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LATIN AMERICA AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contribution from CARICOM --

4-5 April 2017, Managua, Nicaragua

The attached document from CARICOM is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- CONTRIBUTION FROM CARICOM¹ --

1. Introduction

1. The Caribbean Community (CARICOM) competition policy is enshrined in Chapter Eight of the Revised Treaty of Chaguaramas² (Treaty). The Treaty contains provisions against restrictive agreements and anti-competitive unilateral conduct. It also assigns enforcement power to the CARICOM Competition Commission (CCC) in relation to anti-competitive cross-border business conduct. The Treaty, however, contains no merger control rules.³

2. A number of member states of CARICOM have incorporated merger control provisions into their enacted national competition laws such as Barbados⁴ and Trinidad and Tobago⁵. Guyana has prepared a draft Merger Control and Review Act in 2013 which is intended to be a complementary but separate piece of legislation from the national competition law. Jamaica's⁶ national competition law has no merger provisions and the member state is now in the process of developing a merger policy and provisions for

¹ This paper was prepared by the CARICOM Competition Network (CCN). The CCN was established in August 2016. It comprises the CARICOM Competition Commission and the national competition authorities of Jamaica, Barbados, Guyana and Trinidad and Tobago.

² Revised Treaty Of Chaguaramas Establishing The Caribbean Community Including The CARICOM Single Market and Economy (CSME), 2001: http://cms2.caricom.org/documents/4906-revised_treaty-text.pdf

³ Although no regional merger control policy exists, Barbados and Trinidad and Tobago have merger provisions in their national competition laws.

⁴ Barbados Fair Competition Act Cap 326B - <http://www.ftc.gov.bb/library/CAP326C.pdf>

⁵ Trinidad and Tobago Fair Trading Commission - <http://www.tandtftc.org>

⁶ Jamaica Fair Competition Act- http://www.jftc.com/Libraries/Publications/Fair_Competition_Act.sflb.ashx

incorporation into its law. The draft competition Bills of the other member states contain merger provisions.

3. CARICOM acknowledges that the adoption of an effective merger control regime is a necessary requirement for the functioning of the CARICOM Single Market and Economy (CSME). The maintenance of competitive markets is a major objective within the framework of the establishment of a fully functioning CSME, with merger control being a key component of this framework. The Community also recognises that merger control is an integral part of competition law and policy in the majority of jurisdictions that have enacted competition legislation. The Community acknowledging its importance and the increasing number of mergers that are occurring intra-regionally is working assiduously to create a harmonised Community merger control framework.

4. The increase in mergers in the Community has occurred both at the national and Community levels. Some of these very large acquisitions in banking, telecommunications, manufacturing and energy have highlighted the need for strengthening of the fair competition frameworks of member states to more adequately address these types of business transactions. The Community can no longer rely solely on the agreement provisions in national and Community legislation to properly assess mergers in a timely and effective manner.

5. CARICOM utilised the funding under the 10th European Development Fund programme to support the development of a harmonised Community merger control framework through a *Consultancy to Strengthen the CSME Regulatory and Markets Regime*. The completed Draft Community Merger Policy was submitted to the Forty-Third Meeting of the CARICOM Council for Trade and Economic Development (COTED) held from 14-18 November 2016 in Georgetown, Guyana. It is expected that the Community Merger Policy will be finalised in 2017.

6. This contribution to the Latin American and Caribbean Competition Forum (LACCF) reports on these recent developments in CARICOM towards establishing its Community merger control regime. The report highlights the principles governing the Draft Community Merger Policy, its scope and application, and the proposed thresholds being discussed.

2. Principles Governing the CSME Merger Policy

7. The CSME Merger Policy⁷ which has been developed is based on the following core principles:

1. The actions of the Member States regarding mergers will be conducted in accordance with the objects and provisions of Chapter Three and Five of the Revised Treaty regarding the right of establishment, the free movement of goods and services, movement of capital and the movement of skilled Community Nationals, and Articles 51, 78, 169, 177 and 179;
2. The Member States will take all reasonable steps to ensure that their laws are consistent with the CSME Merger Policy;
3. Only merger transactions meeting the requirements listed in section 6.2 will be subject to review by the Commission. The Merger Policy only applies to mergers with a cross-border effect; principles and thresholds for national merger review will be subject to national legislation;

⁷ *“Revised Policy and Rules Framework for the Control of Mergers and Acquisitions in the CSME”* prepared by BKP Development Research and Consulting in consortium with AESA dated August 2016 as amended by The Reconvened Taskforce On Implementation Of Chapter Eight of the Revised Treaty of Chaguaramas, October 2016.

4. The Commission will enforce the CSME Merger Policy in such a way as to minimise administrative and compliance costs for firms;
5. To the extent possible, there should be coherence between the penalties applied at the Member State level and the penalties applied at the Community level for breach of merger rules.

3. Proposed Scope and Application of the CSME Merger Policy

8. The CSME Merger Policy will apply to:

- All sectors, industries and markets within the CSME

9. No sector will be excluded from merger control review. This also applies to sectors in which at present (national) monopolies may exist, or exemptions are set out in the national competition law of a Member State. For regulated sectors, including financial and telecommunication services, where national merger control is under the responsibility of sector regulators, regional merger control will require close coordination between the CCC, sector regulators, and national competition authorities.

- Mergers created by cross-border transactions or transactions with cross-border effects

10. Merger control will require the prior notification to the CCC of agreements likely to produce a significant impact on competition to ensure their scrutiny. Merger control includes the review of long-lasting market structure modifications (of significant size) leading to the reduction in the number of independent suppliers operating in the market.

3. Proposed Notification Thresholds

11. Only mergers involving significant turnovers and with a regional dimension would need to be notified to the CCC. Merger transactions are subject to notification and review only if the following thresholds are surpassed:

- the aggregate turnover of all involved firms (merging firms, acquiring and acquired firms, joint ventures, etc.) realised within the CSME exceeds a threshold of [USD 100 million];
- [at least one of the involved firms exceeds a turnover of [USD 20 million] in each of at least two different CSME Member States; and]
- in the case of the acquisition of the control of a firm, the acquired firm's turnover within the CSME exceeds a threshold of [USD 50 million]

12. CARICOM understands that optimal notification thresholds are important. Thresholds that are too low would lead to the CCC being flooded with merger notifications, while thresholds that are too high might result in mergers that could have anti-competitive effects being overlooked. The region, therefore, views the development of notification thresholds as an iterative process. The threshold values highlighted above will be updated by the CCC subject to approval by COTED every 3 years or as necessary.

4. Implementation of the Provisions by Member States

13. The Member States have already agreed that in order to achieve the objectives of the Treaty regarding competition and with respect to the control of mergers within the CSME that:

- the Community must establish the necessary Treaty undertakings, and strengthen the institutional, informational, procedural and administrative arrangements for the coordinated and consistent enforcement of the CSME Merger Policy; and
- the Member States endeavour to develop, adopt and enact harmonised national merger legislation, and take the necessary steps to create the capabilities and capacity for the effective investigation and enforcement of the CSME Merger Policy.