



COMPETITION POLICY AND LAW IN CARICOM



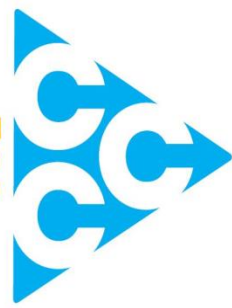
Rules of Procedure- Regional, National and International Dimensions

14 March, 2019



COMMUNITY COMPETITION POLICY

CARICOM
competition
commission



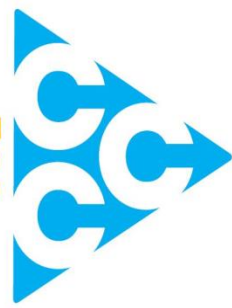
■ THE GOAL

Ensure that the benefits expected from the implementation of the CSME are not frustrated by anticompetitive business conduct



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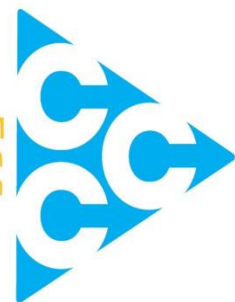
■ The OBJECTIVES

- the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;
- prohibition of anti-competitive business conduct which prevents, restricts or distorts competition, or which constitutes the abuse of a dominant position in the market
- promotion of consumer welfare and the protection of consumer interests



IMPLEMENTATION IS A SHARED OBLIGATION

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■ The COMMUNITY

- Subject to Articles 164, 177, 178 and 179 of this Treaty establish appropriate norms and institutional arrangements to prohibit and penalise anti-competitive business conduct ; and
- establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME





INTRODUCTION TO THE CCC



- CCC is an institution within the CARICOM Community established under the Revised Treaty of Chaguaramas (RTC)
- Inaugurated January 18, 2008
- It is best thought of as a Court for Competition Cases and Advocacy for Consumer Protection Issues
- Jurisdiction is Cross-border for competition complaints





THE REVISED TREATY OF CHAGUARAMAS “RTC”



- Article 171 of Revised Treaty of Chaguaramas RTC makes provision for the establishment of “a Competition Commission” for the purpose of implementing the competition policies of CARICOM.
- The CARICOM Competition Commission “the Commission” was established to fulfill this mandate.
- Article 174.7 of the RTC gives the Commission the power to establish its own rules of procedures.

Functions of the Commission

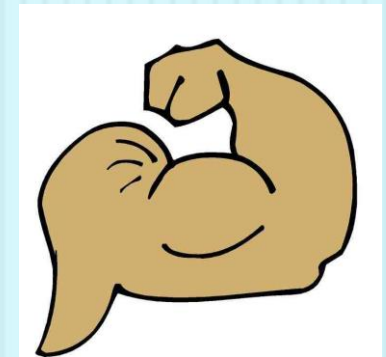
- The Commission has among other functions the dual role to investigate and adjudicate. Articles 173.2 (a) and 174.1 of the RTC
- In an effort to ensure the rules of natural justice are observed and not breached, the Commission has sought to avoid the pitfalls of the Jamaica Fair Trading Commission as seen in the case of the *Jamaica Stock Exchange v. Fair Trading Commission*, C.A. Civil Appeal No. 92/97 (unreported)



- The CCC Rules of Procedure were completed in 2011 in compliance with Art. 174.7
- Rules provide a transparent process through which allegations of anti-competitive business conduct are adjudicated
- Delivers a degree of certainty for parties
- The CCC has developed internal guidelines for investigations that have publicised

POWERS OF THE CCC UNDER ARTICLE 174 OF THE RTC

- Submit legal orders to compel witnesses to give testimony
- Order discovery or production of documents
- Make determinations on compatibility of business conduct with Community Competition law
- Order the termination or nullification of agreements, conduct, activities or decisions
- Make cease and desist orders
- Order payment of compensation
- Impose fines for breaches of community competition law



WHAT ARE THE POWERS OF THE COMMISSION

- Article 170. 1(b) mandates the Member State to put in place the necessary legislative framework to ensure consistency and compliance with the rules of competition...
- Apart from the RTC, the Commission also derives its powers from
 - Domestic Law
 - Guyana Part VIII section **54**, ***Competition and Fair Trading Act 2006, Act No. 11 of 2006***
- Guyana has incorporated the provisions of the RTC into its domestic law thereby making it possible for the Rules of the Commission to be applied in member states for example Guyana.

WHAT ARE THE POWERS OF THE COMMISSION - GUYANA

- **Section 54 of the Competition and Fair Trading Act 2006, Act No. 11 of 2006 (the Act), gives the Community Competition Commission** the powers to:
 - investigate;
 - conduct enquires; and
 - make declarationsin relation to any anti-competitive business conduct in Guyana.

CHART ON JURISDICTION, PRELIMINARY EXAMINATION AND INVESTIGATION



Investigating and Adjudicating Panels

- The terms “Investigating Panel” (IP) and “Adjudicating Panel” (AP) have been defined in the Rules.
 - ▣ **Investigating Panel** means “*a panel of the Commission designated by the Chairman pursuant to Rule 4(2) to conduct an investigation.*”
 - ▣ **Adjudicating Panel** means “*a panel of the Commission designated by the Chairman pursuant to Rule 10(2) to conduct an enquiry, with a view to making a determination ...*”
- The provenance of a definitions for these terms were deliberate, in that the Commission sought to ensure that the “twain” never become one, (even though the “Commission” has both investigative and adjudicative powers.)
- The separation is even clearer in rule 4(2) which states that members of the Investigating Panel “*shall not be part of the adjudicative process*”.
- In rule 10(2) members of the Adjudicating Panel, “*shall not be members of the Investigating Panel*”.
- This separation is deliberately spelt out to ensure that the rules of natural justice are observed and not breached.

POWERS OF THE COMMISSION TO CONDUCT INVESTIGATIONS

- **Article 170.3** provides that every Member State must require its national competition authority to cooperate with the Commission and other national competition authorities in achieving compliance with the competition rules and in detecting preventing anti-competitive business conduct.
- **Article 173.2** provides that one of the functions of the Commission is to cooperate with competent authorities in the Member States and facilitate the exchange of relevant information and expertise.
- **Article 174.2** provides that the Commission may, in accordance with applicable national laws, secure the attendance of any person before it to give evidence and require the discovery or production of any document or part thereof.

The Source of the Commission's Jurisdiction

- The Commission jurisdiction arises in three (3) ways, that is, by the
 - issuing of a Request by a Member State
 - issuing of a Request by the COTED or
 - on the own volition of the Commission*

INVESTIGATIONS

Power when conducting investigations r. 5

- The Investigating Panel has the power to require the production of
 - a specified document
 - Document means anything on or which information of any description is recorded and includes papers relating to pleadings, proceedings, evidence or judgments required or permitted by these Rules to be filed or laid before the commission in connection with an investigation or enquiry and includes documents in electronic form.
 - any specified information
 - any item relevant to an investigation

INVESTIGATIONS

Power when conducting investigations r. 5

- When a document is produced Members of the Investigating Panel
 - ▣ can take extracts of the document or documents
 - ▣ ask current or pass employee of the enterprise to provide explanation of documents produced
 - ▣ require a person to state to the best of his knowledge the location of the document, if the document is not produced

INVESTIGATIONS

Power when conducting investigation r. 5

- Where the Investigating Panel requires the production of any document the Panel must do so by way of Notice.

 - The Notice must:-
 - be in writing

 - indicate the
 - subject matter and purpose of the investigation
 - legal basis for the investigation (i.e. the relevant Treaty or National Law provisions)
 - penalty for non-compliance with the Notice (i.e. the relevant National Law provisions)

 - specify the
 - time
 - place
 - manner and
 - form
- the document, information or item is to be produced or provided

INVESTIGATIONS

Power to enter premises under warrant r. 6

The Rules provide an authorized officer to apply for a warrant under the relevant national law to:-

- ❑ enter and search premises
- ❑ **search any person**
- ❑ take possession of any document
- ❑ **require any person to provide an explanation of the content of any document**
- ❑ obtain access to any information held in a computer or other electronic device
- ❑ use any computer system on the premises or require assistance to use that computer
- ❑ remove anything that has bearing on the investigation
- ❑ **to seal the premises or any article or thing found on the premises**

INVESTIGATIONS

Investigating Panel Report r. 8

At the conclusion of the investigation, the Investigating Panel has to prepare a report of its findings, stating:-

- whether or not an offence has been committed
- the nature of the offence and
- whether the Commission has jurisdiction over such offence pursuant to Articles 174, 175 and 176

INVESTIGATIONS

What becomes of the Investigating Panel Report t r. 9

- The Investigating Panel's Report is sent to the Executive Director.
- If it is found that the Commission does not have jurisdiction the Investigating Panel must consult with the Member States concerned to ascertain whether that Member State would pursue the matter.

ENQUIRY BEFORE AN ADJUDICATING PANEL

- Article 175.7 provides for the Commission to conduct an enquiry if so determined after completion of an investigation, by informing the “party complained of”.
- If such an enquiry is to be executed it is begun by the Executive Director.
- This is by way of Notice together with a Statement of Material Facts and Issues
- The Chairman designates the members of the Adjudicating Panel.

ENQUIRY BEFORE AN ADJUDICATING PANEL

Response r. 13

- This rule allows for the issuing of a Response by the Respondent.
- Response must be filed no later than sixty (60) business days of service of the Notice.

ENQUIRY BEFORE AN ADJUDICATING PANEL

Content of the Response r. 13 (2)

- The response must contain:-
 - evidence or argument for the Adjudicating Panel to consider
 - rebuttals to facts or law
 - any determination the respondent wants

Form of the Response r. 13(3)

- It must be divided into consecutively numbered paragraphs and refers to portion of the SI&MF
- Signed by the respondent or representative
- Provide full name address, telephone and facsimile access numbers and email address of the respondent, agent or representative
- Provide any other information explaining or supporting respondent's defence.

ENQUIRY BEFORE AN ADJUDICATING PANEL

Failure to Comply/Dismissal of application for failure to act/
Withdrawal of application

The Rules also make provision for:-

- an enquiry to be stayed if there is non-compliance with the Rules, direction or order and in this instance failure to comply may result in the AP making such order or taking such other action as it considers just and reasonable.

- dismissal of a Notice where it has been inactive for more than six (6) months from the date of filing

- withdrawal of a Notice by the issuing of a notice on the respondent before any step is taken by the Adjudicating Panel or the respondent or at any subsequent stage with the permission of the Adjudicating Panel.

HEARINGS

- There are a number of ways in which the Commission will hear a matter:
 - Written r. 37
 - Oral r. 38
 - Via telephone r. 46
 - In the absence of the public (i.e. *in camera*) r. 47

- The Commission can also hold joint hearings, for instance where two or more enquiries deal with the same issue or question of law.

- Verbatim transcripts will be taken of proceedings and will be made available no later than five (5) business days after presentation of evidence.

- The Commission can also summon anyone to appear before it and this is enforceable in accordance with the relevant provisions of national law*.

PREHEARING PROCEDURES AND CONFERENCES Rules 17-21

- The Rules also makes provision for Pre-Hearing Procedures and conferences which may engage the attention of the Adjudicating Panel.
- The purpose of the pre-hearing procedures and conferences is to enable informal discussions between the Adjudicating Panel and the parties to the proceedings, in preparation for the hearing.
- It is envisaged that the pre-hearing procedures and conferences will be non-litigious and allow parties to agree on technical matters, issues or admit to certain facts. Any agreement will be recorded by the Adjudicating Panel, while any disagreement will be dealt with in the main hearing of the matter.
- The written procedure will be encouraged by the Rules and this is mainly due to that fact that the Commission will be dealing with cross-border issues.

EVIDENCE Rules 22-35

- Evidence can be presented to the Commission in the form of
 - ▣ An affidavit
 - ▣ A witness statement
 - ▣ Documentary
 - ▣ Oral evidence (viva voci)
 - Ordinary witness
 - Expert testimony
 - Witness panel
- The Adjudicating Panel in the course of its adjudication can allow hearsay evidence and it is for the Adjudicating Panel to determine what weight it will attach to such evidence. (the strict rules of evidence does not apply)
 - ▣ For such evidence to be admissible it must be relevant to the enquiry.
 - ▣ The Adjudicating Panel will also take into consideration the fact that the person whose statement is being reported or prepared the records was not cross-examined.

EVIDENCE

Affidavit evidence –Form of the Affidavit R.28

- The Rule provides for the affidavits to be:-
 - ▣ headed with the title of the enquiry
 - ▣ divided into consecutively numbered paragraphs
 - ▣ written in the first person, with the name, address and occupation of the deponent
 - ▣ signed, sworn or affirmed
 - ▣ confined to statement of facts, unless stated to be based on information or belief

CONFIDENTIALITY

- **Article 170.4 of the RTC states,** *nothing in this Article shall be construed as requiring a Member State to disclose confidential information, the disclosure of which would be prejudicial to the public interest or to the legitimate commercial interests of enterprises, public or private. Confidential or proprietary information disclosed in the course of an investigation shall be treated on the same basis as that on which it was provided.*

CONFIDENTIALITY

Legal and Investigation

- The Rules make provision for the
 - ▣ non-disclosure or production of privileged communication, documents or other materials in the possession of a professional legal adviser* **r. 7**
 - ▣ retention of the confidentiality of all information obtained in the course of an investigation unless it is agreed otherwise. **r. 6(4)**
 - ▣ Report of the Investigating Panel to not be made available to the public except in so far as non-confidential summaries or extract to be reproduced orally at a public hearing in an enquiry. **r. 8**

CONFIDENTIALITY

Filed Documents r. 68

- A party who is filing a document may make a request for confidentiality
- The burden rest on the party applying for confidentiality to satisfy the Adjudicating Panel that the document should be held in confidence.
- There can be an objection or request for confidentiality

CONFIDENTIALITY

Filed Documents r. 68

- The Adjudicating Panel may make a determination when a request for confidentiality is received
 - Order the document be placed on the public record
 - Order the document be held in confidence and may allow an abridged non-confidential version be placed on the public record
 - Make any further order deemed in the public interest

DELIBERATION AND DETERMINATION r. 52

- At the conclusion of the enquiry, the Adjudicating Panel will make its determination after deliberating on the issues, facts and evidence before it:-

- They will then
 - ▣ provide the determination in writing
 - ▣ give the reasons for the determination
 - ▣ publish the determination
 - ▣ take the appropriate action in accordance with Article 174.4 of the Treaty if the need arises

- The issuing of the determination represents the conclusion of the application.

- The Commission must also notify interested third parties of its determination. Art 175.8

DELIBERATION AND DETERMINATION

- Article 174.6 provides that every Member State enact legislation to ensure that the determinations of the Commission are enforceable.

DELIBERATION AND DETERMINATION

GUYANA

- Guyana's domestic law has fulfilled this requirement.
- Section 55 of the Act states, "A decision of the Community Competition Commission under this Act is binding on all parties to which it relates and is enforceable in the High Court to the same extent as a decision made by the Commission"
- By virtue of section 6(3)(a) the Guyana Competition Commission has undertaken to cooperate with the Community Competition Commission for the purpose of enforcing compliance.

Remedies and Penalties Article 174.4

- If it is found that a party has engaged in anti-competitive business conduct the party will be required to take actions to stop such conduct Article 175.9
- Pursuant to Article 174.4 the Commission can
 - ▣ order the termination or nullification of any prohibited conduct
 - ▣ direct any enterprise to cease or desist its anti-competitive business conduct
 - ▣ order the payment of compensation and
 - impose fines
- The party will have 30 days to take the necessary action. Art. 175.10
- Commission can apply to the CCJ if there is non-compliance. Art 175.11

REVIEW AND DETERMINATION

Rules 53-54

- The Rules also make provisions for the Adjudicating Panel to:-
 - correct an error
 - rescind or vary any determination
 - extend the time for the compliance with an order issued by the Commission

Review of the Determination of the Commission

- Review of the determination of the Commission can be done pursuant to Article 175.12 of the RTC. (the individual will have to use the Caribbean Court of Justice (Original Jurisdiction) Rules 2006). Note paragraph 11.4 of the said Rules which outline the procedure that is to be followed. **The application for review must be made within 90 days of the determination of the Commission.**
- The Commission may apply to the CCJ for an order, where an enterprise fails to inform the Commission of its inability to comply with any action the Commission deem fit to remove the effects of any anti-competitive business conduct. **Note paragraph 11.5 the said Rules of the CCJ , which sets out the procedure to be followed.**

LANGUAGE, TRANSLATION AND INTERPRETATION

Rules 57-61

- Part X identifies the official language of the Commission which is English
- Provision is made for:-
 - Documents that are not written in English filed before the Commission. to be translated into English by a translator approved by the Registrar
 - a list of translators and interpreters will be posted on the website of the Commission and, Gazetted annually in all Member States whose official language is not English and the Member State in which the Commission is located
 - an interpreter to attend the hearing in order to translate the evidence of a witness where the person is unable to express himself adequately in English
 - the cost of the interpreter in such proceedings will be borne by the Commission

NATIONAL RULES OF PROCEDURE

- GUYANA – to date is the only member state whose NCAs has actively sought to develop and implement Rules of Procedure to guide their investigations and adjudication processes
 - ▣ This was done under a project part funded by the Caribbean Development Bank in support of the establishment of the Guyana Competition and Consumer Affairs Commission
 - ▣ The project enlisted an outside legal adviser to draft the Rules of Procedure and this was completed in 2013.
 - ▣ The Rules have never been implemented by the CCAC as there were issues surrounding implementation of the Rules

MULTILATERAL FRAMEWORK ON PROCEDURE (MFP)

- The Multilateral Framework on Procedures (MFP) has been proposed and championed by the US DOJ as an important next step in ensuring procedural fairness during competition enforcement globally. The MFP is suppose to:
 - ▣ Recognize and build on work done by the OECD and International Competition Network (ICN)
 - ▣ Add accountability and review mechanisms
- Text strives to capture truly **universal procedural norms** that bridge civil and common law traditions and administrative and prosecutorial approaches
- **Partnership with leading competition enforcers** around the world from a diverse set of countries, legal traditions, and economies

MULTILATERAL FRAMEWORK ON PROCEDURE (MFP)

DOJ - Why the need for a framework on procedures?

- Economies never been more interconnected and competition law enforcement has become more global
 - Over 130 enforcers now active compared
- Good competition law enforcement in this environment demands **unprecedented levels of cooperation** among competition enforcers
 - Mergers can prompt reviews in dozens of jurisdictions, detection and punishment of international cartels may involve many enforcers
- Effective cooperation requires trust in the processes of fellow enforcers
- A mutual commitment to procedural fairness is fundamental to that trust

MULTILATERAL FRAMEWORK ON PROCEDURE (MFP)

DOJ - Why we need accountability?

- Decades of discussions internationally have made good progress on procedural fairness
- Building mutual trust requires a move from discussion to commitment
- The MFP is a multilateral cooperation agreement
 - Similar to bilateral arrangements in merger review developed at ICN and OECD, enabling broader and deeper cooperation among close partners
 - Expected by ICN framework:

“where the ICN reaches consensus on recommendations arising from a project, it is left to its members to decide whether and how to implement the recommendations, for example, through unilateral, bilateral, or multilateral arrangements.”

MULTILATERAL FRAMEWORK ON PROCEDURE (MFP)

Procedural norms detailed in the *MFP* cover investigations and enforcement proceedings. The principles include:

- ▣ Non-discrimination
- ▣ Transparency
- ▣ Representation by counsel
- ▣ Timely resolution of investigations and enforcement proceedings
- ▣ Confidentiality
- ▣ Avoidance of conflicts of interest
- ▣ Notice and opportunity to defend
- ▣ Availability of written decisions
- ▣ Opportunity for independent review of decisions

UNIVERSAL PROCEDURAL NORMS

- How did DOJ develop this list of norms?
 - Variety of sources: FTA competition chapters, ICN and OECD, academic work
 - Revised over several months with representative group of leading antitrust agencies from diverse backgrounds
- Draft language on procedural norms is well advanced and ready for comment from broader competition community
 - Focus at this stage is not to compromise on the norms but to contextualize them to different legal traditions and agency approaches

DEVELOPED BY DOJ AND PARTNER AGENCIES

- MFP is intended to be an international partnership, not the initiative of a particular country
- Partnership began with the development of the language on procedural norms with agencies from:
 - Australia, Brazil, Canada, Chile, European Union, Japan, Mexico, New Zealand, Singapore, UK, and US
- Partnership continues to refine accountability mechanisms
 - Discussions continue on most effective ways of revising MFP language to create accountability and commitment among signatories

IMPLEMENTATION MODALITIES

- Implementation based in partnership among signatories
- MFP is seen as a commitment by competition enforcers to other competition enforcers
- Participation open to any competition enforcer willing to commit to upholding the procedural norms
- Accountability mechanisms in current draft—consultation, reporting, and committee—also based on partnership concept

WHO CAN JOIN?

- ▣ The MFP is designed to be an open instrument welcoming any competition enforcer
- ▣ Only requirement is that the agency be primary enforcer of the relevant competition laws
- ▣ Transparent reservation process makes room for enforcers who may still be developing certain protections or who may be subject to legislation that does not allow for compliance on select issues

MFP IN RELATION TO OTHER INTERNATIONAL FORA

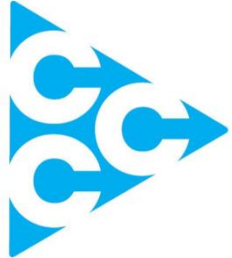
- MFP is designed to be complementary to the work of other competition fora, like OECD and the ICN
- MFP focuses on fundamental norms which differs from aspirational best practices or recommendations
- Focus on fundamental norms and voluntary participation to promote accountability
- MFP expected to advance work of other multilateral organizations
 - Committee discussions provide mechanism to make recommendations for international organizations

LEGAL COMMITMENTS AND NATIONAL IMPLICATIONS OF SIGNING MFP

- Recognizes that different enforcers have different scopes of authority, the MFP has been drafted to cover only commitments within enforcer's control
- Administrative agency may have more control over the procedures used in an enforcement proceeding than a prosecutorial agency
- Each signatory enforcer must evaluate each of the provisions and decide whether it can make that particular commitment
- Where there is a concern, the signatory enforcer may choose to take a reservation or add a declaration clarifying its commitment
- Commitments will be carried out to fullest extent *permitted by applicable law*

REGULATORY BURDEN OF SIGNING MFP

- ▣ The additional burden is designed to be minimal
- ▣ An initial report will summarize in basic terms the manner in which the signatory enforcer provides for each procedural protection
 - Report is not intended to be lengthy, but rather a roadmap
 - Periodic updates are largely to keep the information from becoming stale
- ▣ Consultations can only be brought by fellow enforcers
- ▣ Committee meetings are not envisioned as separate events, but rather as meetings that can be added to existing multilateral conferences



REVIEW OF THE MFP BY CARICOM COMPETITION NETWORK MEMBERS

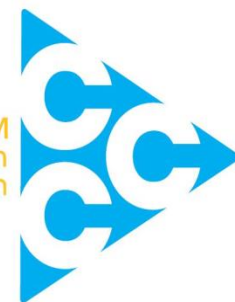


- The matter of the MFP has been a topic of discussion by the CARICOM Competition Network members (JFTC, BFTC, CCAC, TTFTC and CC
- Even if the CCN members do not sign on to the MFP it does provide a starting point for discussion on mutual arrangements for the NCAs and CCC to make progress on development of harmonized procedures as envisaged under Art.173.2(c) of the RTC



THANK YOU

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BARRY HEADLEY

SENIOR ECONOMIST

CARICOM COMPETITION COMMISSION

