COMPETITION POLICY:
IMPLICATIONS FOR CARICOM
SINGLE MARKET AND ECONOMY

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Introduction

The Caribbean Community is faced with a dilemma. The dilemma is that on the one hand Caricom must create, promote, and support economic scale enterprises which can face the consequences and meet the challenge posed by trade liberalisation and globalisation. The consequences and challenges include defending domestic markets and entering, competing, maintaining a presence and expanding market share in the global market place. On the other hand there is the need for competent intervention in markets to protect competition, to preserve market space for small and micro enterprises, to protect consumer interests and to defend the rights which have been extended by the Treaty to all CARICOM natural and legal persons. The rights in question provide in substance for natural and legal persons to enter and participate in all aspects of economic activity of the Community on fair and non-discriminatory terms irrespective of country of origin.

The Community must develop a competitive market economy taking into consideration all of these dimensions. The task of the Community is therefore to carefully design a legal regime in which competition policy and law meet national needs and regional integration objectives and then permit meaningful international cooperation with non-CARICOM States in the bilateral, in the hemispheric and in the multilateral context.

The Purpose of Competition Policy in the Caribbean Community

There are sceptics in the Community who have expressed reservations on the question of whether Small Developing Economies, such as those comprising the membership of the Caribbean Community need competition policy and especially legislation. Where it has been conceded that competition policy and law are relevant there is a tendency to view them narrowly as being required only to reign in anti-competitive behaviour, not market structures which have anti-competitive effects and that they should not be concerned with the broader questions of economic development or with economic efficiency.

One aspect of the argument advanced is that the available policies and legislative paradigms are suitable to large industrial economies which developed the prevailing paradigms. A second argument is that the regulation which competition policy and law brings will likely discourage development of economical scale enterprises that may be formed or organised through market restructuring strategies. The strategies include mergers and takeovers, the concentration of capital and production via vertical and horizontal integration,
the operation of interlocking directorates, monopolization and or the exercise of market influence through an acquired dominant position in the market.

Another argument is that monopolies are almost impossible to avoid in the micro states and economies that make up CARICOM. The implication here is that the promotion of competition through market restructuring measures will always be frustrated by natural monoplies.

Taking these positions together their general thrust is that some aspects of competition policy and law may restrict enterprises from adopting market restructuring strategies that increase con-gglomerateness and scale, when these are precisely the strategies which are necessary to enable Caricom enterprises to effectively compete in the global market place.

An issue to be resolved relates to the scope of competition policy. It is asserted in some quarters that particular aspects of competition policy, such as those relating to the control of mergers are inconsistent with certain provisions of the Protocol Amending the Treaty Establishing the Caribbean Community, Protocol III: Industrial Policy. That Protocol in Articles 39 and 39(a) call on the Community to pursue strategies which will result in internationally competitive production of goods and services. Among the measures advocated are, cross border employment of factors of production and the encouragement of production integration, creation of linkages among economic sectors and enterprises and the creation of regional economic enterprises capable of achieving scales of production to facilitate successful competition in domestic and extra regional markets.

These views and arguments need to be placed in context. There may be one conclusion about the relevance of competition policy to the needs of Small Developing Countries when the question is posed to individual small states which are participating in the global economy on their own. When however the question is posed about the relevance of competition policy in circumstances where an association of states determine that they would create a single market and economy forged from several small markets and economies through a process of regional integration an entirely different conclusion could be drawn.

In the case of a regional integration grouping of small states seeking to create a single market and economy, the objection to the relevance of competition policy and law begs the obvious question of how a single market will emerge if private enterprises are able to maintain national markets by compartmentalisation of the intended single market using restrictive business practices. If compartmentalisation means, the erection of barriers to entry preventing competitors from establishing commercial presence or from selling across borders into a given part of the single market so that in practice national markets are preserved, then there must be competition policy and legislation to discourage such compartmentalisation.

The more fundamental issue at stake however is that of protecting the integrity of the rights and privileges extended to natural and legal persons within the Caribbean Community. The Protocol Amending the Treaty Establishing the Caribbean Community, Establishment, Services and Capital (Protocol II) provides for a qualitatively higher order of rights than would normally obtain in a Free Trade Area and indeed that obtains in the Common Market Annex to the existing Treaty. Article 35: Scope of Application of Protocol II, states "... that the provisions of this chapter shall apply to the right of establishment, the right to provide services
and the right to move capital in the Community.” In Article 40 of Protocol III the undertaking is to adopt policy measures to encourage the development of competitive micro and small enterprises in Member States. Elsewhere in Protocol III there is a call for discouragement of the use of standards and technical regulations to protect domestic industry. In the Protocol Amending the Treaty establishing the Caribbean Community, Protocol IV: Trade Policy, there are strong prohibitions against the use of import duties, quantitative restrictions and discriminatory para-tariffs.

Throughout the Protocols amending the Treaty are the explicit or implied themes on national treatment and non-discrimination, most favoured nation treatment and prohibitions against measures which restrict market access. One purpose of rules on competition must therefore be to reinforce these privileges and protect their integrity by discouraging private anti-competitive conduct.

The sceptics on the relevance of competition policy and law or essential elements thereof in the Caricom context, seem to ignore the interests of consumers who, in a market oriented economy perform the crucial role of consumption in the economic equation of production and consumption but who are completely exposed to the vagaries of the free market. The question is, why should consumers be made to wait for the fruits of economic progress while enterprise enjoy theirs, which will be impossible without the consumer?

The processes of internal market liberalisation is designed to utilise more market oriented solutions to the problems of development while the international aspects of competition in the continuing process of globalisation of financing, production, and distribution of goods and services have created their own justification for competition policy and law in small open developing economies.

In the case of internal market liberalisation domestic oriented market reforms include privatisation of State owned monopolies, price deregulation and sector specific deregulation. These measures aim at increasing the efficiency of allocation and use of resources. They are also intended to bring greater economy wide benefits generally and improved welfare of consumers in particular.

Members of the World Trade Organisation, Working Group on the Interaction between Trade and Competition Policy, have submitted arguments in support of "...competition policy as one element of a package of interrelated policy reforms which aim at promoting economic and social development. A central feature of these reforms has been greater reliance on market forces as an engine of development and adjustment. Another feature is the creation of a framework which aim at ensuring that market forces operate in the public interest notably by promoting and maintaining competitive markets.”

The liberalised and globalised world system brings its own difficulties. Attention has been drawn to a variety of issues which have or are likely to have appreciable negative effects on developing countries generally and small countries in particular, both in respect of market access and the process of competition in the markets of some countries. A Caribbean delegation of Chambers of Commerce and the CARICOM Secretariat visited Sweden in 1998. That delegation saw first hand and observed on the ground, the spectacular private enterprise cartelisation in the Swedish food industry. The pervasiveness of cartelisation which
was observed appear to make it virtually impossible to export food products to that country.

A number of restrictive practices have been identified by studies done by researchers under the auspices of the United Nations Conference On Trade and Development (UNCTAD) and by Countries which have submitted non-papers to the WTO Working Group on the Interaction between Trade and Competition Policy. Some identified practices include, the existence of international cartels which control production and distribution in certain industries, vertical market restraints that foreclose markets to foreign competitors, private industry standard setting activities that unreasonably mark down imports such that prices received make it impossible to cover cost of production and the unreasonable obstruction of parallel imports.

Domestic competition policy and law are not sufficient to address the extra-territorial dimensions of competition and there is therefore a role for international cooperation to reduce conflict among States and promote coordinated enforcement against private restrictive practices.

The point about the international dimension of competition is that small open economies must export to survive. They already face the difficult task of negotiating increased market access where such access is constrained by Government sponsored restrictive trade control measures. However even if they succeed in negotiating increased market access they then face the formidable challenges of private market entry barriers which are generally not part of market access negotiations. If small countries do not themselves demonstrate a commitment to control private restrictive business practices, how could they be expected to receive sympathetic consideration of their market access difficulties which arise from private conduct in the export markets of interest to them, except if tactically small countries negotiate the right to differential treatment.

In the remainder of this paper we turn to the issues, principles and policies which should underpin a competition regime for the Caribbean Community and the substantive provisions which have actually been negotiated, agreed and drafted into a protocol amending the Treaty Establishing the Caribbean Community in respect of Competition Policy, Consumer Protection and Dumping and Subsidies: Protocol VIII.

APPROACHES TO THE CREATION OF A COMPETITION REGIME FOR THE CARICOM SINGLE MARKET AND ECONOMY

Relevant Issues, Affecting Design of Competition Regime for Caricom

One of these realities is that the Conference of Heads of Government of the Caribbean Community (the Conference) has agreed that CARICOM will remain an Association of Sovereign States, an arrangement in which the Single Market and Economy is an integral part of the Community. The implication of this characteristic of the future Caribbean Community is the unusual juxtaposition of separate political entities with autonomous policy and law making powers each of which must participate in a collective process of policy making and must jointly administer and preside over a Common Market. The latter entity is in
the process of transition to a Single Market. The legal ramifications for the administration of competition policy and law in the future Single Market are not entirely clear at this time. What is certain is that sensitivities regarding sovereignty have a decisive influence over the substance and powers of institutions which will apply the rules, as well as the protocol that will govern procedural aspects of investigation and enforcement of remedies.

The definition of the Community as an Association of Sovereign States reflects acknowledgment by the Conference of the highly sensitive question of supranational entities having influence in the realm of the national Sovereign power. For the purposes of pursuing Community objectives therefore the conventional practice of policy making on the one hand and law making and law enforcement on the other will continue to be divided between Community bodies in the former instance and national bodies in the latter respectively.

A Single Market which is administered on the basis of shared jurisdiction, that is, regional entities with certain powers, working with national entities with autonomous policy and law making competence is pregnant with conflict over the questions of competence and jurisdiction.

There is also the question of the extent to which the resource capacity of individual Member States would affect the overall credibility of CARICOM's institutional capacity to operate a regional regime on competition which could involve protracted investigations and litigation.

**Principles and Policies Guiding a Community Competition Regime**

Several principles could be cited as being important in the development of a regime on competition which is designed to meet the needs of an economic integration made up of small open developing states. Two are especially important to CARICOM.

The overriding principle which must guide development of competition policy in the Caribbean Community is that private conduct should not limit the benefits which Member States expect or which could be derived as a result of the absence or elimination of tariffs, quantitative restrictions, para tariffs and other measures of equivalent effect on goods, from the removal of restrictions on the provision of services and on the movement of capital and skills in the Single Market and Economy. Actions by private enterprise which distort the operation of markets and frustrate their integration will undermine confidence in the regional integration strategy and discourage cooperation among Member States.

Secondly, CARICOM must operate an integrated market system on the basis of a set of mutually agreed rules and disciplines that would be enforced consistently in all jurisdictions. Operating a successful economic system requires legal certainty in respect of the types of rights and obligations which statutory provisions confer on economic agents. Equally important is that there must be confidence in economic policy. Confidence is inspired by the existence of substantive law that regulates the relationships between economic agents and by the application of the law by the judiciary impartially and objectively irrespective of the nationality of the parties involved in a dispute.
A third and particularly important principle is relevant in the context of the operation of a competition regime in respect of enforcement of rules. Contracting parties to the Treaty must be prepared to act in good faith, to use best endeavors to ensure that undertakings within their respective jurisdictions obey the law and are promptly sanctioned for violations, that parties not located within their jurisdiction are given prompt attention when they file complaints and that procedures for resolving disputes are followed consistently.

The essence of competition policy is the maintaining of effective competition in the market. To be effective the policies should be designed to achieve universal application to all economic sectors and types of economic activities but should be flexible enough to allow for the judicious examination and exemption of conduct which although restrictive brings economy wide benefits; that is to say conduct which results in enhancing the economic interests of everyone and which benefits consumers particularly.

Competition policy should not only be universal in respect of coverage of economic sectors and activities but also in respect of the variety of anti-competitive actions which are brought under its discipline including, agreements, decisions and concerted practices by enterprises which are either designed to or results in the distortion, material reduction or elimination of competition. The types of anti-competition activities include agreements made by cartels and other forms of horizontal agreements; vertical agreements and restraints; abuse of dominance and acts of monopolisation and the material alteration of the structure of markets with anti-competitive results through mergers and takeovers.

Competition in markets is often affected by the policies and actions of the State. A variety of practices of the state are injurious to competition such as, ownership of enterprises which compete with private capital, establishment of public sector monopolies or private sector monopolies, and state aid programmes which are not based on transparent rules and where benefits are given selectively at the discretion of public officials. The activities of the state in the market should therefore be regulated by competition policy and law.

The approach to the determination of how substantive law will apply is an important aspect of the design of competition policy. The two broad approaches available are the prohibitions approach and the rule of reason approach.

The prohibitions approach set out in the statute those types of conduct which are forbidden and a plaintiff only has to establish that his competitor was or is engaged in a prohibited act. The rule of reason approach requires proof of the reduction, distortion or elimination of competition and the effects of such conduct on a complaining party. Price fixing by cartels is usually prohibited and would fall under the prohibitions approach. Mergers are not prohibited but a particular merger agreement could result in the elimination of competition in which case the regulatory authorities would have the authority to examine the proposed merger and determine whether it should be allowed. This would approximate the rule of reason approach.

The key to the success of competition policy is not only its design but its enforcement which means that competent authorities must be empowered to act effectively.

Three models are available to regional integration groupings. The first is a central regional authority with full powers to investigate and take action within the limits of the rules set
out in the Treaty. This is the ideal model, particularly in respect of uniformity and impartiality in the application of the rules and speed in treating with cases. The main difficulties with this model are in respect of conflict with the concept of supra nationality arising from notions of sovereignty and legal complications likely to arise from the process of enforcement in relation to fundamental rights of citizens from different nation states under their respective constitutions.

Another model could be that each participating state would establish its own national competition authority to enforce the rules in their respective jurisdictions under the authority of municipal law. Competition law would have to be uniform throughout the Community if this model is to be effective. The main advantage of this model is effectiveness of enforcement in each jurisdiction. The main limitation is in respect of treating with conduct by enterprises not located in the jurisdiction, that is cross border conduct or effects since issues relating to extra-territoriality will arise. Unless the contracting parties to the integration programme cooperate in good faith by acting positively and decisively when a sister state files a complaint, then cross border anti-competitive conduct and their effects could go unresolved, leading to loss of credibility and confidence in the integration programme.

A third model could involve the sharing of investigation and enforcement competence between national authorities and a regional authority. This is a combination of the advantages of models one and two discussed previously. This model is probably best suited to the legal and political aspects of the organisation of the Community. The main difficulties with this model are likely to be protracted procedures for investigation and enforcement arising from division of jurisdiction between national and regional enforcement authorities. There is a good chance, however, that the issues relating to supra nationality, sovereignty and extra-territoriality would be more readily accommodated in a model of shared jurisdiction between national and regional competition agencies.

What progress has Caricom made towards the development of competition regime for the Single Market and Economy? There are several aspects to this question. In this paper however three aspects which have been agreed will be dealt with namely, the substantive legal provisions, institutional capacity for enforcement and procedural issues.

The Community has taken the decision to create, through a Protocol, the enabling framework for the promotion of competition within the Single Market and Economy. The Protocol amending the Treaty Establishing the Caribbean, Competition Policy, Consumer Protection and Dumping and Subsidies (Protocol VIII) has been negotiated under the direction of an Inter-Governmental Task Force (IGTF) a body established by the Conference of Heads of Government of the Caribbean Community to revise the Treaty.

**SUBSTANTIVE LEGAL PROVISIONS**

*Implied Rule of Reason Approach*

The authors of the Treaty Establishing the Caribbean Community (the Treaty of Chaguaramas) had recognised that certain practices are incompatible with the Common Market, “in so far as they frustrate the benefits expected from . . . removal of or absence of duties and quantitative restrictions required by the Annex to the Treaty” (the Annex). Article 30 of the Annex recognises the following practices which are incompatible with the Common Market:
(i) agreements between enterprises, decisions by association of enterprises and concerted practices between enterprises which have as their object or result, the prevention, restriction or distortion of competition within the Common Market.

(ii) actions by which one or more enterprises take unfair advantage of a dominant position within the Common Market.

In the Treaty of Chaguaramas the mechanisms for enforcement of the rules of competition provide that Member States should introduce legislation in their respective jurisdictions, "... for the control of restrictive practices by business enterprises giving particular attention to the practices referred to in paragraph 1..." of Article 30. Legislation for the control of restrictive practices were to be uniformly developed and applied in all jurisdictions of the Common Market. In circumstances where redress is sought by a Member State for the effects of the practices referred to in paragraph 1, the Common Market Council (the Council), if the matter is referred to it, may apply the disputes settlement provisions, particularly paragraphs 3 and 4 of Article 11 of the Annex.

The disputes settlement provisions provide for the establishment of Tribunals. A finding by a Tribunal or the Council that any benefit conferred on a Member State by the Annex or any objective of the Common Market is being or may be frustrated, could lead to recommendations by the Council to the State representing the undertaking accused of anti-competitive activities to take appropriate action. If such a State refuses or is unable to comply with the relevant recommendations, a claim by the aggrieved State could be enforced by an authorisation by the Council based on majority vote by the Council, for the aggrieved State party to suspend its obligations under the Annex to such an extent and for such period as the Council may consider appropriate. There is also provision that while a Tribunal is in progress the Council may be approached by an aggrieved Member State for authorisation to take interim measures to safeguard its interests.

The foregoing provisions of the Annex suggest that an important purpose of the provisions relating to restrictive practices is, to reinforce and indeed to protect the integrity of the provisions of the Annex in Chapter 3 relating to trade liberalisation.

Of particular interest are provisions in the Treaty of Chaguaramas which imply that municipal law in anyone jurisdiction would secure the rights and interests in that jurisdiction of enterprises from all other Member States. This inference is premised on the assumption that the relevant laws would be enforced in good faith, consistently with the obligations of the concerned State. Remedy it must be assumed would be enforced by orders of municipal courts which are imposed on enterprises that defy the law and which have caused by their conduct, damage to competition or to their competitors.

Action against cross-border offences, according to the language of Article 30 in the Annex, do not appear to follow the same procedure as when offences of the same nature occur within a given jurisdiction of the Common Market. Moreover, the application of sanction to remedy restrictive practices in such cases is not directly against the offending enterprise but could take the shape of trade remedy against a State party which refuse to act on the recommendations of the Common Market Council. This raises the question as to why the approach to the remedy for the same anti-
competitive act or activities within a jurisdiction should not be the same as when the act or activities is cross-border?

The specific role of a political body in the enforcement aspects of competition policy is an issue. Should such a body have the competence to make determinations and to authorise trade sanctions against a State party for an anti-competitive conduct by private enterprise? Should the Common Market Council be involved at all in enforcement in such cases? A further question is how should a trade remedy approach be reconciled with the need to allow competition to prevail since trade remedy could include restricting competition.

Another question to be answered is the meaning of the term cross-border in a single market and economy, since it does appear that anti-competitive actions by an enterprise within a given jurisdiction can have cross-border effects, intentionally or inadvertently. It needs to be remembered that theoretically, the single market for any given enterprise means the competitors and the consumers of his product or service in every jurisdiction within the Community.

An interesting feature of the provisions of Articles 30 and 11 is that the approach at the Community level to remedy anti-competitive conduct takes into account the broader objectives of regional integration in addition to the provision of redress to an injured party and impact on national interest. This feature has been retained in Protocol VIII.

A second feature of Article 30 when linked to Article 11 which has merit and was retained in the modification of the Treaty on restrictive business practices, is that of the procedures to be followed to remedy anti-competitive conduct. By this, an anti-competitive act complained of to the Council must be examined to assess the nature of the offence and the degree of injury to the aggrieved party and whether any objective of the Common Market is being or may be frustrated. In this approach, there is no presumption that the existence of an act by an enterprise will result in injury to competitors, damage to competition in the Common Market or to the frustration of its objectives. Article 30 only exhort State parties to recognise that certain practices by private enterprises are incompatible with the Common Market. The Article however stops short of prohibiting such practices outright. When given effect in municipal law anti-competitive practices would have to be declared illegal if they are prohibited by the Treaty.

The entire approach of Article 30 of the Annex to the Treaty is not to prohibit anti-competitive practices but rather to provide that in the event of a dispute between State parties, Tribunals may be established “... in order that the facts may be established and the issue determined.” This approach is similar to the procedures applied in cases of dumping in the multilateral system.

Dumping in the WTO scheme is neither prohibited nor illegal. A party if injured or threatened with injury could take provisional action if a prima facie case can be made out against an accused party. Definitive retaliatory action may be authorised if a full investigation is concluded and injury is proved and the accused State party refuses to act on the recommendation of the competent WTO authority. In the WTO regime on Subsidies and Countervailing Measures (except in respect of Prohibited Export Subsidies) a similar approach is provided for in case of subsidies which may cause injury, nullification, impairment, serious prejudice or
serious adverse effects. There is, of course, no attempt here to compare the disciplines relating to restrictive business practices with those relating to subsidies and dumping; the analogy is only in respect of principle and approach.

The strong points in favour of the approach adopted in Article 30 are that it prevents the need to specify in the Treaty, anti-competitive offences in detail, and it reduces what Robert Bork (1978) describes in his discussion of the rule of reason versus the per se methods of court rulings in US anti-trust cases, as "... a degree of arbitrariness which obtain in the per se approach...." The per se approach is understood to be equivalent to the prohibitions approach.

The difficulties which the approach in Article 30 of the Annex creates are in respect of the uncertainty which enterprises will face regarding what types of practices will in fact be challenged and brought before a court or would be interpreted as causing damage to competition within the Common Market or would frustrate its objectives, since any and every act under Article 30, which incidentally provides for no specific defenses, may be caught.

Investigations and litigation or the establishment of tribunals at the Community level seem inevitable with the consequences for cost and infrastructure to maintain enforcement capability. In addition, this approach is more likely to result in anti-competitive activities being undertaken and the municipal Court or the Council then having to unravel or undo market arrangements that could have been discouraged before they are fully consumated.

The Prohibitions Approach with Defenses

The approach set out in Article 30 of the Annex and discussed previously approximates the rule of reason approach. Article 30(j) of Protocol VIII retains the substance of these provisions except that it expressly requires Member States to prohibit the forms of anti-competitive activity set out in Article 30. The provisions are also similar to those set out in articles 85 and 86 of the "Treaty of Rome." States such as the United Kingdom have recently adopted this approach. Many other countries provide for prohibitions in their legislation.

Article 30(j) of Protocol VIII establishes a third substantive rule by which "... any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME..." would be prohibited. However no elaboration is provided on what types of conduct are contemplated to be prohibited in the third category of prohibited conduct set out in Article 30(j).

It should be carefully noted that the provisions of Article 30 of the Annex to the Treaty stop at exhorting Member States to recognise the incompatibility between the Common Market and agreements between enterprises, decisions by associations of enterprises, concerted practices by enterprises and abuses of a dominant position which have as their object or result the prevention, restriction or distortion of competition.
Article 30(j) of Protocol VIII departs in some important respects from the approach of Article 30 in the Annex to the Treaty in that it seeks to specify those types of agreements, decisions, concerted practices, activities and other forms of anti-competitive conduct which State parties have a binding obligation to prohibit in their respective jurisdictions.

The negotiators of Protocol VIII applied the prohibitions approach and in the process specified in some detail the prohibited anti-competitive conduct including the following: the direct or indirect fixing of purchase or selling prices; the limitation or control of production and markets, investment and technical development; the artificial dividing up of markets or the restriction of supply sources; the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions thereby placing them at a competitive disadvantage; making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which, by their nature or according to commercial practice, have no connection with the subject matter of the contract; unauthorised denial of access to networks or essential infrastructure; predatory pricing; price discrimination; loyalty discounts or concessions and exclusionary vertical restrictions.

The prohibitions approach means, in the first instance that an aggrieved enterprise only need to prove that a prohibited act exist within the Single Market and this may be sufficient to invoke a cease and desist order or if necessary a fine from a municipal Court.

Article 30(j) further provides that an enterprise may invoke defenses against accusations by competitors of anti-competitive conduct in order to be excused from the prohibitions relating agreements, decisions and concerted practices. Defenses include improvements in production, distribution and technical progress. The defenses will only be valid however if it can be shown that consumers are allowed a fair share of the resulting benefit.

In the premises it may be worthwhile considering whether an enterprise should be able to invoke the provisions of Articles 39 and 39 (a) of Protocol III, in defense of its actions as one method or approach to ensuring balance between the need to regulate competition on the one hand while promoting the Community’s goals relating to internationally competitive production of goods and services on the other.

Abuse of a dominant position is also prohibited. Protocol VIII provides that “... an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.”

An enterprise is considered to have abused its dominant position if it prevents, restricts, or distorts competition in a market including the restriction of entry of an enterprise into a market.

As in the case of agreements, decisions and concerted practices referred to previously, a number of legitimate achievements by enterprises have been allowed as defenses in circumstances where an enterprise is accused of abuse of a dominant position. Permitted defenses include improvements in product and process technology, significant improvements in production and productivity, cost reductions that benefit consumers, expansion of exports and instances where there is an appreciable effect on employment generation.
It is not entirely clear whether intellectual property should be allowed as a defence or absolute exemption. The danger with an absolute exemption is that it could lead to abuse of property rights beyond that which is justified. This is recognised in the WTO agreement on Trade Related Aspects of Intellectual Property Rights. Enforcement of ownership of intellectual property is however allowed as a defense against accusations of anti-competitive conduct.

Prohibitions could be severe on enterprises and therefore the Community Commission is empowered to exempt enterprises from the requirement to comply with the "Rules of Competition" under specific circumstances. Further a prohibitions approach should empower regulatory authorities to invoke *de minimis* rules to excuse those activities which, even though they may be anti-competitive, do not have or are not likely to have an appreciable, material negative impact on trade and competition within the Single Market. In addition provision should be made for exemption from compliance with the rules where there is evidence of bankruptcy or threat of bankruptcy. The Competition Commission is empowered to exempt anti-competitive conduct which it determines is *de minimis* but it has no competence to exempt for reasons such as alleged bankruptcy.

Given that CARICOM is relatively inexperienced in the discipline of restrictive business practices, it seems appropriate that great care should be exercised in specifying offences and the regulatory authorities should have as a function, researching and demonstrating what other practices deserve to be added to the list of prohibitions over time.

**Combination of Rule of Reason and Prohibitions Approaches**

There are sceptics in the Community who hold the view that it is not necessary to provide for control of mergers but only to provide for anti-competitive conduct deriving from mergers. This view deserves to be questioned, particularly because some types of anti-competitive conduct can only be remedied by altering the structure of the market by deliberate divestiture directives.

If this argument prevails all types of local, regional and multinational agreements leading to cartels, vertical and horizontal arrangements, interlocking directorates and mergers leading to dominant positions or outright monopolies will be allowed to exist and frustrate competition within the Single Market. If they are allowed in the regional market, there can be no legitimate argument against such market structures which frustrate CARICOM exports into extra-regional markets and such a policy may be only defended in the context of a claim to special and differential treatment for developing countries.

It is mistakenly asserted that a capacity to intervene in markets to control anti-competitive behaviour is sufficient to preserve competition. The premise is misconceived. The fact is that an agreement leading to a merger could eliminate all competition from a particular market. Controlling the behaviour of the resulting monopoly may be wholly unsatisfactory where in the particular market in question the intention is to maintain competition as distinct from say protecting consumers from high prices. Controlling behaviour is necessary but not always sufficient to maintain competition in a particular market.
The prohibitions approach may be appropriate in cases of behaviour which derive from a market structure which is known to lead to anti-competitive conduct such as monopoly and near monopoly. However this approach may not always be appropriate in the control of anti-competitive vertical agreements. What is required in such cases is a facility for review by the competition authorities of agreements which will result in, are intended to, or are likely to materially reduce competition or which eliminate competitors all together.

Defining properties of competition in a market economy relating to structure include:

(a) the ability of enterprises in the relevant market to act independently of competitors in respect of policies relating to price, output, distribution of output, introduction of new technology and so on; and

(b) the ability of competitors to enter the relevant market, thereby materially increasing competition.

Two key principles derive from these characteristics of a freely competitive market. These are, that competition rules should preserve the competence of legally distinct enterprises to act independently of competitors and competition law should empower investigating authorities to examine proposed or de facto actions by enterprises in the relevant market which alter a prevailing structure and as a consequence, threaten or in fact lessen competition to any significant material degree.

The material lessening of competition could be achieved in several ways including the following:

(i) Activities of Private Enterprises in which

(1) Private enterprises acting independently, resort to behaviour or conduct to gain unfair advantage over competitors in the relevant market;

(2) Private enterprises acting jointly but voluntarily (i.e., retaining their respective identities), resort to behaviour or conduct to gain an unfair advantage over competitors who are not party to joint voluntary actions of "some participants in the relevant market";

(3) Formerly independent enterprises are forced to act under the influence of competitors (example of effect of dominance);

(4) Formerly independent enterprises losing their identity or control over decision-making (example of effect of merger).

(ii) The State applying forms of aid or adopting policy or practices which:

(1) give some enterprises an unfair advantage over competitors;

(2) result in the establishment of a private or public sector monopoly.

Typically there are certain types of activities and arrangements which can be dealt with by legislation including monopolisation, mergers including acquisitions and take-overs.
cartelisation, vertical agreements and restraints and interlocking directorates.

A point which needs to be borne in mind is that the theory of market structures suggests that a particular market structure could lead to anti-competitive conduct or, alternatively, that anti-competitive conduct derives from particular market structures. This point is important because while the remedy to be applied in one set of circumstances may merely require the prohibition of a practice from continuing, or the imposition of a fine for continued violations (thereby controlling behaviour), the only way possible to bring persistent violations to an end in some situations is, to require divestment of assets or shares (alteration of structure). If therefore the Treaty does not empower the relevant Community body and national legislation does not authorise the authorities in Member States to investigate and apply remedies where the problem lies in structure, it may be impossible to restore and maintain competition in a particular market where this is necessary or desirable.

On the issue of mergers the arguments advanced so far appear to be, that they are necessary to achieve economies of scale for export competitiveness and that provisions for review and examination of merger agreements may discourage merger activity.

These arguments are not unassailable. Size may be a factor in some export industries but it is not a universal requirement. Technical, managerial and economic efficiency are stronger factors irrespective of size. More important however is the consideration that private enterprise decision makers in a market economy will more likely act to protect their interests or to pursue opportunities to profit irrespective of the regulations to merger activity. They are more likely to act first and then be forced to comply with the law rather than the other way around. In the premises, it is interesting to note the observation made by Oz Shy (1995) that the United States (US) has the most restrictive anti-trust regulation structures in the world. Yet there is no shortage of merger activity in the United States. One is attempting, using Shy’s observation, to refer to likely enterprise behaviour rather than a comparison of US and Caribbean economic and market circumstances.

The approach of providing for examination of certain types of agreements, especially those leading to the formation of mergers is entirely appropriate and should be entrenched in the Community competition regime.

A combined approach of prohibitions on the one hand and provision for detailed technical and legal examination (rule of reason approach) on the other, along with the competence of regulatory authorities to grant exemptions, to develop and apply de minimis rules and to permit defenses, seem to be the approach best suited to the immediate circumstances facing the Caribbean Community.

The ramifications of the relationships among the Community Competition body, the Caribbean Court of Justice (the Court) and Municipal Courts required for completeness will involve the further detailing of the institutional arrangements, procedural and administrative steps which may be required, to achieve effectiveness in both investigations and remedy in matters relating to anti-competitive practices.

**INSTITUTIONAL AND PROCEDURAL ISSUES**

The operation of a Community regime on competition creates special institutional and
procedural difficulties when the Community is
‘An Association of Sovereign States’ and there
is no provision for supranational enforcement
authorities. What could happen in this type of
arrangement is that political solutions take
precedence over technical and legal solutions.

The enforcement of Community rules
pose particular challenges. There are several
issues to be examined here and only general
reference will be made to some of these. One of
these is that if enforcement is to be successful it
must be done directly against the enterprise
which has infringed the rules or has damaged
competition and this requires the authority of a
court of law or a quasi-judicial authority with
sufficient enforcement powers.

Secondly, national authorities are not
necessarily competent to address cross border
anti-competitive actions and their effects where
the conduct involves competitors with no
commercial presence and who are operating
outside their jurisdiction.

Thirdly, in the case of CARICOM
several of the smallest states may not be able to
justify a national competition enforcement body
for sometime. Fourthly, an obligation to respect
and discharge duties under a Treaty in good faith
cannot sometimes be discharged because it may
clash with national interests. Then of course there
is the matter of jurisdiction to be shared
between national and regional authorities.

In the provisions of the Protocol
amending the Treaty with respect to the Organs
and Institutions of the Community, The Council
for Trade and Economic Development (COTED)
retain responsibilities for the
development and operation of the Single Market
and Economy. This presumes a policy and rule
making competence which includes competition
policy. Unlike the provisions of Article 30 in the
Annex to the Treaty, Protocol VIII restricts the
competence of the COTED to a competition
policy and rule making body and not an
enforcement authority.

A crucial development in the institutional
metamorphosis of the Caribbean Community is
the Agreement Establishing the Caribbean Court
of Justice. This particular legal authority which
is expected to exercise the power of original
jurisdiction in matters relating to the interpretation
and application of the Treaty will fill a pivotal
void which exist between municipal courts and
the Community where disputes are to be settled
by judicial means.

Models of a Community
Competition Body

In a relatively small region such as the
Caribbean Community, with a population of
about 14 million people when Haiti becomes a
full member of the Community, the ideal model
of a Community competition body would be, to
create a single Community Authority to enforce
the competition rules of the Single Market and
Economy. Between such a body and municipal
courts it should be effective in enforcing
Community rules of competition and will likely
reduce disputes over jurisdiction which are
certain to arise compared to a model which
distributes jurisdiction between a Community
body and national bodies.

There is very weak support for this
model. Sceptics have questioned whether such
a body would be able to cope with the number
of disputes to be settled and whether it would
not exercise powers that bear strongly on the
issue of supra nationality.

It could be shown however that the issue
of supra nationality does not necessarily follow
from the model of a single Community
enforcement body; if it is understood the municipal courts would protect the rights and privileges of nationals under their respective constitutions. At any rate the municipal competition law could be written in such a manner as to ensure that the Community body can act but can neither usurp the authority of the municipal courts nor trample on the rights of nationals.

For the purposes of applying the rules of competition, maintaining surveillance throughout the Caricom Single Market, conducting investigations and determining the appropriate remedy in matters relating to restrictive business practices in the CSME, Protocol VIII establishes a Community Competition Commission. This body is a specialised permanent Tribunal replacing the ad hoc Tribunal provided for in Article II of the Annex to the Treaty.

The model of a Community Commission which appear in Protocol VIII is one which divides jurisdiction between national and regional bodies based on considerations which pretend to distinguish between competition activities and the effects of such activities which can be defined as peculiarly national and those which are peculiarly cross-border. That is to say in the matter of restrictive business practices the competence of the Commission is limited to anti-competition cross-border activities and those anti-competition activities which have cross-border effects.

This separation of jurisdiction in practice is quite a difficult proposition if one were to apply a strict market interpretation to the term Single Market and Economy, and if it were to be understood that the activities of an enterprise within a given national market of the Single Market area may have consequences for those not located in the market area but which have rights to participate in that geographic part of the Single Market on the same terms as those resident in it.

In this model the question of competence to treat with infringements of the Community rules or injury to competitors must always be settled before investigations and other substantive legal proceedings can be amicably initiated and concluded. In addition a fairly elaborate system of notifications and consultations is provided for between the national authority and the Commission where proceedings arise from the initiative of the Commission.

In a model of shared jurisdiction a third party is necessary in order to determine which authority has jurisdiction where jurisdiction cannot be decided on the basis of consultation between national and the regional in specific cases otherwise stalemate and lack of action will be the result. This third party is the Caribbean Court of Justice which has exclusive jurisdiction to interpret the Treaty as revised by Protocol VIII.

The structure, composition, method of appointment and removal of Commissioners, functions, and powers have been examined in some detail and agreement was reached on all of these issues.

The Community Commission will be a seven man body headed by a Chairman. The Commissioners will be appointed by the Regional Judicial and Legal Services Commission when this body is constituted. In the interim provision was made for the Chairman and the members of the Commission to be appointed by the Conference of Heads of Government of the Caribbean Community on the recommendation of the COTED. When at least seven Member States of CARICOM accede to the Agreement
Establishing the Caribbean Court of Justice the Conference will cease to be competent to appoint the Commissioners.

The Commission has been endowed with considerable powers in order to be credible and effective. It is competent to maintain surveillance over the entire Single Market, to initiate investigations if it has reason to believe that competition is at risk in the single market and to pursue investigations on the basis of complaints from aggrieved parties alleging injury or the threat thereof; make determinations on the basis of its findings and take action against parties accused and found responsible for infringement of Community rules or which have caused injury to competitors.

The Community Commission is empowered to appear before Municipal and Community Courts as necessary in order to secure compliance with its decisions. This means that municipal law must recognise the authority and competence of the Commission. Article 30(f) of Protocol VIII compel Member States to enact legislation to ensure that determinations of the Commission are enforceable in their jurisdictions. One important reason for this is that in the conduct of an investigation and throughout the course of such investigation, the Community body would have to engage persons to give evidence. Where a person is requested to appear to give evidence and fails to appear or refuses to appear the Commission would have to apply to a municipal Court to secure an order, with the implication that a municipal Court would be issuing subpoenas to secure such attendance.

Procedural Issues at the Community Level

The Treaty should address the scope of intervention to deal with anti-competitive behaviour and structures. That is, the purpose of the provisions should be to prevent the emergence of, or to take action to restore a more competitive structure and to eliminate anti-competitive behaviour where the purpose of decisions, agreements and concerted practices between or among enterprises is intended to be exploitative of consumers and or to exercise market power to eliminate, prevent, restrict or distort competition or where these consequences are the result of a particular structure or conduct.

The procedural issues which are relevant to the problem of operating a Community competition regime for the Caricom Single Market and Economy fall into general and specific categories.

General Procedures

The general procedures relate to the interaction between the Community competition enforcement body and relevant authorities in Member States. The general procedures apply whatever the source triggering proceedings at the Community level. There would be need for provisions for preliminary review of anti-competitive activity whether formally complained against or triggered by information gathered independently by the Commission. Preliminary review may be necessary to determine whether investigations are justified. There will also be need for a process of determining jurisdiction to investigate and where this question cannot be settled between the regional and national authorities, provision for a third party such as the Court, to make the determination. Settlement of questions relating to jurisdiction would have to carry the caveat that one party would withdraw from the investigation and would still cooperate to ensure the success of the investigation.
Where the decision is made to investigate at the Community level, a process of notifying the State and private parties concerned will be required. Results of preliminary and definitive investigations should be shared among the concerned parties and consultations should be afforded to the parties likely to be affected by decisions of the Community body before determinations are made. Parties affected should have the right to appeal a Community body's determination and to appeal to a municipal court or the Court of Justice in the appropriate circumstances to uphold or strike down a Community body's determination.

Sanction should as far as possible be definite and fall directly on the enterprise whether the national or the Community body makes a determination that remedy requires sanction. Where the Community body makes a determination, it needs to have the authority to follow through on failure of the enterprise concerned to act on its directive and should be competent to appear before a municipal Court or the Court of Justice to effect enforcement.

Protocol VIII provides for all of the foregoing procedures.

Specific Procedures

Specific procedures are required as part of the protocol in the control of anti-competitive market structures and these include notifications, the examination of notifications, the conduct of investigations and the procedures leading to remedy.

There will have to be specific requirement to notify decisions and agreements or undertakings which are intended to create monopolies and mergers and takeovers. Notifications should be made to the Community Competition body within a specified number of days before entry into force and should be sufficiently specific to enable the body to evaluate the nature, scope and potential effect of the agreement or undertaking in the relevant market.

The Community Competition body should be authorised to develop the administrative procedures, including documentation and information required to satisfy the notification requirement. These should be adopted by the COTED.

The Community body should be required to establish and maintain a register of all notifications. In respect of any particular notification the Community body should be required to reply to the notification within a specified period indicating whether it intends to investigate further or whether those submitting the notification should proceed with the agreement or undertaking as appropriate. Where the body fails to reply within the time period specified the parties submitting the notification should be free to proceed.

Where a Member State intends to create a monopoly or will grant State aid to enterprises, these should be notified to the relevant Community body.

Since the idea is not to capture all agreements that will create anti-competitive structures, there will be need for the application of criteria that will distinguish among those that are significant and those that may not warrant any consideration at all. The proposal here is that an agreement should qualify for examination:

(i) if the agreement will result in the creation of a monopoly;

(ii) if it will result in the emergence of a dominant position in the relevant
market;

(iii) if it will appreciably influence or alter the direction, volume, value of trade in the relevant market within the Single Market Area;

(iv) if it will result in a significant concentration of assets under the control of one or a few enterprises which are party to the agreement or undertaking;

(v) if the parties to an agreement are significant competitors.

In addition, a *deminimis* threshold could be specified where, if the value of a merger is below the threshold it would not be examined, or if the impact on trade and competition is negligible.

The Community body should be authorised to initiate an investigation of a decision, agreement or undertaking which is notified, or which is identified by the Commission, or which is reported by competitors or by a Member State, having satisfied itself that the case qualifies for examination and that an investigation is justified.

Investigations by the Community body should be directed to cases involving cross-border agreements and undertakings unless the Member State in whose territory the agreement is to be implemented decides that the body should investigate. This means that a process of consultations should be entered into among the Community body, the enterprises and the Member States(s) involved to determine who should have jurisdiction in a particular investigation.

The Community body should complete a preliminary investigation and forthwith invite the interested parties to consultations. Definitive investigations should only proceed after opportunity has been given to the parties involved in an undertaking or agreement leading to any of the market organisations referred to previously, to rebut allegations or the preliminary conclusions of the Community body.

Consultations and preliminary and definitive investigations by the Community body should be concluded within a specified period, say within a specified number of days respectively. The results of investigations should be discussed with the enterprises involved in the agreement or undertaking. The purpose is to afford opportunity to rebut the findings or to afford opportunity to discontinue the conclusion of the agreement or undertaking altogether or to proceed with a more acceptable form.

**Remedies**

The Community body should be required to produce a formal confidential report which should contain a specific ruling regarding a monopoly, merger or takeover. Where the enterprises involved:

(i) did not notify an agreement or undertaking or proceed to implement a decision, agreement or undertaking before the Community body has completed its investigation, the body should be authorised to examine such a case and if it is found to be anti-competitive in intent or effect, to rule that the agreement be discontinued;

(ii) after opportunity to consult has been afforded to the concerned enterprises and a decision is made involving directions to the
concerned parties to modify the anti-competitive merger, cartel, interlocking directorate arrangement or that a monopoly should be discontinued and the concerned enterprise(s) refuse to act voluntarily, the authority should be empowered to approach the Court in the appropriate jurisdiction to apply a fine or to declare the agreement or undertaking of no legal effect.

(iii) in the event that the Community body recommends that a Member State take action to discourage a particular agreement or undertaking which is considered anti-competitive and which has cross border trade effects and the Member State fails to act within a reasonable period of time, the Community body should be able to apply to the Court of Justice for a decision upholding its recommendation;

(iv) where the Community body determines that a particular merger, cartel or monopoly or interlocking directorate should operate in a particular market even though the rules of competition will not be observed, then the Community body should be authorised to set the terms and conditions under which the particular operation will be conducted.

The provisions of the Treaty should provide opportunity for the parties affected to appeal a ruling of the Commission. The affected parties would naturally have the right to appeal where a Court makes a decision.

It is fair to say that in relation to specific procedures, apart from provisions relating to appeal determinations of the Community Competition Commission, Protocol VIII does not elaborate any specific policies and rules applicable to monopolies, mergers and takeovers or government aid. Specific rules and procedures governing these areas are relevant to any credible regime on controlling anti-competitive conduct. Fortunately however Protocol VIII makes provision for the COTED to develop rules of competition in addition to those already negotiated. Experience and case law in the future would probably be the best guides in developing specific rules and procedures for areas not covered by Protocol VIII.

Conclusions

A sufficiently strong case can be made in favour of the establishment of a competition regime in Small States and particularly in a regional integration arrangement involving Small States such as those of the Caribbean Community. The choices to be made in this regard would take account of the development policy goals of the group, the process of reform within the group as a whole and in the particular the nature of the economies which comprise the integration area. The choices should also be informed by the processes of global trade liberalisation and the globalisation of investment, production and distribution of goods and services, the obligations of Members to the Community and the political structure of the Community.

A variety of models are available to solve the crucial questions relating to legal, institutional
and procedural aspects of designing a Community competition regime for the Single Market and Economy. However a mixture of the rule of reason approach and prohibitions in respect of the substantive legal provisions and a distribution of jurisdiction between national and Community authorities with procedures to avoid conflict and which promote cooperation between national and regional bodies seem to be the most appropriate models for CARICOM.

It is important in the last analysis that sanction should be definite and credible and should fall directly on the offending enterprise whether a national or the Community body makes a determination that sanction is necessary to achieve compliance with the Community Rules on Competition.
REFERENCES


**Note by the Secretariat**