



**COMPETITION POLICY
AND LAW
IN THE CSME**



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FOREWORD

Effective competition policy is widely recognized as a requisite for the orderly operation of markets. Currently over one hundred jurisdictions have implemented competition regimes and are applying competition laws to an ever increasing range of economic sectors, including some that were previously excluded from the ambit of competition policy by virtue of being state supported or being considered 'natural' monopolies. One such example is the telecommunications sector. Among the Member States of the Caribbean Community (CARICOM) however, competition policy is predominantly unexplored territory, the exceptions being Jamaica, which adopted its policy in 1993 and Barbados, which followed in 2003.

The Revised Treaty of Chaguaramas establishing the Caribbean Community, including the CARICOM Single Market and Economy (CSME) ushers in a new era for Member States in respect of competition policy, as it imposes on them an obligation to implement competition policy in accordance with the Treaty provisions. The CSME creates a single economic space within which goods, services, capital and labour are to move freely and the right of establishment is secured. The CSME is expected to contribute to, among other things, expansion of the Region's trade, enhanced international competitiveness and accelerated economic development.

The role of CARICOM's various economic agents, including both government and private sector economic enterprises, in achieving these goals cannot be overstated; nor can the significance of efficient mechanisms for regulating their relationships be ignored. Consequently, the creation of an environment conducive to enterprise growth and increased competition for markets and consumers is balanced by competition rules which seek to ensure that firms are able to enter the markets of their choice; healthy competition is introduced or maintained and consumers are guaranteed a wide choice of good quality goods and services at competitive prices.

This booklet underscores aspects of CARICOM Competition policy and law and outlines the role of stakeholders in the enforcement of the law. It is recognized that civil society organizations and the media should also be committed to enhancing the enforcement process. Against that background, I am pleased to commend to you this latest in the series of Publications issued in support of the Community's CSME public education programme so necessary for ensuring that information is made available to policy makers, enforcers of the law, consumers and the public at large.

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Why the need for Competition Policy in CARICOM?

Many CARICOM countries have lost important export markets in recent years, and are experiencing more intense competition from international firms because of lowered trade barriers (e.g., shortened negative lists and reduced tariffs) to entering domestic markets. A key development strategy of these countries is to create opportunities for firms to improve efficiency by operating on a larger scale, and thereby enhance their competitiveness in domestic, regional and international markets. This is particularly important since many firms in CARICOM countries are relatively small and have difficulty competing in the international markets.

Increasing international competitiveness is one of the major objectives in advancing the process of integration through the establishment of the CARICOM Single Market and Economy (CSME). To facilitate this process, the Council for Trade and Economic Development (COTED) developed a framework for joint action in the region. The Treaty of Chaguaramas was revised to provide for the implementation of the necessary legislation to deepen the integration by removing restrictions to trade and to the movement of capital and labour. By doing so, greater competition is promoted intra-regionally and CARICOM firms are provided with the opportunity to grow and supply larger markets. Competition Policy promotes and maintains competitive markets and this is a critical policy objective of the Revised Treaty of Chaguaramas.

Competition Policy includes all Government initiatives designed to increase competition in markets. These include trade liberalization, privatization, deregulation and foreign exchange policy. Competition law is a subset of competition policy, and is most effective when introduced as part of a wider competition policy regime.

What are Competitive Markets?

In competitive markets, firms compete for customers but are unable to independently influence the prevailing price. In this environment, consumers and firms can easily access information relevant to their decision making process; new firms can freely enter the market and unprofitable existing firms can freely exit the market.

In competitive markets, consumers persistently seek out the best deals and new firms enter a market to contest excessive profits, if any, earned by existing firms. Accordingly, competition provides the proper incentives for existing firms to supply goods and services in the quality, variety and quantities desired by consumers at the lowest possible price.



Since each existing firm, motivated to maximize profits, has an incentive to undermine competition, it is likely that some firms will engage in conduct designed to compromise the competitiveness of the markets. Such conduct could be implemented by a single firm or coordinated amongst a group of firms. In either case, consumers and some firms could be made worse off when competition is undermined.

Given the importance of competitive markets to consumers and some firms, Governments need to discourage firms from engaging in conduct that is likely to undermine the competitive process.



CARICOM Competition Policy Regime

The CARICOM Competition Policy has as its objective to promote and maintain competition and enhance economic efficiency in production, trade and commerce. To ensure that action by enterprises does not reduce the benefits to be derived from the CSME, the CARICOM Competition Policy prohibits anti-competitive business conduct which prevents, restricts or distorts competition. This policy also promotes and protects consumer welfare.

Competition Law discourages conduct which undermines competition and is therefore one of the key measures needed to support the proper functioning of markets. Two pillars of competition law are prohibitions against:

- ***Anti-competitive agreements:***
that is, agreements between two or more competitors which have the intention or the effect of limiting competition amongst themselves in order to gain higher profits;
- ***Abuse of a dominant market position:***
A firm is dominant in a market when its power far exceeds that of its rivals, and it can set prices without taking into account how competitors would react. In some jurisdictions, for instance, a firm is considered dominant if it possesses at least 40 percent share of the market for a particular product; Public-owned monopolies are also subject to the Community competition rules, according to Article 31 of the Revised Treaty.

Chapter 8 *does not address the issue of regulating mergers in the region which is the third pillar of competition law.* However, CARICOM is in process of developing a policy on merger control regulation.

Anti-competitive Conduct under the CARICOM Competition Regime

The following anti-competitive conducts are prohibited under Chapter 8 of the Revised Treaty.

- *Fixing of purchase or selling prices, directly or indirectly:*
 - ◆ At the international level, very damaging cartels are formed, such as the Lysine Cartel which operated from **1992-95**, fixing prices on feed additive for poultry and swine. The membership included some of the world's most significant lysine producers. Production facilities were located in the US, France, Hungary, Indonesia, Italy, Japan, Korea, Mexico and Thailand. Over its life span, the cartel raised prices of over US\$1.4 billion in global sales, **overcharging by 100% and gaining rents of some US\$ 140 million. Every person in CARICOM who eats poultry and pork paid more for the products as a result of this cartel.** One of the conspirators was Archer Daniel Midland Company (ADM) which has flour mills in Jamaica, Belize, Barbados and Grenada.



- ***Restricting competition by arranging not to compete against each other in markets, or to restrict supply of sources:***
 - ◆ The free flow of goods and services within the CSME could be compromised if producers of a product, e.g., pharmaceuticals were to agree not to compete in each other's home markets. So, producers in St. Lucia, for instance, would not compete in Jamaica and vice versa, resulting in higher prices being charged in each market.

- ***Limiting or controlling production, markets, investment or technical development:***
 - ◆ When firms allocate output quotas amongst themselves, they create scarcity and cause price increases. Limiting investment or technical development could have a dampening effect on production of goods and services, or could inhibit efficiency creating changes, leading to higher prices due to inefficiency or scarcity. For instance, intellectual property right holders may deliberately obtain a patent in a developing country so as to bar entry to competitors, thus, limiting the extent of investment or technology transfer.

- ***Conspiring to affect tenders submitted in response to a request for a bid (Bid rigging):***
 - ◆ Collusive tendering for procurement contracts results in winning bids being above the level that would prevail in the absence of collusion. For instance, if a contract for procurement of goods is worth US\$100,000 at market value, and four firms have conspired to bid, they might agree for one to submit a bid at US\$150,000 while the others submit higher ones. In so doing, the body inviting the tenders would pay fifty percent higher than it would have paid if there was competition amongst the firms. The winner would have received rents of US\$50,000. The colluding firms would then take turns in winning bids.
 - ◆ Restricting the activities of those lower in the production chain (Exclusionary vertical restrictions): (The interactions existing among persons operating at various points of the production chain are seen as vertical relationships).

- ◆ A dominant firm may be forced by competition to lower prices or provide better quality of goods and services. To avoid this it might seek to prevent its distributors from carrying its competitors' products.
- ◆ On September 6, 2007, Mittal SA (South Africa), a steel manufacturer which company is also resident in Trinidad andTobago (ISPAT), was fined US\$95.9 million by the South African Competition Tribunal for imposing upon some of its customers, restrictions in the use of or resale of flat steel products. Mittal SA manipulated the supply of flat steel products on the domestic market so as to reduce the supply on the domestic market in order to maintain a price pre-determined by the firm.

The company did this by providing selected merchants with the product at a lower price, but restricting them from trading in the steel or even using it for another purpose, if the steel is discounted for a particular purpose. Mittal SA was ordered not to impose on any customers of its flat steel products any conditions in respect of the customers use or resale of those products, or reach an agreement on a condition with its customers of flat steel products.

- ***Treating parties engaged in similar commercial transactions unequally, so as to give competitive advantage to one party over another:***
 - ◆ For example firms are not allowed to charge different prices to different customers, or categories of customers, for the same product where the differences in prices do not reflect the quantity, quality or any other trading conditions relating the items supplied.
 - ◆ A firm may, for instance, provide its subsidiary with a better price for materials that are input into production than the price it charges its competitors for the same input. This would give the subsidiary an unfair competitive advantage over its rivals.
 - ◆ In Barbados, for instance, the Fair Trading Commission investigated BRC (West Indies) to determine whether the company and its wholesale distributors were engaging in price discrimination and retail price maintenance and found them in breach of the Fair Competition Act (FCA). BRC cooperated with the Commission and revised the arrangements to make them compliant with the FCA.

- ***Tying to a sale or contract additional obligations that are not connected to the substantive transaction:***
 - ◆ Firms may try to get rid of excess stock by tying the purchase of one product or a bank may make it compulsory for the customer to purchase other products such as investment services as a condition of getting a loan.

- ***Refusing to give competitors access to infrastructure or networks where such access is essential to the provision of a service:***
 - ◆ For instance, internet service providers need access to telecommunications land lines (except in the case of wireless services now offered). If the owner of the telecommunications infrastructure refuses to provide access, or in the case of mobile phones, interconnection services, then it would be denying access to an essential infrastructure. A case in the European Union illustrates the application of this provision. A private firm constructed a dock and offered a ferry service. A competitor wanted to offer the same service, and requested access to the dock, at a fee at market price; the request was refused by the owner. The case was taken to the European Court and the owner of the dock lost, on the basis that the dock was an essential facility, without which the competitor could not provide the service, as it was too costly and a waste of resources to build another dock.
 - ◆ Predatory pricing, or pricing with the intention of harming competitors
 - ◆ A firm could resort to selling a product at a below cost price in order to drive out a competitor or to prevent one from entering the relevant market.

- ***Directly or indirectly imposing unfair purchase or selling prices or other restrictive practices;***
 - ◆ An unfair price has no reasonable relation to the economic value of a product or service, and allows a dominant firm to maintain profits that are appreciably higher than it could expect to earn in a competitive market.

- ◆ In the tourism industry, for instance, the International Tour Operators dominate the market for hotel reservations and tie in airline tickets and other tourist experiences. Hotels are left out of the loop and have difficulty accessing the overseas tourists unless they agree to reduce prices to very low levels and accept the package provided by the Tour Operators.
- ◆ Another example of unfair purchase prices is seen in the prices that suppliers are forced to settle for when dealing with large supermarket chains that dictate the price at which they would buy.
- *Engaging in any business conduct that results in the exploitation of its customers or suppliers. This provision affords a national Competition Authority the ability to discipline firms that engage in such practices.*

Competition law aims to **protect competition, not competitors** and thereby maintain competitive markets.



Agreements Allowed by the Revised Treaty of Chaguaramas

- *There are instances when there is a need for collaboration amongst competitors which merit special consideration. The Revised Treaty provides that an enterprise shall not be treated as engaging in anti-competitive business conduct if*
 - ◆ the activity complained of contributes to production or distribution of goods and services, or improves efficiency by, for instance, facilitating technological development through combined efforts at research and development; or collaboration which may increase information dissemination;
 - ◆ the restrictions are limited to achieving the objectives and are indispensable for improvement of production or distribution of goods and services or technical or economic progress;
 - ◆ the collaboration does not result in the elimination of competition in respect of a substantial part of the market for goods or services concerned.

The Revised Treaty provides for *exclusions and exemptions* to:

- a. associations of employees -
employees may cooperate and coordinate their activities for *their own reasonable protection as employees*;
- b. arrangements for collective bargaining on behalf of employers or employees *for the purpose of fixing terms and conditions of employment*;
- c. professional associations -
The CARICOM Competition Commission may exempt activities of professional associations designed to develop and enforce professional standards of competence reasonably necessary for the protection of the public;

d. specific sectors or enterprises or group of enterprises -

The Revised Treaty gives the Council for Trade and Economic Development (COTED) the authority, based on development or public interest considerations, to suspend or exclude from competition rules specific sectors or enterprises or group of enterprises

e. an action of a Member State where exemption is requested and approved.

f. anti-competitive conducts that have only a minimal effect on the Community market (*De Minimis* Rule).



Enforcing the Revised Treaty

Article 171 of the Revised Treaty established the CARICOM Competition Commission with responsibility for applying the rules of competition to cross border anticompetitive business conduct and conduct that has cross border effect in the Single Market.

The CARICOM Commission will also promote and protect competition in the Community and co-ordinate the implementation of CARICOM Competition Policy. This Commission is also required to provide support to Member States in implementation of their obligations, including protecting consumer welfare, facilitating the exchange of relevant information and expertise, and developing and disseminating information about competition and consumer protection policies.

It is mandated to monitor, investigate, detect, make determinations and take any appropriate action to inhibit and penalize enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME. In conducting investigations, the Commission may require any person to give evidence, submit documents, and it may take any such action as may be necessary to advance the investigation.

On the basis of findings of the investigation, the Commission may

- *determine whether business conduct contravened the rules of competition;*
- *apply remedies or sanctions, including ordering the termination or nullification of agreements, conducts, or activities prohibited by the law;*
- *issue cease and desist orders;*
- *impose fines; and*
- *order payment of compensation to persons affected by the anti competitive conduct.*

Member States' Obligations

Member States are required to ensure that all anticompetitive agreements are null and void within its jurisdiction, except for those benefiting from exclusions or exemptions. To meet this obligation, Member States are required to:

- *enact competition laws consistent and compliant with the rules of competition and provide penalties for anti-competitive business conduct;*
- *enact legislation to ensure that determinations of the CARICOM Commission are enforceable in their jurisdictions;*
- *establish and maintain institutional arrangements and administrative procedures to enforce competition laws by establishing and maintaining national competition authorities for the purpose of facilitating the implementation of the rules of competition;*
- *take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis;*
- *provide for the dissemination of relevant information to facilitate consumer choice;*

Each Member State shall require its National Competition Authority to:

- *Cooperate with the CARICOM 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;*
- *Co-operate with other national competition authorities in the detection and prevention of anticompetitive business conduct and the exchange of information relating to such conduct, giving due regard to the need to maintain confidentiality of commercially sensitive information that was provided on a confidential basis.*

It is important to note that national competition laws can be enforced only in national jurisdictions and so national competition commissions will deal only with anticompetitive conduct which takes place in a national economy and which affects consumers in the domestic market.

Procedure for Undertaking an Investigation at the Community Level

According to the Revised Treaty, only *Member States or COTED* can make a request of the Commission to undertake an investigation. Individuals or firms must take their complaints to their governments which in turn will submit a request to the CARICOM Commission to investigate, if there is sufficient reason to believe that anti-competitive conduct has taken place that prejudices trade and prevents, restricts or distorts competition in the territory of the requesting Member State.

COTED can also request of the CARICOM Commission that it investigates a case, where it has sufficient reason to believe that cross-border anti-competitive conduct has taken place in the Single Market.

Requests for initiating an investigation must be in writing and must contain sufficient information to allow the CARICOM Commission to make a preliminary assessment on whether an investigation is justified. If so, then the Commission shall consult with the interested parties and determine whether it or the national authority has jurisdiction.

Once it is decided that an investigation shall be conducted, it must be completed within 120 days from receipt of the request for investigation. Where circumstances warrant, this time period can be extended. This provides legal certainty to businesses which can be adversely affected by the undue lingering of investigations.

Once the Commission conducts its enquiry, it will notify the parties of its decision to apply remedies or sanctions and apply 30 days for compliance by the parties. If the parties fail to comply in the time specified, the Commission may apply to the Court for an order.

The Commission can also request that a national competition authority undertake an investigation where it believes that an enterprise is engaged in anticompetitive conduct that limits or distorts competition in the single market.



Where the CARICOM Commission is dissatisfied with the result of the investigation, it may undertake its own preliminary examination, and where findings show that an investigation is merited, it may consult with the National Commission as to who has jurisdiction. If there is a difference in opinion, COTED shall decide.

If a Member State is dissatisfied with the CARICOM Commission's ruling, it may apply to the Caribbean Court of Justice (CCJ) for review of the decision. The CCJ is the Final Court of Appeal in respect of decisions of the Commission.



Procedure for Undertaking an Investigation at the National Level

At the national level, individual or firms may take complaints to the National Commission. A complainant would generally be required to make the complaint in writing, providing full identification details, and a brief description of the practice that is deemed to be anticompetitive. If there are any documents to support the complaint, these should be submitted. The National Competition Authority would also require the complainant to provide information on all individuals/companies/organizations which are directly affected by the anti-competitive practice, and as much detail as it can provide on the relevant product and geographic market.

An enterprise that is aggrieved by the findings of the National Competition Authority can appeal to a Judge in Chambers. The Judge may confirm, modify or reverse the Commission's findings or any part thereof, or direct the Commission to reconsider its decision, either generally or in part.

Role of Stakeholders in Enforcement of the Law

Stakeholders in the enforcement of the competition regime include businesses and business associations in the private sector; government ministries and agencies; mass and special-interest media; consumer organizations; labour unions, farmer groups and other nongovernmental organizations, and academics and researchers, and all other citizens who do not identify themselves as members of any interest group, but whose lives will be affected by competition law.

The optimum relationship between the Competition Authority and the private sector is one of voluntary compliance on the part of the private sector. To ensure voluntary compliance, firms should engage competition lawyers to conduct due diligence to ensure that their agreements and conducts are not anti-competitive.

Civil society organizations of all kinds and the media can enhance the enforcement process by notifying the Authority of possible anti competitive business practices. It is in their interest to act as “watchdogs” for the Competition Authority.

Competition Authorities need to establish effective collaborative working relations with other government departments and bodies, particularly other regulatory bodies, to ensure that their respective roles are clearly defined, and consultation and cooperation mechanisms are in place.

Academics and researchers in the region have a vital role to play in making the competition regime effective. They are equipped to conduct sectoral, industry and market studies and also assist with public education on the law, its benefits, and enforcement procedures.