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**CAPACITY BUILDING WITHIN THE CARIBBEAN FORUM OF ACP STATES
(CARIFORUM) IN THE AREAS OF COMPETITION, PUBLIC PROCUREMENT AND
CUSTOMS AND TRADE FACILITATION IN SUPPORT OF THE IMPLEMENTATION
OF THE CARIFORUM-EU ECONOMIC PARTNERSHIP AGREEMENT**

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**LEVEL 1
TRAINING MANUAL IN COMPETITION**

A project implemented by:

EQUINOCCIO

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ONE-DAY SENSITISATION WORKSHOP ON COMPETITION LAW

PROGRAMME

- 8:45 – 9:00** Registration of Participants
- 9:00 – 9:15** Opening Remarks and Introduction
- Introduction to Key Concepts and Ideas: Competition, Competition Law, Competition Policy***
- 9:15 – 9:30** Definitions: Competition, Competition Law and Competition Policy
- 9:35 – 10:00** Objectives and economics of Competition Law and Policy
- 10:05 – 10:15** Benefits of Competition Law and Policy
- 10:20 – 11:00** Three main pillars of Competition Law
- Abuse of Dominance
 - Agreements and Concerted Practices
 - Mergers and Acquisitions
- 11:05 – 11:15** Questions and Answers on Key Concepts

MORNING BREAK: (11:20am to 11:35am)

Institutional Arrangements for Competition Law Enforcement in CARICOM

- 11:40 – 11:55** Relationship between national competition authorities and Courts
– Sanctions and other penalties
- 12:00 – 12:15** Introduction to national and regional competition laws in CARIFORUM
- 12:20 – 12:35** Relationship between national competition authorities and
CARICOM Competition Commission (CCC)
- Submission of complaints to CCC
 - Enforcement cooperation
 - Jurisdiction

LUNCH BREAK: (12:35pm - 1:35 pm)

1:40 – 2:00 Jurisdictional issues between Competition Authorities and Sector Regulators

2:05 – 2:15 Questions and Answers on Institutional Arrangements

Competition and Trade Agreements

2:20 – 2:35 Relationship between Competition and Trade Policy

2:40 – 3:00 Competition Chapter of CARIFORUM-European Union Economic Partnership Agreement (EPA)

3:05 – 3:15 Questions and Answers on Competition and Trade Agreements

AFTERNOON BREAK: (3:20pm – 3:30pm)

Competition Culture in CARICOM

3:35 – 3:55 Role of civil society in competition law enforcement

4:00 – 4:15 Role of the media in competition law enforcement

4:20 – 4:30 Questions and Answers on Competition Culture

4:30 - 4:35 Closing Remarks

TRAINING OUTLINE

Training Name:	Level 1 Training in Competition
Training Duration:	One day per country in CARIFORUM
Training Goals:	To impart a basic understanding of the competition regime and to sensitize stakeholders of their role in achieving successful enforcement
Training Results:	It is expected that participants would have a better understanding of the rules of competition and the benefits for themselves and the society and be committed to its successful implementation
Training Description:	A basic sensitization of the main aspects and benefits of the competition regime in CARIFORUM in general and an overview of the particular country's law
Level of Certification:	Certificate of Attendance
Timing of Training:	7 hours
Collaborators:	The Community Competition Commission and the Comisión Nacional de Defensa de la Competencia of the Dominican Republic
Mode of Delivery:	Face to Face

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1. PREFACE

Purpose of Manual

This manual is intended to be an accompaniment to a live presentation, and is meant to guide the participant on the main themes and points of discussion, so as to enhance the learning process.

The purpose of the workshop is to introduce participants to, and create awareness of, competition law and its benefits to consumers and the economy. It includes presenting on the main elements of the emerging and evolving competition regimes in CARIFORUM, and the relationships between the various institutions and the courts of the region in the implementation of these regimes.

In acquiring this basic understanding of the institutional structure and legal provisions of the competition regimes, participants are then guided on the importance of each stakeholder's role in the enforcement process, and the need for their active support of the Competition Commissions by being their "watchdogs" in the market place and report any suspected anti-competitive conduct to the Commission. Such understanding would empower participants to fully utilize the law and institution to the benefit of consumers and the economy, and promote poverty alleviation.

2. KEY CONCEPTS AND IDEAS

Learning Objective:

- *to bring clarity to the participant on the concepts and terms used during the workshop;*
- *to impart an understanding of the prohibitions under the law*
- *to provide a basis for understanding that competition law is based on economic interaction of firms, unlike other laws that are based on other societal dynamics, such a safety, health, ordered use of public space*
- *participants should develop a clear understanding that the benefits of enforcing this law accrues to themselves, and all members of society except those who are engaging in the anticompetitive conduct.*

Our subject is Competition Law and Policy in CARIFORUM. There is a lot of misunderstanding and confusion in usage amongst the following terms: Competition, Competitiveness, Competition Law, and Competition Policy. In the following, we define these terms for clarity.

2.1. Definition of Terms

“Competition” refers to a condition of intense rivalry amongst competitors, be it in sports or in markets, whereby rivals try to achieve their optimum performance so as to win in the relevant endeavour. In the case of Competition Law, the term “competition” refers to rival firms engaging in fierce battle to win over customers using fair means.

Competitiveness refers to a measure of how well positioned a firm is to compete. A firm can engage in several strategies to increase competitiveness, such as improving efficiency, distinguishing itself by product differentiation, or improving the technology it uses. Thus, a firm lacking competitiveness would have trouble staying in a market when faced with competition from more competitive firms.

A **competitive market** is one in which good competition exist amongst firms in the market, that is, no one firm is able to influence the price of a product, consumers have choice, and new firms can enter the market to contest excessive profits.

Competing on the merits means using all “fair” strategies available to gain competitive advantage over rivals

Competition Policy includes all government initiatives designed to increase competition in markets. Thus, removing trade barriers would allow more firms to compete in markets, or privatizing or deregulating industries would lead to the private sector competing in those industries. Competition Policy also includes government policies to protect competition in markets through the enactment of competition law.

Competition Law prohibits anticompetitive conduct by firms (public and private enterprises); it specifies the type of conducts that are prohibited, and provides an institutional framework for enforcement of the law. The purpose of competition law is to protect competition in markets, so that firms can engage in rivalry.

2.2. Objectives and Economic Underpinnings of Competition Law

Objectives

The objectives of competition law differ amongst countries, and are largely determined by the level of development of the economy and the social conditions that shape distribution of wealth.

- In most countries, though, objectives include the *improvement of efficiency* and the *protection of consumer welfare*.
- Some countries, like South Africa, have specific provisions to ensure that there are economic opportunities for the disadvantaged groups in the society.
- In regional groupings, such as the European Union, and the CARICOM Single Market and Economy (CSME), objectives include ensuring that anticompetitive conduct by private firms do not negate the benefits to be derived from trade liberalization among members of the grouping.

Economic underpinnings

Competition law is an economic law. It is based on concepts of preferred behaviour amongst firms as they compete for market share so as to yield the highest good for society, particularly through enhancing consumer welfare.

What are the conditions that stimulate rivalry amongst firms?

- Threat of new entry: firms worry that a competitor may come into the market and take market share. This forces incumbent firms to be efficient and offer good products, thus making it harder for newcomers to compete;

- A single large buyer has bargaining power, such as a large supermarket, and this constrains the suppliers ability to charge high prices;
- If consumers can move to a substitute product in response to a price hike, there is less incentive on the part of the supplier to increase price
- If suppliers have bargaining power, then large purchasers' ability to dictate purchasing price will be reduced.
- Innovative products and services in response to perceived consumer demand or that create new market categories in an industry
- Liberalization of entry and exit into previously restricted markets

Competition Law enforcement requires an understanding of markets. For instance:

- How concentrated are industries, that is, how many firms compete in for the product or service market?
- How easy is it for new firms to enter a market and compete, or exit a market if necessary?
- What structural conditions exist that lead to more or less competitive markets?
 - For instance, in the small economies of CARIFORUM, some sectors are naturally concentrated, that is, have a few firms. This is because it is uneconomic for a large number of sellers to share the limited number of buyers in small economies and still attain profitability given existing economies of scale and scope
 - Or, the investment needed is so large and the market so small that only one firm can exist in the market, such as the cement industry, or water and sewerage supply. This is a natural monopoly;
- What options do firms have as they strive to gain advantage over their rivals? Which of these options are welfare enhancing, and which reduces welfare?
 - For instance, to remain in a competitive market, firms must ensure internal efficiency, and must constantly strive to improve product quality and service.
- How does the legislative and regulatory framework influence the structure of the market, rivalry of firms, ease of entry or exit? An example is does entry require a license, and is there a restriction on the number of licenses

2.3. Benefits of having a strong competitive market environment

Enforcement of competition law ensures that markets remain competitive. To survive in a competitive market, firms are forced to:

- strive to offer the best quality products
- increase efficiency so that they can reduce price in order to attract customers and take market share
- ensure consumers have better choice of products

Thus, consumers benefit when markets are kept competitive.

Moreover, in our small open economies in CARIFORUM, firms have to compete with imports, and therefore can survive only if they are competitive. Firms employ people, and so firms competitiveness secures *employment*.

Anticompetitive business conduct, such as collusion to fix prices, lead to *consumer welfare loss* as colluding firms accrue rents (profits without accompanying endeavor) that are taken from consumers' disposable income, reducing the amount that they can purchase and their available disposable income.

Equally, collusion by firms that are bidding for government or private sector procurement contracts lead to payments by governments and the private sector far in excess of what would have been the cost had the bid been competitive. This loss is from the public and private sector coffers, and government then has less money to spend on social welfare, and the private sector has to charge higher prices to recoup their expenditure and earn a profit.

Firms with market power can use exclusionary behaviour, directed at rivals, to either depress their profits or erect barriers to new firms entering the market. Removal of such barriers allows new firms to flourish when profitable opportunities arise.

2.4. The Three Pillars of Competition Law

Learning objective: This section is introductory, and participants will gain an insight to what could be considered anti-competitive business conduct. Details of the prohibitions will be covered in the country's national law section.

Competition law consists of the following three pillars:

1. Prohibition of anticompetitive agreements
2. Prohibition of abuse of dominance
3. Merger control regulation

2.4.1. Anti-competitive agreements

These are agreements between two or more enterprises that are designed to or have the effect of restricting competition in the market with the aim of increasing profits for the firms involved.

Such agreements include price fixing by firms, market sharing, and bid rigging. All three such conducts lead to consumers being harmed, as higher prices are charged.



For, instance, firms that sell the same product and control a large share of the market, can get together and carve the market into geographic sections, to be controlled by each firm. By doing so, they each get a monopoly in the geographic area they control, and can charge higher prices without fear of rivals coming in and offering lower prices, and taking away market share.

An example could be if all the major firms selling a product get together and agree to charge 100% above the price that would obtain if they were competing against each other. This means that consumers pay twice as much for the product, reducing their disposable income, while the firms gain twice as much profit for no greater effort. This type of behaviour by firms increases poverty.

2.4.2. Abuse of a dominant position

“...an enterprise holds a dominant position in a market if by itself or together with an interconnected enterprise, it occupies such a position of economic strength as will enable it to operate in the market without effective constraint from its competitors or potential competitors.” (The Revised Treaty of Chaguaramas Art. 178).

The Barbados, Guyanese and Trinidad and Tobago competition law similarly defines market power, with the Trinidad and Tobago Fair Trading Act referring to “monopoly power” rather than “market dominance”.

This essentially means that a firm has market power if it can act without concern that its rivals could respond in such a way as to counter the effects of its action.

Abuse of a dominant position can occur when a firm that has market power uses that market power to harm rivals in an effort to stifle competition and thereby hold on to their market share, or drive competitors out of the market. By doing so, a dominant firm need not be concerned about improving efficiency or product quality, since it would have a captive market.



Having a dominant position in a market is not itself anticompetitive. A firm may achieve a dominant position or a monopoly by competing on the merits using strategies that are pro-competitive, such as product differentiation or clever marketing.

2.4.3. Merger Control Regulation (MCR):

The purpose of evaluating proposed mergers between firms with market power is to pre-empt excessive concentration from developing in the whole or some of the product markets of the merged firms. This could lead to a significant change in market structure, increasing concentration among the remaining competing firms, and making it more conducive to collusion or abuse of dominance.

Firms are required to notify a competition authority of a proposed merger if combined, they meet the relevant thresholds stated in the national law of the country. Thresholds vary amongst countries; in some countries, such as Barbados, a market share threshold of 40% is used, while in others, it is at least 50%.

The intention of MCR is not to prevent mergers, but to evaluate the market structures that would result from a merger and determine the likely impact on competition in the relevant market. The Competition Authority would then decide on a course of action:

- whether a merger could be allowed; or
- should remedies (structural and behavioural) be applied whereby the merging companies are required to divest some of their assets (such as Cable and Wireless was required to do in Trinidad and Tobago recently before its merger with Columbus was approved by the Regulatory Authority), or
- should the merger be prohibited altogether because it results in a substantial increase in market concentration and market power and significantly lessens competition in the market.

3. INSTITUTIONAL ARRANGEMENTS: THE COMMISSIONS IN CARIFORUM

Learning Objective: Participants will gain a clearer overview of the different competition regimes in CARIFORUM, where there is harmonization, and which countries stand alone.

3.1. Overview

Competition Law is enforced through Competition Commissions, or Fair Trading Commissions. The legal instruments for setting up these commissions are enshrined in the competition law of the country. In some countries there are very specific requirements to be adhered to in the nomination and appointment of commissioners and the staff of commissions. The powers of the commission are defined by the law, as is the role of the judiciary in enforcing rulings of Commissions, and in hearing appeals from rulings of Commissions. Each law has its own nuances.

In the CARIFORUM region, countries can be separated into four categories:

- i. those which are members of the CSME;
- ii. the Bahamas, which is a member of CARICOM, but not the CSME; and
- iii. the Dominican Republic.

The significance of the CSME is that Chapter 8 of the Revised Treaty of Chaguaramas not only requires each signatory to the RTC to enact a national competition law and establish a national competition authority, but it also created a regional competition policy a Caribbean Community Competition Commission (CCC) that has jurisdiction within the CSME.

National laws apply only to conduct that causes harm to consumers or competition within the national jurisdiction; some laws extend to conducts that originate outside the national jurisdiction, but causes harm to domestic consumers or the economy. The national competition authority will only investigate a case if there is harm caused to domestic consumers or competition in the domestic market.

CARIFORUM



The *CARICOM Competition Commission (CCC)* is responsible for investigating cross border anti-competitive conduct within the CSME. There must be two or more countries involved in a complaint before the CCC can have jurisdiction to investigate. The RTC contains provisions specifying prohibited conducts within the CSME, and the procedure that must be followed for the CCC to investigate and make a ruling on a case.

The Bahamas expects to have a national law and national competition commission. There is no obligation to conformity with that of the rest of CARICOM and the CARICOM Model Competition Bill since it is not a signatory to the CSME component of the RTC. As yet there is no indication that the CCC will have any standing in the Bahamas.

Finally, the Dominican Republic has its own national law and Commission, with no links to the CCC.

3.2. State of Play in the Region

As of June 2015, five countries of the 15 within CARIFORUM have enacted competition law and have established competition commissions.

- Jamaica: law enacted in 1993; amended in 2001
- Barbados: Law enacted in 2002; enforcement began in 2004
- Guyana: Law enacted in 2010; enforcement began in 2012
- Trinidad and Tobago 2006; Commission set up in 2014; enforcement still to be initiated
- Dominican Republic: law enacted in 2008;

Of these five countries, four are enforcing the law. Trinidad and Tobago has proclaimed only that part of the law that establishes the Commission.

- The Commission was set up in 2014 and three Commissioners were appointed in July 2014 to oversee the work of the Trinidad and Tobago Fair Trading Commission.
- The rest of the law which contains prohibitions and enforcement procedures have still to be proclaimed. This was deliberated done in order to give Commissioners time to hire and train staff before they open their doors for business.

Belize, Suriname, the Bahamas and the OECS countries all have draft competition laws, and are in the process of establishing their competition regime.

- The OECS has advanced the furthest in this process
 - These countries have developed a model law that has been approved by OECS Ministers and each country has to now pass legislation.
 - They took the initial decision, approved by the COTED and the Heads of Government, to establish a sub-regional competition authority as the national competition authority of each Member State of the OECS. This decision is now being reviewed in 2015 and alternative options institutional arrangements for enforcing the law are now being considered.
- Suriname has completed their draft national competition bill after consultations with national stakeholders. The draft bill has been approved by the Council of Ministers. It now has to be submitted to Parliament for approval before enactment.

- Belize is currently utilizing 10th European Development Funds to establish the legislative and institutional framework for competition law and policy.
- The Bahamas is still at the early stages of this process.
- Haiti needs to start the process.

4. NATIONAL COMPETITION REGIME: NATIONAL COMPETITION LAW AND COMMISSION

(Existing Laws: Jamaica, Barbados, Trinidad and Tobago, Guyana, Dominican Republic);
(Draft laws: OECS, Belize, Suriname, Bahamas).

The enacted or draft national competition laws of CARICOM Member States conform to the CARICOM Model Competition Bill that was agreed through consensus in 2003. As such all national competition laws have provisions for anti-competitive business agreements and abuse of dominant positions. A number of Member States have gone a step further and included merger control provisions. So Barbados and Trinidad and Tobago have merger control provisions in their competition laws.

Jamaica and Guyana do not have merger control provisions in their enacted national competition laws. Guyana in 2014 completed consultations on a Merger Control Bill. It is now to be finalized and submitted to Parliament for review and approval. Jamaica has not signaled when it will begin the process of incorporating merger control provisions in its national competition law.

Belize, OECS and Suriname have included merger control provisions in their draft national competition laws.

Jamaica is the only member state that does not have merger control provisions in their national competition law.

5. ANTICOMPETITIVE AGREEMENTS/ ABUSE OF DOMINANT POSITION

The text of the provisions concerned with agreements and anticompetitive business conduct are broadly similar in line with the text of the CARICOM Model Competition Bill for the CSME countries.

They contain prohibitions against firms colluding, to engage in:

- price fixing – the price they will charge or the discounts/credit terms they will offer their customers for goods or services
- bid rigging – deciding who should win a contract in a competitive tender process
- output quotas/restrictions – limiting the levels of products or services supplied to a market in order to increase the price, and
- market sharing – choosing which customers or geographic areas they will supply, or preventing competitors (e.g., foreign competitors) from entering the market.

Or firms with market power can abusing their dominant position by engaging in such conducts as:

- a) restricts the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the good or service supplied in that market;
- b) prevents or deters any enterprise from engaging in competitive conduct in that or any other markets;
- c) eliminates or removes any enterprise from that or any other market;
- d) directly or indirectly imposes unfair purchase or selling prices that are excessive, unreasonable, discriminatory or predatory;
- e) limits production of goods or services to the prejudice of consumers;
- f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreement;
- g) engages in exclusive dealing, market restriction or tied selling; or

- h) uses any other measure unfairly in its trading operations that allows it to maintain dominance

In addition, denial of access to essential facility, as for instance if cellular phone providers are denied interconnection with the incumbent's network in order to provide full service.

The powers of Commissions vary in different country laws, but are quite extensive in their ability to investigate, require documents, summon witnesses and enter and search premises of firms that are suspected to be engaging in anticompetitive conduct (with a warrant issued by the court).

High Court Judges enforce the rulings of Commissions in most countries. In some instances, they are responsible for making the ruling in a case.

All decisions of Commissions, or the High Court, can be appealed in the Court of Appeal. Sanctions and other penalties differ as between countries, with some laws, like Barbados, providing the option to impose a specified amount of money, or charging up to 10% of the firm's turnover in the product in question.

Jurisdictional lines between the Competition Commission and Sector Regulators can be unclear and this could lead to friction. Some countries have brought the two under one roof, and the two regulators work closely. In others, where sector regulators have a long history of autonomy in decision making, it can be difficult to introduce the new rules that apply to their sector, administered by another authority. Therefore close collaboration is essential. In the case of Trinidad and Tobago, the regulated sectors were excluded completely from the purview of the Competition Commission, and the Regulators are required to enforce the competition law in each of their sectors.

6. MERGERS CONTROL PROVISIONS

The threshold criteria for assessing a merger have seen two main approaches utilized by member States that have enacted the law or have draft laws. They are (a) market share and (b) asset value. There are pro and cons to both approaches with the most developed country competition authorities applying an asset value threshold. Table below provides a tabular comparison of the different approaches used and the threshold criteria applied.

7. COMPARISON OF MERGER PROVISIONS IN CSME MEMBERS COMPETITION LEGISLATION

ISSUE	BARBADOS	BELIZE (DRAFT LAW)	GUYANA	JAMAICA	OECS (DRAFT LAW)	SURINAME (DRAFT LAW)	TRINIDAD & TOBAGO
THRESHOLD CONCEPT	Market share	Market share	N/A	N.a	Asset value	Market share	Asset value
THRESHOLD LEVEL	40%	40%	N/A	N.a	XCD 25 M (USD 9.4 M)	40%	TTD 50 M (USD 8 M)
DURATION OF PROCEDURE	3 months	3 months		N.a	3 months	3 – 10 months	1 month
ACCEPTED MERGER DEFENCE	Efficiencies/ failing firm	Efficiencies/ failing firm		N.a	Efficiencies/ failing firm	Efficiencies/ failing firm	None
BURDEN OF PROOF	Applicants	Applicants		N.a	Applicants	Applicants	N.a
REMEDIES	Behavioural/ structural	Behavioural/ structural		N.a	Behavioural/ structural	Behavioural/ structural	Structural
PENALTIES	BBD 500,000/ 10% of Turnover p.a.	BZD 600,000/ 10% of turnover p.a.		N.a	XCD 600,000/ 10% of turnover p.a.	SRD 2 million	10% of turnover p.a.

Source: member States Enacted and Draft national competition laws.

8. THE COMMUNITY COMPETITION COMMISSION

The CARICOM Competition Commission (CCC) was established under Article 171 of the RTC. The institution was inaugurated on 18 January 2008 and is currently located in Paramaribo, Suriname. The mandate of the CCC is to:

- (a) apply the rules of competition within the CSME in respect of anti-competitive business conduct;
- (b) promote and protect competition in the Community and co-ordinate the implementation of the Community Competition Policy; and
- (c) perform any other function conferred on it by any competent body of the Community.

Articles 177 to 179 give details of conducts that are prohibitions within the CSME

The jurisdiction of the CCC applies to business transactions of a cross-border nature. In this context, cross-border refers to transactions involving two or more member states of the CARICOM Single Market Economy (CSME).

In matters of a cross-border nature, Article 174 of the RTC bestows upon the CCC the power to monitor, investigate, detect, make determinations or inhibit and penalize business enterprises whose conduct distorts competition within the CSME.

With regard to cross-border competition law enforcement, there are two main channels for which matters can be brought before the CCC. These are complaints or concerns lodged by a member state(s) or by the Council for Trade and Economic Development (COTED). However, the CCC can also investigate a matter on its own accord.

The relationship between the CCC and national competition authorities in CSME member states is one based on cooperation to ensure cross-border competition law enforcement. As such, Article 170.3 obligates member states to cooperate with the CCC and to investigate anti-competitive allegations referred to it by the institution. Additionally, Article 173.2(e) of the RTC states that in discharging its functions the CCC shall cooperate with competent authorities in the member states.

Under Article 176 of the RTC if there is a difference in opinion between a member state and the CCC regarding jurisdiction of the investigating authority, the CCC can refer to COTED for a decision on the jurisdiction of the matter.

Decisions taken by the CCC with respect to cross-border business conduct are binding on an enterprise. The decisions are also viewed to be similar to those given by the High Court in a member state.

However, in accordance with Article 175 of the RTC, if a party is aggrieved by the decisions of the CCC it may apply to the Caribbean Court of Justice (CCJ) for a review of the decision.

9. COMPETITION AND TRADE AGREEMENTS

Learning Objectives:

- *Expose participants to that anticompetitive conduct affects international trade and deprive nations of the benefit of trade*
- *That competition law is necessary in trade agreements to prevent private firms from*

Why competition provisions are necessary in trade agreements

In trade agreements, governments lower tariff and non-tariff barriers so as to increase market access for goods and services amongst the signatories to the agreement.

However, market access is not guaranteed. Private firms may engage in anti-competitive conducts to bar entry of imports through cartelization or abuse of a dominant position.

- For instance, a dominant domestic firm may make an agreement with the main distribution firms in the country for exclusive distribution of only that firm's product, and forbid them from carrying rival's products. Foreign firms would then have no local agent to distribute the imported product, and so cannot access the market
- Governments may wish to favour public enterprises by giving them treatment more favourable than competing foreign firms resident in the country. Competition provisions in trade agreements limit the scope for governments to use other means to limit market access
 - For example, subsidized rates may be provided to local firms for access to goods and services (e.g., water or energy) provided by the government, while foreign resident firms pay more
- Increased market access can result in increased exposure to cross border anticompetitive conduct:
 - For instance, firms outside the country may collude to raise prices and domestic consumers will pay in excess of the competitive price. International cartels operate in many countries and harm consumers:
- Graphite Electrode Case: price increased by 60% → yearly overcharge of US\$1 billion. Graphite electrode is used to increase the heat intensity in mini steel mills. ISPAT Trinidad Limited was affected by this pricing, and therefore, all steel sold by ISPAT during the period of their operation (1992 – 1997) was more expensive than it should have been.

- Lysine cartel – doubled their price. Lysine is used in all animal feed, and there are only a few producers in the world.
 - The leader of the cartel was Archer Daniels Midland (ADM). This company has flour production mills in several CARIFORUM countries.
 - All meat and poultry consumers throughout the world were affected.
- Foreign investors may abuse their dominant position in the domestic market including abuse of intellectual property rights;
- Cross border mergers could be a strategy to assume dominance or monopoly and be in a position to abuse market power

Having competition provisions in trade agreements limit the ability of private firms to exclude products originating in other members to the agreement. It also limits government's ability to use other means to bar entry to imports.

However, note that competition law allows for exclusions and exemptions from the law, and this allows for industrial policy measures. It is the prerogative of the country to determine what is excluded or exempted, but this has to be a part of the legal regime.

10. THE COMPETITION CHAPTER IN THE CARIFORUM-EU ECONOMIC PARTNERSHIP AGREEMENT (EPA)

The CARIFORUM-EU EPA was signed by all Parties in 2008 (except Haiti, which signed in 2009), but has not been ratified by all Signatory States, including some in the EC. It does not come into force until ratified by all signatories. While the Agreement is not yet in force, it is being provisionally applied.

The Chapter on Competition in the EPA requires that within five years of coming into force of the agreement,

- All signatories enact competition laws prohibiting anticompetitive agreements and abuse of a dominant market position. It does not include merger control regulation. (This obligation is also contained in the Revised Treaty of Chaguaramas, Chapter 8).
- The CARICOM Competition Commission and the Competition Commission of the Dominican Republic (CNDC) be established.
 - It is uncertain as yet as to the obligation of the Bahamas regarding establishing a Commission
 - While it does not call for each CSME country to have a national commission, the RTC requires this, and the CCC can only fully carry out its responsibilities in cooperation with national commissions and national courts;

The EPA Chapter on Competition contains soft provisions on cooperation and exchange of information related to enforcement activity and alerting the other Party when anti-competitive behaviour is taking place in the other Party's territory;

- This does not take effect until all signatories comply with the enactment of laws and establishment of the bodies referred to in paragraph 1 [CCC and CNDC]
- The CCC and CNDC have been established, but only five of the fifteen have passed competition laws.

The Chapter requires that public enterprises that are subjected to specific sectoral rules are exempt

- Art. 129 (5) requires that the CARIFORUM – EC Trade and Development Committee shall be informed about the enactment of sectoral rules

- Other public enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
 - This obligation is also a requirement of the RTC (Art. 94 (3), and imposes no further burden on CSME States. The DR Law complies with this requirement. The Bahamas will need to ensure compliance.
- Remove discrimination by state monopolies between EC and CARIFORUM nationals in respect of trade in goods and services
 - Art. 129 (5) requires that the CARIFORUM-EC Trade and Development Committee be informed of the measures adopted to implement paragraph 4
 - As yet, no measures have been adopted in CARIFORUM to implement paragraph 4 obligations or report to the CARIFORUM_EC Trade and Development Committee on implementation.

The obligations under the Competition Chapter of the EPA apply to both the EU and CARIFORUM States, but the EU is already compliant with the provisions. Obligations on cooperation and exchange of information apply to both Parties **but they are voluntary in that Parties may** inform of its willingness to cooperate in enforcement and Parties may exchange non-confidential information. Finally, the Chapter provides for technical assistance to CARIFORUM States to enable them to meet the obligations under the Agreement. Such assistance includes drafting guidelines and manuals, provisions of independent experts and the provision of training for key personnel involved in the implementation of and enforcement of competition policy.

EPA Compliance Obligations: where are we?

- The two competition commissions named as mandatory in the EPA have been established
- 10 member states of CARIFORUM still need to enact competition law and set up Competition Commissions
- Once there is compliance with the above two obligations, then MS will have to engage in cooperation and exchange of information with the EC Party in regard to enforcement activity and alerting the other Party when anti-competitive behaviour is taking place in the other Party's territory
- CARIFORUM – EC Trade and Development Committee will need to be informed about the enactment of sectoral rules

- The Bahamas will need to ensure that its draft law includes provisions for subjecting public enterprises to the competition law
- All MS would need to do an audit of its policies and remove discrimination by state monopolies between EC and CARIFORUM nationals in respect of trade in goods and services

11. DEVELOPING A COMPETITION CULTURE IN CARIFORUM

11.1. What do we mean by a “Culture of Competition”?

- A culture of competition exists when there is societal understanding of the law and acceptance of its value to consumers, the economy, and development policy
- Stakeholders have sufficient understanding of the law so as to expect compliance by firms
- Stakeholders are willing to be vocal in demanding compliance and in reporting suspicious conduct to the Competition Commission.

11.2. Why is this important?

Competition law enforcement needs a two pronged approach

- encouraging compliance with the law and
- punishing breaches of the law sufficiently that it hurts the offenders

11.3. Encouraging compliance

The vast majority of drivers of motor vehicles stop at a traffic lights, even if it is safe to proceed, because obedience of the rule becomes engrained in their behaviour, and compliance becomes automatic. They do not stop simply for fear that the police will discover their act and fine them.

So too with competition law; firms need to become familiar with the provisions of the law and be motivated to comply by:

- conducting internal audits to examine their agreements and conducts and purge their organization of any agreements or policies that would cause them to be in breach of the law
- Private sector lawyers who are employed by firms need to understand the provisions of the law so as to advise their clients on how to stay on the right side of the law
- Firms need to recognize that maintaining competitive markets is not only good for consumers, but also good for firms who can themselves become victims of anticompetitive conduct.
- In addition, competitive markets lead to economic growth and everyone benefits, including firms.

A successful competition regime needs an enabling environment:

An enabling environment here refers to one in which there is synergy between the objectives of the competition law and other institutions upon which compliance with the law and law enforcement depend. Amongst these are:

- Government Ministries that develop sectoral policies. These policies should always be examined against the prescriptions of competition law to ensure compliance;
- The regulated industries can contravene the competition law, and so sector Regulators must be knowledgeable in the rules of competition, and work closely with the Competition Commission;
- The Judiciary has a vital role to play in enforcing the rulings of the Commission, and in hearing appeals from decisions of Commissions, and also need to be trained.
- Most vital is the need for a society that respects the rule of law

11.4. Role of Civil Society in Competition Law Enforcement

The Competition Commission can only investigate cases if it comes to the attention of their investigative officers that there is alleged anticompetitive conduct taking place. There are several ways in which they can get information:

- By conducting market studies and recognizing some key indicators of possible collusion or abuse of dominance
- By being alerted to possible anticompetitive conducts through receiving complaints
 - From firms
 - From consumers
 - From civil society organizations, such as consumer organizations, trade unions and other NGOs
 - Through media reports

Firms must therefore understand the law, so that they can detect possible anticompetitive conducts and report to the commission.

11.5. The Eyes of the Competition Commission

Consumers must be vigilant in checking prices and observing when there are changes that are not easily explainable by market conditions. The consumers are the ones who are in the

shops every day, or accessing services every day. They are best placed to detect unnatural price changes or market sharing arrangements. They must therefore be the eyes of the Commission.

Similarly, the NGOs act as “watchdogs” for their constituency, and are active in defending their interests. Anticompetitive conducts impact directly on the pockets on consumers, rob them of income and reduces their disposable income. They also must be the eyes of the Commission.

The media has a vital role to play as “watchdogs” for the society. Journalist can, in their reporting, question conducts of firms that are possible infringements of the law and this can alert the Commission to look into the situation. Indeed, most commissions in the world assign an officer or officers, depending on the size of the commission, to carefully scrutinize the newspapers every day searching for clues of possible anticompetitive conduct.

12. SUMMARY

In this manual, you learned the following:

- Definition of words used in discussing competition law and policy
- Competition law is an economic law that seek to constrain firm conduct that is harmful to consumers, the economy, and society
- There are very important benefits to having competitive markets
- In CARIFORUM, competition regimes have already been established or are in the process of being established, and you learned some substance on their laws and enforcement procedures
 - CARICOM Competition Policy enforced by the CCCC
 - The Dominican Republic Competition law enforced by the CNDC
 - CSME countries with laws: Jamaica, Barbados, Trinidad and Tobago, Guyana
 - CSME countries in the process of developing laws and authorities: OECS, Suriname, Belize
 - Bahamas and Haiti are at the start of the process
- Competition provisions are included in trade agreements because the liberalization achieved by governments in negotiating the agreement could be negated by anticompetitive conduct by private firms
- The provisions of the Competition Chapter in the EPA, obligations, and the extent to which those obligations have been met
- The importance of developing a culture of competition in CARIFORUM, the stakeholders that should be targeted, and an understanding of each stakeholder's role in participating in the enforcement procedure so as to achieve a successful competition regime.