

CARICOM  
competition  
commission



**INTERNAL GUIDANCE TO STAFF ON THE  
CCC'S ADMINISTRATIVE PROCEDURES FOR THE  
ASSESSMENT AND INVESTIGATION OF  
COMPETITION COMPLAINTS**

**CARICOM COMPETITION COMMISSION**

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## 1 PREFACE

1.1 The CARICOM<sup>1</sup> Competition Commission<sup>2</sup> (“the Commission”) has set out in this guidance document general information on the administrative processes the Commission uses when exercising its powers as set out in the *“Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market Economy”*<sup>3</sup> (*“Revised Treaty”*). The integration of the economies of the Member States into the CARICOM Single Market and Economy (CSME)<sup>4</sup> was conceptualized as a means of creating a regional market in which businesses can expand and grow across national borders. This guidance is to aid individual, business, legal community and other entities that have an interest in the enforcement of the Caribbean Community’s (CARICOM) Competition Policy articulated in Chapter VIII<sup>5</sup> of the Revised Treaty. **Annex 1** reproduces the competition provisions of Chapter VIII of the Revised Treaty for ease of reference.

1.2 The Council on Trade and Economic Development (COTED)<sup>6</sup> is the oversight body designated by the CARICOM to monitor and amend the policy framework and provide guidance to the Commission in the enforcement and advocacy of Community Competition law.

1.3 The objectives of CARICOM Competition Policy according to paragraph 1 and 2 of Article 169 of Chapter VIII of the Revised Treaty states specifically that:

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<sup>1</sup> CARICOM is the Caribbean Community comprised of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago with associate members of Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands

<sup>2</sup> CARICOM Competition Commission established under Article 171 of Chapter VIII of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market Economy, July 5, 2001

<sup>3</sup> *“Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market Economy”* signed by Heads of the Caribbean Community on July 5, 2001 at their Twenty-second Meeting of the Conference in Nassau, The Bahamas

<sup>4</sup> The CSME “means the regime established by the Revised Treaty of Chaguaramas establishing the Caribbean Community

<sup>5</sup> Chapter VIII – Competition Policy and Consumer Protection of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market Economy, July 5, 2001

<sup>6</sup> Council on Trade and Economic Development (COTED) - an organ established by the Caribbean Community as named in paragraph 2 (b) of Article 10 of the Revised Treaty of Chaguaramas

1. ***“The goal 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.***
2. ***In fulfillment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:***
  - (a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;***
  - (b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and***
  - (c) the promotion of consumer welfare and protection of consumer interests.”***

1.4 The Commission is charged with the responsibility of investigating suspected infringements of Community Competition law as it pertains to cross border transactions or transactions with cross-border effects.

1.5 The powers of the Commission are set out under paragraph 1 of Article 174 of the Revised Treaty which states:

***“Subject to Articles 175 and 176, the Commission may in respect of cross-border transactions with cross-border effects, monitor, investigate, detect, make determinations or take action to inhibit and penalize enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME”.***

1.6 The other provisions of Article 174 articulate in more detail the powers identified in paragraph 1 of Article 174.

1.7 In this Guidance, the Commission provides an overview of its administrative and assessment procedures when conducting an investigation into suspected or alleged competition law infringements related to cross-border transactions or transactions with cross-border effects. This is the current practice as at the date of publication of this document. It will be revised periodically to reflect changes in enforcement best practice,

competition law theory and research, and the Commission's experience in assessing and investigating allegations of competition law infringement in the CSME. Please access [www.caricomcompetitioncommission.com](http://www.caricomcompetitioncommission.com) to ensure you have the latest version of this guidance.

- 1.8 This Guidance is concerned exclusively with our assessment and investigative practices under Chapter VIII of the Revised Treaty related to cross-border transactions or transactions with cross-border effects. It addresses the key stages of a typical investigation into a suspected infringement and provides a summary of the action the Commission will take at each of these stages. It does not address competition offences that would be covered by the national competition law<sup>7</sup> of a Member States of CARICOM for either individuals or legal entities. It is expected that national competition laws will adequately address matters specific to that Member State's local circumstances which do not have cross-border effects.
- 1.9 This Guidance of necessity has to be applied in a manner that is cognisant of the Commission's right to adopt a modified approach when the facts and circumstances require the Commission to do so.
- 1.10 This document is not a definitive statement of, or substitute for, the legal and regulatory framework for Community Competition policy set out in Chapter VIII of the Revised Treaty. The legal tests which the Commission will apply in assessing possible breaches of Community Competition law are not addressed in this guidance. It is recommended that any individual or business which considers that they or their business may be affected by an investigation into suspected anti-competitive business practices, should seek appropriate independent legal advice on the matter.

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<sup>7</sup> Barbados has enacted the Fair Competition Act, CAP.326C; Jamaica has the Fair Competition Act, 1993 Amended 2001; Guyana has enacted the Competition and Fair Trading Bill, 2008; Trinidad and Tobago has enacted three (3) provisions of the Fair Trading Act, 2006.

1.11 This Guidance must be read in conjunction with the Revised Treaty, the relevant national competition law of each Member State, the Rules of Procedure 2011 of the Commission, and any other pertinent documents.

## **2 LEGAL FRAMEWORK**

2.1 Chapter VIII of the Revised Treaty and the national competition laws of Member States both prohibit, in certain circumstances, anti-competitive business conduct and agreements, and abuse of a dominant position that can involve a single individual or business (“unilateral behaviour”) or a group of persons or businesses (“collective behaviour”). In CARICOM, the Commission enforces Community Competition law specifically with a mandate focusing on anti-competitive business conduct with respect to cross-border transactions or transactions with cross-border effects. In each Member State, national competition authorities (NCAs)<sup>8</sup> focus mainly on offences within their geographic borders.

2.2 Community Competition policy requires that NCAs cooperate with the Commission in the investigation of alleged infringements that are suspected to have cross-border effects.

2.3 The Revised Treaty makes provision for the creation of NCAs to apply national competition law to suspected instances of anti-competitive business conduct and agreements, and abuse of a dominant position. If said alleged anti-competitive business conduct affects trade between Member States, there is recourse for a Member State or the COTED<sup>9</sup> to notify such alleged conduct to the Commission.

2.4 A Member State can take action under paragraph 1 of Article 175 which states:

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<sup>8</sup> Barbados, Guyana and Jamaica are the three (3) Member States of CARICOM with operational national competition authorities (NCA) that can enforce national and Community Competition law

<sup>9</sup> Council on Trade and Economic Development (COTED) - an organ established by the Caribbean Community as named in paragraph 2 (b) of Article 10 of the Revised Treaty of Chaguaramas

***“A Member State may request an investigation referred to in paragraph 1 of Article 174 where it has reason to believe that business conduct by an enterprise located in another Member States prejudices trade and prevents, restricts or distorts competition in the territory of the requesting Member State.”***

2.5 Under paragraph 2 of Article 175, COTED can take similar action:

***“Where COTED has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects, COTED may request an investigation referred to in paragraph 1 of Article 174.”***

2.6 The Commission has prepared and approved procedural rules consistent with paragraph 7 of Article 174 that are applicable when it undertakes enforcement action. These procedural rules may be cited as the ***CARICOM Competition Commission Rules of Procedure, 2011<sup>10</sup> (“the Rules”)***. The Commission is required to carry out investigations and make decisions in a procedurally fair manner according to the highest standards of administrative law.

### **3 THE SOURCES OF OUR INVESTIGATIONS**

3.1 The Commission obtains information about possible breaches of competition law through a number of sources, namely:

- Requests from a Member State of CARICOM<sup>11</sup>
- Requests from the COTED<sup>12</sup>
- Through the Commission’s own research or market intelligence or other competition policy endeavours

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<sup>10</sup> CARICOM Competition Commission Rules of Procedure, 2011 approved by the Commissioners of the CARICOM Competition Commission. Rules were submitted to the Thirty-first Council for Trade and Economic Development in May 2011.

<sup>11</sup> Requests can come from all Member States that are a part of the Caribbean Single Market Economy. The Bahamas is not part of the Caribbean Single Market Economy (CSME)

<sup>12</sup> The Council on Trade and Economic Development is an organ established by the Caribbean Community as named in paragraph 2 (b) of Article 10 of the Revised Treaty

- Information obtained through collaboration with Member States operational national competition authorities or other competent authorities
- Complaints from third parties

### **Complaints about possible breaches of competition law**

3.2 Chapter VIII of the Revised Treaty prohibits a range of anti-competitive business conduct and agreements, and abuse of a dominant position that can involve a single individual or business (“unilateral behaviour”) or a number of people or businesses (“collective behaviour”). Complaints submitted from a Member State(s), COTED, or information from third parties (an individual or business) that have suspicions about anti-competitive business conduct can prove useful and important sources of information on anti-competitive business conduct.

### **How to make a complaint**

3.3 Chapter VIII of the Revised Treaty explicitly sets out the action a Member State or COTED takes to request that an investigation be conducted. If an individual or business suspects that another individual(s) or business(es) is infringing some aspect of competition law then that individual or business should contact the following competent authorities:

- The national competition authority (NCA) in the Member State
- The competent authority (e.g. Ministry or department with operational oversight for competition policy and law) in the Member State if there is no operational NCA
- The CARICOM Competition Commission where there is no such national competition authority or designated competent authority<sup>13</sup> ***(Explained in more detail at paragraph 4.5 of this Guide)***

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<sup>13</sup> The Commission can undertake a review and analysis of the information submitted on its own initiative. This is done using Article 176 which speaks to the *Determination of anti-competitive business conduct: procedure of commission proprio mutu. (Please refer to paragraph 4.5)*



3.4 All competition related complaints can be made by calling the Commission at (597) 49 14 39, by facsimile at (597) 53 06 39 or by email to [senioradmin@ccc.sr](mailto:senioradmin@ccc.sr) . All complaints will be handled in strictest confidence. Guidance will be provided on how to submit a complaint in writing for consideration by the Commission inclusive of the type and quantum of information the Commission requires. The Commission has developed **Form A** located at **Annex 2** to assist complainants in providing information that would assist the Commission in the analysis of the complaint.

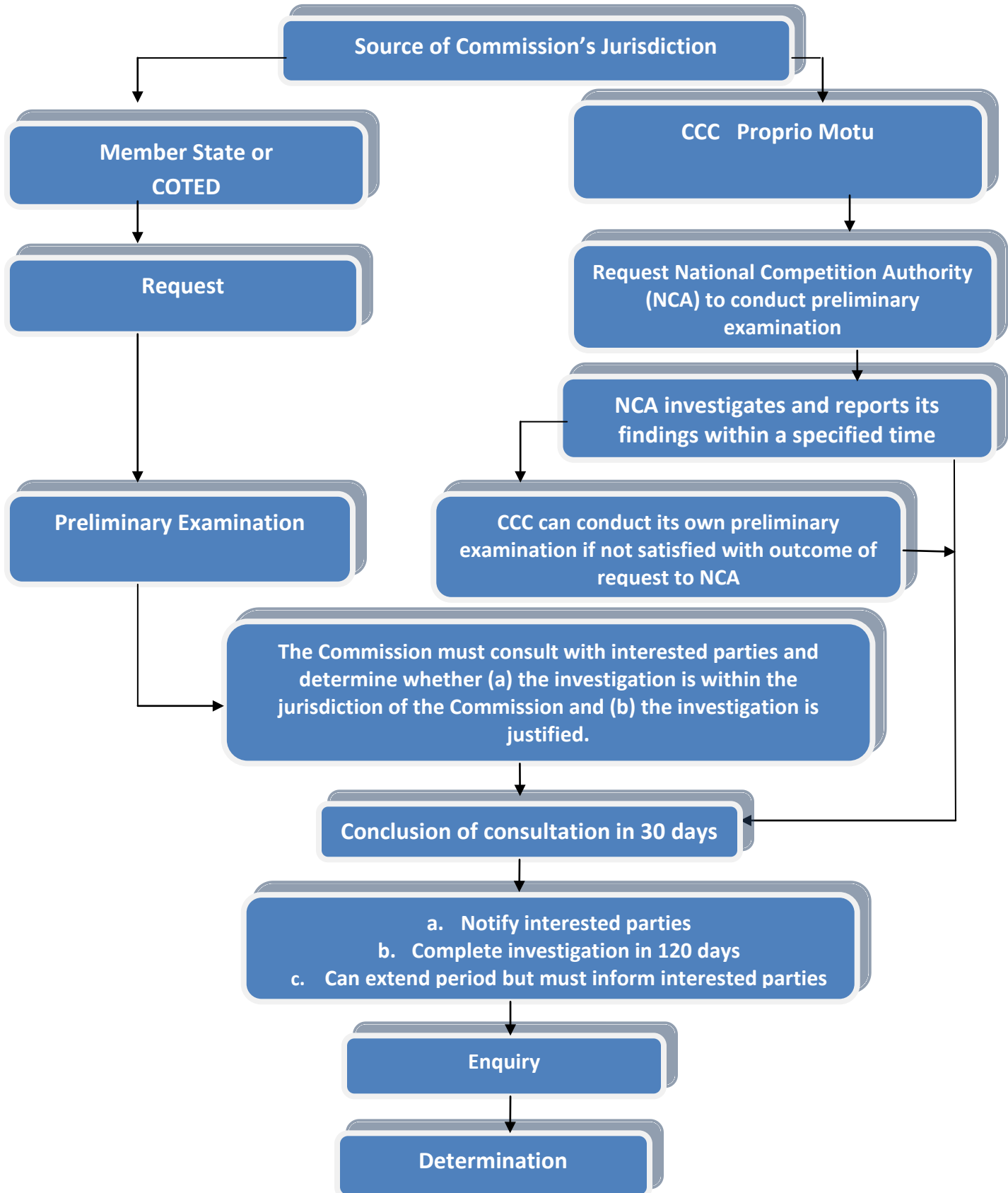
3.5 The Commission will perform an analysis of the information submitted in the complaint to enable it to make a determination under paragraph 4 of Article 175 as to whether:

- a) the investigation is within the jurisdiction of the Commission; and
- b) the investigation is justified in all circumstances of the case.

The Commission has the singular responsibility to make a determination as to whether the complaint meets the required criteria.

3.6 The Commission has created **Figure 1** below to illustrate the administrative, assessment and investigative, and enquiry procedures followed in making a determination on a competition complaint for ease of reference.

**Figure1: Flow Chart of Administrative, assessment and investigation, and enquiry procedures**



### **Pre-complaint discussions**

- 3.7 The provision requiring a formal written complaint should not preclude complainants from approaching the Commission on an informal basis prior to the submission of a written complaint. This type of interaction can serve to clarify whether the conduct expected to be the subject of the complaint is likely to be consistent or inconsistent with Community competition law. These discussions assist the complainant in deciding whether to commit the requisite resources to preparing a reasoned complaint.
- 3.8 The Commission will provide some preliminary views on whether the complaint is worthy of investigation if and when a formal written complaint is submitted to the Commission. These preliminary views will of necessity be premised on paragraph 4 of Article 175. These views are of course subject to the likelihood of the infringing behavior raising competition concerns, on the assessment of the complaint with respect to resource constraints, and prioritisation of competition complaints. However, it should be carefully noted, that any preliminary view arrived at during the consultation phase does not commit the Commission to undertake or pursue any specific or predetermined course of action.
- 3.9 It is useful for a reasoned discussion if basic information on the key concerns to be highlighted by the complainant is secured prior to initiating consultation with the Commission. A copy of the Commission's complaint form is set out at **Annex 2**. The basic information required by the complaint form includes:
- The identity of the complainant and the party/ies to the suspected infringement, and their relationship to one another (for example, whether they are competitors, customers or suppliers)
  - the reasons for making the complaint, including a brief description of:
    - the product(s)/service(s) concerned
    - the agreement or conduct the complainant believes to be anti-competitive

- the type of business operated by the complainant and the party(ies) to the suspected infringement (for example, manufacturer, wholesaler, retailer) and an indication of their geographic scale (for example, local, national, or international)
- if known, the size of the market and of the parties involved (for example, market shares) or the provision of estimates where feasible.

3.10 If a Member State(s), COTED or person (natural or juridical) considers making an approach to the Commission about initiating a pre-complaint discussion, contact should be made by telephone with the Administration Department at (597) 49 14 39. If contact is by email, then correspondence should be sent to [senioradmin@ccc.sr](mailto:senioradmin@ccc.sr) and include the words **“Pre-Complaint Discussion”** in the subject line of the email.

3.11 There will be occasions where at the conclusion of preliminary discussions with a prospective complainant, the Commission may reach certain determinations. These may be inclusive of:

- (i) the view there is in-sufficient information to carry out a formal investigation.
- (ii) the view that a person or enterprise under review appears to have infringed the law.
- (iii) the Commission may also reach the conclusion that it has no other reasonable option than to reveal to a person or business the identity of the complainant. This may be required to enable the individual or business to properly respond to the allegations against raised them. The Commission before disclosing a complainant's identity or any of their specific information will discuss the matter with the complainant. This gives the complainant the opportunity to make representation to the Commission on this matter.

#### **4 COMMISSION RESPONSE WHEN IN RECEIPT OF A WRITTEN COMPLAINT**

- 4.1 Written complaints should be addressed directly to the Executive Director. All competition complaints submitted to the Commission by telephone, facsimile or email to the designated points of contact will be forwarded to the Executive Director. The Executive Director will direct the correspondence after due consideration to the appropriate Departments for review and analysis. The review process will involve reference to the economic and legal theories that inform the enforcement of competition law. All complaints the Commission receives will be given a complaint reference number.
- 4.2 The ability of the Commission to reach a determination on whether to proceed with a formal investigation as requested is highly dependent on (a) the cooperation of the complainant, (b) the quality of information it receives in the original complaint (**completed Form A in Annex 2**), and (c) any other information the Commission can acquire on its own initiative. A complaint that is well structured and supported by factual documentation will assist in the speedier conclusion of the consultative phase, and determination of the facts and relevance of the complaint.
- 4.3 The Commission must state for the record that not all requests for an investigation contained in a complaint will lead to a full investigation. Only upon a determination which suggests a possible breach of Community Competition law has occurred will the request for investigation proceed further. *(Please refer to paragraph 3.5 of the Guide).*

#### **5 PRELIMINARY ASSESSMENT OF FORMAL COMPLAINT**

##### **Consultation Phase**

- 5.1 The Commission is guided by paragraph 4 of Article 175 which sets out the criteria to be used in making a determination as to whether an investigation is warranted. Paragraph 4 of Article 175 states:

***“Where COTED has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects, COTED may request an investigation referred to in paragraph 1 of Article 174.***

***(a) the investigation is within the jurisdiction of the Commission; and  
(b) the investigation is justified in all circumstances of the case.”***

5.2 The consultation process set out in Article 175 has a clearly defined timeline for completion. Paragraph 5 of Article 175 states:

***“The consultations shall be concluded within 30 days of the date of receipt of the request for the investigation, unless the parties agree to continue the consultations for a longer period.”***

5.3 According to paragraph 6 (b) of Article 175, the Commission has a maximum of 120 business days from the date of receipt of the request for investigation to complete the investigation of the complaint, and make final recommendations on action to be taken. This maximum period for completion of the investigation can be extended according to paragraph 6 (c) of Article 175 when the Commission considers this warranted.

5.4 In practical terms, the Commission aims to acknowledge receipt of all written complaints within five (5) business days. A further written response will be given within 15 business days of receipt of a formal written complaint. **(Please see paragraph 5.7)** A response within this 15 business day period is more likely where the information proved meets or exceeds the minimum standards required by the Commission.

5.5 A competition complaint can give rise to complex economic and legal issues that require a longer review period. The Commission must respond within 30 business days as required under paragraph 5 of Article 175 with a determination on the views reached from analysis of the complaint.

5.6 Assessment by the Commission of a complaint may require informal dialogue with the complainant in order to clarify information provided in the original submission. The

Commission may also request that additional information be submitted to aid in a reasoned assessment of the information provided in the original complaint.

- 5.7 The Commission may seek additional information from the complainant, the person(s)/company(ies) complained of, and/or third parties on an informal basis. These additional requests may take the form of: (a) written requests for information; (b) a request for clarification of information already provided to the Commission; and or (c) an invitation to meet with the Commission. In this scenario, the Commission is not using its formal powers to gather information but relying on the voluntary cooperation of interested parties<sup>14</sup>.
- 5.8 The Commission does not bind itself to investigate all suspected instances of anti-competitive conduct. The Commission has to prioritise the requests for investigations with regard to the following constraints:
- The available resources (technical and financial)
  - impact that an investigation will have on the market(s), and direct or indirect benefits to consumers/businesses
  - the likely strategic effects of the investigation
- 5.9 The Commission aims to keep complainants informed of the progress of the consultation phase of the investigation. In all cases, the Commission seeks to communicate with the complainant within 30 business days of receipt of the formal written complaint as required under paragraph 5 of Article 175 of the Revised Treaty.
- (Refer to paragraph 4.2 of the Guide)**

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<sup>14</sup> Interested parties under paragraph 4 of Article 175 are considered to be the complainants or other potential sources of relevant information including individual(s) or business(es) such as consumers of goods or services or competitors in the relevant market

- 5.10 On the basis of the information that the Commission has received or acquired, the Commission makes a determination whether the complaint meets the criteria set out in paragraph 4 of Article 174. If the criteria are met, and the Commission considers that it has reasonable grounds for suspecting there has been a breach of Community competition law, the Commission will initiate a full investigation.
- 5.11 A full investigation allows the Commission to use its formal information gathering powers as set out under paragraph 2 of Article 174 of the Revised Treaty. The Commission where necessary will use the regulatory powers provided under Member States national competition laws to assist in facilitating the investigation.

## **6 OPENING A FORMAL INVESTIGATION**

### **Investigation Phase**

- 6.1 When the preliminary consultation and complaint assessment process is completed, and analysis of the information provided suggests there has been a breach of any of the provisions of Article 177 and/or Article 179 of the Revised Treaty, the Commission will undertake a full investigation.
- 6.2 Where the Commission decides to conduct a full investigation the following process is established under paragraph 6 of Article 175 of the Revised Treaty to:
- a) notify the interested parties and COTED;***
  - b) complete the investigation within 120 business days from the date of receipt of the request for the investigation; and***
  - c) where circumstances so warrant, extend the time period for completion of the investigation and notify the interested parties.***
- 6.3 Upon completion of an investigation, paragraph 7 of Article 175 states:
- “Where the Commission decides to conduct an enquiry following an investigation, the Commission shall afford any party complained of the opportunity to defend its interests.”***



6.4 To facilitate the investigation, the Chairman<sup>15</sup> of the Commission in accordance with Rule 4 (2) of the Rules of Procedure 2011:

***“shall designate an Investigating Panel<sup>16</sup> comprising one or more of the Commission’s members to conduct an investigation and the said members shall not be a part of any adjudicative process in relation to matters arising out of such an Investigation.”***

6.5 The Commission will then make full use of its range of investigative powers in accordance with paragraph 2 of Article 174 of the Revised Treaty, applicable national competition laws<sup>17</sup>, and the Rules of Procedure 2011 as required when conducting the investigation.

6.6 The Investigating Panel designated by the Commission on completion of the investigation in accordance with Rule 8 of the Rules of Procedure 2011 shall:

***“upon completion of its investigation, draw up a report of its findings stating with reasons whether 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 of the Treaty. The Report shall not be made available to the public except in so far as non-confidential summaries or extracts of the report may be reproduced orally at a public hearing in an enquiry conducted pursuant to these Rules.”***

6.7 The actions taken by the Commission following the completion of the Investigating Panel Report is guided by Rule 9 of the Rules of Procedure 2011 which sets out the following:

***9. (i) When the Investigating Panel concludes an investigation the Investigating Panel shall forward the Report to the Executive Director.***

***(ii) If the investigating Panel concludes that an offence has been committed but that the Commission does not have jurisdiction in the matter, the Commission shall consult with each Member State concerned to examine whether the national competition authority of that Member State should pursue the matter.***

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<sup>15</sup> Chairman is appointed as such by the Regional Judicial and Legal Services Commission (RJLSC) from among the seven (7) duly appointed Commissioners of the CARICOM Competition Commission

<sup>16</sup> Rule 2 of Part 1 of the Rules of Procedure 2011 states that “Investigating Panel” means a panel of the Commission designated by the Chairman pursuant to Rule 4 (2) to conduct an investigation;

<sup>17</sup> Barbados Fair Competition Act, CAP. 326C, Guyana Competition Commission Bill 2008 and Jamaica Fair Competition Act, amended 2001

### **Conclusion of Full Investigation**

- 6.8 At the conclusion of a full investigation, the Investigating Panel will make a recommendation derived from its findings based on the analysis of information gathered whether:
- (i) an enquiry is warranted, or
  - (ii) no enquiry is warranted.
- 6.9 If the Investigating Panel is of the view that an enquiry is warranted the Executive Director will then proceed according to Rule 10 (1) of the Rules of Procedure 2011. This process is consistent with paragraph 7 and 8 of Article 175 of the Revised Treaty.
- 6.10 If the Investigating Panel in its reasoning finds an enquiry is not warranted, the Commission will not proceed to the Enquiry Stage of the process. A non-confidential summary of the investigation report will be published to publicly conclude the Investigation process.

### **Procedure under Propio Mutu**

- 6.11 The Commission is prescribed in how it will address matters brought to the attention of the Commission by means other than by a Member State or COTED.
- 6.12 The Commission is guided by Article 176 which states:
- 1. Where the Commission has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts, or distorts competition within the CSME and has cross-border effects, the Commission shall request the national competition authority to undertake a preliminary examination of the business conduct of the enterprise**
  - 2. Where a request is made under paragraph 1, the national competition authority shall examine the matter and report its findings to the Commission within such time as may be determined by the Commission.**
  - 3. Where the Commission is not satisfied with the outcome of its request, the Commission may initiate its own preliminary examination into the business conduct of the enterprise referred to in paragraph 1.**

6.13 The Commission must of necessity consult with the Member State(s) within which the enterprise is located with regard to actions that are initiated in that Member State(s). Paragraph 4 of Article 176 states:

***“Where the findings of the preliminary examination under paragraphs 2 and 3 require investigation, the Commission and the Member State concerned shall hold consultations to determine and agree on who should have jurisdiction to investigate.”***

6.14 The Revised Treaty provides for a scenario where there are differences of opinion between the Commission and the Member State on the course of action to be taken in addressing a competition complaint. Paragraph 5 of Article 176 states that:

***“If there is a difference of opinion between the Commission and the Member State regarding the nature and effects of the business conduct or the jurisdiction of the investigating authority, the Commission shall:***

***(a) cease any further examination of the matter; and***

***(b) refer the matter to COTED for its decision”***

6.15 Chapter VIII of the Revised Treaty further allows for a Member State(s) to seek a remedy through the Caribbean Court of Justice (“the Court”). Paragraph 6 of Article 176 states:

***“Nothing in this Article shall prejudice the right of the Member State to initiate proceedings before the Court at any time.”***

6.16 In such a scenario where the Court is asked to adjudicate on whether a Member State or the Commission has jurisdiction over a matter, paragraph 7 of Article 176 is applied which states:

***“Where there is a finding that the Commission has jurisdiction to investigate the matter, the Commission shall follow the procedures set out in paragraphs 5, 6, 7 and 8 of Article 175.”***

## **7 FORMAL POWERS OF INVESTIGATION**

### **Information Gathering Powers**

7.1 The powers of the Commission are established pursuant to Article 174 of the Revised Treaty. The investigative powers of the Commission are set out in paragraph 2 of Article 174 which states:

***“The Commission may, in accordance with applicable national competition laws<sup>18</sup>, in the conduct of its investigations:***

***(a) Secure the attendance of any person before it to give evidence***

***(b) Require the discovery or production of any document or part thereof; and***

***(c) Take such other action as may be necessary in furtherance of the investigation.”***

7.2 Paragraph 2 of Article 174 therefore provides the Commission with a significant range of information gathering methodologies. The investigative powers of the Commission are vested through the implementation of complementary provisions contained in the national competition laws of Member States. It is only with the full enactment of these national competition laws that the powers of the Commission can be fully and effectively extended into a Member State. Enforcement of the Commission’s requests for information for example is done with the full force of the national competition law<sup>19</sup> and other pertinent laws in the specific Member State in which the request is made.

### **Written information requests**

7.3 This issuing of written information requests is the power likely to be used most frequently by the Commission. The Commission will send out a formal request to obtain information from a range of sources, namely:

- person(s) / enterprise(s) under investigation
- Competitors of person(s)/enterprise(s)
- Customers of person(s)/enterprise(s)

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<sup>18</sup> Barbados Fair Competition Act, CAP.326C at subsection 46 of Part IX and the schedule to the Act

<sup>19</sup> Barbados Fair Competition Act, CAP.326C - subsection 46 of Part IX and the schedule to the Act; Guyana Competition and Fair Trading Act 2006 - subsection 53-55 of Part VIII and the first schedule to the Act

- the person(s)/enterprise(s) that brought the complaint
- Suppliers of the individual/business under investigation
- Any other entity the Commission considers relevant

7.4 Under paragraph 2 of Article 174, the Commission can exercise its authority through enforcement of the relevant provisions of the national competition and other applicable laws of a Member State. These national competition laws provide penalties<sup>20</sup> such as fines or imprisonment for any person(s) or enterprise(s) that does not comply with a formal information request without lawful reason; or provides false or misleading information; or destroys, falsify or conceals documents. The Commission can therefore compel the provision of requested information in a timely manner.

7.5 The Commission can also request the provision of information that has not been written down but that has to be developed or created. A good example of this is estimates of market share information about competitors or customers derived from knowledge or experience. This may even require the Commission to seek clarification or explanation from past employee(s) and not just current employees of a business.

7.6 These formal requests for information will set out the basic facts about the investigation. It will identify what information is required; specify or describe the type of documents being sought; give timelines and details for when and where to produce the documents; and set out the penalties for non-compliance with the request. The Commission may send additional information requests if more information or clarification is required upon analysis of prior submissions.

7.7 The Commission will only ask for documents that in the opinion of the Commission are directly relevant to the investigation. If respondents are not sure of the relevance of the

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<sup>20</sup> Barbados Fair Competition Act, CAP.326C at subsection 39-44 of Part VIII; Guyana Competition and Fair Trading Act 2006 - subsection 49 and 49a of Part VII

information request(s) from the Commission, the respondents can write and seek clarification from the Commission.

- 7.8 The Commission may send draft requests where the scope and scale of the investigation, the complexity of satisfying information requests, and deadline for producing a response, suggest that feedback from likely respondents is beneficial to refining the scale, scope and timeline for completing an investigation.

#### **Deadlines for submitting information**

- 7.9 The Commission sets the deadline for receipt of completed information when submitting a formal information request. The deadline for responding to a formal information request is of necessity dependent on the type and quantum of information required by the Commission. The Commission is unable to set uniform timescales for information requests as each investigation is different in nature and scope. Any respondent which has concerns about a timeline for producing information should submit written correspondence outlining said concerns to the Commission at the earliest opportunity to enable discussion on the matter and a quick resolution.

#### **Responding to written information requests**

- 7.10 It is a requirement of paragraph 2 of Article 174 and enacted national completion laws that recipients of formal information requests comply fully with such requests. Non-compliance with said request(s) without lawful excuse, or providing false or misleading information, or destroying or falsifying such information is a criminal offence. The type of non-compliance will determine the manner in which penalties will be imposed consistent with what is prescribed in the national competition law of a Member State.
- 7.11 Response(s) to the Commission can take the form of electronic or hard copy format. The electronic version is preferred where feasible. Hard copy can be submitted by fax, registered mail or express mail service providers.

- 7.12 Person(s) or enterprise(s) should clearly identify any confidential, commercially sensitive or personal information in all non-confidential submission(s) to the Commission where disclosure could cause harm. This can facilitate access to the file for the addressee of the Investigative Report, or for broader disclosure, third parties, or publication in various media formats.
- 7.13 A non-confidential version can also be prepared for general consumption of the public. A non-confidential or redacted version with an explanation that justifies why certain information should be kept confidential should be submitted.
- 7.14 A separate blacked-out version could then be provided if the Commission accepts the confidentiality claims. The Commission will allow up to 10 business days for such blacked-out and redacted version with an explanation to be submitted after provision of the first response to an information request.
- 7.15 Any extension of the deadline for submission must be agreed in prior consultation with the Commission. An additional period of five (5) business days will be granted to determine whether there is any confidential information. After this additional time period has expired, all information submitted will be treated as non-confidential.  
***(Please refer to paragraph 8.10)***
- 7.16 In the event the Commission refuses the claims of confidentiality, the Commission will provide reasons as to why it arrived at its determination. These reasons may include (i) claims are too extensive, (ii) evidence is crucial to case (balance of interest) or (iii) not justified.
- 7.17 The Commission will return all information that it has determined not to be pertinent to the case under investigation, if it duplicates information sent previously, and if it is outside the nature and scope of the case.

### **Power to enter premises**

- 7.18 The Commission has the same powers as those prescribed for the national competition authority of a Member State as set out in the relevant national competition law<sup>21</sup>. This includes the authority to enter the business premises of an enterprise (office or warehouse) and/ or domestic premises (home of employee) to secure information or evidence in an investigation.
- 7.19 The Commission working through the national competition authority or other competent organ of government will be required to secure a warrant obtained through an application to the relevant judicial authority prescribed in the relevant national competition law. The Commission can only enter an enterprise or domestic premises with a legal warrant from the Court<sup>22</sup>. There is no provision whereby the Commission can legally enter premises without a warrant.
- 7.20 The search must be executed in a manner consistent with the provisions of the Member State's national competition law<sup>23</sup> and the Rules of Procedure 2011<sup>24</sup> of the Commission.

### **Entering and searching premises with a warrant**

- 7.21 An application for a warrant will mainly be utilized in circumstances where the Commission has good reason to believe that information pertinent to an investigation is likely to be hidden or destroyed after submission and receipt of a formal request for information. It is reasonable to expect that this type of action will mainly be used in

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<sup>21</sup> Barbados Fair Trading Commission Act, CAP. 326C at Section 7 (1) and (2); Guyana Competition and Fair Trading Act 2006 at Section 14 of Part II.

<sup>22</sup> Court is defined as the "High Court" in the Fair Competition Act, CAP.326C of Barbados; "Court" means the High Court established under the Supreme Court of Judicature Act at paragraph 2 of the Fair Trading Act, No.13 of 2006; "Court" means Supreme Court at paragraph 2 of the Fair Competition Act, 1993 and Amended 2001; "Court" has not been defined in the Competition and Fair Trading Bill, 2004 with reference to "High Court" at paragraph 53 (4)

<sup>23</sup> For example - Section 7 (1) and (2) of the Barbados Fair Trading Commission Act, CAP. 326C; Guyana Competition and Fair Trading Act 2006 at Section 14 of Part II.

<sup>24</sup> Rules 6 (1), (2), (3) and (4) of the Rules of Procedure 2011



circumstances where the existence of cartels is suspected or other anti-competitive agreements among person(s) or enterprise(s).

**What powers does the Commission have when entering premises with a warrant?**

- 7.22 Inspections are carried out with the use of a warrant by authorized officers<sup>25</sup> under Member States national competition law. A warrant gives the authorized officer(s) authority to enter premises without the use of force against any person in the execution of said warrant.
- 7.23 Officers authorized under the warrant issued pursuant to the provisions of a national competition law and the Rules<sup>26</sup>, will search the premises for documents that are consistent with those covered by the warrant and take copies of, or extracts from them.
- 7.24 The search<sup>27</sup> process may cover but is not limited to offices, desks, filing cabinets, electronic devices, such as computers and phones, as well as any other documents on the premises. There are circumstances in which original documents can also be taken away from premises being searched at the conclusion of the search:
- if it is believed necessary to ensure their preservation or prevent interference with them;
  - where it is impractical to make copies of the documents on the premises;
  - any document, or copies of it, to determine whether it is relevant to the investigation, when it is not practical to do so at the premises;
  - any relevant document, or copies of it, contained in something else where it is not practical to separate out the relevant document at the premises; and
  - copies of computer hard drives, external drives, mobile phones, mobile email devices and other electronic devices.

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<sup>25</sup> Authorised officers mean staff of the CARICOM Competition Commission or officials from a national competition authority or other competent authority in the Member State so authorized by the Commission

<sup>26</sup> CARICOM Competition Commission Rules of Procedure 2011, Section 6 (1) (a) and (1) (b)

<sup>27</sup> CARICOM Competition Commission Rules of Procedure 2011, Section 6 (1)

- 7.25 The Commission will place any materials to be taken away in designated pouches/boxes that will be affixed with the seal of the Commission. This will be placed in a secure location and access to the information will be restricted to the specified members of the Investigating Panel and Case Team personnel assigned to the specific investigation.
- 7.26 The Commission will seal all evidence removed from the premises. A listing of all documents copied or to be removed from the premises will be prepared at the conclusion of the search. This document is signed by the designated official of the Commission and countersigned by the representative of the property that is the subject of the search warrant.
- 7.27 The Commission will return all documents or copies of information taken away from the premises that have been determined not to be relevant or outside the scope of the current investigation.

**What happens upon arrival?**

- 7.28 The Commission will seek to perform a search of business premises during the normal working hours of the business. The authorized officers will provide proof of identity upon entry to the business; written authorization from the Commission or national competition or competent authority; a document setting out the scope of the investigation; and a description of the offences and associated penalties for non-cooperation. A separate document will advise the occupier of the premises of the powers vested in the authorised officer and of the right of the occupier to have legal counsel present during a search of the premises.
- 7.29 The warrant will be produced on entry and will list the names of the officers authorised to conduct a search of the premise(s) identified in the warrant. A brief outline of the conduct being investigated and the offences that may be committed through non-cooperation with the warrant will be produced on entry. The warrant will be secured according to the procedures in the applicable national laws.

7.30 The Commission will request that the occupier of the premises designate an individual to act as point of contact to liaise with the authorized officers throughout the course of the search. The Commission is of the view that such a course of action can minimize friction and resolve disputes that can or may arise.

**What if no one is present at the premises?**

7.31 If there is no agent or officer of the company on the premises when the authorised officers arrive, the Commission or its agents will take all reasonable steps to get in contact with the occupier to inform them that the premises are to be searched. The Commission will allow the occupier or other designated agent sufficient time to arrive at the premises and to be present during the execution of the search warrant.

**8 LIMITS ON POWERS OF INVESTIGATION**

**Privileged Information**

8.1 The powers of the Commission do not extend to requiring any person or enterprise to provide privileged information to the Commission.

8.2 The Commission at Rule 7 (1) of the Rules of Procedures 2011 stipulates:

***“Nothing shall compel-***

***(a) a professional legal adviser to disclose or produce a privileged communication, or a document or other material which is in his possession.***

***(b) a person to disclose or produce a privileged communication, document or other material provided by a professional legal adviser in the course of advising that person on the application of the competition rules to that person or to that person’s business.”***

8.3 The Commission in its Rules of Procedure 2011 envisages this is not applicable to legal counsel who is an employee of the enterprise. Communications, documents or other material from this type of legal counsel is not considered privileged. Rule 7 (1) applies only to legal counsel retained from external legal agencies that are un-affiliated with the enterprise.

8.4 If a dispute occurs over whether the communication or parts of communication are privileged, the authorized officer may request that the communication be placed in an envelope or package and the seal of the Commission affixed. The Commission policy will be to place the communication in safe and confidential storage until such time as the dispute is resolved amicably between the parties through dialogue and consultation.

#### **Handling Confidential information**

8.5 The Commission is guided in the handling of confidential information or trade secrets<sup>28</sup> acquired during an investigation in accordance with the following:

**(i) Chapter VII of the Revised Treaty**

Paragraph 4 of Article 170 of the Revised Treaty gives an undertaking *that “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.”*

**(ii) Part II of the Rules of Procedure 2011**

Rule 5 (6) and Rule 6 (4) of the Rules of Procedure 2011 state:

*“all information obtained pursuant to this Rule shall be treated as confidential and shall not be disclosed in public hearings before an Adjudicating Panel unless the person from whom the information was obtained agrees that it is not confidential, or unless the information is disclosed in a non-confidential summary form agreed by such person.”*

8.6 The Commission will take all necessary steps according to applicable national competition laws and the Rules of Procedure to safeguard the integrity of any communication or document acquired to protect the interests of a person and/or enterprise as necessary. This will apply to all confidential information acquired in the course of an investigation.

8.7 The Commission can take action to safeguard confidential information in a number of ways which include:

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<sup>28</sup> Trade secrets means the secrets of any trade, business, industry, profession or occupation, relating to the supply of acquisition of goods or services; under Part I of the Rules of Procedure 2011

- (a) Using documentation in which sensitive information from reports, documents or communications has been blacked out as necessary in documents submitted by parties advocating claims of confidentiality that have been accepted by the Commission;
- (b) aggregating data (e.g. size of market in numbers)
- (c) put a range on data (e.g. market share in percentage terms)
- (d) ensuring all documents retrieved during an inspection are sent back to the inspected parties requesting a non-confidential version be provided.

8.8 The Commission advises that any information that a person or enterprise views as sensitive and not for public consumption should be identified as such as early as possible and preferably at point of submission. Access to confidential information will be on a need to know basis. Access to the sensitive or confidential information document will be severely restricted to only to designated staff of the Commission and the Investigating Panel during an investigation. Access to this information will be facilitated at the Enquiry stage according to the Rules of Procedures 2011.

8.9 It is important that an information provider if not originally advising of the confidential nature of a communication or correspondence previously submitted to the Commission, does so as soon as possible after the date of original submission.

8.10 Documents that have been removed from premises during the course of an inspection will be copied and the originals returned to the owner. A non-confidential version of any confidential information should be submitted as soon as practicable along with arguments as to the reasons for claims of confidentiality.

8.11 The Commission may take the view that the information is not confidential or that the circumstances of the investigation require some degree of public disclosure. In this scenario, the Commission will give the person or enterprise who provided the confidential information prior notice of its intention to disclose some or all of their

information. The Commission will give the person or enterprise the opportunity to make representation to the Commission on the matter. The Commission will give due consideration to the input from the person or enterprise and advise of its final determination on the matter in a timely manner.

8.12 The Commission will advise any the person or enterprise that is not satisfied with the determination given by the Commission to seek legal opinion or determination on the issue.

8.13 The Commission must note at this time that the practices which apply to confidentially under investigations are dealt with differently when a competition matter reaches the stage of an enquiry<sup>29</sup>. Reference must therefore be made to the pertinent Rules of Procedure and to the Revised Treaty to ensure that stakeholders are applying the correct procedures to ensure confidential information remains as such and is treated as such by the Commission.

### **Confidentiality Matters**

8.14 The Commission is aware that a person or enterprise may prefer to keep knowledge of a complaint submitted on their behalf by a Member State(s) or COTED or directly through their own circumstances from the general public, competitors or associates. As such specific concerns about the disclosure of their identity or commercially sensitive information should be notified and highlighted in any written submission to the Commission from entities submitting the complaint.

8.15 Paragraph 4 of Article 170 of the Revised Treaty gives an undertaking that:

***“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.”***

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<sup>29</sup> The administrative process for dealing with confidentiality at the enquiry stage is spelt out in paragraph 68 of Part XI of the Rules of Procedure 2011.

8.16 In making paragraph 4 of Article 170 operational, the Commission has developed Policy Manual, Staff Rules and Rules of Procedure, which taken together ensure sensitive information is treated as such and is not disclosed to un-authorised persons. The Commission can enforce strict penalties on its officer(s) with the ultimate sanction for a breach of confidentiality being termination of their employment contract. In addition, there are financial and custodial penalties included in the national competition laws of Member States regarding the release or disclosure of confidential or proprietary information to un-authorised person(s) or enterprise(s). The Commission keeps the identity of complainants strictly confidential during the consultation and investigation phases.

## **9 THE ANALYSIS AND REVIEW STAGE**

### **Analysis**

- 9.1 The powers of the Commission according to paragraph 2 of Article 174 provide for the authority granted under national competition law to be used by the Commission when it undertakes an investigation in Member States. The evidence that it gathers using the prescribed powers is critical to the outcome of any investigation undertaken by the Commission.
- 9.2 The information that has been gathered by the Commission is tested in the context of the factual, legal and economic arguments that inform the enforcement of competition law to establish whether it supports or contradicts the theories of competition harm or detriment set out in the Revised Treaty.
- 9.3 An investigation does not always proceed in a straight line from step A to step B. In some circumstances, the complainants may point to a particular set of facts or conduct that suggests a specific form of anti-competitive conduct in the market. Information gathered during the course of the investigation may reject the original form of anti-competitive conduct or theory of competition harm. It may instead lead to the discovery

of a different type of anti-competitive conduct or theory of competition harm by an person(s) or enterprise(s) in the market.

9.4 Analysis and review of information gathered may initially suggest a number of enterprises as being involved in the alleged anti-competitive behavior. The information secured may only be sufficient to allow for the investigation and prosecution of a small number of the suspected entities in breach of competition law.

9.5 The course of action to be taken is at the discretion of the Commission and of necessity takes into consideration resource constraints, and the likely impact on the market from pursuing the investigation and prosecution of person(s) or enterprise(s) complained of.

#### **Internal scrutiny**

9.6 The Case Team is comprised of members of the Competition and Legal Departments of the Commission. The Competition Department will be the lead adviser on the review of any complaints filed with the Commission. The Competition Department will assess the merits of the complaints on the factual and economic grounds. The Legal Department will provide its input from the perspective of factual and legal grounds. Input from the Legal Department will assist the Competition Department in determining the likely course of action that should be pursued by the Commission.

9.7 There are a number of outcomes that result from the completion of an assessment of a complaint namely either; (a) a rejection of complaint based on factual, economic and legal grounds; (b) an investigation based on factual, economic and legal grounds; and (c) an enquiry or no enquiry.

9.8 The actions of the Commission will therefore be guided by the initial preliminary findings of the Case Team and the recommendations derived from those preliminary findings.



9.9 This Assessment Report is forwarded to the Executive Director by the Competition Department. The Executive Director reviews the Assessment Report and forwards it to the Chairman of the Commission with recommendations that will set out if it has met the criteria for further action in the form of a full investigation or that there is no need for further action.

9.10 The Chairman reviews the Assessment Report from the Executive Director. If the Chairman is of the view there is sufficient evidence to warrant an investigation, the Chairman will appoint an Investigating Panel to conduct the investigation. This appointment process will be done in accordance with paragraph 4 of the Rules of Procedure pursuant to paragraph 6 of Article 175 of the Revised Treaty.

#### **Investigation Panel - Case Management and Coordination**

9.11 The Investigating Panel appointed by the Chairman becomes the designated Case Managers of the complaint. The Investigating Panel will guide the work of the Competition and Legal Departments in the execution of the investigation into the complaint, and make final recommendations on the merits of the complaint.

9.12 Rule 8 of the Rules of Procedures 2011 require that the Investigating Panel:

***“upon completion of its investigation, draw up a report of its findings stating with reasons whether 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 of the Treaty.”***

9.13 The Investigating Panel functions also include:

- Review and provides feedback on Case Team’s work proposals and theories of harm
- Reviews substantive issues raised by the Case Team and highlights strengths and weaknesses in case reports
- Provides quality assurance to analysis undertaken and options considered by the Case Team

- Makes suggestions pertaining to activities and strategies that could be executed to improve the investigative process

### **Action following the completion of the Investigation Panel Report**

9.14 The Investigating Panel upon conclusion of the investigation will forward an Investigation Report to the Executive Director for action pursuant to Rule 9 (1) of the Rules of Procedure 2011.

9.15 In accordance with Rule 9 (2) of the Rules of Procedure 2011:

***“If the Investigating Panel concludes that an offence has been committed but that the Commission does not have jurisdiction, the Commission shall consult with each Member States concerned to examine whether the competition authority of that Member State should pursue the matter.”***

## **10 INVESTIGATION OUTCOMES**

10.1 The powers of the Commission according to paragraph 3 of Article 174 provide that:

***“The Commission may, on the basis of its investigations, make determinations regarding the compatibility of business conduct with the rules of competition and other related provisions of the Treaty.”***

10.2 The Revised Treaty therefore provides for a range of determinations to be arrived at by the Commission in the course of execution of its mandate under paragraph 2 of Article 173 (a) to:

***“monitor anti-competitive practices of enterprises operating in the CSME, and investigate and arbitrate cross-border disputes;”***

10.3 The range of possible investigation outcomes can be summarized as follows:

- (i) Matter not pursued due to administrative priorities that require resources be focused on other matters that are likely to have more significant impact on business conduct in the CSME

(ii) The Investigating Panel Report indicates there are no grounds for action on factual, economic and legal grounds for further investigation by the Commission. An enquiry is not warranted.

(iii) The investigating Panel Report states there is a provisional view that a breach of Community Competition law has occurred on factual, economic and legal grounds. The alleged conduct under investigation amounts to an infringement and an enquiry is warranted before the Commission.

### **Closing investigations by reason of administrative priorities**

10.4 The Commission is of the view that with scarce technical, financial and human resources it must focus available resources on complaints that will deliver the greatest impact on the social welfare of consumers, and benefits to the private and public sectors.

10.5 In circumstances where the Commission ends an investigation for administrative reasons, the Formal Complainant will be advised of this provisional decision in writing. The correspondence will set out the key reasons for not taking forward the investigation with the level of explanation dependent on the facts of the case as supported by the evidence gathered.

10.6 Formal complainants will be given a reasonable time to respond to the Commission's provisional letter of closure of the investigation. This period of time can be extended when the investigation has been extensive and complex.

10.7 Any response from the Formal Complainant which includes confidential information will be treated as set out in paragraph 4 of Article 170 of the Revised Treaty which gives an undertaking that:

***“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.”***

- 10.8 The Commission will review any submission from the Formal Complainant(s). The Commission will then issue a final letter of closure in circumstances where no new evidence or facts have been presented to change the prior provisional views of the Commission.
- 10.9 Any person(s) or enterprise(s) can also be further advised that the Commission is not pursuing an investigation at this time into the suspected breach of competition law, but may do so at a later date if additional information or evidence becomes available or is made available to the Commission.
- 10.10 If a response from the Formal Complainant provides further information sufficient to change the provisional view of the Commission, then formal correspondence will be sent to the Formal Complainant to advise of such, and the investigation continued in the usual way.

#### **No grounds for decision**

- 10.11 The Commission will issue a no grounds for decision to the Formal Complainant in circumstances where there is insufficient evidence of a breach of Community Competition law.
- 10.12 The Commission will provide a non-confidential version of the proposed decision to the Formal Complainant. The consultation phase set out in Section 11.4–11.13 for provisional closure will be followed.

#### **Commitments on future conduct**

- 10.13 In circumstances where the Commission is of the view that the case gives rise to competition concerns, the Commission may decide to pursue a course of action whereby it will accept binding undertakings (“commitments”) from an person(s) or enterprise(s) regarding its future conduct. These commitments have to be agreed through consultation with the Commission, and must fully address all competition

concerns raised during the investigation. The decision to accept these commitments is at the discretion of the Commission.

10.14 The Commission may accept these commitments under specific circumstances whereby:

- (a) Competition concerns are easily and clearly identifiable
- (b) The commitments offered will fully address competition concerns
- (c) Proposed commitments can be implemented effectively and monitored at reasonable cost
- (d) Implementation of commitments can occur in a reasonable period of time

10.15 The Commission is unlikely to accept “commitments” offered in circumstances where there is strong evidence of the existence of secret cartels.

10.16 A person or enterprise under investigation can offer commitments at any time after the conclusion of an investigation, and the issuing of a Notice and Statement of Issues and Material Facts. The Commission is likely to accept commitments in circumstances where there are credible and address the competition concerns identified during the investigation. The submission by a business of proposed commitments in the latter stages of an investigation is not likely to be credible or acceptable to the Commission.

10.17 A person or enterprise desirous of proposing commitments to the Commission as an alternative remedy to possible anti-competitive conduct should contact the Commission through the Executive Director. The Commission will respond to the proposed commitments from a person or enterprise with a summary of the competition concerns that have been identified. The commitments offered in relation to the identified competition concerns will be evaluated by the Commission to determine whether the proposed commitments are appropriate, satisfactory and acceptable. If the commitments are acceptable to the Commission after due consideration, then

agreement can be reached quickly between the Commission and parties offering commitments. .

10.18 If the commitments offered by the subject of an investigation are not acceptable to the Commission. Negotiations between the Commission and the subject(s) of an investigation will continue until a settlement is reached that is acceptable to the Commission and the party offering commitments.

10.19 In circumstances where the commitments are viewed as acceptable to the Commission, interested parties affected by the anti-competitive conduct and the proposed commitments will be asked to provide feedback within 20 business days of receipt of correspondence submitted by the Commission.

10.20 If the Commission after this review process obtains from the party offering the commitments a willingness to make major changes to the proposed commitments or is willing to make additional commitments, the Commission will give the formal complainant and other interested parties an additional 20 business days to submit their views on the modified commitments.

10.21 The Commission will publish the final accepted commitments on [www.caricomcompetitioncommission.com](http://www.caricomcompetitioncommission.com) in a non-confidential manner.

#### **Issuing a Notice and Statement of Issues and Material Facts**

10.22 The Executive Director in accordance with Rule 10 (1) of the Rules of Procedure 2011:

***“shall commence an enquiry by filing a Notice together with a Statement of Issues and Material facts before an Adjudicating Panel<sup>30</sup>, if the Investigating Panel recommends an enquiry.”***

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<sup>30</sup> In Part 1 section 2 of the Rules of Procedure 2011, “Adjudicating Panel” means a panel of the Commission designated by the Chairman pursuant to Rule 10 (2) to conduct and enquiry, with a view to making a determination pursuant to Article 174 (3) of the Treaty and, if appropriate, to make an order, direction or imposition pursuant to Article 174 (4) of the Treaty

- 10.23 The Executive Director can only issue a Notice together with a Statement of Issues and Material Facts when the Investigating Panel Report required under paragraph 9 (1) of the Rules of Procedure 2011 has explicitly recommended an enquiry be launched given its findings.
- 10.24 The Statement of Issues and Material Facts sets out the Investigating Panel's findings of facts, and economic and legal arguments that give rise to the provisional view there has been an infringement of Community competition law. The Notice will advise that an enquiry is to be convened by the Commission before an Adjudicating Panel constituted by the Chairman of the Commission according to Rule 10 (2) of the Rules of Procedure 2011.
- 10.25 It must be made clear that the Investigating Panel has no powers to make a determination as to what penalties can and should be imposed on any party complained of for alleged breaches of Community competition law. Only the Adjudicating Panel constituted by the Chairman of the Commission has the authority and mandate under the Rules of Procedure 2011 to make such determinations, and specify the actions to be taken to remedy the identified anti-competitive conduct.
- 10.26 The Executive Director will prepare and submit the Notice together with the Statement of Issues and Material Facts which is filed with the Registrar, CARICOM Competition Commission. The Registrar informs the parties complained of as set out in Rule 10 (1) of the Rules of Procedure.

## **11 OPENING A FORMAL ENQUIRY**

- 11.1 The Commission is mandated to open an enquiry when the Investigating Panel submits a recommendation that there is a case to be heard into a matter that suggests there has been a breach of any of the provisions of Article 177 and/or Article 179 of the Revised Treaty.

## Commencement of Enquiry phase

11.2 Rule 10 (1) of the Rules of Procedure 2011 requires that:

***“Where in accordance with Rule 9 the Report of the Investigating Panel is forwarded to the Executive Director, the Executive Director shall commence an enquiry by filing a Notice together with a Statement of Issues and Material Facts before an Adjudicating Panel, if the Investigating Panel recommends an enquiry.”***

11.3 Rule 10 (2) of the Rules of Procedure 2011 further states:

***“For the purposes of paragraph (1) of this Rule, the Chairman shall designate an Adjudicating Panel consisting of the Commission’s members to adjudicate on the notice and the said members shall not be members of the Investigating Panel.”***

11.4 In addition, Rule 10 (3) of the Rules of Procedure 2011 states:

***“In the case of any event of force majeure that prevents a member of an Adjudicating Panel from continuing to serve on the Panel, the Chairman shall designate another member of the Commission (not being a member of the Investigating Panel) in place of such member, and such appointment shall not invalidate the deliberations of the Panel.”***

## Enquiry Phase

11.5 The Investigating Panel of the Commission on making a determination there has been sufficient evidence of a factual, economic and legal nature to require an enquiry into the alleged conduct following an investigation is mandated under paragraph 7 of Article 175 to ***“afford any party complained of the opportunity to defend its interests.”***

11.6 The Adjudicating Panel is the body designated to provide an opportunity for the party complained of to respond to the Notice and Statement of Issues and Material Facts issued by the Executive Director prior to the action set out under paragraphs 51 (1) and 51 (2) of the Rules of Procedure 2011 and issue a determination on the allegation of breach of Community Competition law.



- 11.7 The Commission aims to give the affected parties reasonable time and opportunity to respond to any concerns raised in the Notice and Statement of Issues and Material Facts before the Adjudicating Panel. Rule 13 (1) of the Rules of Procedure 2011 state that:
- “Not later than sixty (60) business days after receipt of service of notice, a respondent may file a response.”***
- 11.8 Rule 13 (2), 13 (3) and 13 (4) of the Rules of Procedure 2011 further specify how the respondent(s) should prepare and submit response(s) to the received Notice and Statement of Issues and Material Facts to the Adjudicating Panel.
- 11.9 Paragraph 8 of Article 175 states that:
- “at the conclusion of an enquiry the Commission shall notify the interested parties of its determination.”***
- 11.10 The information provided by the complainant or interested parties<sup>31</sup> will form the basis for the determination reached by the Commission on the merits of the complaint. The notification process may also provide some timelines for the submission of additional information that is required to assist in the successful conduct of the enquiry.
- 11.11 Rule 51 (2) of the Rules of Procedure 2011 state:
- “the decision of the Adjudicating Panel shall be based upon consideration of the entire record of the evidence properly before it.”***
- 11.12 Prior to the Adjudicating Panel adjourning to consider its decision as at Rule 51 (1) of the Rules of Procedure 2011, there is the opportunity for all recipients of the Notice and Statement of Issue and Material Facts to enter into discussions with the Adjudicating Panel. These discussions are aimed at seeking early resolution and settlement of the case.

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<sup>31</sup> The determination of what constitutes “interested parties” have been adjudicated by the CCJ in [2012] CCJ 4 (OJ) in Trinidad Cement Limited versus CARICOM Competition Commission at <http://www.caribbeancourtofjustice.org/wp-content/uploads/2012/12/2012-CCJ-4-OJ.pdf>

11.13 This “settlement process” usually occurs when a person or enterprise which is the subject of an enquiry voluntarily admits to having breached Community competition law. The person or enterprise then voluntarily co-operates with the Commission to conclude the enquiry.

11.14 Rule 52 of the Rules of Procedure 2011 address the matter of the Adjudicating Panel’s determination and states that:

***(1) The Adjudicating panel shall at the end of its deliberation draw up its determination in writing, and such determination shall be signed by all members of the Adjudicating Panel.***

***(2) The Adjudicating Panel shall publish its determination, including the reasons for such determination.***

***(3) The enquiry is concluded when the Adjudicating Panel issues its determination on the notice with statement of issues and material facts.***

***(4) Copies of determination of the Adjudicating Panel shall be available free of charge upon request and shall be sent to all parties.***

***(5) In the light of the determination, the Adjudicating Panel shall take action it considers appropriate in accordance with Article 174 (4) of the treaty. It may also make such order as it sees fit requiring a party to compensate another party for the costs incurred by the latter in taking part in the enquiry to the extent permitted by the law of any relevant Member State.”***

#### **Issue of an infringement decision**

11.15 The Commission in addition to the infringement decision will issue a press release which explains and describes the basic facts pertaining to the case.

11.16 The Commission will deliver the infringement decision to each of the parties complained of in confidence in advance of any public release of information on the case. In market-sensitive and non-market sensitive situations, the Commission aims to balance an open approach with the need to be transparent to ensure the orderly release of information.

11.17 The infringement decision issued by the Commission will outline the following:

- (i) detail the factual, economic and legal arguments relied upon to make the decision;
- (ii) the action to be taken by the Commission;
- (iii) the material presentations delivered during the course of the investigation and enquiry;
- (iv) the penalty<sup>32</sup> to be imposed, and if the penalty is financial<sup>33</sup>, how the level was calculated; and
- (v) any direction(s) to bring the infringement to an end.

## **12 CONCLUSION**

12.1 The Commission must at all times be cognizant of the timelines for the completion of the investigation and enquiry phases of a complaint that has met the initial thresholds that mandate further action be undertaken to determine whether there has been a breach of Community Competition law.

12.2 The Commission is mandated to open an enquiry only when the Investigating Panel submits a recommendation that there is a case to be heard into a matter that suggests there has been a breach of Community competition law according to Articles 177 or Article 179 of the Revised Treaty.

12.3 The Caribbean Court of Justice (CCJ) is the final arbiter of the application and interpretation of all articles of the Revised Treaty.

12.4 The Commission in all its constituent parts will undertake an institutional review of all administrative procedures related to the conduct of the investigation and enquiry phases of a competition matter. The Commission seeks to identify the processes that

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<sup>32</sup> Penalties will be dependent on the jurisdiction that the party(ies) complained of is resident and the penalties prescribed in the Member State's national competition laws for that type of infringement

<sup>33</sup> Financial level will be determined by the jurisdiction that the party(ies) complained of is resident and the financial penalties prescribed in the Member State's national competition laws for that type of infringement

have worked well and those processes which can be improved in the short term for other ongoing cases or long term for future cases.

12.5 This process is not related to the investigation process. The process of institutional and administrative review is intended to ensure a constant focus is kept on ensuring that best practices are maintained or new ideas are incorporated into the administrative practices of the Commission.

12.6 In addition, the Commission under its mandate under paragraph 1 and 2 of Article 173 on an ongoing basis monitors any national or community legal constraints that have been identified for modification or removal to improve the implementation of Community Competition law at the regional and national levels.

## **13 ANNEX 1 – LEGAL ARTICLES**

- 13.1 The legal framework for the enforcement of Community competition law as set out under Chapter VIII of the Revised Treaty of Chaguaramas for ease of reference.

### **CHAPTER EIGHT COMPETITION POLICY AND CONSUMER PROTECTION**

#### **PART ONE RULES OF COMPETITION**

##### **ARTICLE 168 Scope of Chapter**

*The rules of competition shall not apply to -*

- (a) combinations or activities of employees 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) business conduct within the meaning of Article 177 duly notified to COTED in accordance with Article 170;*
- (d) negative clearance rulings within the meaning of Article 180 or exemptions within the meaning of Articles 181 and 183;*
- (e) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public and approved by the Commission.*

##### **ARTICLE 169 Objectives of Community Competition Policy**

- 1.. The goal of the 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.*
- 2. In fulfilment of the goal set out in paragraph 1 of this Article, the Community shall pursue the following objectives:*
  - (a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;*
  - (b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and*
  - (c) the promotion of consumer welfare and protection of consumer interests.*

**ARTICLE 170**  
**Implementation of Community Competition Policy**

1. *In order to achieve the objectives of the Community Competition Policy,*

*(a) the Community shall:*

*(i) 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*

*(ii) establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME;*

*(b) the Member States shall:*

*(i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;*

*(ii) provide for the dissemination of relevant information to facilitate consumer choice;*

*(iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws; and*

*(iv) 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.*

2. *Every Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition.*

3. *Every Member State shall require its national competition authority to:*

*(a) co-operate with the Commission in achieving compliance with the rules of competition;*

*(b) investigate any allegations of anti-competitive business conduct referred to the authority by the Commission or another Member State; .*

*(c) co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.*

4. *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.*

5. *Within 24 months of the entry into force of this Treaty, the Member States shall notify COTED of existing legislation, agreements and administrative practices inconsistent with the provisions of this Chapter. Within 36 months of entry into force of this Treaty, COTED shall establish a programme providing for the repeal of such legislation, and termination of agreements and administrative practices.*

**ARTICLE 171**  
***Establishment of the Competition Commission***

*For the purposes of implementation of the Community Competition Policy, there is hereby established a Competition Commission (hereinafter called “the Commission”) having the composition, functions and powers hereinafter set forth.*

**ARTICLE 172**  
***Composition of the Commission***

1. *The Commission shall comprise seven members appointed by the Regional Judicial and Legal Services Commission to serve on the Commission. The Regional Judicial and Legal Services Commission shall appoint a Chairman from among the members so appointed.*
2. *The Commission shall comprise persons, collectively having expertise or experience in commerce, finance, economics, law, competition policy and practice, international trade and such other areas of expertise or experience as may be necessary.*
3. *A Commissioner shall be appointed for a term of five years and such appointment may be renewed for a further period of not more than five years as determined by the Regional Judicial and Legal Services Commission.*
4. *A Commissioner may be removed from office only for inability to perform the functions of his office or for misbehaviour and shall otherwise be subject to the disciplinary procedures of the Regional Judicial and Legal Services Commission.*
5. *A Commissioner shall be removed only on the vote of the Judicial and Legal Services Commission that represents not less than three-quarters of all the Members of the Commission.*
6. *A Commissioner may at any time resign the office of Commissioner by writing under his hand addressed to the Chairman of the Judicial and Legal Services Commission.*
7. *A Commissioner shall not enter upon the duties of the office unless he has taken and subscribed before the Chairman of the Judicial and Legal Services Commission, the Oath of Office set out in the Annex to this Treaty.*

*8. Notwithstanding the foregoing provisions of this Article, the Conference shall on the recommendation of COTED execute the functions required to be carried out by the Regional Judicial and Legal Services Commission where the Parties to the Agreement Establishing the Caribbean Court of Justice are less than seven.*

**ARTICLE 173**  
**Functions of the Commission**

*1. The Commission shall:*

*(a) apply the rules of competition in respect of anti-competitive cross-border business conduct;*

*(b) promote and protect competition in the Community and co-ordinate the implementation of the Community Competition Policy; and*

*(c) perform any other function conferred on it by any competent body of the Community.*

*2. In discharging the functions set out in paragraph 1, the Commission shall:*

*(a) monitor anti-competitive practices of enterprises operating in the CSME, and investigate and arbitrate cross-border disputes;*

*(b) keep the Community Competition Policy under review and advise and make recommendations to COTED to enhance its effectiveness;*

*(c) promote the establishment of institutions and the development and implementation of harmonised competition laws and practices by the Member States to achieve uniformity in the administration of applicable rules;*

*(d) review the progress made by the Member States in the implementation of the legal and institutional framework for enforcement;*

*(e) co-operate with competent authorities in the Member States;*

*(f) provide support to the Member States in promoting and protecting consumer welfare;*

*(g) facilitate the exchange of relevant information and expertise; and*

*(h) develop and disseminate information about competition policy, and consumer protection policy.*

*3. The Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its functions to one or more of its members.*



**ARTICLE 174**  
**Powers of the Commission**

1. *Subject to Articles 175 and 176, the Commission may, in respect of cross-border transactions or transactions with cross-border effects, monitor, investigate, detect, make determinations or take action to inhibit and penalise enterprises whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME.*

2. *The Commission may, in accordance with applicable national laws, in the conduct of its investigations:*

*(a) secure the attendance of any person before it to give evidence;*

*(b) require the discovery or production of any document or part thereof; and*

*(c) take such other action as may be necessary in furtherance of the investigation.*

3. *The Commission may, on the basis of its investigations, make determinations regarding the compatibility of business conduct with the rules of competition and other related provisions of the Treaty.*

4. *The Commission shall, to the extent required to remedy or penalise anti-competitive business conduct referred to in Article 177:*

*(a) order the termination or nullification as the case may require, of agreements, conduct, activities or decisions prohibited by Article 170;*

*(b) direct the enterprise to cease and desist from anti-competitive business conduct and to take such steps as are necessary to overcome the effects of abuse of its dominant position in the market, or any other business conduct inconsistent with the principles of fair competition set out in this Chapter;*

*(c) order payment of compensation to persons affected; and*

*(d) impose fines for breaches of the rules of competition.*

5. *The Commission may enter into such arrangements for the provision of services as may be necessary for the efficient performance of its functions.*

6. *The Member States shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdictions.*

7. *The Commission may establish its own rules of procedure.*

**ARTICLE 175**  
**Determination of Anti-Competitive Business Conduct:**  
**Procedure of Commission on Request**

1. A Member State may request an investigation referred to in paragraph 1 of Article 174 where it has reason to believe that business conduct by an enterprise located in another Member State prejudices trade and prevents, restricts or distorts competition in the territory of the requesting Member State.

2. Where COTED has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts or distorts competition within the CSME and has or is likely to have cross-border effects, COTED may request an investigation referred to in paragraph 1 of Article 174.

3. Requests under paragraphs 1 and 2 shall be in writing and shall disclose sufficient information for the Commission to make a preliminary assessment whether it should proceed with the investigation.

4. Upon receipt of a request mentioned in paragraph 3, the Commission shall consult with the interested parties and shall determine on the basis of such consultations whether:

(a) the investigation is within the jurisdiction of the Commission; and

(b) the investigation is justified in all the circumstances of the case.

5. The consultations shall be concluded within 30 days of the date of receipt of the request for the investigation, unless the parties agree to continue the consultations for a longer period.

6. Where the Commission decides to conduct the investigation, the Commission shall:

(a) notify the interested parties and COTED;

(b) complete the investigation within 120 days from the date of receipt of the request for the investigation; and

(c) where the circumstances so warrant, extend the time period for completion of the investigation and notify the interested parties.

7. Where the Commission decides to conduct an enquiry following an investigation, the Commission shall afford any party complained of the opportunity to defend its interest.

8. At the conclusion of an enquiry, the Commission shall notify the interested parties of its determination.

9. Where the Commission determines that a party has engaged in anti-competitive business conduct, it shall also require the party to take the action necessary to remove the effects of the anti-competitive business conduct.

10. Where a specific course of action is required under paragraph 9, the enterprise concerned shall take the appropriate course of action within 30 days of the date of notification. If the concerned enterprise cannot comply, it shall notify the Commission and request an extension.

11. If the enterprise cannot comply within the time period specified and fails to inform the Commission, the Commission may apply to the Court for an order.

12. A party which is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination.

#### **ARTICLE 176**

##### **Determination of Anti-Competitive Business Conduct: Procedure of Commission Proprio Motu**

1. Where the Commission has reason to believe that business conduct by an enterprise in the CSME prejudices trade and prevents, restricts, or distorts competition within the CSME and has cross-border effects, the Commission shall request the national competition authority to undertake a preliminary examination of the business conduct of the enterprise.

2. Where a request is made under paragraph 1, the national competition authority shall examine the matter and report its findings to the Commission within such time as may be determined by the Commission.

3. Where the Commission is not satisfied with the outcome of its request, the Commission may initiate its own preliminary examination into the business conduct of the enterprise referred to in paragraph 1.

4. Where the findings of the preliminary examination under paragraphs 2 and 3 require investigation, the Commission and the Member State concerned shall hold consultations to determine and agree on who should have jurisdiction to investigate.

5. If there is a difference of opinion between the Commission and the Member State regarding the nature and effects of the business conduct or the jurisdiction of the investigating authority, the Commission shall:

(a) cease any further examination of the matter; and

(b) refer the matter to COTED for its decision.

6. *Nothing in this Article shall prejudice the right of the Member State to initiate proceedings before the Court at any time.*

7. *Where there is a finding that the Commission has jurisdiction to investigate the matter, the Commission shall follow the procedures set out in paragraphs 5, 6, 7 and 8 of Article 175.*

**ARTICLE 177**  
***Prohibition of Anti-Competitive Business Conduct***

1. *A Member State shall, within its jurisdiction, prohibit as being anti-competitive business conduct, the following:*

*(a) agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community;*

*(b) actions by which an enterprise abuses its dominant position within the Community; or*

*(c) any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME.*

2. *Anti-competitive business conduct within the meaning of paragraph 1 includes the following:*

*(a) the direct or indirect fixing of purchase or selling prices,*

*(b) the limitation or control of production, markets, investment or technical development;*

*(c) the artificial dividing up of markets or restriction of supply sources;*

*(d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions thereby causing a competitive disadvantage;*

*(e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which, by their nature or according to commercial practice, have no connection with the subject matter of the contract;*

*(f) unauthorised denial of access to networks or essential infrastructure;*

*(g) predatory pricing;*

*(h) price discrimination;*

*(i) loyalty discounts or concessions;*

*(j) exclusionary vertical restrictions; and*

*(k) bid-rigging.*

*3. Subject to Article 168, a Member State shall ensure that all agreements and decisions within the meaning of paragraph 1 of this Article shall be null and void within its jurisdiction.*

*4. An enterprise shall not be treated as engaging in anti-competitive business conduct if it establishes that the activity complained of:*

*(a) contributes to:*

*(i) the improvement of production or distribution of goods and services;*

*or*

*(ii) the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;*

*(b) imposes on the enterprises affected only such restrictions as are indispensable to the attainment of the objectives mentioned in subparagraph (a);*

*or*

*(c) does not afford the enterprise engaged in the activity the possibility of eliminating competition in respect of a substantial part of the market for goods or services concerned.*

#### **ARTICLE 178**

##### **Determination of Dominant Position**

*For the purposes of this Chapter:*

*(a) an enterprise holds a dominant position in a market if by itself or together with an interconnected enterprise, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors;*

*(b) any two enterprises shall be treated as interconnected enterprises if one of them is a subsidiary of the other or both of them are subsidiaries of the same parent enterprise.*

#### **ARTICLE 179**

##### **Abuse of a Dominant Position**

*1. Subject to paragraph 2 of this Article, an enterprise abuses its dominant position in a market if it prevents, restricts or distorts competition in the market and, in particular but without prejudice to the generality of the foregoing, it:*

- (a) restricts the entry of any enterprise into a market;*
- (b) prevents or deters any enterprise from engaging in competition in a market;*
- (c) eliminates or removes any enterprise from a market;*
- (d) directly or indirectly imposes unfair purchase or selling prices or other restrictive practices;*
- (e) limits the production of goods or services for a market to the prejudice of consumers;*
- (f) as a party to an agreement, makes the conclusion of such agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the agreement;*
- (g) engages in any business conduct that results in the exploitation of its customers or suppliers, so as to frustrate the benefits expected from the establishment of the CSME.*

*2. In determining whether an enterprise has abused its dominant position, consideration shall be given to:*

- (a) the relevant market defined in terms of the product and the geographic context;*
- (b) the concentration level before and after the relevant activity of the enterprise measured in terms of annual sales volume, the value of assets and the value of the transaction;*
- (c) the level of competition among the participants in terms of number of competitors, production capacity and product demand;*
- (d) the barriers to entry of competitors; and*
- (e) the history of competition and rivalry between participants in the sector of activity.*

*3. An enterprise shall not be treated as abusing its dominant position if it establishes that:*

- (a) its behaviour was directed exclusively to increasing efficiency in the production, provision or distribution of goods or services or to promoting technical or economic progress and that consumers were allowed a fair share of the resulting benefit;*
- (b) it reasonably enforces or seeks to enforce a right under or existing by virtue of a copyright, patent, registered trade mark or design; or*
- (c) the effect or likely effect of its behaviour on the market is the result of superior competitive performance of the enterprise concerned.*

**ARTICLE 180**  
**Negative Clearance Rulings**

- 1. In any case where a Member State is uncertain whether business conduct is prohibited by paragraph 1 of Article 177, such a Member State may apply to the Commission for a ruling on the matter. If the Commission determines that such conduct is not prohibited by paragraph 1 of Article 177, it shall issue a negative clearance ruling to this effect.*
- 2. Subject to paragraph 3, a negative clearance ruling shall be conclusive of the matters stated therein in any judicial proceedings in the Community.*
- 3. The Court may, on an application of the Commission, review a decision of the Commission where the decision was induced by deceit or improper means.*

**ARTICLE 181**  
**De Minimis Rule**

*The Commission may exempt from the provisions of this Part any business conduct referred to it if it considers that the impact of such conduct on competition and trade in the CSME is minimal.*

**ARTICLE 182**  
**Powers of the COTED Respecting Community  
Competition Policy and Rules**

*Subject to this Treaty, COTED shall develop and establish appropriate policies and rules of competition within the Community including special rules for particular sectors.*

**ARTICLE 183**  
**Exemptions**

- 1. Where COTED determines, pursuant to Article 182, that special rules shall apply to specific sectors of the Community, it may suspend or exclude the application of Article 177 to such sectors pending adoption of the relevant rules.*
- 2. COTED may, on its own initiative or pursuant to an application by a Member State in that behalf, exclude or suspend the application of Article 177 to any sector or any enterprise or group of enterprises in the public interest.*

## **14 ANNEX 2 – CCC COMPLAINT FORM**

### **INFORMATION ON PREPARING A COMPLAINT**

The Commission has developed some guidance to assist a legal entity (enterprise) or natural person (individual) with preparing a complaint for the assessment of the Commission. There may be instances where all the information identified is not available to the enterprise or individual preparing a complaint. The Commission's assessment process is made quicker and easier when as much information as is possible is submitted with the complaint.

At all times the Commission **recommends** that where an enterprise or individual believes that a breach of Community Competition law has occurred the enterprise or individual submit the complaint with all the information that an enterprise or individual has in their possession.

#### **I. Information regarding the complainant and the enterprise(s) or association of enterprises giving rise to the complaint**

- a) Provide full details on the identity of the legal entity or natural person submitting the complaint. Provide basic information on the subject of the complaint and if it is an enterprise(s), identify the corporate group to which it belongs. Provide a contact person(s) where possible (with telephone number, postal and email address) from which supplementary explanations can be obtained by the Commission.
- b) Identify the enterprise(s) or association of enterprises whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the enterprise(s) belongs. Specify the nature and scope of the business activities pursued by them. Indicate if a relationship exists between the legal entity or natural person submitting the complaint and the subject(s) of the complaint (e.g. customer, competitor, etc).

#### **II. Details of the alleged infringement and evidence**

- a) List in detail the facts which in your opinion, it appears there exists an infringement of Article 177 or Article 179 of the Revised Treaty of Chaguaramas.
  - Indicate in particular the nature of the products (goods or services) affected by the alleged infringement(s).
  - Explain, where necessary, the commercial relationships concerning these products.
  - Provide all available details on the agreements or practices of the enterprise(s) or associations of enterprises to which this complaint relates.
  - Indicate, to the extent possible, the relative market share positions of the enterprises concerned by the complaint.



- b) Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for e.g. text of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations, etc).
- Provide the names and address of the person(s) able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement.
  - Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for e.g. information related to prices and price trends, barriers to entry to the market for new suppliers, etc.).
- c) Set out your view if possible, about the geographical area (Member States) impacted by the alleged infringement.
- Explain where it is not obvious, the extent that trade between two or more Member States of the Community may have been affected by the conduct complained of.

### **III. Finding sought from the Commission and legitimate interest**

- a) Explain what finding or action you are seeking from the Commission as a result of proceedings brought before the Commission.
- Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 175 of the Revised Treaty.
  - State in particular how the conduct complained of affects you
  - Explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

### **IV. Proceedings before national competition authorities or national courts**

- a) Provide full information about whether you have approached, concerning the same or closely related subject matters, any other competition authority and/or whether a lawsuit has been brought before a national court.
- If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.