

Unclassified

DAF/COMP/LACF(2013)29

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

26-Aug-2013

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/LACF(2013)29
Unclassified

LATIN AMERICAN COMPETITION FORUM

Session II: Regional Competition Agreements

Contribution from CARICOM

3-4 September 2013, Lima, Peru

The attached document from CARICOM is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

Contact: Mr. Mario UMAÑA
Email: mariou@iadb.org

JT03343710

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English



LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session II: Regional Competition Agreements

CONTRIBUTION FROM THE CARICOM COMPETITION COMMISSION

1. Regional Integration in the Caribbean

1. Regional integration has remained a perennial issue in the Caribbean throughout the post-colonial era. Several distinct stages of Caribbean regionalism have been identified since the 1950s that eventually led to the establishment of the Caribbean Community (CARICOM)¹ and the signing of the Treaty of Chaguaramas by its Member States in 1973.

2. Since 1973 the signatories of CARICOM have strived for deeper levels of integration among themselves. In 1989, the CARICOM Heads of Government declared the further goal of creating a CARICOM Single Market and Economy (CSME) with full factor mobility and the harmonisation of economic policies. In 2001 the member States signed the *Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market & Economy* (CSME)² (herein after referred to as the “Revised Treaty”).

2. Revised Treaty of Chaguaramas

2.1 Community Competition Policy

3. The importance of competition policies within the CSME is first enunciated in the Preamble of the Revised Treaty. The Revised Treaty affirms that, inter alia, “...*the application and convergence of*

¹ In 1973 the full membership of CARICOM included the following thirteen countries: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago.

² It should be noted that the countries of Haiti and Suriname became signatories to the Revised Treaty, bringing the membership of CARICOM to fifteen countries. The Bahamas is not a participant in the CSME process.

national competition policies and the cooperation of competition authorities in the Community will promote the objectives of the CSME". It was therefore against this background that Chapter VIII of the Revised Treaty was developed, and sets out the Rules for the Community Competition Policy as well as a system whereby those Rules are to be enforced.

4. Chapter VIII of the Revised Treaty expands on Article 30 of the original Treaty of Chaguaramas which briefly referred to restrictive business practices and the actions that should be taken by the Community should these practices occur. Chapter VIII of the Revised Treaty also incorporates the language referring to the CSME which is not found in the original Treaty of Chaguaramas³. Specifically, Article 169 of the Revised Treaty states that the objective of Community Competition policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct. These benefits are expected to be shared by all stakeholders including the private sector, government and the consumers.

5. In order to successfully implement the Community Competition Policy, Article 170 of the Revised Treaty obligates the Community and the CSME Member States to establish the appropriate norms and frameworks to prohibit anti-competitive business conduct. So there is a shared obligation to establish the necessary enforcement frame work for competition policy and law in the CSME. At the Community level, this required the establishment of the CARICOM Competition Commission. At the national level, Member State were mandated to enact national competition laws and to establish national competition authorities that would collaborate with the CARICOM Competition Commission when issues of a cross-border nature are suspected.

2.2 CARICOM Competition Commission

6. The CARICOM Competition Commission (Commission) was inaugurated on 18 January 2008 in Paramaribo, Suriname. The mandate of the Commission is to (a) apply the rules of competition, in respect of 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.

7. In order to carry out its mandate, Article 173 of the Revised Treaty instructs the Commission, among other things, 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

8. The Commission having been powers under Article 174 of the Revised Treaty including:

- May make determinations regarding the compatibility of business conduct with rules of competition and other related provisions of the Treaty.
- Shall order the termination or nullification of agreements, decisions or activities prohibited under the Revised Treaty

³ Article 30 the original Treaty of Chaguaramas ensured that restrictive business practices did not frustrate the benefits expected from the removal of duties and quantitative restrictions to trade within CARICOM

- Adopt measures such as issuing cease and desist orders as appropriate to end anticompetitive business conduct

9. The Commission in carrying out its functions and using its powers under Chapter VIII of the Revised Treaty is subject to the legal rules of the national jurisdiction in which it executes its powers. This means that the Commission has to operate according to the national competition law in each Member State. As such, the work of the Commission is very dependent on collaboration with national competition authorities in the Member States.

2.3 *Member States Competition Obligations*

10. As it stands the Commission is a young competition agency with limited experience in competition enforcement. To date the Commission has not engaged any other competition authority, either regionally or extra-regionally, on competition enforcement matters. Additionally, the Commission has not received any formal requests for investigatory assistance from competition agencies within or outside of the region.

11. At the regional level, the lack of cooperation on competition enforcement has mainly been as a result of two factors:

- Article 170 requires CSME Member States to enact national competition legislation, and establish national competition authorities that are obligated to cooperate with the Commission on issues pertaining to suspected anti-competitive business conduct that is of a cross-border nature. Only four (4) countries have enacted national competition laws and these are Barbados, Guyana, Jamaica and Trinidad and Tobago. However, only Barbados, Guyana and Jamaica have functioning national competition authorities (NCAs).
- Only Barbados and Guyana have incorporated provisions in their national competition legislation to facilitate cooperation between the NCAs and the Commission.

12. The limited number of CSME Member States with national competition legislation or functional NCAs restricts the Commission's ability to conduct regional investigations in all CSME Member States. The Commission's ability to compel persons or institutions to provide information in Member States without national competition laws or NCAs has not been tested to date. National competition laws would allow NCAs to require the discovery or production of any document or part thereof (search of premises, removal or copying of files or electronic docs at premises) on behalf of CCC.

13. The Commission has consequently endeavoured over the recent years to provide technical assistance to those countries that have not yet met their national obligations under Article 170 of the Treaty.

2.4 *Government Subsidies Provisions*

14. In the Revised Treaty of Chaguaramas signed by Member States there are provisions that speak to subsidies (Articles 96-124). These matters are more appropriately dealt with as part of the consultation and review process under the Council on Trade and Economic Development (COTED) has responsibility for trade matters in CARICOM. There have been no competition matters raised before the Commission to date.

2.5 *Monopolies*

15. There are provisions that speak to designated monopolies under Article 31. The Revised Treaty required that such monopolies be subject to the agreed rules of competition for Community economic enterprises as set out in the Revised Treaty.

16. The review of the establishment of monopolies in the “public interest” is a matter the Commission is considering reviewing given the impact such monopolies can have on competition in national and regional markets.

2.6 *Government Procurement Provisions*

17. Under the Revised Treaty of Chaguaramas Article 239 gives an undertaking to establish a protocol on government procurement between the Member States. The CARICOM Framework Regional Integration Policy on Public Procurement (FRIP) in its Fourth Draft has been adopted, and the development of a Protocol to amend the Revised Treaty of Chaguaramas, was authorized by the COTED in 2011. Member States agreed to the formation of a Task Force that would be responsible for developing proposals on the implementation of the various dimensions of the framework policy.

3. **Competition, Government Subsidies and Procurement Provisions in Bilateral Trade Agreements Signed by CARICOM**

18. CARICOM as a group has concluded several bilateral trade agreements with both developed and developing countries. These include FTAs with Costa Rica⁴, Colombia⁵, the Dominican Republic (DR)⁶, Cuba⁷ and the European Union.

3.1 *Competition Provisions*

19. The CARIFORUM⁸-EU Economic Partnership Agreement (EPA)⁹ is the only bilateral trade agreement signed by CARICOM that contains fully developed competition provisions. The other bilateral trade agreements are not fully developed and in most instances provide for CARICOM and the other signatories to negotiate or protocols implementing agreements these chapters at a later date. Further, the trade agreements, with the exception of CARIFORUM-EPA, do not explicitly provide a role for the Commission.

20. The CARIFORUM-EU EPA at Articles 125 - 130 of TITLE IV -TRADE RELATED ISSUES at Chapter 1 – *Competition* speaks to competition issues and how they will be addressed by the signatories.

21. The CARICOM-DR FTA at Article XVII – Trade in Goods and Services of Annex VII speaks to Anti-competitive business practices and sets out procedure for addressing anti-competitive business

⁴ http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_caricom_costarica.pdf

⁵ http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_caricom_colombia.jsp?menu=secretariat

⁶ http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_caricom_dominicanrep.jsp?menu=secretariat

⁷ http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_caricom_cuba_2000.pdf

⁸ The CARIFORUM group comprises the countries of CARICOM and the Dominican Republic.

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF>

practices. The preamble of the CARICOM –DR agreement at Article II in the Objectives speaks to anti-competitive business practices.

22. The CARICOM-Costa Rica agreement at Article 1.02 (1) (d) speaks in the Objectives to a desire to address anti-competitive business practices.

3.2 *Monopoly Provisions*

23. In the CARICOM-DR agreement Article XVI speaks to Monopoly and exclusive service providers and the treatment of such by the signatories.

24. In the CARIFORUM-EU EPA, Article 129.1 and 129.4 - Public enterprises and enterprises entrusted with special or exclusive rights, including designated monopolies deals with the matter of monopolies.

3.3 *Government Procurement*

25. The CARICOM-DR Agreement at Article XI – Government Procurement addresses this matter in limited detail. The subsequent Protocol Implementing the CARICOM-DR Agreement expands on this issue in Article VII – Government Procurement.

26. The CARIFORUM-EU EPA addresses this in great detail in Chapter 3 in Articles 165-182.

3.4 *Subsidies*

27. In the CARIFORUM-EPA Article 28 – Agricultural export subsidies; Article 129.1 and 129.4 - Public enterprises and enterprises entrusted with special or exclusive rights, including designated monopolies; Article 67.2(a) on Market access and Article 76.2 (a) on Market Access deal with the matter of subsidies. The other bilateral agreements do not contain such detailed provisions.

4. *Challenges to Implementing Bilateral Trade Agreements*

28. These have revolved around the limited institutional and financial capacity, and the possible need to prioritise the implementation of particular bilateral trade agreements over others. These factors are consistent with the assumption by signatories that as trade developed there would be opportunity to articulate and incorporate competition related provisions into these trade agreements. With the expansion of trade not occurring as envisaged there has been no push for signatories to amend the previously signed agreements.

29. The most recent FTA agreed with the EU was signed almost 10 years after the CARICOM-DR agreement in 2008. As such it takes into consideration changed economic scenario and developments in other trade negotiations.

30. CARICOM and Canada are In the process of negotiating an FTA which includes Competition.