THE ROLE OF COMPETITION POLICY IN REGIONAL INTEGRATION: 
THE CASE OF THE CARIBBEAN COMMUNITY

Taimoon Stewart
SALISES, UWI, St. Augustine
Republic of Trinidad and Tobago

Introduction

One of the policy instruments designed to advance the process of integration in the CARICOM Single Market and Economy (CSME) is the development and implementation of a regional competition regime. However, competition law is new to this region, with only Jamaica having some experience, having enacted a competition law in 1993. Little is known about what types of anti-competitive conducts exist in the CSME, and what could be the major challenges to enforcement of the competition regime.¹ This paper explores the relevance of this regime for the advancement of the integration process, and provides some empirical evidence of anti-competitive conducts in regional trade and investment.

In section 1 of the paper, an overview of the competition regime outlined in Chapter VIII of the Revised Treaty of Chaguaramas is provided, with some comparisons with the European Community’s (EC) competition regime. Section 2 outlines the types of conduct that are considered anti-competitive, and in section 3, empirical evidence is provided on the existence of or potential for such conduct in the region. In small economies, concentration of industries is inevitable and with only a few actors, the business environment is conducive to cooperative behaviour amongst business persons. Such structural features are addressed as well, since they provide circumstances that could potentially give rise to abuse

¹ A recent study conducted by the SALISES, with this author being the lead researcher, examined competition issues in six CARICOM countries, including conducting interviews with key persons in the public, private and NGO sectors. The final report is published in “Competition Issues in Selected CARICOM Countries: An Empirical Examination.” SALISES, UWI, March 2004. Some of the empirical findings are used in this paper.
of a dominant market position. Section 4 explores some of the challenges of introducing and implementing the competition regime at the national and regional levels.

1. Competition Policy in the CSME

Member States (MS) of the Caribbean Community\(^2\) (CARICOM) have made significant advances in regional integration, moving from the formation of a Free Trade Area (CARIFTA) in 1968, to a Common Market in 1973, and finally, to a CARICOM Single Market and Economy\(^3\) in 2001, with the signing of the Revised Treaty of Chaguaramas (hereafter referred to as the Revised Treaty). This Treaty provides for, among others, the removal of restrictions by Member States (MS) on Trade in Goods, the Right of Establishment, Provision of Services, including Banking and Financial Services, Movement of Capital and Current Transactions and Skilled Community Nationals.

Member States have also agreed on having a Common External Policy (CET), and are negotiating external trade agreements as a single unit under the management and guidance of the CARICOM Regional Negotiation Machinery (CRNM). A quasi-Cabinet has been formed, with Heads of Government assuming the responsibility for specific portfolios, and there is an Assembly of Caribbean Community Parliamentarians, consisting of both government and opposition Parliamentarians. The Community is in the process of developing regional institutions for enforcement, regulation and support of the CSME.

It was recognized by MS, however, that the benefits that are expected to be derived from the establishment of the CSME could be frustrated by anti-competitive business conduct by public and private enterprises. While tariff and non-tariff barriers are removed and free flow of goods, services and investment is anticipated, businesses could nullify this effect by colluding to divide up markets geographically, thus essentially maintaining national markets. Anti-competitive agreements to fix prices or bid rig in tendering could harm

\(^2\) The Member States of CARICOM consist of Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

\(^3\) The Bahamas and Haiti are not members of the CSME.
consumers and bar entry to non-members of cartels. Or firms may dominate product markets regionally and abuse their dominant position by engaging in predatory behaviour or limiting competition through exclusionary distribution agreements, amongst other strategies.

In order to prevent private and public anti-competitive business conduct from negating the anticipated benefits to be derived from removal of governmental barriers to trade and investment, Chapter VIII of the Revised Treaty provides for the development of a Community Competition Policy. This competition regime that is being introduced into the CSME should therefore be understood in the context of its role in safeguarding the advances made by governments in liberalizing markets through prohibition of anti-competitive business conduct.

The objectives of the Community Competition Policy are:

1. The promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;
2. … 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
3. The promotion of consumer welfare and protection of consumer interests.

(Art. 169 (2))

Member States are required to enact the rules of competition as outlined in Chapter VIII of the Treaty, and to establish national competition authorities to implement and enforce the rules. Member States are also required to take effective measures to ensure access by nationals of other MS to enforcement authorities, including courts, on an equitable, transparent and non-discriminatory basis.

Jamaica has had a competition law (the Fair Trading Act) and an authority (The Fair Trading Commission) since 1993 and at present that law is being amended to take into consideration, among other factors, the provisions of Chapter VIII of the Revised Treaty.
Barbados enacted its law in January 2003, and has set up a Fair Trading Commission that brings under one umbrella the supervision of regulated industries, competition and consumer affairs. While St. Vincent and the Grenadines (SVG) passed a competition law in 1998, no authority has been set up to enforce the law. The Organization of Eastern Caribbean States (OECS)\(^4\), a sub-regional grouping of smaller states within CARICOM, and Trinidad and Tobago both have draft laws and other MS are in the process of drafting their laws.

While National Authorities would be responsible for investigating and disciplining firms engaging in anti-competitive conduct within national borders, a Community Competition Authority will be established to deal exclusively with cross-border anti-competitive conduct. Business conduct which has a minimal impact on competition and trade in the CSME is exempt from the provisions of Chapter VIII. This authority will have to work closely with national authorities to conduct investigations and to take legal action and impose sanctions through national courts. The final court of appeal against rulings of the Commission is the Caribbean Court of Justice (CCJ).

The regime that is being introduced in the CSME is very similar to that which exists in the European Community (EC), though not as advanced or as wide in scope. The objective of the EC Competition Law is “to defend and develop effective competition in the common market” (Mario Monti 1999:118). Action by the European Commission Directorate General Competition Division (DG Competition) is triggered only if trade between Member States is affected by the practices in question, as is the case for the proposed CARICOM Competition Authority. Likewise, national competition authorities in Europe deal with cases that affect only the local market, but DG Competition shares power with the MS national authorities and law courts in investigating anti-competitive agreements and abuse of a dominant market position (Ibid.: 119).

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\(^4\) The OECS countries consist of Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. The OECS countries and Belize are considered Less Developed Countries within CARICOM.
EC Competition Law is wider in scope than CARICOM’s Competition Law since it includes, in addition to prohibition of anti-competitive agreements and abuse of a dominant position, Merger Control Regulation (MCR) and the monitoring of State Aid. In both these areas, power is not shared with the National Authorities. Neither of these provisions is included in the Chapter VIII of the Revised Treaty. Indeed, MCR was quite consciously excluded from the CARICOM regime because the majority of MS felt that firms in the CARICOM are too small and there is a need for increasing size through integration of production systems. Article 51 (b) of the Revised Treaty explicitly calls for the promotion of linkages among economic sectors and enterprises within and among MS, and Article 51 (c), the promotion of regional economic enterprises capable of achieving scales of production to facilitate successful competition in domestic and extra-regional markets. Having MCR was deemed to be contradictory to this objective, and to the conditions existing in small open economies.

A major difference between the two regimes is the power conferred on the Competition Commission. Whereas DG Competition has supranational authority and can independently investigate, rule on cases and impose fines, the CARICOM Competition Commission is severely hampered by restrictions that are directly a result of the reluctance on the part of MS to relinquish sovereignty. Indeed, this absence of supranational legal authority is a major shortcoming of the Revised Treaty as a whole, that could not only render the CSME a lame duck in many ways, but could also weaken its external relations because there will be no equivalent to the European Commission with legal authority vested in it to represent the EC (for instance, in the WTO), and to take action within the Community supranationally.

In this respect, the CARICOM Commission is severely hampered in its ability to initiate investigations independently. According to Article 175 of the Revised Treaty, investigations can be initiated upon request from an MS or from the CARICOM Council for Trade and Economic Development (COTED). Article 176 requires that 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, the
Commission shall request that National Competition Authority undertakes a preliminary examination of the business conduct of the enterprise. The National Authority is obliged to comply, and if the Commission is not satisfied with the findings, it may initiate its own preliminary examination in the business conduct. If it deems that further investigation is merited, then the Commission and the MS concerned shall hold consultations to determine and agree on who should have jurisdiction to investigate. If there is a difference of opinion between the Commission and the MS regarding the nature and effects of the business conduct or jurisdiction of the investigating authority, the Commission is required to cease any further examination of the matter and refer the matter to COTED for its decision.

This arrangement is very worrisome, since it virtually “ties the hands” of the Community Commission, and vests power in COTED, a political body. In some cases, such as cartelization, swift action is needed in order to secure the evidence, and absolute secrecy and confidentiality required. Just the preliminary investigations by the MS or the Commission could compromise the full investigation, particularly if cartel activity is involved. In small societies such as CARICOM’s, it would be very difficult to keep confidentiality when the issue would be bounced back and forth between the Commission, the MS and the COTED, on which there sits a representative from each MS. This could provide plenty of opportunity for the culprits to cover their tracks and destroy evidence.

2. Types of Conducts Prohibited

Article 177 of the Revised Treaty prohibits:
1. Anti-competitive 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
2. Actions by which an enterprise abuses its dominant position within the Community; or
3. Any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME.
Conducts identified as anti-competitive include price fixing, limit or control of production, artificial dividing up of markets or restriction of supply sources, the application of unequal conditions to equivalent contracts, tied selling, unauthorized denial of access to networks or essential infrastructure, predatory pricing, price discrimination, loyalty discounts or concessions, exclusionary vertical restrictions and bid rigging.

Exemptions are provided for instances where the conduct results in improved production or distribution of goods and services, the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit (Art. 177 (4) (a)). However, restrictions on other enterprises must be only what are indispensable to the attainment of the above objectives; competition must not be eliminated in a substantial part of the market. (Art. 177 (4) (b) & (c)).

Abuse of a dominant position in a market constitutes prevention, restriction or distortion of competition in the market. Such action includes restricting the entry of any enterprise in a market, preventing or deterring any enterprise from engaging in competition in a market, directly or indirectly imposing unfair purchase or selling prices or other restrictive practices, limits the production of goods and services for a market to the prejudice of consumers, tied selling, or engaging in business conduct that results in the exploitation of its customers or suppliers.

3. Empirical Evidence of Anti-competitive Conduct in the CSME

Extent of intra-regional trade

Despite efforts to increase intra-regional trade since 1968, with the creation of the Caribbean Free Trade Association, and its deepening into the CARICOM Common Market, the level of trade in the region is still very poor. The major problem is that these countries largely produce competing goods and services: agriculture commodity products (sugar, bananas, and citrus), tourism, and mining of minerals. There is reliance on external sources
for most manufactured goods. Trinidad and Tobago penetrated most CARICOM markets with a range of products and has a positive trade balance with the rest of the region.

In 1998, Trinidad and Tobago led the region in intra-regional trade with a positive balance of EC$1.7 billion, an increase of EC$1.2 billion from the 1990 figure of EC$500.5 million. Apart from Trinidad and Tobago, only Belize registered a positive balance of EC$2.5 million exporting a range of agricultural products. However, for the three years of data (2000-2002) available from the Belizean Central Statistical Office, the balance of trade with Belize was negative. The rest of the region all have negative trade balances in intra-regional trade, with the benefits accruing largely to Trinidad and Tobago. It is understandable that firms in the rest of the region feel threatened by firms from Trinidad and Tobago.

Intra-CARICOM exports are dominated by petroleum and petroleum products and by non-traditional manufacturers such as paper and paper board, cigarette paper, waters (including mineral and aerated waters), miscellaneous edible products and preparations, organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleansing preparations (whether containing soap or not) building cement, iron and steel (IADB/INTAL 2002 CARICOM: 5).

The poor performance of intra-regional trade, notwithstanding the inroads made by Trinidad and Tobago, is reflected in the minuscule percentage of this trade to total trade. Interestingly, despite thirty-five years of movement to integrate these economies, the trends have varied little in respect of direction of imports. Regional imports as a percentage of total imports have varied little since 1973, as the following figures show: 1973 – 7.5 percent; 1981 – 9.54 percent; 1989 – 8.8 percent; between 1990-1998, the figure has remained consistent at 9.5 percent. Intra-regional exports to total exports have shown

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5 Figures taken from the IADB/INTAL, 2002, CARICOM Report No. 1, p. 9. Grenada’s positive balance of EC$122.6m as reflected in that table is a mistake and is in fact, a negative balance. This was confirmed with the author of the report.
growth, increasing from approximately 10.7 percent in 1973 and 10.97 percent in 1986 to 16.5 percent in 1995 and 22.9 percent in 1998.⁶

According to the IADB/INTAL Report on CARICOM, intra-regional investment has not been at a volume or rate that could be considered compatible with the integration process, and has been fragmented and sporadic. There has been some cross-border investment in manufacturing/distribution and financial services and in tourism. For instance, the Jamaican Sandals Hotel chain has been expanding into the region. Most investment emanates from Barbados and Trinidad and Tobago. The report provides CARICOM data showing that of 39 companies studied effecting cross-border operations, 33 had their head office in the More Developed Countries (MDCs). Trinidad and Tobago had 16 locations in other CARICOM countries, Barbados – 10; Jamaica – 6; Guyana – 4; Antigua and Barbuda – 1; SVG – 1; and St. Lucia – 1.⁷

The empirical evidence is that anti-competitive conducts are prevalent in these economies, both at the national and regional levels, despite their openness and miniscule size.⁸ There is therefore a need for competition law. Moreover, there are serious concentrations in these economies as firms strive to achieve minimum efficient scale, given the small size of market, or because entrenched historical wealth owners still control most resources. Because the economies are highly dependent on imports, and the productive sector is dominated by exportables – tourism, agricultural commodities and mining – the main areas of concentration are found in the import/distribution/retail sectors and the downstream tourism services.

**Price Fixing by Trade Associations**

Active cartels were found largely in the activities of trade associations, and mainly in Trinidad and Tobago where the economy is larger and more complex. Thus, recent price

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⁶ Bhoendradatt Tewarie, El Agraa *et al* and CARICOM Secretariat 2000.
⁷ IADB/INTAL *CARICOM Report* 2000: 14-15. The data are from 2000, and since then there has been further cross-border investment. However, figures are not readily available.
⁸ Interviews were conducted by this author in Belize, Bahamas, Jamaica, St. Lucia, St. Vincent and Trinidad and Tobago between January and April, 2003. In addition, structural aspects of the economies were studied.
fixing by the Baker’s Association was openly announced in the newspapers, the Shipping Association increased their handling charges as a group, despite protests from their clients, and price maintenance was found to be standard business practice for one large bakery company, albeit to prevent retailers from charging a higher price. Because there is no law prohibiting collusion, and this has been the business practice of trade associations from time immemorial, there is no sense of wrongdoing amongst the firms.

The five largest poultry producers in Trinidad indulged in incremental increases of price from January to August of 2003, in the amount of 85 percent increase, and it took government intervention and the threat of opening the sector before prices were brought down. However, a closer examination revealed that, rather than price fixing, the issue was predatory behaviour on the part of one dominant player who was responsible for the price swings and the demise of two producers.

With the free flow of goods within the CSME, and the fierce protectionist stance of poultry producers at the national level, there is a need to guard against collusion to divide markets geographically in the region, thus allowing local producers to maintain control of national markets. Given that firms from Trinidad and Tobago are the major exporters and investors in intra-CARICOM trade, cartelization by trade associations would have effects on the prices of goods exported to other CARICOM countries, and business practices may be transferred with investment.

Interestingly, in the very small territories of St. Lucia, SVG, and the Bahamas, there were strong feelings by all who were interviewed that firms did not collude to fix prices. Rather, they followed the leader. There seem to be a business culture amongst these family firms to fiercely guard their independence. There is a view that “Partnership is a leaky ship.” However, they do not adhere to fierce “dog eat dog” competition either, but maintain a balance, primarily because their competitors are family or friends in these small societies.
Import and Export Cartels

There is a prevalence of import cartels in the smaller economies, linked to new emigrants: Chinese, Taiwanese, Indians, and Syrians. Within their ethnic groups, they combined their orders and import together, thus reducing cost by increasing scale. In some cases, the collaboration takes place across the region, and indeed, internationally. It is quite possible that they fix prices as well. However, prices are lower than that offered by incumbents, so that, in fact, competition is increased and consumers gain. Indeed, Barbadians are shopping in St. Vincent so as to access these better prices.

The Syrians operated in a similar manner, and also successfully challenged the incumbent retailers of textiles, so much so that they now totally control the textile trade in the region, having moved up the islands from Trinidad. They import in bulk and break bulk in one island and trans-ship the orders to the various islands. Having gained dominance, it is no longer clear whether their pricing is in the consumer’s interest. However, the perception is that the prices compare favourably with prices in the US for comparable textiles. The Syrians have now moved up the social ladder and have been included into the white/near white social strata, and now dominate the business sector in Port of Spain, the capital of Trinidad and Tobago, having moved into manufacturing and distribution, fast foods and gourmet restaurants and bakeries.

Therefore, in small economies, collaboration amongst small businesses facilitates market entry and challenging of incumbents. Where this domination derives from inherited “plantation” wealth, such collaboration provides the means by which to dislodge such dominance in the interest of a more egalitarian society. This is even more important when the divide is along racial lines. Export cartels are also prevalent in the smaller islands where commodity production for export by small farmers can be economic only if they group together to export, organizing the collection, selection, packaging, and shipping of the product together. Products like bananas from the Windward Islands, and spices from Grenada must be coordinated and exported in bulk to be economic. Both import cartels and export cartels should be exempt from the competition rules because they facilitate
entrepreneurial entry, increase competition, and consumers benefit. The *de minimus* clause of the CARICOM treaty may be sufficient to exempt these collaborators, but this should be examined more closely in terms of the level of intra-regional trade that exists amongst these groups.

*Cooperative Behaviour in the Banking Sector*

The banking sector in CARICOM countries is dominated by foreign banks, many of which have branches in many countries across the region. In the case of Bank of Nova Scotia, there are branches in every CARICOM country. Barclays Bank, which merged with Canadian Imperial Bank of Commerce in 2002 to form the First Caribbean International Bank (FCIB), is well represented, and increasing its presence. There is an average of six banks in each CARICOM country, of which there are at least two that are locally owned. In interviews, banks were accused of cartelization across the region. There were complaints about the high interest charges on loans, and the wide margin between the lending and borrowing rates, which averaged around 8 percent, whereas the interest rate spreads found in the industrialized countries ranged between 1.6 and 4.9 percent, with the exception of Germany which has a spread of 7.1 percent.\(^9\)

However, research findings point to the type of interdependent behaviour identified by Gal (2001) who argued that because the business elite is small, they are careful not to compete in each other’s domain but rather, operate within an explicit or implicit understanding to jointly exercise market power or limit competition. As one banker said, they are careful not to “rock the boat.” Moreover, given the high level of risk, the leader is unwilling to take more market share from competitors. Another factor is the limited size of market, in which, for instance, a clientele of 100,000 is divided amongst eight banks (Bahamas). Room for competition is very limited, and transparency in the market facilitates cooperative behaviour.

While this may be so, there is definitely a larger spread than is necessary. The fact that the small local banks are able to survive, having much higher overheads because of diseconomies of scale, points to the excessive spread and high profits reaped by the larger banks. It is interesting to note that in economies where there is a large liquidity reserve requirement, and a floating exchange rate (T&T and Jamaica), or severe foreign reserve shortages, as is the case with Belize, the spread is much wider than in economies where there is a fixed exchange rate and exchange control regulations (St. Lucia, SVG, and the Bahamas). One may possibly link stability of currency and access to hard currency to the width of spread which banks consider adequate to cover costs (given high liquidity reserve requirement is linked to risk coverage and defense of foreign reserves).

Apart from having to defend the reserve requirement, banks in small economies suffer from diseconomies of scale, limited investment opportunities (exacerbated by foreign exchange controls which remove accessibility to foreign markets), the need to provision for bad debt because of vulnerability of the economies, volatility of earnings and delinquent client behaviour. The personalized nature of banking practices increase the discriminatory nature of banking relations, in which friends and relatives get privileges above the average client.

Indeed, research findings show that, despite the many problems faced by the banks due to small size and vulnerability, they have higher profits than banks in industrialized countries.\textsuperscript{10} There may be a defense of these higher profits as a buffer to ride out bad times, given the vulnerability of the economies, and the higher risk of destabilization of the financial sector. However, there is room for lowering charges and giving consumers (including producers) a fairer deal, given the importance for development of access to capital at economic rates. The regional reach of most banks in CARICOM countries must lead to unified policies across the region, and similar cooperative behaviour.

Given that, to all appearances, the behavioral problem stems from structural features, and introducing more competitors in the market is unsustainable because of limited size of

\textsuperscript{10} In Stewart et. al 2004, an in-depth study of the banking sector showed that the profitability of banks in the Caribbean exceed that of the industrialized countries by as much as two times.
market, what then is the solution? Many bankers proposed mergers as the way of increasing competition amongst bigger entities, and that this trend has already started with FCIB. Central Banks may also need to factor into their supervisory analysis a balance between solvency of banks to ensure stability in the financial sector, and consumer interests. Since the banking sector is sacrosanct, and only the Central Bank has authority over this sector, it is extremely important that some accommodation be arranged between the Central Bank and the regional and national competition authorities from the very inception of the introduction of the regime since complaints against banks may no doubt be lodged with the competition authorities fairly early.

Concentrations and Potential Abuse of Dominance

Serious concentrations were found in all the economies, particularly in the import/distribution/retail sectors. While the Minimum Efficient Scale (MES) argument certainly provides an important explanation, it was found that many of the owners of dominant firms were descendants of the plantocracy, and distribution of wealth in the society still reflects in large measure the inegalitarian and exploitative history of these territories. MES can partly explain the fact that in the Bahamas and St. Lucia, two supermarkets control the import and retail trade in food. However, the fact that these supermarkets are owned by the white elites, whose families dominated the economy since the colonial period, cannot be explained by the MES argument. In many of the economies, this ownership structure was discerned in the import/distribution/retail sectors, and the dominance of this group created barriers to entry of newcomers. This is why collaboration of small entrepreneurs to import and retail is bringing good competition into the economies by challenging the entrenched incumbents. It could only be made possible through cooperation.

This entrenched wealth has spread its portfolio to the new growth areas linked to the tourism industry, for instance, Tour Operators and Destination Management Companies. This widening of portfolio is now transcending national borders. It is therefore important to have a competition law to prevent barriers to entry from being erected by these dominant
firms. This applies to the retail sector as well, where the present dominant importers and retailers in the national economies could move into other territories and assume a regional dominance. It is necessary to guard against abuse of dominance.

**Cement**

With small size and diseconomies of scale, there are natural monopolies in electricity and water supply, and the production of flour and cement at the national level. While the cement industry was not initially a regional monopoly, it has become so because of the need to achieve minimum efficient scale. Both the Barbados and Jamaican plants were in serious financial trouble at the time of take over by Trinidad Cement Limited. The cement industry in the CARICOM region is now controlled by one firm, Trinidad Cement Ltd. (TLC). The parent company is incorporated in Trinidad and Tobago, and is a joint venture of foreign and local ownership. A multinational firm of Mexican origin, Sierra Trading (Cemex S.A. de. C.V.), owns twenty percent of shares; individual Trinidad and Tobago nationals own 18.75 percent of the company, while the other 61.25 percent is owned by institutions in Trinidad and Tobago.

During the last decade, TCL acquired the Jamaican and Barbados cement plants, that is, Caribbean Cement Company Ltd. of Jamaica and Arawak Cement Company Ltd. of Barbados. In 1996, TCL also acquired majority ownership in Ready Mix (West Indies) Ltd. (RML) in Trinidad, which manufactures and sells pre-mixed concrete. RML in turn, acquired a 60 percent shareholding in Pre-mix and Pre-cast Concrete Inc. in Barbados in 2002. The Group also includes TCL Trading Ltd., incorporated in Anguilla in 1997. Its primary activity is trading in cement and related products, but it also functions as a marketing support for the two cement companies, Trinidad Cement Ltd. and Arawak Cement Company Ltd. TCL has a monopoly in cement production and distribution in the region.

TCL produces 1.5 million tons per annum. Ninety percent of their cement is sold in the English speaking Caribbean, though some is exported to Haiti, the Dominican Republic
and Cuba. By contrast, Venezuela produces 8 million tons and Colombia 9-10 million tons per annum. So while TCL has a dominant market position in CARICOM, it is a small player in the wider Caribbean. The market for cement is open to imports in the region, and there have been anti-dumping cases in Trinidad and Tobago and Jamaica against exporters from Thailand and Indonesia. The findings were that anti-dumping had taken place and the following additional duties applied: against Thailand by Trinidad 152.8 percent and Jamaica, 89 percent;\(^\text{11}\) against Indonesia by Trinidad – 48 percent and Jamaica, there was a preliminary ruling of 56.2 percent but this was reduced to 9.98 percent by judicial review. The management of TCL complained that the judicial review in Jamaica is made by Independent Commissioners who do not seem to understand anti-dumping rules. They also complained that they have to contend with the same importer, a Trinidad and Tobago company, in both markets but must fight the case in each country. They contended that the importer has done damage to the tune of TT$ 30 million. The importer has lost all anti-dumping cases against it. They proposed the establishment of a regional anti-dumping unit that could take care of such cross-regional cases.

The management of TCL argued that imported cement does not have a competitive advantage over regionally produced cement, so long as it is fairly traded. It claims that in Jamaica, there is dumping of cement from Egypt, Argentina, Thailand, China, Indonesia and Russia. It has filed a safeguard petitioned in Jamaica recently. The cement company recommended to the Council for Trade and Economic Development (COTED) of the CARICOM to increase the Common External Tariff (CET) applied in CARICOM to 50-60 percent. COTED complied and that bound rate is now in force. Their argument for so recommending was that anti-dumping institutions are weak in the region.

With dumped cement easily available, it is difficult to convince the public that the price of cement is fair. Interviews with hardware dealers and construction contractors revealed great resentment against TCL. However, one has to view this with caution since the idea of dumping is new in Trinidad and Tobago and not clearly understood by the public. The fact

\(^{11}\) The duty was very high because the cement supply was a distress cargo, in that the ship had problems and had to dock to be repaired. The cement was sold to a local importer at US$19.36 per ton CIF when he price should have been between US$48-54.
that TCL slashed prices drastically to match the price of the dumped cement led to the view
that they were overcharging before, and there is little sympathy for the problematic
situation in which TCL found itself.

Abuse of a Dominant Market Position

Because FDI dominates in these economies, and import dependence is coupled with limited
buyer power because of diseconomies of scale, economic actors in these small economies
are more susceptible to exclusive dealing, tie-ins and refusal to deal. These economies are
technology takers and most licensing contracts between locals and foreign firms contain
tie-ins, and local firms simply accept this as normal. Other examples of unequal contractual
terms are the guaranteed rate of return to the foreign owned electricity company in St.
Lucia, and the exploitative contracts which Cable and Wireless managed to secure in this
region during the 1980s, by which a monopoly was granted even on technology to be
invented. Lack of knowledge of trends in the telecom sector, and lack of capacity to
negotiate in this region explain why the contracts were so unbalanced.

Concentrations in these economies and the close networking of the leading businesspersons
are reflected in the prevalence of interlocking directorates in this region. While there may
be some credence given to the argument that in the micro-economies like SVG, the pool of
skilled persons is very small, this is not the case in Trinidad and Tobago and Jamaica. Yet,
in both of these economies, the phenomenon is evident. With the expansion of firms to
other CSME countries, the incidence of interlocking directorates could assume regional
proportions. Prohibition of interlocking directorates is needed in CARICOM countries,
since this is one of the ways in which the dominant capital holders ensure that their control
of the economies is maintained.

Beer

Rivalry between Heineken brewery in St. Lucia and Carib brewery in Trinidad led to both
firms offering loyalty discounts to retailers to sell only their product, and engaging in other
strategies to bar entry. For instance, Heineken brewery has encountered problems with customs, based on complaints from the Carib brewery, about their labeling. The Carib brewery complained that in St. Lucia, a 1 percent environmental tax was imposed on Carib sold in cans, but other canned drinks, such as Fruta, are not charged this tax. Further, it is alleged that Carib is giving special deals to distributors, which effectively blocks access to Heineken.

Loyalty discounts are distinguished from quantity discounts, the latter not constituting an abuse because it is linked solely to the volume of purchases, while the former has no economic justification and is intended to remove, or restrict the buyer’s freedom to choose her sources of supply. Interviews with supermarkets in Trinidad revealed that Carib Brewery has supplied refrigerators to store and display cold beers, but restrict the use of the equipment to only Carib beer. This could be deemed to be anti-competitive, since consumers are restricted to only cold Carib beers. Indeed, there is a similar case in the EC in which Unilever supplied freezer cabinets to its Irish distributors free of any direct charge on condition that they stock only Unilever products. The Commission ruled that Unilever had abused its dominant market position.

It is clear that these two giants in the beer industry are engaging in conduct that could be deemed to be anti-competitive, and which are affecting intra-regional trade. However, without a law in place in either country, there is little that could be done. When the Community Competition Commission is operational, action could be taken to stop this type of anti-competitive conduct.

Steel

Downstream steel and wire rods producers and hardware suppliers in Trinidad and Tobago have been complaining bitterly about the treatment meted out to locals by the Multinational Corporation (MNC) that owns the steel mill, ISPAT. This steel mill, the only one (1) in Trinidad and Tobago, was owned by the government, and divested to an Indian MNC about a decade ago. The agreement for divestment contains an undertaking that the Steel Mill will
supply the downstream industries to ensure the viability of that sector. However, the downstream industries and the hardware suppliers are complaining that they were being charged prices that were considerably higher than the average world prices for steel.

Prices increased from 27 percent higher than average world prices in January 2002, to 40 percent higher in September and October 2002. Prices started coming down after that, declining abruptly from 35 percent above world prices in December 2002 to 5.5 percent above world prices in January 2003. Matters are made worse by the fact that little notice is given when prices are being changed, and this plays havoc with quotations provided by the downstream businesses to their clients, domestic and regional, and their frequent inability to fulfill order at promised prices. A further complaint is that the trucks are not dispatched as they are filled. Rather, documents are only completed and handed over when all orders for the day have been met, causing vehicles to remain idle for as many as 12 hours on a stretch, increasing cost to the downstream industries. While the anti-competitive conduct is taking place at the national level, and would have to be dealt with by the National Competition Authority, intra-regional trade is affected by this conduct since processed steel products from Trinidad and Tobago are sold throughout the CARICOM region.

The view in the downstream industry is that ISPAT is trying to force closure of the factories, after which it would import the semi-finished products from its Indonesian and Mexican plants or take over the local downstream industry. They have already succeeded in closing one plant. Can ISPAT’s conduct in the Trinidad and Tobago market be considered predatory, given that it could be a strategy to drive out firms in downstream markets, to create a void which it would fill?

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12 Fact sheet produced by the Downstream Steel and Wire Rods Association and submitted to the author during an interview.
**Exclusionary Distribution Contracts**

In CARICOM countries, importers in most cases are also distributors, and in many cases, are retailers as well. The very large importers tend to deal with wholesalers, but can also deal directly with retail outlets. So the lines of demarcation are much diffused, and competition occurs across lines, that is, supermarkets or large retail businesses are importing directly from the US and competing with agents.

The issue of sole distribution is a problematic one in all the territories. Because of the small size of the market, particularly in the micro-economies, exporters have a preference for dealing with a sole importer and distributor, so that container loads of goods can be sent, rather than small consignments. It was the norm in the region to have sole agents for products, but this is eroding in all the territories, primarily because competitors can go to the large distributions houses in Miami and purchase a range of brands.

Interviews in St. Lucia and St. Vincent revealed that, indeed, many distributors are required by their suppliers to have sole importation rights for a brand, and not carry a competitor's brand. This is strictly adhered to by the distributors. They explained that, in addition to economies of scale, the supplier also has security of payment, and credibility with the firms that are handling the product. Suppliers want to be sure that their distributor has the ability to stock the goods, manage the inventory and market the goods properly. There is an arrangement whereby the cost of advertising is split 50/50 between the supplier and the distributor. This is a vertical arrangement from North to South. Relationships tend to be traditional. The importer/distributor carry certain brands of products, and even when better products or prices become available, they tend to remain loyal.

With the trend now of direct buying by retailers at the large warehouses in Miami, sole agents are finding that retailers are importing their agency brands and free riding on their advertisements. For instance, an interview with the M&C Group revealed that Julians, the large supermarket in St. Lucia is bringing in products for which the M+C Group has exclusive distribution rights, such as Proctor and Gable products, and that there is a hotel in
St. Lucia that buys wine and spirits from Martinique, brands for which M+C has the agency.

This practice transcends the North South dimension, and regional distributors also refuse to deal with anyone but their agent in another CARICOM country. Suppliers’ refusal to deal with anyone but the sole importer/distributor is illustrated in a case in SVG in which a retailer tried to source detergent directly from the agent in Trinidad and Tobago, but was refused. He then went to the supplier in Miami, but was refused. The Ministry of Trade in SVG intervened, making contact with the Ministry of Trade in Trinidad and Tobago, and arguing that this is anti-competitive. However, the case was dropped because the retailer was accommodated. In another cross-regional case, the supplier in Trinidad and Tobago of KC Sweets has reprimanded M+C for also carrying sweets from Columbia, according to the interviewee from M&C.

Another case is the supplies to SVG of Nestle products from Trinidad and Tobago. Supplies are sent solely to Bryden and Spratt, a Barbadian company resident in SVG. A year ago, the ECGC (the Government's Marketing Board) got Nestle to ship a container directly to them, since they had been purchasing a container per month through the agent, at great loss. The distributor got very annoyed and took steps to revoke the agreement between ECGC and Nestle, but could not succeed, because the ECGC was importing by the container load and Nestle was willing to supply.

Possible cases of anti-competitive conduct could easily arise in a region where there is no culture of competition. For instance, tickets for cricket games in the region must be made available to nationals of all the MS on an equal basis. It is quite possible that this is not the case, with nationals getting priority for games in their country. There have been two cases in the EC of abuse of a dominant position in the sale of tickets for the Football World Cup games, first in Italy in 1990 and then in France in 1998. It is quite conceivable that similar strategies could be adopted regarding ticket sales for the 2007 Cricket World Cup to be held in the Caribbean.
In the first instance, an Italian travel agency, 90 Italia SpA, had been entrusted by FIFA with the exclusive rights for supply of stadium entrance tickets. The agency was offering tickets linked to travel and accommodation. A Belgium travel agency wanted to offer the same deal, but was refused tickets. The Commission ruled that the Italian agency was economically independent from FIFA, and therefore the offer should have been open to other European agencies. As a result of the agreement, customers had no alternative source of supply for tickets. The agreement was therefore null and void and FIFA was required to make the tickets available to competitors.

In 1998, a French committee held a monopoly in the organizing of the Football World Cup, including the ticket sales. The Commission found that the arrangement made for the ticket sales was discriminatory since it favoured consumers who could provide an address in France. Persons not resident in France were at a disadvantage, and the Commission ruled against the organizing committee, finding that the arrangement constituted an abuse of its dominant position (Monti 1999:124).

4. Implementation of the Competition Regime

Status of Implementation

At present, the CARICOM Secretariat and MS are behind schedule in implementing Chapter VIII. Only two countries have laws and authorities to enforce the law. The process of getting legislation in place has been slow in other countries, primarily because competition law is not seen as a priority, given the serious socio-economic problems faced by all of these countries. Trinidad and Tobago has had a draft law since 1998. A model law has been in existence in the OECS for at least a year, and the CARICOM Secretariat has developed a model law about two years ago for MS to use in developing their national law, but a meeting is yet to be convened to discuss the model law.

According to Article 170(5), within 24 months of entry into force, MS should notify COTED of existing legislation, agreements and administrative practices inconsistent with
the provision of Chapter VIII, and within 36 months, COTED shall establish a programme providing for repeal of such legislation and termination of agreements and administrative practices. The count down of 24 months began in February 2002 with approval by Heads of Government of the Provisional Application of the Revised Treaty pending ratification. The deadline for notification was therefore February 2004, but MS are not in a position to comply. This causes a slippage of the next deadline of February 2005 when COTED was supposed to establish a programme providing for the repeal of such legislation, and termination of agreements and administrative practices.

At the Regional level, Art. 171 requires the establishment of a Community Competition Commission with the Caribbean Court of Justice (CCJ) being the Court of Appeal. Neither institution has been established as yet. Significant advances have been made towards establishing the CCJ, but there are still misgivings in several countries as to the wisdom of relinquishing the Privy Council in the UK as the final Court of Appeal.

Art. 183 (Exemptions) requires COTED to determine where special rules shall apply to specific sectors of the Community. This requires significant gathering of empirical data and analyses in order to make determination of which industries or sectors merit exemption. The process is still to be undertaken by the CARICOM Secretariat.

It is clear that technical assistance is needed for developing the inventories of laws, agreements and administrative practices that are inconsistent with the Chapter, and for identifying which sectors or industries need exemption.

Some Suggestions for Implementation

While MCR has been rejected at the Community level, Barbados’ Fair Trading Act includes MCR, as does Trinidad and Tobago’s draft law. There is merit to revisiting this regional position since clear evidence was found of situations that were abusive of a dominant position, the dominance having been created through hostile take over of the competitor in one case (Belize), and timed to avoid scrutiny by the Fair Trading
Commission in Barbados in another case. In Belize, one country wide bus company allegedly used predatory tactics to run the other five companies out of the market, buying them out when they could not longer survive, and making them sign a commitment not to apply for a country wide bus license for fifteen years. Once the monopoly was obtained, the company then almost doubled the bus fare, causing riots in the street. In the Barbados case, the companies merged just before the passing of the Fair Trading Act in Parliament, thus avoiding the scrutiny that would have come from the Fair Trading Commission. There were protests from down stream users about the merger. It is very possible that intra-regional mergers could have such deleterious effects on competition as well.

In shaping its competition laws, CARICOM countries should have very strong provisions for prohibiting abuse of a dominant market position, because this is the major type of anti-competitive conduct found in most of these economies. While this is the more difficult provision to enforce, and even though the Jamaican FTC has had few cases in its ten years of existence, this should not be a disincentive to having such provisions and aiming to effectively enforce them.

The main constraint, and this was the experience of the Jamaican FTC, was lack of skilled personnel to enforce the law through use of the rule of reason procedure. Caribbean people have the ability to master complex procedures. So the problem is not capability. It is the lack of opportunities to develop expertise because of lack of resources. It is lack of capacity. Added to that, it is very difficult to keep skilled persons because salaries are so low compared to other countries. Brain drain is a major problem that impacts heavily on development potential.

Given these constraints, the regional governments should give priority to the following:

They need to secure sustainable technical assistance for training of lawyers, economists and trade experts on the methodology for applying the rule of reason procedure. Internships or seconded staff from more mature authorities should be arranged to guide staff while gaining practical experience.
Because staff turnover has been an endemic problem in Jamaica and in Latin America and other developing countries, scholarships should be tied to a minimum number of years of service to the government, with a penalty of repayment of all funds expended for the training. Draconian as this may seem, it is the only way that a competition regime can be introduced and implemented with any credibility and sustainability in this region.

A special educative programme should be developed to target the trade associations and dominant local firms in the economies, since the culture of competition is virtually non-existent in most of the economies and firms are largely unaware of the (potential) illegality of their actions. Cartels may be more prevalent in the larger economies within CARICOM: Trinidad and Tobago, Jamaica and Barbados.

Both at the national and sub-regional levels, import and export cartels should be exempt from the application of the competition law, which could be covered by providing exemption for small and medium sized enterprises. This is provided for in the de minimus clause in Chapter VIII of the Revised Treaty of Chaguaramas, but a provision explicitly referring to bulk buying by small enterprises could be included in national laws. Indeed, there is precedent to support this proposal. The United States Virgin Islands Antimonopoly Law provides for exception of such agreements. Article 1505 (Exceptions), Provision 11 exempts:

… the establishment of formal agreements between small entrepreneurs engaged in the retail sale of the same or similar commodities for the purpose of bulk purchase of those commodities in order to meet in good faith, competition of businesses with substantially larger sales volumes. For purposes of this paragraph, the term “small entrepreneur” means a merchant whose gross receipts from all sources in any year cannot reasonably be expected to exceed $250,000 and who will not employ more than 12 persons.

It may be useful to consider the merits of prohibiting vertical integration in some sectors in order to ensure that there are spaces for small entrepreneurs to enter the market, or to
prevent dominant players from crowding out small entrepreneurs, for instance, in the tourism downstream sector. Again, there is precedent in the USVI Antimonopoly law, which prohibits vertical integration in the import, wholesale and retail sectors.

Special focus should be given to rooting out interlocking directorates where competition between the firms could be compromised. This could be politically sensitive because of the smallness of the societies and personalised relationships between government officials and the business elite. However, it is evident that in these societies, a small group of business elites is in control, and organise their relationships to preserve that control. The end result is that it is very difficult for new entrepreneurs to enter markets which they control. Reducing interlocking directorates could help to eliminate anti-competitive means used to control markets.

It is evident that, given the lack of human and financial resources, CARICOM countries need the maximum assistance possible to be able to develop and effectively implement competition regimes at the national and regional levels. Skill training is needed in the following areas in order to implement the provisions of Chapter VIII.

For example, in order to develop national laws (Art. 170 (1) (b)), MS require lawyers with drafting skills and knowledge of laws and experiences in other countries. The Commissions need technical staff with Information Technology skills, Information Systems Management expertise and Public Relations expertise in order to provide information and directives required in Article 170(1)(b)(ii).

In order to implement the law, the Commissions need the following:

- Lawyers trained in CL
- Economists trained in CL and Rule of Reason procedures
- Trade specialists trained in CL
- Accountants trained in CL
- Magistrates, Judges trained in CL
- Police sensitized to CL
- Systems for interface between Regulators and Competition Commission
International trade and economic specialists to evaluate competition in targeted sectors and whether excluding and exemption are needed.

Education of the private sector education in the provisions of the law.

It is clear that a very well formulated programme of technical assistance is required for the region. However, the CARICOM Secretariat is in the process of organizing such assistance. This should include developing capacity to offer courses in competition law at the university, so as to have sustainable training of human resources for the region.

Lessons to be learnt from the Jamaican and other countries’ experiences

Jamaica has had the very unfortunate experience of having a fundamental error in the Fair Competition Act, in that the investigative and adjudicative arms of the Fair Trading Commission were not separated. The FTC was taken to court for breach of natural justice, lost the appeal, and is now in the process of revising the law. Meanwhile, the FTC has been crippled. The lesson to be learnt here is that it is essential to have the draft law vetted by several international experts with experience in implementing the law, in order for legal loopholes and errors to be identified. It is not sufficient for CARICOM lawyers and technocrats to do this job, since there is no one with the necessary expertise and experience in competition law in the region.

The experience of Peru teaches that fines must be set at a high enough level so that large firms can be hurt by them, but smaller firms can survive a fine. At first, in Peru, the fine was set at US$40,000, but this was found to be too low for multinationals in the economy, and the fine was raised. However, the best course to follow is to have a percentage of yearly turnover, or assets (world-wide if that is the geographic market), in order that firms of all sizes are equally punished.

Exemption from the law of small and medium sized enterprises is necessary in small economies. A methodology has to be worked out for defining the threshold, and the EU’s experience should be examined in this respect. The EU Directive relating to exemption of
small and medium enterprise has been revised. It would be important to understand what problems were experienced with the former exemption.

Informed consultation is a very important part of the process, in order to win over stakeholders. This was done, to some extent in Jamaica and it led to some revision of the law. There should be an intensive programme of public education prior to and during the implementation stage of both national and regional competition laws.

The Community Competition Commission is mandated by the Revised Treaty to assist National Authorities in the establishment of their institutions. In fulfilling this task, the Commission should advocate a clear demarcation of responsibilities between the competition authority and other regulatory bodies is essential, or there will inevitably be trouble. In South Africa, after a bitter struggle between the Financial Regulator and the Competition Commissioner over jurisdiction to approve a banking merger, the Court had to decide. It is best to avoid such conflicts by both clearly demarking their jurisdictions and by including mechanisms in the institutional framework for the Regulators to work with the Competition Authority through regular meetings and consultations. It is important to sensitize the regulators to competition law issues.

Barbados provides us with a valuable lesson. The Fair Trading Commission was set up some three years in advance of the passing of the law. Utility regulators were brought into the Fair Trading Commission, and were the initial focus of the work of the Commission. Consumer protection also is part of the Commission’s work. In the meanwhile, the Commissioner proceeded to recruit staff, and get technical assistance to train them in competition law and investigation procedures. By the time the law was passed, the Commission was ready to start operating. It is important to note that by having a tangible Commission and staff, Barbados was able to get technical assistance for training in a way that would have been impossible if they just had a draft law pending approval. Other countries should follow this example.
Jamaica’s experience in the early years of the Commission’s life provides a good example of how important it is to exercise prosecutorial discretion, particularly in choosing the first cases very carefully in order to build the good reputation of the Commission, and win credibility with the private sector and consumers. The Commission in Jamaica chose as one of its first cases, to challenge the Bar Association, claiming that the Canons of Professional Ethics, including restrictions on advertising and fixing of fees, were inconsistent with the Fair Competition Act. The issue got wide publicity and the Commission lost the case, and credibility. The verdict was that the General Council of the Bar Association and the professional ethics that govern the legal profession are not subjected to the Fair Competition Act. It is important to choose cases that are easy to investigate and to win, and that the issues are easily understood by the public and directly affects the pockets of all levels in the society, such as a case against the Baker’s Association for fixing prices.

The need for political independence of the Commission is even more important in small economies, given the ease of access to politicians, and the cronyism between the business and political elites. Governance issues featured prominently in the findings of the interviews, and the possibility of political interference should be considered seriously when developing the institutional framework for the competition regime and the powers of the Commission at the national level.

The Community Commission should ensure that there are built-in measures to require MNCs to cooperate in investigations, both at the regional and national levels. The Zambian Competition Authority had so much trouble getting information from Coco Cola that the government passed a law making it punishable by incarceration if a firm fails to cooperate. They immediately got cooperation, once the law was passed. While this is an extreme example, there must be less draconian means by which MNCs could be persuaded to cooperate.

The task of implementing the competition regime in CARICOM is quite daunting, but MS should direct more attention to this area, since the anticipated benefits to be derived from the CSME could be eroded by private and public enterprises. It seems that because
competition law is so new to the region, not sufficient weight is being given to its value by Member States.

References


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