

**THE APPROPRIATE DESIGN AND ENFORCEMENT OF COMPETITION  
LAW AND POLICY IN COUNTRIES AT DIFFERENT STAGES OF MARKET  
DEVELOPMENT-THE CASE OF CARICOM**

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# **THE APPROPRIATE DESIGN AND ENFORCEMENT OF COMPETITION LAW AND POLICY IN COUNTRIES AT DIFFERENT STAGES OF MARKET DEVELOPMENT-THE CASE OF CARICOM**

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## **Introduction**

The appropriate design of competition law and policy for developing countries at different stages of development is recognized as an important step in implementing effective competition policies to foster development.

Critical for the design and enforcement of competition law and policy is an institutional structure that satisfies constitutional dictates regarding substantive and procedural legal issues in the domestic context, but also regional obligations to the extent that these are implicated, and, not least, multilateral obligations undertaken.

Domestic enforcement of competition law and policy, therefore, cannot be divorced from regional and multilateral obligations undertaken with respect to enforcement. In this way the appropriate design of competition law and policy for developing countries depends to a large extent on the set of obligations assumed to meet particular development objectives and not necessarily on a predetermined template of options from which particular countries choose the ones considered most appropriate for meeting these objectives.

The proliferation of regional trade agreements and the competition law obligations contained therein provide a basis on which to assess what individual countries being parties to these arrangements consider to be in their best interest in satisfying development objectives.

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Regional obligations offer flexibility but also dissuade a unilateralist approach to enforcement by promoting some semblance of harmonization. Multilateral obligations reflected in the General Agreement on Trade in Services have so far provided a piecemeal approach to the enforcement of competition law that signals greater flexibility in design and implementation of competition law.

The focus of this paper is to provide an overview of governance arrangements within Caricom for the enforcement of competition law and policy in the context of the interplay of other policy objectives to satisfy development initiatives. This includes examining oversight of the Council for Trade and Economic Development (COTED), functions and responsibilities of the Community Commission, and issues relating to development of Community Policy and rules of competition.

Before examining this question, I identify selected approaches to satisfying development objectives in the competition law context and whether and the extent to which these are adopted in the governance arrangements for Caricom for enforcement of competition law and policy.

## **SPECIAL AND DIFFERENTIAL TREATMENT**

Special and differential treatment has long been promoted as an important principle to achieve development objectives of countries at different stages of development.

Consistent with this approach, special and differential treatment in the competition law context is championed as a principle worthy of adoption to secure flexibility in competition regimes for promoting development.<sup>1</sup> Indeed, consistent with this principle, the WTO Working Group on the Interaction between Trade and Competition Policy

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<sup>1</sup> UNCTAD, Preparing for Future Multilateral Trade Negotiations: Issues and Research Needs from a Development Perspective', UNCTAD/ITCD/TSB/6, September 1999, United Nations Conference on Trade and Development, Geneva.

concluded that effective competition policy depends on the satisfaction of this principle, thereby eschewing a one size fits all approach.<sup>2</sup>

The principle has also become the basis for future negotiations on competition law and policy at the multilateral level where at Doha the WTO Working Group on the Interaction between Trade and Competition Policy noted that ‘full account shall be taken of the needs of developing and least developed country participants and appropriate flexibility provided to address them’.<sup>3</sup>

Included in this principle are notions of flexibility, transition time periods for adoption of more robust competition policy, technical assistance and capacity building.

Modalities for operationalizing special and differential treatment in the competition law context can include employing flexibilities in the General Agreement for Trade in Services (GATS), an agreement with core principles permitting countries to include further principles as they see fit, and agreements (including a regional trading arrangement) that establishes a minimum requirement of competition law principles and some modicum of flexibility for other policy objectives that permit exceptions and exemptions of sectors from the operation of competition law.

Employing a GATS approach permits gradual liberalization and policy flexibility in sectors where countries are not yet comfortable in accepting total liberalization. Concessions on market access and national treatment are done in accordance with particular service sectors by way of positive listing and conditions may be placed upon such concessions provided they are scheduled.

Chapter VIII of the Revised Treaty of Chaguaramas (RTC) reflects the third approach and contains the competition law provisions that Caricom Member States have agreed to

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<sup>2</sup> WTO Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, November 30, 2000, WT/WGTCP/4, para 76.

<sup>3</sup> WTO Ministerial Declaration, Ministerial Conference, 4<sup>th</sup> Session, November 14, 2001, WT/MIN(01)/DEC/1, at para. 25.

implement in their domestic legislation. Included in the Chapter are the general objectives of the Community Competition Policy, modalities for the implementation of Community Competition Policy, the establishment of a Competition Commission to, *inter alia*, investigate and arbitrate cross-border disputes, prohibitions regarding anti-competitive business conduct, and a recognition of the significance of policy space to satisfy other or competing policy objectives reflected in provisions on exemptions.

This third approach is different from but not necessarily mutually exclusive of the GATS approach since the provisions on exemptions can be employed to give effect to positive and negative listings made within the WTO under GATS. Whether the provisions on exemptions will be employed for this purpose depends in part on the interpretation of Caricom Member States of their GATS obligations, in particular Article V(1)(a) regarding substantial sectoral coverage. That is, satisfaction of GATS Article V(1)(a) may be read as limiting the flexibility afforded in a regional trading arrangement with respect to liberalization of service sectors and the extent to which they can be shielded from the application of competition law.

Arguably, there is no obligation to apply robust competition law to sectors that are liberalized pursuant to GATS. However, Article VIII of GATS, though not requiring a comprehensive competition law regime to apply to service sectors that are liberalized, imposes an obligation on states to ensure that monopoly service suppliers do not abuse their dominance in service sectors for which commitments for liberalization are made.

The governance arrangements in Caricom provide a basis, if only as a departure point, on which the enforcement of competition law and policy for developing countries at different stages of development may be examined.

The RTC recognizes that Caricom states include countries at different stages of development and provides for policy flexibility in accordance with a special and differential principle. Thus Article 1 refers to disadvantaged countries in the following terms:

- (a) the Less Developed Countries within the meaning of Article 4; or
- (b) Member States that may require special support measures of a transitional or temporary nature by reason of:
  - (i) impairment of resources resulting from natural disasters; or
  - (ii) the adverse impact of the operation of the CSME on their economies; or
  - (iii) temporary low levels of economic development; or
  - (iv) being a Highly-indebted Poor Country designated as such by the competent inter-governmental organisation;<sup>4</sup>

The less developed countries may also apply to COTED, as a temporary measure to promote industrial development, for suspension of community origin treatment of eligible imports on the ground that the product is produced in one of their territories.<sup>5</sup>

Further recognition and acceptance of the principle of special and differential treatment is observed in Article 49 of the RTC regarding removal of restrictions on the right of establishment,<sup>6</sup> Article 51(2) (h) of the RTC with respect to the objectives of the community industrial policy<sup>7</sup>, and Article 52(2) of the RTC concerning a special regime for the implementation of the community industrial policy that factors the special needs of disadvantaged regions.<sup>8</sup>

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<sup>4</sup> Pursuant to Article 4 of the RTC the more developed of the developing countries are those listed in subparagraphs (b), (c), (g) (h) (m) and (n) of Article 3. These are The Bahamas, Barbados, Guyana, Jamaica, Suriname and Trinidad and Tobago. By virtue of Article 4 of the RTC, the remainder of the countries listed in Article 3 is to be considered less developed countries. These are Antigua and Barbuda, Belize, Dominica, Grenada, Montserrat, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines.

<sup>5</sup> Article 164 of the RTC.

<sup>6</sup> Article 49 of the RTC provides as follows: *'Where in this Chapter the Member States or competent Organs are required to remove restrictions on the exercise of the rights mentioned in paragraph 1 of Article 30 the special needs and circumstances of the Less Developed Countries shall be taken into account'*

<sup>7</sup> Article 51(2)(h) of the RTC stipulates that one of the objectives of the community industrial policy is to secure *'balanced economic and social development in the CSME bearing in mind the special needs of disadvantaged countries, regions and sectors within the meaning of Article 1 ...'*

<sup>8</sup> Article 52(2) of the RTC provides that *'The Community shall establish a special regime for disadvantaged countries, regions and sectors.'*

In the context of the enforcement of competition law, there is no express provision recognizing special and differential treatment for less developed countries in the application of the prohibitions against anti-competitive conduct. Nonetheless, there are provisions in the RTC which permit this flexibility.

As shown below, the governance arrangements under the RTC provides much flexibility for giving effect to the special and differential principle in the enforcement of competition law and policy.

### **OVERSIGHT OF THE COUNCIL FOR TRADE AND ECONOMIC DEVELOPMENT (COTED)**

Oversight of COTED under the RTC regarding its relationship with the competition adjudicating body the Community Commission (“the Commission”) is in three main areas, namely development of Community Competition Policy, resolving jurisdictional issues between the Commission and a member state on the question of the nature and effects of business conduct or whether an investigating authority has jurisdiction to investigate a matter, and requesting the Commission to conduct investigations.

COTED has as one of its functions, pursuant to Article 175(2) of the RTC, the authority to request the Commission to carry out an investigation where it has reason to believe that business conduct in the Caricom Single Market and Economy (CSME) prejudices trade, restricts or distorts competition within the CSME, and has or is likely to have cross-border effects. Whether the Commission should accept such a request depends on whether the request is in writing and discloses ‘sufficient information for the Commission to make a preliminary assessment whether it should proceed with the investigation’.<sup>9</sup>

Further, the Commission is to consult with interested parties to determine if it has jurisdiction to investigate and whether the investigation is justified in the circumstances.<sup>10</sup>

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<sup>9</sup> Article 175(3) of the RTC.

<sup>10</sup> Article 175(4) of the RTC.

Unlike Article 176 of the RTC, Article 175 does not provide for COTED to resolve jurisdictional disputes, but gives the CC the power to conduct an investigation once it determines that it has jurisdiction after consultation with interested parties. The text of the provision suggests that the settlement of jurisdictional disputes would have to await the CC's determination of the matter, whereupon the relevant challenge can be made to that determination pursuant to Article 175(12) of the RTC.<sup>11</sup>

It is unclear, however, whether the Community Commission is still obligated to accept COTED's request if the writing and sufficient information requirements are met, but there is a dispute between the member states involved or between a member state and COTED as to the nature of the conduct. Must the Commission conduct the investigation until the matter is resolved by the regional court, that is, the Caribbean Court of Justice (CCJ)? Or should the investigation be halted pending the outcome of such jurisdictional disputes?

While it is perhaps advisable to establish some governance arrangement whereby this issue can be specifically resolved, its absence signals some flexibility for states in the classification of anti-competitive conduct for which remedial action is sought. This flexibility, however, is not dependent on the category of the Caricom Member State in terms of whether it is a less or more developed developing country member.

On the other hand, disagreements between the Commission and member states on the nature of conduct to be investigated are to be resolved by COTED on jurisdictional issues in a specific context as discussed below. The particular context envisaged relates to a request by the Commission directed to a member state to conduct a preliminary enquiry into anti-competitive conduct that the Commission believes has cross-border effects.

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<sup>11</sup> Article 175(12) contemplates challenges to the Community Commission's determination encompassing orders for compliance such as termination of anti-competitive agreements, payment of compensation to persons affected by anti-competitive conduct, and the imposition of fines for breach of competition provisions of the RTC but may also include determinations by the Community Commission that it has jurisdiction regarding the particular investigation conducted.



Regarding resolution of this jurisdictional issue, this requires a finding, determination or decision<sup>12</sup> to be made by COTED in the event such a matter is referred to it by the Commission. Article 176(4)(b) of the RTC uses the term ‘decision’, but since jurisdictional issues are legal questions it is perhaps to be expected that the decision by COTED in this regard would be accompanied by a statement of reasons similar to a finding or determination.

On this view, it would perhaps be necessary for some institutional arrangement to be in place to ensure that what is essentially a legal question is resolved as a legal issue. This includes provision of the necessary support personnel to permit COTED to make a legal determination. This approach is likely to reduce resort to the Caribbean Court of Justice (CCJ) to resolve a jurisdictional issue about which COTED has made a decision that is not considered legally justifiable.

Alternatively, the governance arrangement may contemplate a consensus decision by member countries in resolving particular jurisdictional issues. The current arrangement in Article 27 of the RTC<sup>13</sup> contemplates that a decision of this sort, if regarded as a ‘recommendation’, can be made by a two thirds majority of the member states. Importantly, a decision of COTED on a jurisdictional issue would be legally non-binding<sup>14</sup>, thereby permitting resort to the CCJ.

The non-binding nature of a COTED decision on a jurisdictional issue again affords a particular Caricom Member sufficient flexibility to pursue competition policy in accordance with its development objective. Article 27(6) of the RTC, for example, requires a Member State to provide reasons for non-compliance with a decision of

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<sup>12</sup> Article 176(4) (b) of the RTC requires the Commission to refer to COTED for its decision. This decision would doubtless include a factual finding (i.e. whether the impugned conduct has cross-border effects in fact) and a determination that the applicable provision of the RTC requires the jurisdictional issue to be resolved in a particular manner (i.e. a quasi-judicial determination).

<sup>13</sup> Article 27(6) of the RTC provides that ‘Recommendations of Community Organs shall be made by a two thirds majority of Members States and shall not be legally binding. Member States omitting to comply with recommendations shall inform the Secretariat in writing within six months stating the reasons for their non-compliance’.

<sup>14</sup> Ibid.

COTED but does not stipulate penalties for non-compliance<sup>15</sup> thereby indicating a conciliatory approach to disagreements on non-binding COTED decisions.

On the other hand, a consensus decision may provide greater certainty and promptitude in resolving jurisdictional issues. But in as much as a decision of COTED reached by consensus is no more binding than one without, non-compliance presents a similar opportunity for the pursuit of national development objectives.

## **DEVELOPMENT OF COMPETITION POLICY**

A wide mandate is given to COTED regarding the development of competition policy.<sup>16</sup> Article 15 of the RTC provides that COTED is the body charged with the promotion of trade and economic development of the Community. Under Article 182 of the RTC COTED is charged with developing and establishing appropriate policies and rules of competition within the Community.

In this regard, it can decide what sectors are to be excluded from the prohibited anti-competitive practices set out in Article 177<sup>17</sup> of the RTC or what special rules are to be applied with regard to particular sectors. Development of competition policy may also include COTED's review of, and decision about changes to, policies initially adopted by the Commission or its legal interpretation of a provision.

In addition, development of competition policy may include decisions taken by COTED with regard to harmonization of laws and regulations within Member states.

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<sup>15</sup> Ibid.

<sup>16</sup> Article 182 of the RTC. Article 182 provides as follows: '*Subject to this Treaty, COTED shall develop and establish appropriate policies and rules of competition within the Community including special rules for particular sectors*'.

<sup>17</sup> Article 177 of the RTC specifies prohibited conduct to include agreements whose object or effect distorts or prevents competition in the Community, conduct amounting to an abuse of dominance, price fixing, artificial division of markets, predatory pricing, price discrimination, loyalty discounts, bid-rigging among others.

In each of these cases, a decision would not necessarily be legally binding. This requires some institutional arrangement by which such decisions can be made binding to ensure greater predictability and certainty in the applicable rules and policies for competition within the Community.

The Conference Heads of Government (CHG) may also be involved in the development of Community Competition Policy in accordance with Article 20 of the RTC. Article 20(1) of the RTC provides for cooperation among community organs in the development of community policy where the policy to be developed impacts on the spheres of competence of another community organ.

The Community Organs are referred to in Article 10 of the RTC as the Conference of Heads of Government and the Community Council of Ministers (as the principal organs); and the subordinate organs include the Council for Finance and Planning, the Council for Trade and Economic Development (COTED); the Council for Foreign and Community Relations; and the Council for Human and Social Development.

In the relationship between the CHG and COTED, there is likely to be some impact on the latter with regard to policy developed by the former that would require their cooperation in accordance with Article 20 of the RTC. This is so because Article 12(2) of the RTC stipulates that the CHG ‘*shall determine and provide policy direction for the Community*’, and Article 12(7) of the RTC provides that the CHG ‘*may issue policy directives of a general or special character to the other Organs and Bodies of the Community concerning the policies to be pursued for the achievement of the objectives of the Community and effect shall be given to such directives*’.

In as much as policy questions are political questions, it is to be expected that broader policy questions on competition within the Community will be decided by the

Conference of Heads of Government in consultation with COTED as provided for in Article 20 of the RTC.<sup>18</sup>

In this regard, it is arguable that the institutional arrangement is already in place to secure predictability and certainty for the development of competition policy within the community. This is so because there is the stipulation in Article 28 of the RTC that a decision of the Conference of Heads of Government secured by the affirmative votes of all its members is binding.

Nonetheless, two caveats are worth noting. First, a decision by the Conference of Heads of Government that is not based on an affirmative vote of all members would not be binding as to provide COTED with a clear and unambiguous mandate that can be directed to the Commission regarding the appropriate competition policy for the community.

Second, even where a decision of community competition policy is secured by an affirmative vote of all members at the Conference of Heads of Government, the absence of a provision for *direct effect* of such decisions within member states permits differential application of competition law and policy in the community. This results from the dualist structure for the recognition and application of international law, according to which domestic legislation would have to be promulgated to give effect to international obligations incurred.

The particular relationship between the Commission and COTED and the governance arrangements contemplated, therefore, requires some consideration of the issue of how to treat with decisions of the Conference of Heads of Government. It would seem that the most effective way to give effect to decisions on community competition policy made by

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<sup>18</sup> Article 20 of the RTC provides for cooperation among community organs in the development of community policy where the policy to be developed impacts on the spheres of competence of another community organ. The Community Organs are referred to in Article 10 of the Revised Treaty as the Conference of Heads of Government and the Community Council of Ministers (as the principal organs); and the subordinate organs include the Council for Finance and Planning, the Council for Trade and Economic Development (COTED); the Council for Foreign and Community Relations; and the Council for Human and Social Development.

the Conference of Heads of Government in consultation with the COTED is to provide for their direct effect in member states.

In addition, it is worth noting that while COTED is charged with the development of competition policy in the Community, the Community Commission also plays an advisory role in the development of competition policy. For example, Article 173(2) (b) of the RTC requires the CC to ‘*keep the Community Competition Policy under review and advise and make recommendations to COTED to enhance its effectiveness*’. There is, however, no provision to give direct effect to policy positions of the Community Commission in the performance of its advisory role.

Therefore, absence of a provision for direct effect permits rather than reduces policy space for pursuing national development objectives.

## **RELATIONSHIP BETWEEN COMMUNITY COMMISSION AND CCJ**

Article 175(12) of the RTC provides that “*a party that is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination*”.

Paragraph 4 of Article 174 of the RTC refers to orders or directives that the Commission makes to remedy or penalize anti-competitive conduct referred to in Article 177 of the RTC. Pursuant to Article 174 (4) of the RTC, the Commission may order the termination or nullification of agreements, conduct, activities or decisions prohibited by Article 170.<sup>19</sup> The Commission may also direct the enterprise to cease and desist from anti-competitive business conduct and to take such steps as are necessary to overcome the effects of its abuse of dominance in the market or any other business conduct inconsistent with the principles of fair competition in Chapter VIII of the RTC.<sup>20</sup>

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<sup>19</sup> Article 174(4) (a) of the RTC.

<sup>20</sup> Article 174(4) (b) of the RTC.

In addition, the Commission may order the payment of compensation to persons affected<sup>21</sup>, and impose fines for breaches of the rules of competition.<sup>22</sup>

Although Article 175(12) seems confined to orders or directives issued by the Commission for compliance with its findings, it is arguable that an aggrieved party may also challenge the particular findings as the basis on which the orders or directives were made.

Importantly, where the Commission determines that there is anti-competitive business conduct and requires a party to take the necessary action to remove the effects of the anti-competitive conduct, the party to whom the directive is given is to take the appropriate remedial course of action within 30 days of notification by the Commission.<sup>23</sup> If the enterprise cannot comply with the Commission's order within the 30 day period and fails to inform the Commission, the Commission may apply to the CCJ for an order.<sup>24</sup>

However, it is unclear whether there is any limitation to the specific order for which the Commission may apply to the CCJ. For example, Article 175(11) of the RTC does not stipulate whether the order to be applied for is limited to a declaration of breach of the competition provisions in the RTC or would encompass an order for compliance with the determination of the Commission.

Noteworthy is the fact that where the CCJ's order includes an order for compliance with the determination of the Commission this may not be achieved because the existing governance mechanism does not *require* a decision of the CCJ to have direct effect and enforceable within a CARICOM Member and against a CARICOM national found to have breached the competition provisions of the RTC.

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<sup>21</sup> Article 174(4) (c) of the RTC.

<sup>22</sup> Article 174(4) (d) of the RTC.

<sup>23</sup> Article 175(10) of the RTC.

<sup>24</sup> Article 175(11) of the RTC.

The Caribbean Court of Justice Act incorporated in several of the various CARICOM states provides for the compulsory jurisdiction of the CCJ to be given effect in CARICOM States whether in the CCJ's original or appellate jurisdiction but does not require decisions of the CCJ that are directed at a Member State or a national of a Member State to have direct enforcement in the domestic legal order of CARICOM Members.

Further, in the event that an order of the CCJ includes an order for compliance with a determination of the Commission and the route chosen for enforcement of this order is by way of provisions in domestic legislation requiring decisions of the Commission to be binding in the domestic legal order of CARICOM Members, compliance with the order may be frustrated by reluctance to incorporate provisions requiring decisions of the Commission to be made binding in the domestic legal order of CARICOM Members.<sup>25</sup>

Importantly, several CARICOM countries have passed legislation to give effect to the RTC provisions on competition law and policy, but this action by itself is insufficient to give effect to these provisions without the necessary promulgation or amendment to domestic legislation to incorporate specifically the provisions of the RTC.

This is because some provisions of the RTC are drafted in mandatory terms that would take effect on the promulgation of the relevant law to give effect to the RTC and other provisions, although drafted in mandatory terms, contain a permissive component in the language or may be directory by requiring a further legislative act other than the one to give effect to the Revised Treaty. For example, section 3 of the Caribbean Community Act, 2004 of Antigua and Barbuda provides that '*Subject to this Act, the Treaty, the text of which is set out in the Schedule, shall have the force of law*'.<sup>26</sup>

In this context consider Article 170 (b) of the RTC.

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<sup>25</sup> Pursuant to Article 174(6) of the RTC CARICOM Member States are to enact legislation to ensure that determinations of the Community Commission are enforceable in their domestic legal order.

<sup>26</sup> Another example may be noted, that is, section 3 of the Barbados Caribbean Community Act, 2003. Section 3 provides that: '*Subject to this Act, the Treaty shall have the force of law in Barbados*'.

*(b) the Member States shall:*

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

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

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

*(iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.*

Another example is Article 170(2) which provides that:

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

Yet another example is that provided in Article 177 of the RTC which states:

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

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

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

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

These provisions are in mandatory terms but require some further action on the part of Member States beyond the promulgation of the terms of the treaty as an Act of Parliament. Because the language used is directory in nature the passage of an Act to give



effect to the treaty cannot result in these provisions having legal effect in as much as further action is required.

By contrast, some provisions are drafted in mandatory terms that can take effect when the treaty is promulgated in domestic law. For example, the general exemption provision of Article 168 with respect to the scope of Chapter VIII of the RTC excludes negative clearance rulings and collective bargaining arrangements.

To ensure community competition law and policy is harmonized, Article 174(6) of the RTC provides that “*Member States shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdiction*”. This provision establishes a positive obligation with respect to determinations by the Commission, albeit not with respect to the Commission’s other powers, for example, powers exercisable pursuant to Article 174:2 (a) and 174:2 (b).<sup>27</sup>

It is not clear whether *all* determinations of the Commission should be enforceable in CARICOM Member States or those determinations relating to a dispute involving an enterprise incorporated in the particular Member State.

That not all determinations are included in this obligation coupled with the requirement of further action by CARICOM Members to implement the necessary enactments to give effect to decisions of the Commission provides some modicum of flexibility for CARICOM Members to pursue competition law and policy consistent with their particular development objective.

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<sup>27</sup> That is, securing the attendance of any person to give evidence and requiring the discovery or production of any document or part thereof. These powers are to be exercised in ‘accordance with applicable national laws...’ but without a requirement that the national laws provide for the exercise of these powers.

## **Referring matter to COTED regarding dispute between the Community Commission and a national competition authority or Member State**

In accordance with Article 176(1) of the RTC, the Commission may request a national investigating authority to undertake a preliminary examination of business conduct of an enterprise within the CSME that the Commission has reason to believe prejudices trade and prevents, restricts or distorts competition within the CSME and has cross-border effects.

If the Commission is not satisfied with the outcome of its request it may conduct the preliminary examination itself.<sup>28</sup> Where the Commission's preliminary examination requires that there be further investigation, the Commission is to hold consultations with the Member State concerned to determine and agree on who should have jurisdiction to investigate.

However, the Commission must cease further examination of a matter and refer the matter to COTED for its decision where there is a difference of opinion between the Commission and a Member State regarding the nature and effects of the business conduct or the jurisdiction of the investigating authority. It is noteworthy that recommendations of Community Organs (including COTED) are not legally binding in accordance with Article 27(6) of the RTC.

Therefore, a COTED determination that the Commission has jurisdiction to conduct an investigation into anti-competitive may not necessarily result in adoption of the Commission's determination of claims of anti-competitive conduct and consequential remedial orders.

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<sup>28</sup> Article 176(3) of the RTC.

## **Exclusion of sectors from the operation of competition law**

If COTED determines that special rules are to apply to particular sectors it may suspend the application of Article 177 to such sectors pending the adoption of the relevant rules<sup>29</sup>, and it may also suspend the application of Article 177 to particular sectors in the public interest either on its own initiative or at the request of a CARICOM Member.<sup>30</sup>

The exercise of this discretion to exclude sectors from the competition provisions in the RTC does not require amendment to domestic legislation in every instance that the discretion is exercised. For example, under section 3 of the Fair Competition Act of Jamaica, exempted conduct includes ‘*activities expressly approved or required under any treaty or agreement to which Jamaica is a party*’.<sup>31</sup>

This provision allows for account to be taken of changes in competition policy that may occur at the regional level, but it also permits satisfaction of the adoption of competition policy consistent with the development needs of CARICOM Members as determined at the regional level.

In this regard, special note may be made of Article 31 of the RTC that provides for the invocation of a public interest exception as a limitation to the right of establishment available to CARICOM Members for any industry. Article 31 of the RTC recognizes that invocation of the public interest exception may result in the continuation or creation of government or private monopolies which doubtless has implications for the application of competition law principles.

Admittedly, the establishment of monopolies under the public interest exception is not necessarily in conflict with competition rules. Article 31 expressly provides for the satisfaction of Community competition rules where the public interest exception is invoked to restrict the right of establishment. However, the requirement for the satisfaction of Community competition rules applies in respect of government

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<sup>29</sup> Article 183(1) of the RTC.

<sup>30</sup> Article 183(2) of the RTC.

<sup>31</sup> Section 3 of the Fair Competition Act, 1993 of Jamaica.

monopolies continued or established as a result of the invocation of the public interest exception and not in respect of private monopolies.

Arguably, this shortcoming with respect to private monopolies can apparently be remedied by the obligation on Member States under Article 170 of the RTC for the implementation of the Community Competition Policy and Article 177 of the RTC regarding rules to prohibit anti-competitive business conduct within the Community.

Article 170(1)(b), for example, obliges Member States to enact legislation to prohibit and provide penalties for anti-competitive business conduct. In addition, the Article 31 public interest exception affects the right of establishment with respect to enterprises of other Member States but not domestic enterprises of the Member State imposing the restrictions in so far as there are applicable domestic rules of competition.<sup>32</sup>

Moreover, the authority to restrict the right of establishment cannot be applied effectively in practice in a manner that disregards international obligations. For example, to the extent that the term applies to *commercial presence*, concessions made under the General Agreement for Trade in Services (GATS) for certain sectors cannot be excluded in the exercise of the right under Article 31 of the RTC.<sup>33</sup>

Nonetheless, it bears noting that if the term monopoly as used in Article 31 of the RTC refers to the exclusive right<sup>34</sup> to supply a commodity, then such an interpretation, while not *necessarily* foreclosing the application of competition rules identified in Article 177 of the RTC, provides flexibility for their application consistent with the particular development objective identified by the CARICOM Member.

Additionally, there is no limitation regarding the industry or sector concerned regarding the invocation of the public interest exception for the right of establishment. Again, this

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<sup>32</sup> This is so where the term 'monopoly' is reducible to some measure of market share as a proxy for market power and where a particular threshold of market share is regarded as exemplifying a monopoly. The observation would not apply, however, where the term monopoly refers to an exclusive right to supply a commodity as in the case of an exclusive license or exclusive statutory right to supply a commodity.

<sup>33</sup> Concessions made under GATS, to the extent made on an MFN basis, cannot be denied to countries to which they have already been granted notwithstanding a regional trade agreement that attempts to limit or revoke the grant of such concessions.

<sup>34</sup> For example, an exclusive right existing by virtue of a license or an exclusive statutory right.

flexibility permits a limited application of competition law consistent with the development objective identified and can be read as a permitting a *de facto* operationalization of special and differential treatment in the design of competition law and policy for developing countries.

## **RELATIONSHIP BETWEEN COTED AND CCJ**

Decisions of COTED can be examined by the CCJ, although it is doubtless that this would apply to policy directives. Article 187(c) of the RTC permits suits to be brought against an organ of the Community on the ground that it has acted *ultra vires*. This power to review decisions of COTED is limited to situations where COTED has exercised a discretion. (See, *Trinidad Cement Company Limited v. The Caribbean Community* [2009] CCJ 4 (OJ), para. 41. Moreover, Article 211 of the RTC gives the CCJ jurisdiction to decide disputes between Member States and the Community which includes community organs.

However, it is unlikely that the CCJ would regard the exercise of discretion on purely political policy questions as justiciable. It is to be expected that disputes between Member States and community organs on political questions regarding development policy will remain largely unresolved, if not by conciliatory means at the level of the conference heads of government.

Therefore, absence of governance mechanisms for definitive resolution of policy disputes among Member States provides flexibility for the pursuit of particular development objectives, albeit this may be constrained by general policy positions for which agreement has already been obtained by the conference heads of government.

## **RELATIONSHIP BETWEEN NATIONAL COMPETITION AUTHORITY AND COTED**

The relationship between a national competition authority and COTED is indirect in the sense that COTED, in accordance with Article 15 of the RTC, is charged with the promotion of trade and economic development of the Community. However, this broad mandate is likely to impact the operation of national competition authorities in terms of COTED's power to exclude particular sectors from the provisions relating to prohibited conduct under Article 177 of the RTC and which are to be incorporated into the domestic law of CARICOM Members.

In addition to this general relationship, there is the more specific relationship contemplated under Article 182 of the RTC whereby COTED is the body charged with developing and establishing appropriate policies and rules of competition within the Community that are to be adopted by national competition agencies. Pursuant to Article 182 of the RTC COTED is charged with developing special competition rules for particular sectors. This broad mandate doubtless may translate into the development of competition rules that factor other policy concerns for the development of CARICOM Members including the community industrial policy.

However, there is no provision for *directives* to be issued to a national competition authority from COTED when it recommends the adoption of particular competition policy or special rules for particular sectors. Arguably, this loophole may contribute to Member States maintaining different rules for particular sectors consistent with their development objective.

## **RELATIONSHIP BETWEEN NATIONAL COMPETITION AUTHORITY AND THE COMMUNITY COMMISSION**

Under Article 176(1) of the RTC, national competition agencies are enjoined to conduct a preliminary examination of conduct of a business enterprise within the CSME on the request of the Commission where the Commission is of the view that business conduct within the CSME prejudices trade, and prevent, restricts or distorts competition with the CSME.

This obligation under the RTC will often require amendment to domestic law for effect to be given to it. In some jurisdictions, for example, Jamaica, there is no provision in the competition legislation for investigations to be conducted at the request of an external body. In the case of Jamaica, section 5 of the FCA requires the FTC to conduct investigations at the request of the relevant Minister, and it is arguable that a request by the Commission for a preliminary examination of business conduct could be done through this medium.

This approach, however, leaves much discretion to Members when Article 176(1) was not intended to provide such discretion but rather an obligation for the conduct of such preliminary examinations. Through such discretion national objectives can be pursued with flexible policy options at the expense of community objectives for competition policy.

This is not to suggest that Members have no discretion with respect to the conduct of an investigation. The discretion is however confined to jurisdictional disputes as to whether a national investigating authority or the Commission is to conduct an investigation, as opposed to a preliminary examination, where the Commission finds that further investigation is warranted, following its dissatisfaction with the outcome of a request for a preliminary examination of business conduct to be done by a national investigating authority.

Amendment to domestic legislation may also be required where the preliminary examination to be conducted involves companies whose conduct has an effect on a market other than the market of the territory of the investigating authority.

For example, section 2(3) of the Fair Competition Act (FCA) of Jamaica states that:

*Every reference in this Act to the term 'market' is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*

Given that a preliminary examination requested by the Commission is in respect of conduct that has an effect within the CSME or affects the operation of the CSME, it is not inconceivable that a request for such an examination can be made regarding conduct whose effect is limited to the territory of the investigating authority since the market of each CARICOM state is a part of a Single market. But, if the term cross-border effects connotes conduct whose effect is not limited to a particular territory, it is unclear as to what the basis for a request for the conduct of a preliminary examination would be where the conduct and its effect is confined to a particular Member State.

It may be that the term 'cross-border effects' denotes, as an example, anti-competitive conduct that has an effect outside of the Member State where the conduct originates. If this is so, community competition policy, to the extent that the promotion of this objective is largely within the mandate of the Commission, may not address adequately domestic anti-competitive conduct that frustrates market access.

In addition, the investigative function of the Commission may be affected due to the absence of competition laws and functioning competition authorities in some CARICOM Member States. Article 174(2) of the RTC provides for the Commission to carry out its



investigations in accordance with applicable national laws.<sup>35</sup> This may require domestic legislation to compel nationals of CARICOM States against whom investigations are to be conducted to appear before the Commission to provide evidence, and for the Commission, whether by itself or in association with a national competition authority, to be able to conduct discovery and to require the production of documents to conduct its investigation.

However, many CARICOM States have not promulgated competition legislation and, while legislation may exist in some countries, there are but two fully functioning competition authorities in the region, that is, in Jamaica and Barbados.

This state of affairs has, by default, provided CARICOM Members with sufficient space for manoeuvre in fashioning competition law and policy for their particular development objective. Although this would not necessarily be in keeping with satisfying the application of the special and differential principle endorsed by developing countries in operationalizing competition law and policy, absence of the required legislation or substantial delays in their promulgation and the functioning competition institutions to facilitate effective community competition policy, provide incentives for the pursuit of development objectives tailored to national concerns.

## **CONCLUDING REMARKS**

The foregoing discussion focuses on the governance arrangements in CARICOM for the enforcement of competition law for developing countries of the region at different stages of development. The paper took as a departure point the acceptance of the principle of special and differential treatment in the fashioning of an appropriate regime for the enforcement of competition law and policy as consistent with development objectives as endorsed by developing countries and supported both at UNCTAD and within the WTO Working Group on The Interaction between Trade and Competition Policy.

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<sup>35</sup> Article 174(2) of the RTC. Among the provisions contemplated for the Community Commission to conduct investigations effectively are those providing for the attendance of any person to give evidence before it and for the discovery or production of documents or other evidence.

As the discussion demonstrates, the Revised Treaty of Chaguaramas not only recognizes the existence of CARICOM countries at different stages of development but presents several opportunities for achieving coherence and convergence in regional competition law and policy fashioned in the context of satisfying the special needs of developing countries in the CARICOM region by establishing governance arrangements that promote a community competition policy.

However, CARICOM Members enjoy some flexibility in pursuing national development objectives in their application of competition law and policy, not necessarily by virtue of any express provision for operationalizing special and differential treatment, but by virtue of extant flexible and fluid governance arrangements that permit deviations from even a one size fits all approach to competition law and policy with this regional economic space, thereby facilitating national development objectives exclusive of those determined appropriate for the region as a whole.

The dynamic interaction of this dualist approach recommends itself as representing a near optimal solution to compromising on competing objectives for satisfying development objectives. It remains to be seen what fissures, if any, may be engendered as the CARICOM Single Market and Economy becomes fully operational.