

2014



"....to promote and maintain fair competition within the CARICOM Community for the enhancement of economic efficiency and consumer welfare."

CARICOM COMPETITION COMMISSION

QUARTERLY REPORT

JANUARY - MARCH 2014



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FOREWORD

This report highlights the work of the CARICOM Competition Commission (CCC) for the first quarter of 2014, in the areas of Competition Law and Policy and Consumer Welfare and Protection in the CARICOM region. The work of the CCC is guided by the institution's mandate under Chapter VIII of the Revised Treaty of Chaguaramas (RTC). Consequently, the document is structured to highlight, in some cases, the relevant provisions within the RTC that each activity falls under.

It is important to note that this initiative is conceived first and foremost as a tool to keep the network of practitioners within the regional Competition law and Consumer protection community continuously apprised of the activities of the CCC. The report, however, also has the potential benefit of providing a platform for the sharing of information and ideas, and the discussion of salient views on the development of Competition law and Consumer protection in the region. It is hoped that as this publication evolves, contributions from national Competition and Consumer authorities in CARICOM can be featured in order to broaden our understanding of these two key areas. Also, those persons who are not involved directly in Competition law and Consumer protection, but in related matters, may participate in the debate by providing new and innovative perspectives of reflection.

At this time the CCC takes the opportunity to assure all the Member States, national Competition and Consumer authorities, and Organs of CARICOM that it will continue to provide any necessary support to you for the rest of 2014. This support will be based on the institution's principles of quality and timeliness.

Dr. Kusha Haraksingh
Chairman
CARICOM Competition Commission

SECTION A: COMPETITION LAW AND POLICY

1. Article 173 (b) - "promote and protect competition in the Community and co-ordinate implementation of the Community Competition Policy"

(A) BELIZE

During the first quarter of 2014, Belize established a Project Unit with funding under the 10th European Development Fund (EDF), to facilitate fulfilment of its obligations under Chapter VIII of the RTC. A request was made to the CCC for assistance with the Terms of Reference for a Competition Advisor. Review of the TOR was completed and submitted to Belize for consideration.

Based on the technical assistance provided to the Organisation of Eastern Caribbean States (OECS) by the CCC in 2013 with regards to the implementation of the soon to be established Eastern Caribbean Competition Commission, the CCC also advised Belize to liaise with the OECS Secretariat. The CCC is of the view that lessons learnt by the OECS from their own implementation process, which is also being funded under the 10th EDF, will be invaluable to Belize.

(B) GUYANA

The CCC requested and received a copy of the Draft Mergers and Acquisitions legislation from the Ministry of Tourism, Industry and Commerce (MINTIC) in Guyana. On 6 December, 2013, the CCC provided written comments on the document to MINTIC. Further comments from the CCC were also provided via email to MINTIC and the Consultant who had prepared the Draft Mergers and Acquisitions legislation.

The CCC made an additional offer to continue to provide comments in 2014 to MINTIC on the Draft Mergers and Acquisitions legislation when the responses from other stakeholder groups have been compiled.

Technical assistance was also provided to the Guyana Competition and Consumer Affairs Commission (CCAC) with regards to drafting its Consumer Rules of Procedure. The comments provided by the CCC will assist the CCAC towards finalising their Consumer Rules of Procedure.

(C) SAINT LUCIA

From 10 -11 December, 2013, the Ministry of Commerce, Business Development, Investment and Consumer Affairs and the Ministry and External Affairs, International Trade and Civil Aviation in Saint Lucia hosted a Competition Policy Seminar. The 2-day seminar was aimed at educating both the public and private sectors on the importance of competition law to Saint Lucia.

The CCC was represented at the seminar by one of its Commissioners and two of its Professional Staff. These representatives were resource persons and delivered presentations on the following topics:

- Abuse of dominance;
- Agreements and concerted practices;
- CCC's Rules of Procedure; and
- Results of a survey on the knowledge of the business sector in Saint Lucia on competition law and policy.

These presentations can be accessed on the CCC's website at <http://www.caricomcompetitioncommission.com/en/publications/presentations>.

Although the seminar took place in December, 2013, it is mentioned in this report since it was held after the CCC presented its 2014 Work Programme to the 37th Meeting of the Council for Trade and Economic Development (COTED). The 37th Meeting of the COTED was held in November, 2013.

(D) SURINAME

Given that Suriname is in the process of enacting its national Competition law, it was felt necessary to continue to educate the local business sector on Competition law and policy. The CCC therefore delivered a presentation at a meeting held by the Suriname Chamber of Commerce (KKF) Entrepreneurs on 18 February, 2014. The presentation outlined: (1) the importance of Competition law and policy to Suriname; and (2) the mandate, functions and work of the CCC in the Community.

The presentation can be accessed on the CCC's website at http://www.caricomcompetitioncommission.com/images/pdf/intro_ccc_abc_18feb_2014_presentation.pdf

(E) CARICOM SECRETARIAT CSME UNIT

The CCC responded to a request from the CSME Unit to provide input into the proposal for the 11th EDF programme with respect to the areas of Competition law and policy and Consumer protection. The CCC will monitor the development of the 11th EDF proposal to ensure that areas of regional priority are incorporated for potential funding in future years.

The CCC and the CSME Unit also convened a video conference to coordinate their work activities for the remainder of 2014. The coordinated efforts of the two institutions will seek to allow the CCC to take advantage of available funding from the CSME Unit under the 10th EDF programme which is currently being rolled out.

(F) CARIBBEAN CENTRE FOR COMPETITIVENESS

The Chairman of the CCC, Dr. Kusha Haraksingh, attended the 2nd Caribbean Competitiveness Forum which was held in Jamaica from 18-19 March, 2014. The Forum was organised by the

Caribbean Centre for Competitiveness and its theme was "*A New Innings: Competitiveness through Global Value Chains, Clustering and Innovation*".

Chairman Dr. Haraksingh presented on the topic: "*Together Not Apart: Competition, Competitiveness and Clusters*". The presentation explored the intersection between competition and competitiveness, and explains why the pursuit of the latter without regard to the disciplines of the former can be counterproductive and ultimately self-defeating. The presentation also paid specific attention to business clusters and cautions that information sharing among businesses can sometimes lead to anti-competitive conduct.

The Chairman's presentation can be accessed on the CCC's website at <http://www.caricomcompetitioncommission.com/images/pdf/CCfC%20Presentation%202014.pdf>

2. Article 173 (a) - "apply the rules of competition in respect of anti-competitive cross-border conduct".

(A) DRAFT GUIDE TO CCC PROCEDURES IN INVESTIGATIONS

Work continued on developing the Draft Guide to CCC Procedures in Investigations. The Draft Guide is an internal document that outlines the step-by-step administrative process that the Commission is likely to undertake in arriving at a decision on whether a complaint is likely to have identified a breach of the prohibitions under Chapter VIII of the RTC.

The Draft Guide is being amended in accordance with the views expressed by the CCJ in their decision of [2012] CCJ 4 (OJ) on CCJ Application No OA 1 of 2012 by TCL Group.

(B) PROPOSED AMENDMENTS TO CHAPTER VIII OF THE RTC

Article 173 of the RTC mandates the CCC to keep the Community Competition Policy under review and to advise the COTED on recommendations to enhance its effectiveness. With this responsibility in mind the staff of the CCC undertook to examine and recommend possible amendments to Chapter VIII of the RTC. The review process was based on: (1) ensuring that the language in Chapter VIII of the RTC is consistent and is as unambiguous as possible; (2) ensuring that the RTC is consistent with the proposed amendments to the CCC's Rules of Procedure; and (3) ensuring that Chapter VIII reflects case law and international best practices.

A paper reflecting the views of the staff of the CCC and their recommended amendments to the RTC was developed and submitted to the Commissioners for their approval. Once approved, the paper will be submitted to the Inter-Governmental Task Force responsible for reviewing the RTC.

(C) CCC FINING GUIDELINES

Article 174.4(d) of the RTC enables the CCC to impose penalties on any regional enterprise that commits infringements to Article 177 of the Treaty (Prohibition of Anti-Competitive Conduct), to the extent required to remedy their anti-competitive business conduct. As such, the CCC

endeavoured to operationalize Article 174.4(d) by drafting a fining regime to deter and penalise anti-competitive business conduct of a cross-border nature in the region. Final revisions to the draft fining guidelines have been completed and forwarded to the Commissioners for their approval.

(D) CCC'S RULES OF PROCEDURE

Article 174.7 states that the CCC may establish its own rules of procedure. In fulfilment with this mandate the ***CARICOM Competition Commission Rules of Procedure 2011*** was published. The document is subject to revisions to reflect changes in case law and international best practices in the area of Competition law. Work continues on the revision of the CCC's Rules of Procedure. These revised Rules seek to incorporate the guidance provided by the CCJ in their decision of [2012] CCJ 4 (OJ) on CCJ Application No OA 1 of 2012 by TCL Group, as well as the CCC's own experience from implementing these Rules.

(E) MODEL RULES OF PROCEDURE

The CCC is in the process of drafting Model Rules of Procedure. It is envisioned that these Model Rules will serve as a template from which national Competition agencies may fashion their own rules of procedure. This is in an attempt to harmonise the enforcement procedures in CARICOM.

SECTION B: CONSUMER WELFARE AND PROTECTION OF CONSUMER INTERESTS

1. Article 186 - “provide support in the promotion of consumer welfare and protection of consumer interests”.

(A) GUYANA

A request was made to the CCC for technical assistance regarding the CCAC’s Consumer Rules of Procedure. This is a continuation of the support previously provided to the Solicitor General’s Office in Guyana on the same matter. Some of the technical advice will be delivered in sessions via video-conference or Skype prior to travel to Guyana.

(B) SURINAME

The CCC was approached by Consumentenkring, which is a Consumer protection NGO in Suriname, for assistance in distributing a questionnaire on mobile telecommunications throughout CARICOM. The CCC provided comments on the questionnaire to Consumentenkring, and made suggestions on how the instrument can be improved on before being administered. Additionally, the CCC provided Consumentenkring information from the Mobile Study Report which was undertaken by the CCC, and included information about Suriname. The Mobile Survey Report can be accessed on the CCC’s website.

(C) ALL MEMBER STATES

1. UN Guidelines on Consumer Practices

The United Nations Centre for Trade and Development (UNCTAD) is undertaking a possible revision of the UN Guidelines on Consumer Practices (UNGCP). This task was mandated by the First and Second Ad Hoc Expert Group Meetings on Consumer Protection in 2012 and 2013. Working Groups have been established as a mechanism to explore issues relating to E-commerce, Financial Services, Implementation of the UNGCP, and Other Issues.

The CCC participated in the following teleconferences of the Working Groups:

- i. E-commerce - 3 March 2014
- ii. Other Issues - 7 March 2014
- iii. Financial Services - 20 March 2014

In order to obtain input on potential areas to include in the revision of the UNGCP, each Working Group circulated questionnaires of which the results will be used to construct a report. The CCC disseminated the various questionnaires to contact persons in the National Consumer Organisations (NCOs) for completion. This was done with an aim of developing and submitting a regional response to UNCTAD that highlights the specific views of CARICOM. Collection of this data is also beneficial for the CCC’s own implementation of its mandate for consumer protection.

2. World Consumer Rights Day 2014

Annually, on 15 March, WCRD provides an opportunity for consumer organisations to draw attention to the important role that consumer protection policies and laws play in making societies safer and fairer. Moreover, on this day the occasion is presented to consumer agencies across the globe to promote the basic rights of all consumers in their respective jurisdictions, and for demanding that those rights are respected and protected.

A statement by the CCC on World Consumer Rights Day 2014 was published on its website, and distributed to all Consumer Organisations, Chambers of Commerce, and National Competition Authorities in CARICOM.

(D) CARICOM SECRETARIAT CSME UNIT

The Sixth CARICOM Meeting on Consumer Affairs was held in Antigua under the auspices of the CSME Unit from 27-28 February, 2014. The CCC attended the two-day meeting and provided an update on the work it has executed thus far in relation to Consumer protection under Chapter VIII of the RTC, and its plans for the remainder of the year in accordance with its approved 2014 Work Programme.

Prior to the Meeting, the CCC responded to a request from the CSME Unit for assistance in compiling and preparing an analytical report on responses to a Needs Assessment questionnaire that was circulated to Member States. Data tables and a brief outline of some of the key findings from the analysis were prepared, and formed one of the reports disseminated by the CSME Unit for the Meeting.

SECTION C: SHORT ARTICLES

A Note on Information Sharing Among Competing Firms

*Rommell Hippolyte*¹

This article briefly highlights the competition issues that arise when rival firms share information among themselves. It also presents some useful tips national competition authorities in the CARICOM region should bear in mind to help detect the likelihood of information sharing among firms and consequently reduce the possibility of collusion in their respective jurisdictions.

To begin with there are two important things that must be mentioned. Firstly, the concept of a perfectly competitive market is built on the idea of all market participants (e.g. buyers and sellers) having complete access to information. On this premise, information exchanges are considered essential for competitors to actively participate in a competitive market place. Increased transparency in the market also leads to benefits for consumers by reducing search costs and helping consumers to choose products more effectively². Secondly, although fundamental for competitive markets, information exchanges can have either pro-competitive or anti-competitive consequences, depending on specific circumstances.

Pro-competitive outcomes occur when the exchange of information among competing suppliers enhances economic efficiency in a product market. Information sharing that leads to more intense competition among rival firms, the diffusion of technological knowledge, innovation, and the promotion of product standardisation or benchmarking in a product market, are generally perceived as pro-competitive. As a result of their overall welfare increasing attributes pro-competitive information sharing are not investigated by competition agencies.

In contrast, anti-competitive market outcomes arise when information sharing leads to collusion among rival firms. Collusion involves competing companies working together to limit competition in a product market for their own benefit. Collusion may take several forms including price fixing, the artificial dividing up of markets or restricting to supply sources, and bid-rigging. If essential information is exclusively shared by only a few competitors, these companies could use that information to foreclose other rival firms (or potential entrants) in the market that are not participating in the information sharing system. This lessening of competition can ultimately lead to harm to consumers in the form of high prices. In this regard, competition authorities across the globe have become increasingly concerned about anti-competitive information sharing that leads to collusive behaviour.

Structure of the Market and the Nature of the Product

Competition authorities rely on a number of factors when deciding whether communications among competitors may constitute a restriction of competition. One factor considered is usually the structure of the market and the nature of the product or service in question. In general, the fewer the firms competing in the market, the easier it is to collude. If a market only has a few firms on the supply-side, the ability to coordinate will be easier. Conversely, in markets with

¹ The author is the Research Economist at the CCC. The author's opinions are his own and do not necessarily represent those of the CCC.

² See OECD Policy Roundtables (2010). "Information Exchanges between Competitors under Competition Law"

many suppliers, coordination is much more difficult as firms will have greater incentives to deviate from any collusive understanding in order to try and gain market shares over their competitors. Emphasis on the structure of the market has led many competition authorities to carefully review information exchanges in markets with only a few suppliers. In the UK Agricultural Tractor Registration Exchange case³, for example, the European Commission prohibited the exchange of information in a market where four suppliers (Ford, Case, Massey-Ferguson and John Deere) had a combined market share of almost 80 percent.

Price collusion is also much easier to achieve if the agreements concern homogenous products, i.e. if the products are the same in terms of attributes and quality. In differentiated product markets, access to detailed sensitive information about competitors may not be useful to predict future behaviour of competitors and therefore may not lead to an increase of coordination among them.

Characteristics of the Information Exchanged

A major challenge that competition agencies face is determining what types of information exchanges are pro-competitive and anti-competitive. In order to make this distinction, it is important that competition authorities fully understand the various types of information that competitors may sometimes share.

The types of information firms share with each other may include, among others, sales data, prices charged to customers for goods or services rendered, bidding or tender details, discounts offered, details about customers, production costs, new products, research and development and other general business strategies. Consequently, for competition agencies the specificity of the information communicated and the time period to which that information relates become important. Essentially, the more detailed the information shared the more likely it can be used to facilitate anti-competitive business conduct. As with regards to time, in order for collusion to effectively take place, information exchanged among competitors would have to relate to current and future information so that coordination can be maximised.

An example of how the two concepts - specificity and the period of time to which the information pertains - are used to determine anti-competitive conduct was the 2010 case involving Royal Bank of Scotland (RBS) in the United Kingdom. In that case Royal RBS agreed to pay a fine of £28.5 million after admitting to competition law breaches⁴. RBS disclosed generic and confidential future pricing information to Barclays Bank, which Barclays took into account in determining its pricing. For this case the substantive issues are: (1) the information shared which was confidential (and therefore specific), and (2) the information shared pertained to the future activities of the bank.

In general it is difficult to develop an exhaustive list of the types of information that should not be legitimately shared among suppliers. Regional competition authorities may therefore wish to consider two mechanisms in their monitoring activities. Authorities can develop what could be considered as a “positive list” or “negative list” approach to information sharing among firms. A positive list approach would describe the types of information exchanges that a competition

³ See Decision 92/157/EEC of 17 February 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.370 and 31.446 - UK Agricultural Tractor Registration Exchange, OJ 1992 L68, p.19)

⁴ The fine was reduced from £33.6 million to reflect RBS's admission and agreement to cooperate. See <http://www.ofc.gov.uk/news-and-updates/press/2010/34-10#.U0fm-VWrpDw>

authority deems likely to be anti-competitive, while under the negative list approach an authority would describe information sharing that it is less likely to pursue.

An example of establishing a positive list approach to the issue of information sharing could be to prohibit any of the following:

- (a) Information exchanges among competitors of data regarding future prices and/or quantities (such as future sales, market shares, territories or customer lists);
- (b) Information sharing on current conduct that reveals intentions on future market behaviour (outside pricing and quantity information) or cases where the combination of different types of data enables the direct deduction of intended future prices and quantities to have the object of restricting competition; and
- (c) Any exchange of information that may not have the intention of restricting competition but may have that effect.

On the contrary, a negative list approach, such as that adopted by the US Fair Trade Commission (FTC)⁵, could contain the following information exchanges that a competition agency will not challenge firms on:

- (a) The exchange of information that is managed by a third party;
- (b) The information is based on data that is more than three (3) months old;
- (c) There are at least five (5) contributors of data for each disseminated statistic;
- (d) No individual participant's data represents more than 25% of any particular statistic; and
- (e) Information is sufficiently aggregated such that participants are unable to identify the data of other participants.

Ways Firms Share Information

Equally important to the various types of communications among firms, the market structure and the nature of the products involved, is recognising the different ways companies sometimes exchange information. There are several possible methods of doing so. Some firms may share information:

- (a) Directly with each other firms;
- (b) Use trade associations as a means to share business details;
- (c) Publish information on their websites, or
- (d) By way of government meetings.

⁵ In 1996 the FTC issued "Health Care Guidelines," which carved out safety zones for certain exchanges of information between competitors in order to protect them from antitrust claims.

Competition authorities must consequently adopt practical approaches for monitoring information sharing via these channels. For example, periodically monitoring the websites of firms may be a first step to take or the attendance of meetings of trade associations. Advocacy is also another strategy when addressing trade associations and government departments.

Way Forward for the CARICOM Competition Commission

There have been documented cases of active collusion among firms in CARICOM. This collusive behaviour has so far been found within national jurisdictions. For instance, in 2011 the Barbados Fair Trading Commission investigated and found that shipping agents in Barbados were cooperating to set Local Administration Charges (LAC) in 2004⁶. In 2003, in Trinidad and Tobago price fixing by the Baker's Association was openly announced in the newspapers. Due to the fact that there is no law prohibiting collusion in Trinidad and Tobago, and this has been the business practice of trade associations for some time, there was no sense of wrongdoing among the firms involved⁷.

The CCC views the issue of information sharing among rival firms to be important in order to effectively prohibit collusive behaviour in CARICOM. As such, in 2012 the CCC held a workshop at its office in Paramaribo with Surinamese businesses to highlight the issue of information sharing among competitors. At the workshop several cases that were concluded in the USA and Europe were presented to the participants to demonstrate the practical enforcement of competition rules to information sharing among rival firms. Also in 2013, at a competition seminar in St. Lucia, staff from the CCC was able to discuss with representatives of trade associations the types of information that should and shouldn't be shared in their meetings.

Going forward the CCC intends to continue to engage trade associations and government departments with the aim of helping them to understand the potential dangers that can occur when rival firms share information. In-depth research on how meetings with Government departments and trade associations are possibly used to facilitate information exchanges will also be conducted and the results used to feed into our advocacy and educational seminars.

For any more information about the work of the CCC please feel free to email admin@ccc.sr or contact us via our website at www.caricomcompetitioncommission.com.

⁶ The Commission agreed that the conduct of the agents had the potential to amount to a breach of the Fair Competition Act CAP 326C. For more details see http://www.ftc.gov.bb/index.php?option=com_content&task=view&id=226&Itemid=28

⁷ See Dr. Taimoon Stewart (2004). "The Role of Competition Policy in Regional Integration: The Case of the Caribbean Community." <https://sta.uwi.edu/salises/workshop/papers/tstewart.pdf>