the commitments made by the Parties in the present chapter.]

**Comments:** All parties concerned have agreed to the need for the provision of technical assistance especially to small developing countries and countries that do not yet have Competition Laws in place. The text on technical assistance remains bracketed mainly because some countries (particularly the US) have expressed concerns as to who will provide the necessary funding to facilitate the implementation of the required technical assistance programmes.

It was pointed out earlier that immediately following the working sessions of the NGCP technical assistance sessions are convened. These sessions are quite important and serve as a forum for Member States to indicate their concerns with respect to areas of technical assistance that should be included in FTAA Competition Policy. OECS Member States are encouraged to consider the areas of technical assistance now covered in the Draft Chapter on Competition Policy and indicate any other assistance elements that should be included.

- (g) Paragraph 7.1 of heading entitled: Transitional Measures addresses Possible Transition Period and reads as follows:

“[The adoption of competition rules, the implementation of institutional provisions to apply such rules and the initiation of effective application of the provisions of this chapter shall be carried out within a time frame that has been agreed to, taking into account the size of the economies and the vulnerability of the Parties.]”

**Comments:** The US appears reluctant to have this paragraph remain as it is worded. While the US has ‘unofficially’ stated its willingness to offer favorable transitional measures to the CARICOM region, it does have strong reservations about the use of the word ‘vulnerability’ in the paragraph. It is expected that this item will meet with some challenge and much discussion during the next round of negotiations. One way to deal with this may be to return to the wording of the Annotated Outline which, incidentally, was agreed upon by all parties. The original reads as follows: ‘consideration should be given to economic development and the size of economy, as well as the stage of legislative and institutional development of countries.’

#### ***A Summary of the US Position Regarding the FTAA Chapter on Competition Policy***

In respect of Competition Policy, the US has indicated its position on five issues; they are as follows:

1. Competition Law: the US is of the view that each of the FTAA countries should have a competition policy agency at the national or sub-regional level. This

agency would possess adequate powers and enforcement autonomy which would allow it to effectively enforce antitrust laws. The purpose of antitrust laws should be to promote economic efficiency and consumer welfare and the US does not find it appropriate to specify in the Chapter on Competition Policy detailed provisions on the substantive coverage of antitrust laws or on how agencies should operate. The US is of the opinion that competition agencies should be subject to independent domestic judicial review.

2. Mechanisms to Co-operate and Exchange Information: Technical Assistance and Information Dissemination: the US is of the view that cooperation among the FTAA countries is important to ensure effective competition law and policy development. It is also of the view that the FTAA countries' interest would be served if they worked together in the provision of technical assistance on competition policy and law enforcement.
3. Official Monopolies and State Enterprises: the US supports the establishment of rules on official monopolies and state enterprises in the FTAA. It feels that such rules, like those in the North American Free Trade Agreement (NAFTA), would ensure that when the state participates in commercial activity, its FTAA trading partners are not subject to discrimination.
4. Regulation: with respect to this issues, the US has not yet indicated a clear position. It is still reflecting on whether obligations concerning domestic regulation and its effect on competition could be appropriate in the FTAA Chapter on Competition Policy.
5. Institutional Provisions: the US believes that FTAA countries should agree to consult with each other on matters arising under the Competition Chapter. It supports the establishment of a competition policy review mechanism which would provide a forum through which meaningful peer review of an FTAA member country's overall performance in conforming to the competition chapter may be conducted. The review mechanism would also provide an organized means for discussing competition issues of interest along the lines of the WTO Trade Policy Review Mechanism.

### ***Concluding Remarks***

The Brief has spoken to many substantive matters, competition policy specific, but has also alluded to the link between competition and trade policy. The intention of this Brief, however, has not been to review competition and trade policy in tandem as its main intention was to lend itself to a specific examination of the implications of CARICOM-specific and FTAA competition policy issues, *per se*, on the OECS. A more deliberate and explicit analysis of the link between competition and trade policy will follow in a subsequent Brief. This notwithstanding, the competition issues highlighted above are done so with the recognition that trade policy is increasingly becoming a form of competition policy. This will continue to be the case in the 21<sup>st</sup> Century, as increasingly a central objective of modern trade negotiations have been to improve the contestability of rational markets; especially since economic developments in the global economy have increasingly been characterized by

the dramatic growth in merger activity in general, and in the number of cross-border mergers in particular.

Trade agreements and their associated negotiations have increasingly gone beyond issues of 'trade', *per se*, to embrace issues of *sound regulation* through advancing such concepts as the transparency of laws and regulations, non-discrimination, and standards. Increasingly the principles and rules built into trade frameworks are fundamentally centered on *good governance*; this has a profound impact on the trade and competition policy nexus. This Brief has served to lay the groundwork for a further exploration of these issues which have gained notoriety, especially at the multilateral level, in recent years.

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