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**REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES**

**Contribution from CARICOM**

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More documentation related to this discussion can be found at: [oe.cd/rca](http://oe.cd/rca).

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## *Regional Competition Agreements: Benefits and Challenges*

### **-- CARICOM\* --**

#### **1. Introduction**

1. The Caribbean Community (CARICOM) competition policy is enshrined in Chapter Eight of the Revised Treaty of Chaguaramas (Treaty). The Treaty contains provisions which prevent restrictive agreements and anti-competitive unilateral business conduct that frustrates the establishment of the CARICOM Single Market and Economy (CSME).<sup>1</sup> However, it does not contain rules on cross-border merger control.<sup>2</sup>

2. The Treaty also establishes the CARICOM Competition Commission (Commission) and assigns it with the enforcement powers to prohibit cross-border business conduct that prejudices trade or prevents, restricts or distorts competition within the CSME. Pursuant to the Treaty, the Commission was inaugurated in 2008, with the mandate to: (a) apply the rules of competition, regarding anti-competitive cross-border business conduct; and (b) promote and protect competition in the Community and co-ordinate the implementation of the Community Competition Policy within the CSME. To carry out its mandate, Article 173 instructs the Commission to:

- Monitor anticompetitive business conduct in the CSME;
- Coordinate the implementation of competition policy in the CSME;
- Cooperate with national competition authorities;
- Investigate and arbitrate cross-border cases; and
- Develop and disseminate information about competition policy, and consumer protection policy.

3. This brief for the Global Forum on Competition highlights the benefits a regional competition framework provides for CARICOM and the challenges faced by the Commission in meeting its mandate. It also presents some strategies which the Commission has used to overcome these challenges.

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\* Contribution from the CARICOM Competition Commission

<sup>1</sup> The CSME is a development strategy to deepen the economic integration of the countries in CARICOM by advancing beyond a common market and towards a single market and economy. The CSME comprises the Member States of CARICOM except The Bahamas. The countries are: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

<sup>2</sup> Although no regional merger control policy exists, Barbados and Trinidad and Tobago have merger provisions in their national competition laws. Guyana drafted its national merger control rules, which is a separate piece of legislation from the national competition law. Jamaica has no merger provisions but is developing these rules. The draft competition Bills of the other Member States contain merger provisions.

## 2. Benefits of a regional competition framework and Authority

4. The geographical boundaries of the CSME stretch from the island of Jamaica in the north, to Guyana and Suriname on the north coast of the South American mainland. The CSME also extends from Belize in the west of Central America to Barbados, which is the most easterly of the islands.

5. Given the geographical scope of the CSME, the Commission believes many benefits can be accrued to the region by pooling the resources of its competition authorities to undertake joint competition enforcement and market surveillance initiatives. There is also much value to having a regional competition authority to coordinate these cross-border activities.

### 2.1. Shared Enforcement and Market Surveillance Activities

6. The objectives of the CARICOM competition policy can only be achieved through effective cooperation between the Commission and the national competition authorities in the CSME. Article 170 of the Treaty instructs the member states of the CSME to:

- Enact national competition laws;
- Establish and maintain a national competition authority to facilitate the implementation of the rules of competition;
- Co-operate with the Commission in achieving compliance with the rules of competition;
- Investigate any allegations of anti-competitive business conduct referred to the authority by the Commission or another Member State; and
- Co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.

7. The Treaty further provides for how cooperation between the Commission and the national competition authorities on competition enforcement should take place. According to the Treaty, cooperation is initiated by two means:

- (i) When a complaint by an interested party is made, consultations must be held between the Commission and the national competition authority(ies) regarding the jurisdiction of the Commission, and
- (ii) When the Commission on its own accord believes anti-competitive conduct is taking place and requests a national competition agency in a CSME Member State to undertake a preliminary investigation.

8. To facilitate a greater level of cooperation amongst the competition authorities in the region, the CARICOM Competition Network (CCN) was established in 2016. The CCN is chaired by the Commission. Since its establishment, the competition authorities in the region have collectively tried to tackle several areas relating to competition, including:

(i) General competition policy (i.e. administration of Chapter Eight)

- The development of a formal referral mechanism of cases from the national competition authorities to the Commission.
- Harmonised investigation procedures through the use of case studies.

(ii) Research and market studies

- Identifying sectors of importance to each competition agency for market studies or competition assessments.
- Developing common methodologies to ensure the market studies are conducted the same way in each country so the results can be compared and compiled.
- Sharing research experience and lending technical assistance to other national authorities.

(iii) Capacity building from international agencies

- Identify training needs and develop proposals to facilitate the training.
- Enter discussions with Third parties such as the US Federal Trade Commission and La Comisión Federal de Competencia Económica (COFECE)

## 2.2. Enhanced Detection of Anti-competitive Business Conduct

9. Detection of anti-competitive conduct generally, and cartels specifically, is a major challenge facing competition enforcement within the CSME. This is often due to inadequate human and financial resources and the high cost of investigating cross-border anti-competitive conduct. For the Commission, the problem is more acute as sometimes the institution is located far from the origin or effect of the anti-competitive business conduct.

10. However, an effective regional competition framework offers an opportunity for coordinated investigations by the enforcement agencies. Through the CCN, the competition authorities can notify other members of anti-competitive business conduct detected in their jurisdictions. This alerts the other CCN members to conduct which might take place by the same firm(s) in their countries.

## 2.3. A Collective Voice

11. Individually, the competition authorities in the CSME are small and their impact on the evolving international competition landscape is often minimal. However, as a group, the views of the competition authorities in the region are more likely to be considered. This is evidenced in the participation of the Commission in regional competition forums such as the OECD/IDB Latin America and Caribbean Competition Forum, the UNCTAD's International Group of Experts on Competition Law and Policy, and the meetings and workshops of the International Competition Network (ICN). It is often through the Commission that the collective views of the national competition authorities in the region are expressed.

### 3. Challenges of a small regional authority

12. As shown above are many benefits to having a regional competition authority in the CSME. However, several challenges exist that, if not addressed, will continue to stifle the full potential of the regional authority to fulfil its mandate in accordance with the Treaty.

#### 3.1. Lack of implementation of national commitments

13. Article 174.1 of the Treaty authorises the Commission to monitor, investigate, detect, make determinations or act to inhibit and penalise enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME. The Commission holds the view that if it receives a complaint from the relevant parties<sup>3</sup>, Article 174.1 of the Treaty affords it the latitude needed to fulfil its mandate even if a Member State has not enacted its national competition law or established its national competition authority. However, in these circumstances, the Commission is restricted from using its full powers under Article 174.2 of the Treaty (i.e. the ability to execute “dawn raids”, secure the attendance of persons to give evidence or the discovery or production of documents relevant in a case.). This impairs the ability of the Commission to make sound decisions which should be based on many sources of evidence.

14. To date, of the 14 Member States of the CSME, only 4 have enacted national competition laws and established national competition authorities. These Member States are Barbados, Jamaica, Guyana and Trinidad and Tobago. However, despite having these 4 Member States with competition frameworks, two outstanding issues remain. First, the national competition law of Jamaica does not include a provision that mandates the national competition authority to cooperate with the Commission. Second, Trinidad and Tobago has only proclaimed the administrative aspects of its national competition law. The provision which mandates the national competition authority to cooperate with the Commission is still not in force. Because of these two issues, the Commission cannot exert its full powers under Article 174.2 in these two countries. This suggests that the Commission can only exercise its full powers in Barbados and Guyana or on 14.3 percent of the Member States of the CSME.

#### 3.2. Lack of instruments for sector regulators

15. Having access to information collected by national sector regulators (e.g. price data) is often important to the Commission. This source of information is even more important if within a particular jurisdiction the sector is exempt from national competition law and assistance cannot be acquired from the national competition authority. Most national sector regulators in the region, however, do not have the legislative provisions which allow them to cooperate with regional institutions such as the Commission, such as the ability to enter a Memorandum of Understanding. Therefore, without the required legislative amendments, the Commission is restricted from accessing relevant information from national sector regulators.

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<sup>3</sup> Article 175 of the Treaty.

### 3.3. Jurisdictional conflicts

16. The Treaty assigns jurisdiction over cross-border anti-competitive business conduct to the Commission. Tension is created, however, if Member States impacted by cross-border anti-competitive business conduct apply their national laws to prohibit the practice instead of referring the matter to the Commission. By taking individual enforcement action on cross-border anti-competitive business conduct, national competition authorities:

- Undermine the implementation of the Community competition policy;
- Undermine the authority of the Commission and binds its ability to make decisions; and
- Leaves enforcement gaps in other jurisdictions impacted by the anti-competitive business conduct.

### 3.4. Small staff and Budget

17. Throughout its existence, the Commission has operated with a small established staff size. This is due to difficulty recruiting staff from within the region with a background in competition law.<sup>4</sup> The staff shortage has resulted in officers taking on several roles within the institution.

18. The issue of a small staff is even more pronounced given the consumer protection mandate of the Commission under Part Two of Chapter Eight of the Treaty. This mandate to provide technical assistance to national consumer protection agencies in the region in research and consumer advocacy.

19. Similar to staffing, budgetary constraints are a constant challenge for the Commission. The recurrent operational expenses of the agency are funded by the Member States. The Commission has, however, experienced delays in receiving funds from the Member States, due to several reasons including: the different budgeting cycles and fiscal difficulties of the countries; natural disasters to which the region is prone; changes in governments every 5 years; and changing priorities or the lack of political will of governments. Over the past 3 years, the Member States have only contributed 39.6 percent of the total approved budget of the Commission. This has led to insufficient funds to conduct regional market studies and provide staff training. The financial challenges have also impaired the ability of the Commission to promote competition throughout the region to the extent necessary to build a strong competition culture.

### 3.5. Need for a stronger competition culture

20. Many perceive competition culture to be related to the age of the market economy and the experience of the competition authority. From this perspective, the competition culture within the CSME remains weak. Although Jamaica and Barbados have had their

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<sup>4</sup> Like institutions in other regions, CARICOM agencies recruit personnel from within the Community. This policy limits the number of qualified persons from which the Commission can enlist.

competition frameworks in place since 1993 and 2001<sup>5</sup>, Guyana only enacted its law in 2010 and Trinidad and Tobago established its national authority in 2014. As stated above, 10 of the CSME Member States do not have their competition frameworks in place to make competition advocacy a sustained initiative.

21. The weak competition culture within the CSME directly influences the number of complaints received and cases handled by the Commission. Many businesses in the region do not understand competition law or what business practices are anti-competitive. In 2013, the Commission conducted a survey of businesses in Saint Lucia and 67 percent admitted they were uncertain or did not understand the basics of competition law. Moreover, 71 percent did not know what conduct is anti-competitive, while 89 percent were unaware of, or were uncertain about, the existence of the Commission. If these statistics reflect the level of awareness about competition law and the Commission in the wider region, it explains the low volume of complaints received by the Commission.

22. In addition to businesses, civil society needs to be recruited into the efforts to prohibit anti-competitive businesses conduct in the region. This requires greater awareness from consumer groups and the media of the impact of anti-competitive business conduct on consumers and the application of competition law to protect the welfare of consumers.

### **3.6. Lack of Merger Control**

23. As stated above, the Treaty does not contain merger control provisions. CARICOM, however, acknowledges that the adoption of an effective merger control regime is a necessary requirement for the functioning of the CSME. Due to the importance of merger control within the competition law and policy framework, the region has endorsed a Community merger control policy. However, until this policy becomes a provision within the Treaty, the powers of the Commission are limited in the area of merger control.

## **4. Strategies to overcome challenges**

24. As the Commission strives to prove its relevance as a regional institution in the CSME and as a competition authority in particular, it became necessary to develop strategies to overcome the challenges it faces. This section highlights a few of the strategies implemented.

### **4.1. Lack of implementation of national commitments**

25. The enactment of competition laws and the establishment of competition authorities are national issues over which the Commission has no control. Nevertheless, over the years the Commission has continued to provide its support to the Member States in the following ways:

- Technical assistance provided to Suriname in the drafting of its national competition Bill.

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<sup>5</sup> Although the national competition authority in Barbados was established in 2001, over the years price discrimination, predatory pricing, exclusive dealing and in recent times mergers have been the main areas of investigation.

- Assistance to Belize in developing its Strategic and Action Plan to access funds provided to the country to establish its competition framework.
- Technical assistance to the Organisation of Eastern Caribbean States in developing a Strategic and Action Plan for the establishment of a sub-regional competition authority.

#### **4.2. Budgetary constraints**

26. Instead of relying solely on Member State contributions, over the years the Commission has sought alternative sources of funding or assistance. These funds or assistance have been directed towards building the capacity of the technical staff of the competition authorities in the region and strengthening the competition culture through sensitisation sessions within the CSME. A few examples of these are:

- Developing project proposals for capacity building projects for the competition authorities in the region.
- Competition workshops to educate stakeholders (e.g. government officers, private lawyers, the media, etc.) using funding from sources such as the European Union under the CARICOM-EU Economic Partnership Agreement (EPA) Capacity Building Project.
- Full and partial funding for staff to take part in ICN workshops such as from the US Federal Trade Commission.
- Financial and technical assistance from extra-regional sources to build the capacity of the staff of the competition authorities in the CSME.

#### **4.3. Information Sharing and Advocacy**

27. Since its establishment, the Commission has strived to create a strong competition culture within the CSME through competition advocacy. The two main competition advocacy methods used by the Commission are the publications of articles and training sessions. Both methods of raising the awareness of competition law and policy in the CSME and its benefits have had varying levels of success. For instance, articles published in newspapers and on the website of the Commission are more likely to reach a wider audience and generate greater interest in competition law and policy than educational workshops. On the other hand, workshops allow the Commission to cater its advocacy and training to the specific needs of stakeholders.

28. As the Commission continues to share information and promote the benefits of competition in the CSME, the following initiatives will be pursued:

- Improve its website to make it easier for persons to find relevant information on competition law and policy in the region;
- Increase the number of articles on competition law on its website and in local newspapers;
- Develop a regional lecture series on competition law and policy using online platforms; and
- Develop targeted activities to increase the knowledge of competition law and policy to civil society (e.g. media and consumer protection agencies).