

2014



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

CARICOM COMPETITION COMMISSION

QUARTERLY REPORT

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TABLE OF CONTENTS

FOREWORD 3

SECTION A: COMPETITION LAW AND POLICY 4

 1. *Article 173 (b) – “promote and protect competition in the Community and co-ordinate implementation of the Community Competition Policy”* 4

 (A) BELIZE..... 4

 (B) SURINAME..... 4

 (C) ALL MEMBER STATES..... 4

 (D) CARICOM SECRETARIAT CSME UNIT 5

 2. *Article 173 (a) – “apply the rules of competition in respect of anti-competitive cross-border conduct”*..... 6

 (A) MODEL RULES OF PROCEDURE 6

SECTION B: CONSUMER WELFARE AND PROTECTION OF CONSUMER INTERESTS 7

 1. *Article 186 – “provide support in the promotion of consumer welfare and protection of consumer interests”*..... 7

 (A) ALL MEMBER STATES..... 7

 (B) CARICOM SECRETARIAT CSME UNIT 8

SECTION C: SHORT ARTICLES 9

 Competition Law and Standardisation in CARICOM 9

FOREWORD

This report highlights the work of the CARICOM Competition Commission (CCC) for the second quarter of 2014, in the areas of competition law and policy and consumer welfare and protection in the CARICOM region. The work of the CCC is guided by the institution's mandate under Chapter VIII of the Revised Treaty of Chaguaramas (RTC). Consequently, the document is structured to highlight, in some cases, the relevant provisions within the RTC that each activity falls under.

The second quarter of this year witnessed several collaborative efforts between the CCC and the CARICOM Secretariat CSME Unit (CSME Unit) as the two agencies continued to work towards developing the competition policy and consumer protection framework in CARICOM. As pointed out in the report, discussions between the two agencies revolved around the role of the CCC with respect to the CARREX and the development of an optimal model for cross-border consumer protection in the region. Regarding the latter, a technical paper has been prepared by the CCC and the results will soon be circulated to Member States for comments.

The CCC also took the opportunity during the review period to engage with Member States and provide technical assistance where needed. The extent of technical assistance provided, however, was largely dependent on the finances available to the CCC.

Going forward the CCC expects that the level of engagement with Member States will increase as more funding becomes

available. With this expectation in mind, we are currently preparing ourselves to provide technical assistance and capacity building programmes in competition law for Guyana and Trinidad and Tobago. The latter country has recently appointed the Commissioners for its national competition authority.

Finally, the CCC would like to remind readers that we welcome research papers or working documents pertaining to competition law or consumer protection law in the CARICOM region. It is hoped that future reports can provide a platform for such research so that the understanding of competition law and consumer protection law in the region can be broadened.

For information on how your work can be featured in one of our future quarterly reports kindly contact admin@ccc.sr.

Dr. Kusha Haraksingh
Chairman
CARICOM Competition Commission

SECTION A: COMPETITION LAW AND POLICY

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

(A) BELIZE

Belize has made a commitment to fulfil of its obligations under Chapter VIII of the RTC. In doing so, with funding under the 10th EDF programme, the **Belize Competition Project** commenced with the aim of addressing areas that are essential to the establishment of the country’s competition policy framework. These areas include: enacting a national competition law; addressing human resources constraints; establishing a national competition authority; and developing a competition advocacy programme.

During the second quarter of 2014, the CCC continued to work closely with Belize by providing technical assistance to the staff of the **Belize Competition Project** in order to fulfil its mandate.

(B) SURINAME

PARTICIPATION IN INVESTOR FORUM HOSTED BY THE SURINAME CHAMBER OF COMMERCE (KKF)

On 29 April, 2014, representatives from the CCC were invited to participate in an investor forum held by the Suriname Chamber of Commerce. The aim of the investor forum was to introduce a delegation of investors, businessmen, and trade officials from India to suppliers and investors from Suriname.

The CCC was able to provide information on community competition law and policy to the prospective investors from both Suriname and India. There was also some interest shown from the delegation from India on the status of the enactment of Suriname’s competition law and the establishment of its national competition authority.

(C) ALL MEMBER STATES

QUESTIONNAIRE ON PROGRESS TOWARDS MEETING COMMITMENTS UNDER THE EPA

The CCC responded to a request from a consultant reviewing CARICOM’s progress in meeting its commitments under the Competition Chapter (Articles 125-130) of the CARIFORUM-European Union Economic Partnership Agreement (EPA).

The CCC identified and suggested areas where technical support could be provided by the European Union under the EPA.

DEVELOPMENT OF A PROJECT PROPOSAL FOR FUNDING AN ADVOCACY PROGRAMME FOR COMPETITION IN THE CSME

The CCC is in the process of drafting a funding proposal for international development partners, such as the United Nations Conference on Trade and Development (UNCTAD), to support the work of the CCC's advocacy programme in the CARICOM Single Market and Economy (CSME). The expected budget for the programme is still being completed, after which the draft proposal will be submitted to the Commissioners for approval.

It is anticipated that the proposal will be utilised as the basis for future requests for funding from other international development partners.

DEVELOPMENT OF PRODUCT MARKET INDICATORS (PMI) FRAMEWORK FOR CARICOM

The CCC is currently working towards developing Product Market Regulation Indicators (PMRIs) for the Member States of CARICOM. Essentially, the PMRIs are statistics that could be used to measure the extent to which policies promote or inhibit competition in the product markets of Member States. The development of the PMRIs would involve converting qualitative information on the economic and administrative policies that may influence competition in national product markets of Member states, into quantitative data that can be easily analysed.

At this point the CCC has drafted a survey instrument to be used to collect information on the economic and administrative policies in Member States. Feedback on the instrument has been sought from the Barbados Fair Trading Commission and Jamaica Fair Trading Commission.

(D) CARICOM SECRETARIAT CSME UNIT

REQUEST FOR ASSISTANCE IN REVIEWING COMPETITION AND CONSUMER PROTECTION CHAPTERS OF THE CSME MANUAL ON PROCEDURES

The CCC responded to a request from the CSME Unit to provide support to consultants that are contracted to revise the "*Procedures Manual for the Implementation of the CSME*". The Manual was first published in 2002.

The CCC updated the Community Competition Policy and Community Consumer Protection chapters of the Manual to reflect its operational experiences and procedural rules.

The Manual will now reflect a more up to date perspective on developments in competition law and consumer protection policy in the region after 2002.

COLLABORATION WITH THE CSME UNIT ON COMMUNITY MERGER CONTROL REGULATIONS

In 2011, the Council for Trade and Economic Development (COTED) endorsed the extension of the Community Competition Rules under Chapter VIII of the RTC to include a policy for mergers and acquisitions. The Meeting also approved the reconstitution of the Competition Task Force to refine the policy and to prepare rules for the control of mergers and acquisitions in the CSME.

The reconvened Task Force met in January, 2012 with the primary focus of developing the documentation regarding the policy and rules framework for mergers and acquisitions in the CSME. A further meeting of the Task Force is scheduled for the third quarter of this year.

In preparation for the upcoming meeting the CCC prepared a preliminary review of the current status of merger control provisions in the national competition laws of CARICOM Member States. This was with the aim of collaborating with the CSME Unit to advance work on the incorporation of the Community Merger Control Regulations into the RTC.

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

(A) MODEL RULES OF PROCEDURE

As indicated in the previous report, the CCC envisions that in the future the competition enforcement procedures in CARICOM will be harmonised. As a result of this vision, the CCC has completed work on a draft Model Rules of Procedure. The Model Rules will serve as a template from which national competition agencies may fashion their own rules of procedure.

SECTION B: CONSUMER WELFARE AND PROTECTION OF CONSUMER INTERESTS

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

(A) ALL MEMBER STATES

CCC PROPOSAL ON AN OPTIMAL MODEL FOR CROSS-BORDER ENFORCEMENT OF CONSUMER PROTECTION ISSUES IN CARICOM

Consumer protection laws prohibit conduct by business enterprises that serve to exploit consumers as well as protect them from harmful goods. Additionally, National Consumer Organisations (NCOs) provide a place where consumers can seek redress. However, the consumer protection laws and NCOs that exist in the Single Market are national in scope and do not consider the “regional consumer” or cross-border enforcement. Based on this background the CCC reviewed three models for cross-border consumer protection enforcement for CARICOM with the aim of finding an optimal model that is best suited to the circumstances of CARICOM Member States. The models were assessed on the basis of five objective criteria. The results of the analysis will be made available to Member States for their consideration and feedback before being presented to COTED.

APPLICATION AND ENFORCEMENT OF QUALITY STANDARDS FOR CONSUMERS AND BUSINESSES

Article 186.1(c) RTC and Article 186.1(j) RTC provide a mandate for the CCC to promote standards within the Single Market. As a result of this mandate, in May 2014 the CCC engaged with representatives from the CARICOM Regional Organisation for Standards and Quality (CROSQ) to discuss:

- (i) The issue of the benefits of quality standards for consumers; and
- (ii) The implementation of a quality infrastructure in the CSME.

The CCC also drafted a paper on the relationship between competition law and standards. The paper argues that because of connection between the two disciplines the need for a formal relationship between the CCC and CROSQ is needed.

The two organisations expect to continue regular discussions with a view to coordinating the achievement of their respective mandates under the RTC with regard to business facilitation, competition and consumer protection.

(B) CARICOM SECRETARIAT CSME UNIT

The Seventh CARICOM Meeting on Consumer Affairs was held in Jamaica under the auspices of the CSME Unit from 24-25 April, 2014. The objective of the meeting was to revisit the CARICOM Rapid Alert System for the Exchange of Information on Dangerous Goods (CARREX) in terms of its structure, scope (e.g. whether or not it would be for only non-food items), and to look at mechanisms for collaboration between CARICOM and other institutions such as the OAS.

The CCC participated in the meeting in order to obtain a clear understanding of the role Member States and the CSME Unit had envisaged for it in the CARREX. At the meeting the CCC also proposed several functions that it can fulfil with the view of ensuring that the CARREX works effectively.

SECTION C: SHORT ARTICLES

Competition Law and Standardisation in CARICOM

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INTRODUCTION

Many private business enterprises and public institutions around the world use and participate in the development of standards. A standard is basically an agreed set of characteristics of a particular good or service. As a process, standardisation (or standard setting) involves defining the technical or quality requirements with which current or future products, production processes, services or methods may comply. The adoption of standards by market players is also usually a voluntary procedure that is coordinated by an independent standard setting organisation.

Over the years standardisation has continued to play an increasingly significant role in the global economy and the benefits of standards are considered to be wide-reaching in both scope and form. At the national level, the role of standards is four-fold and directly related to productivity². In particular, standards protect the safety of consumers through adequate and consistent quality of goods and services; facilitate international trade by providing a common platform for market players; enhance the interoperability of technologies and processes; and facilitate technological change and economic development by reducing information asymmetry³. Essentially, standards therefore form part of the knowledge economy that underpins industries and the society as a whole. They promote the adoption and dissemination of new technologies among companies while at the same time developing competitive markets.

¹ The views of the author are his own and do not necessarily reflect those of the CARICOM Competition Commission. To provide comments on the paper please contact researcheconomist@ccc.sr.

² See Standards Australia (2007).

³ Several national studies have empirically demonstrated that standardisation contributes positively to economic growth and labour productivity. Such studies were conducted on Germany (2000 and 2010), France (2007), UK (2005), Australia (2007), Canada (2007), and New Zealand (2011).

At the corporate or firm level, standards also have several benefits. For most companies standardisation provides them with greater control over safety-related problems; helps them optimise compliance with regulations; ensures high-quality supplies; increases the level of customer confidence in their products; and enables them to anticipate future market requirements in their own particular sector⁴. Standards are also perceived by some companies as a top-level business strategy. As such, like investments in any other industrial project, voluntary standards involve a form of risk-taking and are expected to generate profit for the company⁵.

It is important to mention, however, that although beneficial to the economy, business enterprises, and the society as whole, the inappropriate use of standards can also lead to potential loss of competition in product markets and create technical barriers to trade (TBT). The potential loss of competition in product markets can impact negatively on consumers through higher product prices, lower quality goods or reduced options of goods to choose from. It therefore stands that when used improperly, the aforementioned role of standards of protecting consumers can ultimately prove to be unattainable. It is therefore essential that the process of developing standards is monitored to minimise any risk of infringing competition rules both at the national and regional levels, and to maximise consumer welfare.

The objective of this article is to briefly highlight the important relationship between competition policy and standardisation. It is anticipated that by outlining the relationship between these two specialised areas, a clear rationale will be established for collaboration between the CARICOM Competition Commission (CCC), which has enforcement powers regarding competition law as well as defined mandates with respect to consumer protection in the region, and the CARICOM Regional Organisation for Standards and Quality (CROSQ).

STANDARDS IN CARICOM

At the regional level, CARICOM has recognised the crucial role of standards and the process of standardisation. The legal framework for the current CARICOM standardisation system is laid down in Chapter IV of the Revised Treaty of Chaguaramas (RTC), specifically Part III, which addresses Common Supportive Measures. In addition, CROSQ was established in 2000 to facilitate the development of regional standards, promote the

⁴ See ISO (2014). “*The Economic Benefits of Standards*”

⁵ Miotti, H. (2009), “*The Economic Impact of Standardization: Technological Change, Economic Growth in France*”. Also see ISO (2014). “*The Economic Benefits of Standards*,” which suggests that standards contribute 0.15 and 5 percent of the annual sales revenues of companies surveyed.

harmonisation of metrology systems, and support the sustainable production and trade of goods and services in the CARICOM Single Market and Economy (CSME)⁶.

Since the establishment of CROSQ there has been a constant expansion of the portfolio of CARICOM standards. A CARICOM standard is the harmonisation of the standards of several CARICOM Member States. The harmonisation of standards is the process of establishing a common CARICOM Standard either from the standards of Member States or from international standards adopted, or adapted, and approved by CARICOM Member States. The overarching purpose of this harmonisation is to increase intra-regional trade by reducing TBTs. To date, there are 39 CARICOM standards that exist, of which 23 or 59 percent are related to food items. Other CARICOM standards that have been developed relates to management practices, codes of practice for tour guides, tour operators and tourist accommodation, and labelling standards for tobacco products and aerosol insecticides, among others.

Given that standards are trade enhancing, they are considered as powerful tools for Small and Medium-sized Enterprises (SMEs). The application of quality systems and practices by SMEs ensures the consistent production of goods and services that are acceptable to consumers. Standards are particularly vital to SMEs as they remove many of the obstacles that would otherwise hinder their entry into and expansion within a market. SMEs can therefore benefit greatly from understanding, accessing and using standards, as well as actively participating in and influencing their development⁷. The importance of standards to SMEs in CARICOM is particularly essential to note since approximately 94 percent of enterprises in the region are categorised as SMEs⁸.

STANDARDISATION AND COMPETITION LAW

Competition authorities recognise that standards are generally pro-competitive as they can accelerate the implementation of new technologies, facilitate entry of suppliers in

⁶ For more information on CROSQ see <https://www.crosq.org/index.php/home/the-organisation>

⁷ See European Commission (2012), “Using Standards to Support Growth, Competitiveness and Innovation” available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fec.europa.eu%2Fenterprise%2Fpolicies%2Fsme%2Fregional-sme-policies%2Fdocuments%2Fno.2_sme_standards_en.pdf&ei=5THFU5jWN-u-sQT8pYGIAw&usg=AFQjCNGna4bAVanqovQzxBBWVgREO1wkug&bvm=bv.70810081.d.cWc

⁸ World Bank Group (2013), “*Mapping Enterprises in Latin America and the Caribbean*” available at http://www.enterprisesurveys.org/~/_media/GIAWB/EnterpriseSurveys/Documents/Topic-Analysis/Mapping-Enterprises-LAC-Note2.pdf

product markets and reduce information costs⁹. However, the standardisation process is not without antitrust risk since it often involves communication, deliberation and most importantly agreement among competitors¹⁰. Competition authorities are therefore cautious of standard setting agreements among competitors as they raise traditional concerns regarding coordination or collusion and the distortion of competition in product markets.

There are several ways competitors can coordinate during the standardisation process which could potentially result in the distortion of competition in product markets. For instance, market players could manipulate standards in order to facilitate the exclusion of goods and service providers of potential competitors. Additionally, some professional associations use “rules” to prohibit entry to a market from competitors and to promote coordinated high prices. These associations claim that competitive price pressures would have an adverse effect on quality, thereby reducing public safety. For example, in *National Society of Professional Engineers v. USA*, the Supreme Court deemed illegal the “Code of Ethics” provisions that prohibited competitive bidding among professional engineers. The association claimed that competitive price to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare¹¹. The Supreme Court pointed out that the engineers’ attempt to justify their restraint “on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the US Sherman Antitrust Act”.

Besides constituting an agreement between competitors, standardisation could also potentially lead an abuse of a dominant position if they result in excessive pricing. Most competition laws prohibit business enterprises in dominant positions in product markets from directly or indirectly imposing unfair purchase or sell prices or other unfair trading conditions. Therefore, a business enterprise that owns intellectual property rights to technology incorporated in a standard may possess significant market power, potentially fostering anti-competitive conduct such as demanding excessive royalties or licensing terms from licensees that adhere to the standard. Such situations often are called patent hold-ups. Competition authorities may treat excessive royalties charged by a licensor holding a

⁹ Wilkinson, L., and Kucerik, B. (2010), “*Standard-Setting and Anti-trust*” available at <http://www.weil.com/files/Publication/300f2734-1671-4b84-83c5-3386a4f2b5ca/Presentation/PublicationAttachment/f6cf91ef-17dc-44c1-9162-3676cc8c8987/Standard-Setting%20and%20Antitrust%20-%20TPL%20Feb%202010.pdf>

¹⁰ OECD (2010), “*Policy Roundtable: Standard Setting*” available at <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/47381304.pdf>

¹¹ See 435 U.S. 679 (1978) pp. 684-685.

dominant position as excessive pricing employed by a dominant firm and hence as an infringement of competition law.

On the contrary to patent hold-ups, joint negotiations among licensees could also lead to a serious anti-competitive exercise of buyer power. In this case the negotiations would be primarily aimed at depressing the royalty prices charged by licensors for gaining access to essential intellectual property rights. Such situations are called reverse patent hold-ups and they reduce the future incentive for investment in research and development of patent holders. Consequently, consumers are deprived of future consumption opportunities¹².

Another anti-competitive concern which is related, to patent hold-ups is called patent ambushing. This occurs when a business enterprise participating in the standardisation process hides the fact that it holds essential intellectual property rights incorporated in a standard. A patent ambush prevents competition on its merits since during the standardisation process multiple technologies may compete for incorporation into the standard. However, as a result of the ambush, crucial information on the cost of one of the technologies is intentionally hidden. Disclosure occurs once industry has adopted the standard and the business enterprise can charge a monopoly price which it would otherwise have been unable to charge¹³.

ROLE OF THE CARICOM COMPETITION COMMISSION REGARDING STANDARDS

The CCC obtains its mandate from Chapter VIII RTC. Part One of Chapter VIII RTC relates to the Community Competition Policy and provides the CCC with enforcement powers to prohibit cross-border anti-competitive business conduct. Specifically, Article 174 RTC provides the CCC with the power to investigate, monitor, detect and make determinations or take action to inhibit and penalise business enterprises whose conduct prejudices trade or prevents, restricts or distorts competition within the CARICOM Single Market and Economy (CSME).

Based on the previous section there are two important possible applications of the Community Competition Policy to standardisation agreements. First, standardisation agreements that constitute cross-border anti-competitive business conduct in the form of

¹² Mariniello, M. (2013), "European Antitrust Control and Standard Setting", Bruegel Working Paper 2013/01

¹³ Schellinghouth, R. (2011), "*Standard-Setting from a Competition Law Perspective*", Competition Policy Newsletter, No.1

horizontal agreements between competitors would be prohibited under Article 177 RTC. Second, standards that lead to an abuse of a dominant position in a product market, such as “unfair” selling prices, would be prohibited under Article 179 RTC.

The RTC also recognises the relationship between competition law and policy and consumer protection law. In this regard, Part Two of Chapter VIII relates to the Community Consumer Protection Policy. However, unlike Part One, the RTC does not provide the CCC with enforcement powers in this area. Instead, the main responsibility of the CCC is as an advocate for consumer rights in the region.

With regards to standards in particular, Article 186.1(c) RTC and Article 186.1(j) states:

“1. The Commission shall, for the purpose of providing support to the Member States in the enhancement of consumer education and consumer welfare:

(c) Promote in the Member States product safety standards as part of a programme of consumer education in order to assist the consumer to make informed choices concerning the purchase of consumer goods;

(j) Promote, after consultation with the competent standardising agency and other public and private agencies or organisations, the establishment of quality standards for consumer products.”

The language in Article 184.1(j) RTC in particular is very instructive as it points to a presumption of a joint promotion of standards within the CARICOM region by the CCC and CROSQ. In this regard, Article 184.1(j) RTC provides a basis for a formal relationship between the two agencies.

WAY FORWARD FOR THE CARICOM COMPETITION COMMISSION

Although the Community Competition Policy can be applied to situations where standards lead to an abuse of a dominant position, the CCC is less concerned with this possibility. This is due to the fact that most standards that exist in CARICOM Member States are adopted from international agencies such as the International Standardisation Organisation (ISO). As such, at the regional level, the probability of patent hold-ups, patent reverse hold-ups, or patent ambushing is very small.

On the other hand, the CCC acknowledges that standards are already being used as a reason to fix prices or fees among competitors in the CARICOM region, as well as to exclude or disadvantage potential competitors in product markets. For instance, at the

National Competition Policy Seminar held in Saint Lucia in December 2013, representatives of trade associations that attended referenced the use of standards as a justification for fixing the prices of the products of their members. Also, in Barbados two reports were written by the Barbados Fair Trading Commission (BFTC) on fee setting by professional associations. The national association of engineers thought that the BFTC's intervention was a problem as they needed pricing standards to keep the industry "safe". The CCC is sure that in addition to Saint Lucia and Barbados the practice of creating "rules" to deter entry to a market from competitors and to promote coordinated high prices occurs in other CARICOM Member States as well.

As the CCC continues to work towards developing the competition culture in the CARICOM region it is therefore critical that the business community be educated on the potential anti-competitive effects of standardisation. This *ex ante* approach follows the old adage that "prevention is better than cure". In other words, it is better if the CCC can prevent abuses of the standardisation process from occurring in the first place, or continuing, through the education of the regional business community rather than have individual antitrust cases coming onto its radar. In this regard, the CCC has dedicated itself to including the potential anti-competitive effects of standardisation as part of its advocacy programme. Additionally, the CCC will work with the national competition agencies that are already established, as well as those that will soon be established, to address the issue of using standards as an exclusionary practice.

It is also recognised that there sometimes exists a "grey area" where the boundaries of competition law and other policy tools for maximising consumer welfare, such as standards, intersect. This "grey area" arises particularly when the other policy tools are extraordinarily complex. Given that Article 184.1(j) provides for collaboration between the CCC and CROSQ as it relates to the promotion of standards, it is therefore imperative that the two agencies develop a firm strategy for implementing this mandate. Central to this strategy should be regular dialogue between the CCC and CROSQ on the CARICOM standardisation process to minimise antitrust risks, as well as the inclusion of the CCC in educational programmes (i.e. both the business community and consumers) on standards conducted by CROSQ.

For further information about the work of the CCC, please contact admin@ccc.sr with your questions or use the query facility on www.caricomcompetitioncommission.com. In addition, if there are any queries on CARICOM Standards please contact CROSQ at <https://www.crosq.org/>.