The CARICOM Competition Commission as a Regional Institution

By:

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The CARICOM Single Market and Economy (CSME) is a regional initiative of the Caribbean Community (CARICOM)[1]. It aims to deepen the economic integration among these countries to better respond to the challenges and opportunities of globalization. The integration efforts include removing restrictions to the free movement of goods, services, persons, capital, and technology and the right of CARICOM Nationals to establish a business in any participating country.

Chapter VIII of the Revised Treaty of Chaguaramas of 2001(Treaty) envisages an efficient CSME whereby measures undertaken by the national government do not hinder intra-regional trade and commerce or have an anti-competitive effect on the overall regional economy. The Treaty, therefore, established the CARICOM Competition Commission (Commission) to (a) prohibit anti-

competitive cross-border business conduct; (b) promote and maintain competition and coordinate the implementation of the Community Competition Policy within the CSME, and (c) promote consumer welfare and protect consumer interests.

This article highlights the benefits the CSME region enjoys for having a regional competition framework and the challenges faced by the Commission in meeting its mandate. It also presents some strategies which the Commission used to overcome these challenges.

1. Opportunities for a Regional Competition Authority in the CSME

The CSME stretches from the island of Jamaica in the north to Guyana and Suriname on the north coast of the South American mainland. It also extends from Belize in the west of Central America to Barbados, which is the most easterly of the islands. Given the geographical scope of the CSME, there are many benefits to having a regional competition authority to coordinate competition enforcement and market surveillance activities in the region.

a. Shared Enforcement and Market Surveillance Activities

Ensuring that anti-competitive cross-border business conduct does not frustrate the benefits of the CSME requires effective cooperation between the Commission and the national competition authorities in the region. Article 170 of the Treaty mandates the CSME Member States to:

- Enact national competition laws;
- Establish and maintain a national competition authority to facilitate the implementation of the rules of competition;
- Co-operate with the Commission in achieving compliance with the rules of competition;
- Investigate any allegations of anti-competitive business conduct referred to the authority by the Commission or another Member State; and
- Co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct and the exchange of information relating to such conduct.

The Treaty also outlines how cooperation between the Commission and the national competition authorities on competition enforcement should take place. Under the Treaty, cooperation is initiated in two ways:

- Consultations between the Commission and the national competition authority(ies) regarding jurisdiction when a cross-border competition matter arises, and
- When the Commission requests a national competition agency in a CSME Member State to undertake a preliminary investigation when it believes anti-competitive cross-border business conduct is occurring.

Further, to encourage greater cooperation amongst the competition authorities in the region, the Commission established and has chaired the CARICOM Competition Network (CCN) since 2016. Through this platform, the competition authorities in the region tackle several issues relating to competition, including:

(i) General competition policy (i.e. the administration of Chapter Eight) through:

- The development of a formal referral mechanism of cases from the national competition authorities to the Commission.
- Harmonized investigation procedures through the use of case studies.

(ii) Research and market studies by:

- Identifying sectors of importance for market studies or competition assessments.
- Developing common methodologies to ensure the market studies are conducted in a consistent manner in each country and the results are comparable.
- Sharing research experiences.

(iii) Capacity building from international agencies by:

- Identifying training needs and develop proposals to facilitate the training.
- Entering discussions with third parties on the areas of training identified.

b. **Enhanced Detection of Anti-competitive Business Conduct**

Detection of anti-competitive conduct is a major challenge facing competition enforcement within the CSME. This is due to inadequate human and financial resources and the high cost of investigating cross-border anti-competitive conduct. The problem is more acute for the Commission as the institution is sometimes located far from the origin of the anti-competitive business conduct or its effects.

An effective regional competition framework, therefore, offers an opportunity for coordinated investigations by the enforcement agencies. Through the CCN, the competition authorities can notify other members of anti-competitive business conduct detected in their jurisdictions. This alerts the other CCN members to conduct which might occur by the same firm(s) in their countries.

The Commission also established and chairs a Regional COVID-19 Steering Committee (Committee) comprised of national competition and consumer protection authorities in the CSME. The Committee oversees a Regional COVID-19 Action Plan, also developed by the Commission in collaboration with the Committee Members, which contains strategies for national competition and consumer authorities in the region to follow during the pandemic. These strategies are centred around the following three pillars:

(i) Monitoring: This pillar would see the activation and/or creation of online portals for regional monitoring of key products and services and interagency collaboration on mechanisms.

(ii) Advocacy: Encouraging businesses and consumers to report misleading advertising and excessive pricing. Significant collaboration with relevant authorities to issue public advisories and to warn against negative trade practices.

(iii) Enforcement: Competition and consumer agencies are encouraged to be firm and steadfast in taking action to minimize instances where competition and consumer welfare is harmed.

The next section addresses the challenges the Commission has faced over the years. It does not include COVID-19 since the pandemic presents cross-cutting issues relating to the existing challenges.

2. Challenges of a Small Regional Authority

While there are many benefits to having a regional competition authority in the CSME, several challenges also exist that continue to hinder the regional authority from fulfilling its mandate under the Treaty. Unlike other global, regional competition systems, the Treaty does not create a system of direct applicability of regional decisions. This means that the CARICOM region does not have a system of community competition law. Its Members meet as autonomous national sovereigns and agree to policy mandates for execution by their individual Parliaments. No Community decision has the force of law unless and until the national Parliaments transform this into national law. This system retains the supremacy of national sovereignty but significantly constrains the ability for decision making by regional institutions and intervention, since regional enforcement can only occur through national legislation.

a. Lack of competition frameworks in some Member States

To date, only 4 of the 13 active CSME Member States have enacted national competition laws and established national competition authorities, namely Barbados, Guyana, Jamaica and Trinidad, and Tobago. Of these, the Barbados Fair Trade Commission is a mixed regulator, also addressing utility regulation; the Guyana Competition and Consumer Affairs Commission addresses both competition and consumer matters, while the Jamaica and Trinidad and Tobago Fair Trade Commissions address competition matters only.

Absence of national competition frameworks in the remaining 9 Member States represents a critical jurisdictional constraint on the Commission's effective functioning. The Treaty requires the Member States to enact national competition laws and establish national competition authorities as the conduits through which the Commission's jurisdiction can be invoked and applied in the Member States. Without the required national competition frameworks, the Commission has little, if any, jurisdiction to independently enforce the 'rules of competition' in those Member States without the necessary legislation.

b. Lack of cooperation agreements with sector regulators

Access to information collected by national sector regulators is important to the Commission when it conducts competition assessments. However, the Treaty

itself is silent on the obligation of sector regulators to co-operate with the Commission. In turn, most sector regulators in the region do not have the legislative provisions which allow them to co-operate with the Commission, such as the ability to enter a Memorandum of Understanding. Without the required legislative amendments on both a regional and national level, the Commission is restricted from accessing relevant information from national sector regulators for competition assessments.

c. Jurisdictional Conflicts

The Treaty assigns jurisdiction over cross-border anti-competitive business conduct to the Commission. However, tension is created if the Member States impacted by cross-border anti-competitive business conduct exempt particular activities in their national laws from competition law as a whole or from a referral of the matter to the Commission. By taking individual enforcement action on matters which may have a cross-border anti-competitive effect, national competition authorities:

- Undermine the implementation of the regional competition policy;
- Limit the Commission's ability to make determinations as they may conflict with those of national authorities; and
- Leaves enforcement gaps in other jurisdictions impacted by the anti-competitive business conduct.

d. Budgetary Constraints

Budgetary constraints are a constant challenge for the Commission. The CSME Member States fund the recurrent operational expenses of the agency. Unfortunately, the Commission has experienced delays in receiving funds from the Member States over the years. This is mainly due to the different budgeting cycles and fiscal difficulties of the countries and natural disasters to which the region is prone and an unwillingness to provide approvals of budgets that would see the Commission staffed appropriately and able to undertake key projects for enabling surveillance and enforcement. This has led to insufficient funds to conduct regional market studies, undertake staff training and build a regional competition culture to the extent necessary to build a strong competition culture.

e. **Need for a Stronger Competition Culture**

The lack of competition legislation by so many CSME Member States has resulted in the region having a weak competition culture, which directly influences the number of complaints received and cases handled by the Commission. Many businesses in the smaller Member States in the region do not understand competition law or what business practices are anti-competitive. In 2013, the Commission conducted a survey of businesses in Saint Lucia, and 67 percent admitted that they were uncertain or did not understand the basics of competition law. Moreover, 71 percent did not know what conduct is anti-competitive, while 89 percent were unaware of, or were uncertain about, the existence of the Commission. If these statistics reflect the level of awareness about competition law and the Commission in the wider region, it explains the low volume of complaints received by the Commission. This is balanced against businesses of the larger Member States and international conglomerates who, being possessed of the knowledge of competition law and policy, wield the strength of finances and considerable size to influence and/or delay national and regional decision making against the implementation of systems which may lead to stronger monitoring of the market – namely a strong capture effect.

f. Lack of Merger Control

The Treaty does not contain merger control provisions. However, the Member States recognize that an effective merger control regime is a necessary requirement for the functioning of the CSME. Given the importance of merger control within the competition law and policy framework, the Member States endorsed the development of a regional merger control policy. However, until this policy is developed and becomes a provision within the Treaty, the powers of the Commission are limited in the area of merger control.

3. Strategies to Overcome the Challenges

As the Commission continues to prove its relevance as a regional institution in the CSME and as a competition authority, it became necessary to develop strategies to alleviate the challenges it faces. In 2019, the Commission drafted its first three-year strategic plan to better position the Commission to execute its Treaty mandate. This is especially during the on-going COVID-19 pandemic.

This section highlights a few of the strategies implemented.

a. Lack of Competition Frameworks in some Member States

The Member States recognize the need for national competition legislation and authorities. At the Eighteenth Special Meeting of Conference of Heads of Government (CHOG) the Member States agreed to amend constitutional documents, namely the Treaty, to enable the Commission to act as a national competition commission for Member States without a national commission, whilst retaining its parent and main role as a regional competition authority. Consultations and preparatory work have commenced to develop the framework for the Commission to act in this dual role. For this initiative to be successful, however, the Member State must enact national competition legislation that will recognize the Commission as its national regulator and provide the national legal framework through which the Commission can act.

b. Lack of Cooperation Agreements with Sector Regulators

In its 2020-2022 Strategic Plan, the Commission identified building closer relationships with sector regulators as one of its strategic goals. To support this effort, the Commission has convened discussions with sector regulators to develop a cooperation framework with these institutions that revolve around areas of mutual interests, such as joint training programmes and non-confidential information sharing. The Commission has also drafted cooperation agreements to bolster these discussions and provide a basis for collaboration.

c. Budgetary Constraints

Instead of relying solely on Member State contributions, over the years, the Commission has sought the assistance of its international development partners to provide capacity building for its staff and regional stakeholders. A good example of this is the two capacity-building workshops held jointly by the Commission and the US Federal Trade Commission in 2019. The first workshop sensitized government officials in the OECS sub-region on competition law and policy basics, while the second was for case handlers in competition authorities in the region on merger assessments. The Commission has also committed from 2020 to 2022 to operate on "least spend" budgets that focus on policy enhancement and institutional strengthening to provide Member States the

room to consolidate legislative positions for full operations.

d. Policy Review

The regional policy is currently under review, with new areas such as merger control and the dual role of the Commission to be finally completed and approved, and consequential legislative and Treaty amendments drafted and enacted. The Commission is actively involved in the development of these policies.

e. Need for a stronger competition culture

Since its establishment, the Commission has strived to create a strong competition culture within the CSME through competition advocacy. The Commission uses several competition advocacy methods to raise the awareness of competition law and policy in the CSME and its benefits, including newspaper articles and publications on its websites and in-country training workshops.

Regarding the workshops, the emergence of the COVID-19 pandemic has restricted the Commission's ability to conduct these activities. This has led the Commission to move its training online and develop online modules on competition law and policy, which is expected to sensitize more stakeholders than its in-country training programme.

Conclusion

The Commission remains a key institution in support of the CSME by prohibiting anti-competitive cross-border business conduct. The institution also plays a critical role in coordinating the region's competition enforcement and market surveillance activities, particularly during the COVID-19 pandemic which has led to diminished resources. However, as a small regional institution, the Commission is confronted with several challenges that must be circumvented to allow its effective functioning as a competition authority. As such, the Commission has maintained flexibility and creativity in its approach, adopting "light touch" enforcement and surveillance of the market, focusing only on critical areas of import. It is actively working with its Membership to provide a stronger platform through which both national and regional competition

enforcement can be effectively executed.

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[1] There are 15 Member States namely Antigua and Barbuda, Barbados, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad & Tobago. However, only 13 Member States actively participate in the CSME and are financial contributors to the CARICOM Competition Commission (Bahamas and Haiti are not yet fully participatory)

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