

Confronting Anti-competitive Conduct Under the EPA

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As the Economic Partnership Agreement (EPA) between the CARIFORUM States and the European Community begins to come into operation, businesses on both sides are seeking ways in which to take advantage of the increased access to each other's domestic markets. As this process begins to take effect it is important that local businesses are aware of the fact that they are likely to encounter some anti-competitive challenges when entering such markets and they should also be aware of the process for recourse available to them to counter these challenges.

The first objective of the EPA is "the reduction and eventual eradication of poverty through the establishment of a trade partnership". This overall objective at once links the attainment of increased standards of living for the populations of CARIFORUM and to a lesser extent, Europe, to the fortunes of free, open and fair trade across their markets. The parties recognise that in so far as the businesses from both sides are given the opportunity to access new and greater demand in each other's markets and they are able to access that demand unhindered, their performances will improve and consequently also the welfare of the citizens under the agreement. Most critical therefore to the success of the agreement is free and undistorted competition in the trade relations between them.

The parties however also recognise that the attainment of these objectives can quickly be frustrated by anti-competitive businesses practices which have the potential to distort the proper functioning of markets and generally undermine the benefits of trade liberalisation. In view of this the parties therefore declare within the agreement that anti-competitive practices are incompatible with the proper functioning of the agreement if they restrict trade between the parties.

The EPA seeks to address these anti-competitive concerns by requiring that, the Parties and the Signatory CARIFORUM States, within five years of the entry into force of the Agreement, put in place laws for addressing restrictions on competition within their jurisdiction. It also requires them to establish the relevant competition authorities that would administer the competition law.

The Agreement goes further in seeking to give effect to the elimination of anti-competitive conduct, by allowing for the competition authorities to inform the each other of their willingness to cooperate with respect to enforcement activity and to exchange information related to the anti-competitive activity taking place within the other party's territory.

Each authority can also inform the other authorities of any enforcement proceeding it is carrying on which would require the prohibition of conduct in the other party's territory.

For example, where an enterprise from Europe is engaging in an anti-competitive practice in the EC, but which is having a harmful effect in a CARIFORUM territory, the CARICOM Competition Commission (CCC) as the competition authority representing CARICOM under the agreement has the right to communicate what information it has on the matter to the EC (i.e. the competition authority for the European Community). In addition where the remedy to the anti-competitive conduct requires a prohibition of conduct in the European Community (EC), the agreement provides for the communication of such information to the EC.

In spite of the excellent objectives embedded in the agreement it would be naïve to expect that competing businesses in the EC will simply welcome competitors from CARIFORUM countries into their markets and be ready to share their rewards. It is more likely that local businesses will encounter aggressive competition from their EC counterparts and in some cases they will encounter anti-competitive practices designed to restrict the entry, or deter them from engaging in competitive conduct. Such tactics may manifest themselves in practices such as exclusive dealing, or excessive, unreasonable, and discriminatory prices. For example:

- Prices set higher for local suppliers by an EC competitor where the EC competitor also supplies an input to their cost.
 - Unfair terms of contract influenced by an EC competitor or its affiliate which make delivery or quality requirements harder to meet.
 - Restricted access to markets because the incumbent suppliers have recently introduced exclusive contracts to foreclose the new competition.
- These are just some of the anti-competitive strategies used by the competitors or their affiliates to frustrate the regional competitors and retain control over their domestic markets.

It is extremely important that local businesses be aware of the strategies that may be used. It is necessary that they recognise such strategies when they are confronted with them and be aware that the agreement has provided for such strategies to be eliminated. If the offending business is situated in the EC then the rules of cooperation as mentioned above can be implemented. Businesses faced with anti-competitive restrictive practices should communicate their concerns to the Barbados Fair Trading Commission which will communicate the same to the CCC, CARICOM's party under the agreement. As a party to the agreement the CCC can seek cooperation under the EPA.

CARICOM businesses must be prepared to compete and to compete aggressively, through innovation, specialisation, flexibility and hard work, but they must also be aware of the anti-competitive tactics that they may have to confront and be fully aware of how to identify and respond to such challenges.