Sub-Saharan Africa and CARICOM: Comparing experiences in implementing competition regimes

By:

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A recent publication by Fox and Bakhoum, *Making Markets Work For Africa: Markets, Development and Competition Law in Sub-Saharan Africa*, explores the competition regimes of Sub-Saharan Africa, but uses a political economy approach to flesh out the enduring impact of colonialism and imperialism on these societies and economies. It argues in part that colonial powers reshaped the economies to extract resources for export to the metropole while creating an import dependency for consumables. This legacy transformed these economies and their indigenous institutions and power. Locals were brutalized and deprived of meaningful economic opportunities. This legacy created the current realities in these countries: political instability in many of the countries, particularly Francophone Africa, economic concentration in the hands of multinational corporations and state owned enterprises, persistent poverty, and endemic corruption of the political elite that deprive these countries of opportunities for economic progress, particularly the disadvantaged

underprivileged. These are the conditions into which competition regimes were introduced.

Caribbean Community, (CARICOM), countries were also victims of colonialism and imperialism, but these societies and economies were created, not re-shaped, as plantation economies, producing entirely for export and importing consumables. The indigenous population of CARICOM countries were exterminated, and the colonial populations transplanted from Europe, Africa, Madeira, China, and India. Whites occupied the position of privilege and power in the colonies, with non-whites serving as slaves, and later, ex-slaves and indentured labourers. Indentureship ended in 1917. What developed was an export oriented economy, import dependent in the extreme, with social stratification keeping the small white population at the top: elites who controlled power and resources in the economy, and colonial policies and social norms and racial discrimination limiting upward mobility and entrepreneurial opportunities for the non-whites.

The whites had first mover advantage during the colonial period, with the emergence of a mercantile class amongst the whites since the late 19th century. This white mercantile class controlled the import and export business. This seed capital was rooted deeply at the time when other ethnic groups had recently emerged out of slavery, or were still indentured labourers, and unable to access meaningful entrepreneurial opportunities in general. Many of these white families and their companies still control major sectors of these economies in most CARICOM countries, with amalgamation of firms consolidated into the most powerful conglomerates in the region. Political power is in the hands of non-whites, but the elite white businesses wield powerful influence behind the scenes, and corruption is pervasive, though not in the extreme as found in Sub-Saharan Africa, and there is a level of accountability demanded by CARICOM's society.

The Fox and Bakhoum book, which was recently reviewed in a symposium on this blog, shows that there are varying efforts at developing competition regimes at both the national and sub-regional levels in Africa. It explores the substantive provisions in the various laws, including the regional laws, and examines the level of success there has been in enforcement. It found that

while many Francophone countries have competition laws, they are unable to enforce the competition dimensions of their laws because the West African Economic and Monetary Union, (WAEMU) Court of Justice gave exclusive competence to the WAEMU Commission to enforce competition law in the Community: both cross-border and domestic anticompetitive conducts. Eastern and southern African countries have fared better in developing their regimes, with some great successes in enforcement at the national level. This was in part attributable to the institution built during British colonialism, including an independent judicial system. The sub-regional efforts are still at its infancy and the study identified potential conflict of jurisdiction between Common Market for Eastern and Southern Africa (COMESA) and East African Community, (EAC), in enforcement of competition law. South Africa is in a different category, leading developing countries in successful enforcement of its competition law.

CARICOM is still in the process of developing its competition regime. There is a regional law, Chapter 8 of the Revised Treaty of Chaguaramas, the legal instrument for the CARICOM Single Market and Economy, and a regional enforcement institution, the CARICOM Competition Commission (CCC). It has jurisdiction over cross border anticompetitive conducts, like the EU commission. Four of the 14 countries in the CSME have laws and enforcement institutions but only three are fully functioning, Jamaica's, Barbados' and Guyana's. Trinidad and Tobago (TT) has a law (passed in 2006) and an institution (set up in 2014), but the law has not been fully proclaimed, and so not being enforced. The sub-regional group, the Organization of Eastern Caribbean States, have agreed to have a single competition law and institution and there is a draft law, but the process of legislation has been stalled for the last few years, as is also the case in the rest of CARICOM countries. The process has been slow and fraught with problems, not the least of which is lack of political will. All the Commissions suffer from scarce resources and very limited technical staff.

All the laws in the region prohibit anticompetitive agreements and abuse of dominance, with Barbados and TT including merger control regulation in their laws. However, there are draft laws that include merger control regulation in all the laws of the region. This would make CARICOM similar to that of Eastern and Southern countries in its inclusion of the three pillars of competition law. But, there are qualitative differences, one such being the public interest clauses in

the laws especially in South Africa to protect the historically disadvantaged population. Or, the provisions in Francophone African laws that prohibits abuse of economic dependence and allow for intervention to control prices. CARICOM laws follow the western standard of efficiency and consumer welfare, and protecting the integrity of the common market.

A major constraint at the regional level is that the CCC is severely limited in its ability to undertake investigations of its own initiative, having to rely on the regional trade body, or member states to request an investigation. This has limited its performance, a reversal of the WAEMU situation. The Jamaica Fair Trading Commission (JFTC) is also constrained in enforcement capability. In an Appeal Court ruling (Jamaica Stock Exchange v JFTC), JFTC was required to revised the law because there is insufficient firewall between the adjudicative and investigative arms of the commission, in breach of natural justice. But, while awaiting legislation of the revised bill, the JFTC has been investigating and identifying anticompetitive conducts in the country and, through Consent Agreements, getting firms to change their behaviour. And, cases have been taken to the courts. In a path-breaking victory, the JFTC appealed a case (Digicel/Claro Merger) to the Privy Council, the highest Court of Appeal for Jamaica, having lost in the Jamaican Appeal Court. It got a ruling in its favour in 2017 confirming that the provisions in its law prohibiting anti-competitive agreements can be invoked to investigate mergers, and that the Commission has jurisdiction to investigate conducts in the regulated sectors.

The Barbados Commission has investigated several mergers and approved them with remedies, and have also investigated abuse of dominance cases. But, this commission has chosen the persuasive route rather than imposing fines, wanting to develop a culture of competition and create firms' awareness before bringing the full force of the law against them, soon to be implemented. Finally, Guyana's commission is very new, has been building its expertise, and has investigated and fined a cartel among ship terminal operators. In short, there are similarities and differences between competition regimes and their backgrounds in Africa and in the Caribbean. A comparative study of these emerging regimes is overdue. This essay begins that process.

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