Competition Law and Policy: Institutional Design and Strengthening –

The Barbados Fair Trading Commission

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Contents

1. INTRODUCTION

The Fair Trading Commission of Barbados (Commission) in its seventh year of competition law administration can still be defined as an emerging competition authority. Much of its thinking and philosophy as set out in its various guidelines are still to be tested. The Commission's institutional design is therefore still largely a combination of its goals, rules and a small part practice.

The Commission's primary objectives as set in the Fair Competition Act (Act) are to

(a)… promote and maintain and encourage competition;

(b) … prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in Barbados and within the CARICOM Single Market and Economy;

(c) …ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place

The attainment of these goals determines the main functions, structure and role of the organisation designed to achieve them. The primary functions of the organisation arising from these objectives can largely been defined as:

1. Promotional, wherein the Commission seeks to encourage and advance the principles of competition law and
2. Enforcement, wherein the Commission applies the powers invested in it to ensure that the rules of competition are adhered to.

The organisation's design therefore takes its shape in the execution of these primary functions, and may succinctly be defined as one of balance between competition advocacy and enforcement.

2. ADVOCACY

2.1 Advocacy Provisions

The Commission's functions in regard to advocacy are set out at Section 5[1] of the Fair Competition Act. Here the Commission is required to make available to business persons, and consumers, information with respect to their rights and obligations under the Act.

This responsibility of a competition advocate appreciably determines the programme design of the organisation. In the programme for any given year the Commission will commit a significant proportion of its resources to writing, presenting, and educating the general public in regards to competition law and policy.

2.2 Application of Advocacy provisions

Initially like most new agencies the Commission would have focussed primarily on the promotion of competition. Its efforts were almost entirely spent on informing and educating a public which was completely uneducated in regards to the principles and norms of competition law. Competition Law is still generally considered very much a new and emerging subject in Barbados and the Caribbean.

The Commission's primary thrust in the area of promotion would have been in respect of businesses. Here the Commission has been able to make some major inroads in regard to the awareness and exposure of key business leaders to this subject. This awareness has in several instances acted as a deterrent for persons not to engage in certain anti-competitive practices. The largest domestic businesses whether in the distributive sector, construction, telecommunications, or financial institutions have encountered the Commission during different investigations. These encounters have led to the sharpening in awareness of these organisations to the rules embedded in the Competition Act and the approach of the Commission in enforcing these rules.

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[1] *(a) …make available*

(i) to persons engaged in business, general information with respect to their rights and obligations under this Act;

(ii) to consumers, general information with respect to the rights and obligations of persons under this Act that affect the interests of consumers;

A good example of the learning that is taking place would be a decision taken by one leading manufacturer to revise its trade policy in conjunction with all its distributors to ensure compliance with the Act. Such changes in behaviour point to the appreciation for the rules of competition and a reluctance to undertake activity that may be prohibited by the Commission.

The progress of the Commission in regard to the increasing awareness of the business community has encouraged the Commission's effort in this area. The Commission therefore has continued to engage in a strong campaign of educational awareness especially within the business community. The Commission also has devised a long term plan which is designed to ensure the direct exposure of the majority of the business community to the more advance concepts of competition law and to develop a strong relationship of mutual respect.

The Commission's awareness programme also is intended to educate the legal community which too is lacking in regard to an understanding of the competition law. Here the greatest challenge lies with the judiciary, and the Commission has been seeking to develop opportunities in partnership with the judiciary to increase the exposure of the judiciary to the subject of competition law.

The Commission' programme also extends to consumers and young or potential entrepreneurs who will be accessed through broad base education programmes and through the tertiary education system.

3. ENFORCEMENT

The Commission's enforcement role, which is often perceived as its primary role, embraces both the investigation and adjudication of allegations of anti-competitive conduct.

3.1 Investigation

The Commission at Section 5 of the Act is required to carry out, on its own initiative or on complaint such investigations or inquiries in relation to the conduct of trade as will enable it to prevent the use of trading practices likely to contravene the Act.

3.1.1 Information Gathering

In the conduct of an investigation the Commission is given considerable powers of search and seizure of documents. Its powers are set out under Section 6[2] of the Act.

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[2] *(2) The Commission shall obtain such information as it considers necessary to assist it in its investigation or inquiry and, in appropriate circumstances, shall examine and obtain verification of documents submitted to it.*

(3) For the purposes of carrying out its functions under this Act, the Commission shall have power to

(a) require a person engaged in business or trade or such other person as the Commission considers appropriate, to state such facts concerning goods manufactured, produced or supplied by that person or services so supplied, as the Commission may think necessary to determine whether the conduct of the business in relation to the goods and services constitutes an anti-competitive practice; and

(b) require that any document submitted to the Commission be verified by affidavit.

(4) Where a person

(a) whose conduct is the subject of an investigation undertaken by the Commission;

(b) to whom a mandate has been given for the furnishing of returns or information in accordance with subsection (1)(h); or

(c) who is required to provide information to the Commission fails to provide information, relevant to the matter to the Commission; the Commission may make a finding on the information available to it.

(5) Any person who

(a) being a witness, leaves a sitting of the Commission without the Commission's permission;

(b) willfully

(i) insults any member or officer of the Commission; or

(ii) obstructs or interrupts the proceedings of the Commission, is guilty of an offence and is liable on summary conviction to a fine of $40 000 or to imprisonment for a term of 6 months or both.

7. *(1) The Commission, for the purpose of ascertaining whether any person has engaged or is engaging in conduct constituting or likely to constitute a contravention of this Act, may*

(a) enter and search any premises;

(b) inspect and remove, for the purpose of making copies, any documents or extracts therefrom in the possession or under the control of any person; and

(c) upon completing the search authorised by the warrant, leave a receipt listing documents or extracts therefrom that are removed for the purposes of this section.

(2) Sections 27 and 28 of the Fair Trading Commission Act apply, with such modifications and adaptations as are necessary, to a search or seizure executed under this Act.

(3) The occupier or person in charge of any premises entered pursuant to this section shall provide the authorised officer with all reasonable facilities and assistance for the effective exercise of his functions under this section.

The powers provided to the Commission include: powers to require persons to state facts, supply documents verified by affidavit and powers to examine documents. The Commission in the course of an investigation can also with the authorisation of a warrant enter and search any premises, inspect and remove for the purpose of making copies, any documents or extracts there from and upon completing the search, leave a receipt listing documents or extracts that were removed.

In general the business community is cooperative in regard to requests for information. Often requests are made for an extension of time within which to comply, but there have been no cases of refusal to supply information. As a result of the cordial relationship between the Commission and the business community there have been no cases where this specific section has been tested or challenged in court.

3.1.2 Domestic Institutional Sources

When investigating a case, the Commission usually seeks information from all available sources. Many of these sources tend to be government data bases such as the Barbados Statistical Service which collects information on economic sectors, imports/exports data and other general information. Other information is also obtained from regulatory bodies such as the Central Bank and the Supervisor of Insurance. In addition organisations such as Corporate Affairs, Customs, Telecommunications Unit, and the Ministry of Commerce can be contacted to obtain information in regard to imports and exports, sales in markets, businesses registered, sector loans, duties, and prices etc. It should be mentioned however, that in most cases these organizations only provide general industry information rather than individual firm information either due to the fact that they do not collect this type of information or that they view this information as confidential and therefore cannot be shared.

The general format for accessing this information is formal letter or email. In spite of this however there is generally no information available in regard to the activities of a single firm. The information available from these organizations is usually dated, aggregated and often not in the format needed to support the particular case. The Commission also relies heavily on internet research as a source of information.

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(4) A person who assaults, obstructs or impedes an authorised officer in the performance of his duties under this section is guilty of an offence and is liable on summary conviction to a fine of $40 000 or to imprisonment for a term of 6 months or to both.

8. *A person who alters any record or destroys any record likely to be required for any investigation that has commenced under this Act is guilty of an offence and is liable on conviction on indictment to a fine of $150 000 or to imprisonment for a term of 2 years or to both.*

There are no established channels for agencies to share information and resources. This has never been a part of the tradition locally. Agencies tend very much to be closed shops each operating under quite different and distinct confidentiality laws.

There is a considerable opportunity here for strengthening of the domestic flows of information. Specific information sharing agreements need to be developed between the organisation and certain key public institutional sources, not simply to hand over information but possibly to generate the specific market aggregates required. These agreements would preferably be with those agencies which routinely house financial information on businesses like the tax departments. This information would allow for a considerable improvement in market determination during an investigation.

3.1.3 Regional Information Sharing

At this time there is virtually no information sharing modalities within the region with respect to competition policy. The reason for this may be the lack of demand for such information. In regard to organizations of CARICOM, there has been little opportunity to test what is available but governmental organizations are likely to be available across the member states from which information can be accessed. Again the modality for accessing this information is likely to be a formal letter. It is likely however that the information available will be perhaps of even less quality than that available locally.

There are however, some projects seeking to create shared data bases regionally. These are likely to be managed by CARICOM. Specifically there should be in place list of businesses and persons who will have the right of establishment, and movement respectively.

3.1.4 Regional Institutional Strengthening

Within CARICOM the CARICOM Competition Commission (CCC) under the current system may be able to address the problem of information coordination. Given their powers under the various legislations they will be able to access the information normally accessible only to the local authority. They could then compile and coordinate this information across member states to make meaningful determinations. The same should apply to the coordination of resources.

Without doubt national authorities and the CCC would benefit significantly if some form of bilateral information sharing agreements were established. This would assist in regard to the successful undertaking of a number of investigations which are now not considered. Jamaica and Barbados had attempted to develop such an informal information sharing arrangement but it was not sustained. Given the number of international cartels which impact on the consumers in the region, along with the high number of multinational organisations engaging in business with local consumers, considerable investigative strides could arise from such cooperation agreements. This would address the instances where the Commission would have been aware of cartels not locally based but whose activities would have directly affected local consumers, but no consideration was given to pursuing the investigation due to jurisdictional challenges and lack of the necessary resources to do so.

3.1.5 Investigative Standards

The legal standard utilized when conducting an investigation in Barbados is usually determined by the availability and reliability of information. In our case, very often the price and volume information needed to measure cross elasticity for SSNIP or test like 'Brown shoe' is not readily available. The likelihood of accessing such information from any one agency is extremely small as such information is usually only available from firms in the industry. The possible exception to this might be the telecommunications industry. In this industry price and volume information can be readily accessed to measure substitutability effects. In general, however, most firms find it difficult to provide substantial price and related volume information over any lengthy period.

The Commission uses the SSNIP test to determine both the geographical and product dimensions of a market whenever there is information available. Often the Commission will rely on other proxy information to estimate what the SSNIP test might produce. For example: if there are known price increases which might or might not have resulted in switches to a substitute product, then this may be relied upon to give an indication of where the SSNIP estimate might lie. In situations where there is no data available but an estimate for SSNIP is necessary the Commission might rely on unscientific and random survey methods to gauge where the boundaries of the market might be. The Commission conducted a formal SSNIP test using customer surveys to determine the product market dimension in the Digicel AT&T merger case. In regard to the four firm concentration ratio, the Commission has used this on occasions as an additional means of assessing the concentration level in the market. The Commission has also attempted to

reformulate the thresholds for high and low concentration to account for local circumstances. The Commission has never formally used the Brown Shoe test[3] or the critical loss analysis[4].

3.1.6 Merger Investigative Standards

With regard to merger investigations, the Act states that all mergers likely to control 40 per cent or more of any market must be pre-notified to the Commission. Section 20[5] of the Act indicates that all such mergers are prohibited unless permitted by the Commission.

The Act states that when conducting a merger investigation the Commission must consider the structure of the markets likely to be affected by the proposed merger; the degree of control exercised by the enterprises in the proposed merger; the availability of alternative services or goods provided by the enterprises concerned in the merger; the likely effect of the proposed merger on consumers and the economy; and the actual or potential competition from other enterprises and the likelihood of detriment to competition.

With respect to barriers to entry all potential entrants are considered. In most cases greater emphasis may be placed on examining the local potential entrants, however all possibilities may be examined. The Commission does not as rule formally identify potential entrants but during the course of the investigation they may be

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[3] The Significance of Variety in Antitrust Analysis - Thomas B. Leary, Federal Trade Commission: In Brown Shoe, the Supreme Court established that "reasonable interchangeability" and cross-elasticity of demand determine the "outer boundaries" of a product market. Within the "outer boundaries" of a product market, the Court established that there may be relevant submarkets based on one or more "practical indicia" separate and apart from interchangeability and cross-elasticity of demand.

[4] Critical loss analysis in evaluating mergers, Antitrust Bulletin, June 22, 2001, Langenfeld, James; Li, Wenqing : A critical loss analysis estimates the amount of lost sales that would make a price increase unprofitable, and then asks whether such a price increase would lead to such a loss of sales. Thus if it is applied correctly, a critical loss analysis can be a useful tool for determining whether a merger will enable firms to profitably increase price.(3) In fact, the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines use a type of critical loss analysis to define markets. Economic theory shows that a critical loss analysis can also be used to help evaluate a merger's unilateral competitive effects, although the analysis is more complex.

[5] Section 20 of the Act states that all mergers by an enterprise that:

a) *by itself controls or*
b) *together with any other enterprise with which it intends to effect the merger is likely to control*

not less than 40 per cent of any market or such other amount of the market as the Minister may by Order prescribe are prohibited unless permitted by the Commission…"
(Special Note - the Commission usually has to undertake a preliminary investigation to determine whether the company's market share does account for 40% of the market).

identified. When examining a merger case the barriers to entry are usually closely examined. If it is found that they are low entry barriers, entry would be usually presumed; if barriers are high it would be assumed that short-run entry may be highly unlikely. Essentially, it is the level of these entry barriers which determines the potential entrants and not necessarily the attraction of great profitability.

3.2 Adjudication

The Commission at Section 6[6] of the Act is given extensive powers to declare certain business practices to be anti-competitive including, abuses of a dominant position and a range of other practices including the withholding of supplies, the making or carrying out of an agreement, the attachment of extraneous conditions to any transactions, discrimination or preferences in prices or other related matters; the recommending or prescribing of retail price and the acquisition of one company by another company or the acquisition of the assets of one company by another.

3.2.1 Consumer Welfare

The Act does not specifically mention consumer welfare as an objective. However, it appears that the consumer is considered, in Section 13 (4) (b) (1) which deals with anti-competitive agreements, Section 16 (4) (a) which deals with abuse of a dominant position and Sections 20 (6) and (7) (d) which deals with mergers.

The Act in regards to anti-competitive agreements and abuse of dominance allows a defendant to argue that in spite of having breached the Act its actions contributed to the improvement of production and consumers are allowed a fair share of the resulting benefit. Section 16 (4) (a) which states that;

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[6] *(a) declare certain business practices to be abuses of a dominant position;*
(b) prohibit the withholding of supplies or any conduct relating to the withholding of supplies;
(c) prohibit the making or carrying out of an agreement or order the termination of an agreement the execution of which is likely to result in the engaging in or effectuation of an anticompetitive practice;
(d) prohibit the attachment of extraneous conditions to any transactions;
(e) prohibit
(i) discrimination or preferences in prices or other related matters;
(ii) the recommending or prescribing of retail prices;
(f) require the publication of accurate price lists that are available to members of the public;
(g) prohibit
(i) the acquisition of one company by another company;
(ii) the acquisition of the assets of one company by another company except in accordance with section 20(2);
(h) mandate the furnishing of such returns or information as it may require within such period as it may specify by notice.

> *(4) An enterprise shall not be treated as abusing a dominant position*
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> *(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;*

Section[7] 13(4) (b) (1) which deals with anti-competitive agreements is similar to the aforementioned.

The Act therefore requires that in order for an act to be deemed as '*not* anti-competitive' it has to be generating efficiencies and those efficiencies has to be passed on to the consumer. The Act does not specify which consumers the benefits should be passed to. Whether these are the consumers benefiting directly from the output of the transaction, or whether these are consumers in general, including those who may be indirectly recipients of the benefits by way of being shareholders of the defendant company.

The Commission has always assumed that in so far as the Act has specifically requested that these benefits be passed on to the consumer, that these consumers are those benefiting directly from the transaction. In relation to anti-competitive agreements the Guide to Anti-competitive Conduct states that to satisfy the test of whether anti-competitive conduct can be exempted, some of the resulting benefits from the arrangement must be passed on to the "*consumers of the product in question*". This clearly speaks to an interpretation of the consumer in the transaction rather than the net consumer welfare.

In this context therefore the Commission's interpretation is that consumers in the transaction must benefit by getting their 'fair' share of benefits, in addition to the 'total consumers'. For example therefore, if an enterprise engaged in anti-competitive conduct which resulted in an increase in prices, the enterprise would have no defence, if it argued that its actions resulted in an improvement of production. The fact is that unless the consumers in the transaction did benefit from the conduct, the act is still regarded as a breach.

It is important to note here also that the efficiencies generated and benefits shared between the two categories of consumers do not have to be greater than any harm to

[7] Section 13(4)(b)(1) states that:

> *Subsection (2) shall not apply to any agreement or category of agreements*
> *(a) the conclusion of which has been authorised under Part V; or*
> *(b) that the Commission is satisfied*
>
> *(i) contributes to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;*

competition. There is no stipulation as to the quantum of such benefits. The Commission has the freedom to determine whether the benefits created are sufficient.

3.2.2 Mergers and Authorisations

Interestingly, the Act appears to take a different view with respect to mergers and authorisations in the distribution of benefits. In regard to both of these the Act stops short of requiring that the benefits generated by the efficiencies have to be passed on to the consumer. In regard to both of these the law simply requires that the benefits must offset or more than out-weigh any harm to competition.

In regard to authorisation the Commission is given power to grant authorisations where the otherwise anti-competitive conduct is likely to promote a public benefit. The commission in the Guide to Authorisation of Anti-Competitive Conduct, interprets this provision as requiring the applicant to demonstrate that the conduct will produce a net benefit result to the community. Total consumer welfare therefore or "allocative efficiency" appears to be the necessary standard for authorisations as set out at Section 29 (2)[8] where the promotion of the "public benefit" is specifically mentioned. Here the emphasis is clearly wider than the consumers to the transaction, even though the Guide suggests that these should also be considered.

Technically speaking then, enterprises seeking either a merger or an authorisation should only have to demonstrate that they have been able to generate significant efficiencies that outweigh the harm to competition and they should be exempted, [Bork's view]. However the Commission especially in regard to mergers, (there has so far been no test of the authorisation provision) has required that not only must the enterprise demonstrate efficiencies that more than offset harm, it must demonstrate that the consumer gets a fair share of the resulting benefits.

The Commission's interpretation therefore has been extremely consistent in regard to requiring that consumers in the transaction get their fair share of benefits, both, where the Act is specific i.e. in regard to agreements and abuse, but also where the Act is not specific i.e. in regard to mergers. The only potential middle ground the Commission has taken in this area would be in not requiring that all efficiencies be

[8] *(2) The Commission, notwithstanding any other provision of this Act, upon receipt of an application referred to in subsection (1) may, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit and is reasonable in the circumstances, grant an authorisation subject to such terms and conditions as it thinks fit and for such time as the Commission shall specify.*

passed on to the consumer. In the Digicel, AT&T case, the Commission acknowledged some efficiencies that were not being directly passed to the consumer.

An example of the Commission's interpretation is seen in the local case of the Travel Agents Association of Barbados against (Leeward Islands Air Transport) LIAT. In the case it was determined that LIAT could be deemed the dominant supplier of wholesale regional air travel tickets, and in this capacity did withhold a number of benefits it offered directly to its customers from travel agents.

However, in considering the extent to which LIAT's conduct could be deemed as discriminatory under the Competition Act, the Commission considered among other things whether LIAT's actions could have been excused on the basis that its actions were designed to improve the distribution of the product and consumers were allowed a fair share of the resulting benefit. In this regard, it was evident that LIAT's actions particularly with respect to its corporate portals and deep discounts led directly to the reduction of the price of tickets and to their improved distribution. Based on the foregoing it was determined that LIAT had not breached Section 16 of the Fair Competition Act.

3.2.3 Competition on Merit

Purely efficient conduct that eliminates a competitor does not breach the Act. If a practice is found to be efficient but still technically in breach of the Act and had eliminated a competitor, then that conduct would be prohibited by the Commission unless consumers were able to get a fair share of the resulting benefit from the efficiencies generated.

Competition on its merits is of great importance under the Act. One of the Act's primary objectives is to ensure that all businesses in the market irrespective of size have the opportunity to participate equitably. In addition all conduct is measured by the extent to which they are likely to lessen competition or eliminate a competitor. Nevertheless the Commission does not consider that competition should exist simply because in principle more competition is preferable to less competition. Rather, the belief is that if there are sufficient efficiencies to be gained then competition can be harmed. However, if a practice is anti-competitive with little efficiencies and eliminates a competitor, it will be treated as anti-competitive.

In the Commission's only merger to date, namely the Digicel-Cingular merger, the lessening of competition in the market (moving from three players to two players) was analysed. Although there was lessening of competition on the surface, the

investigation surmised that due to the liberalization of the market where necessary licenses were recently made available, entry barriers were now lower and there could be potential competition. In spite of the lessening of competition, the benefits to consumers were given special attention in making a determination on this merger. Potential post merger prices were investigated and the Commission, as part of the condition of the merger, requested that prices and the quality of service be maintained at the identified levels for a specific time period.

3.2.4 Use of Presumption

The Commission both in regards to cases involving potential anti-competitive agreements and abuse of dominance seeks to rely on quite stringent quality of evidence in order to presume a breach of its laws. The Commission's decision making process involves the compilation of available evidence, conducting any relevant investigative tests, matching the evidence against the established statute and relevant case law, and using logical deduction to reach a preliminary conclusion or presumption of a breach of the Competition Act.

From here the burden tends to shift to the defendant who in each instance is presented with the case against them and given the opportunity to present to the Commission any evidence or alternative interpretation of the facts which could rebut the presumption of a breach. After consideration of the defendant's views the Commission will come to a final determination on the matter. The Commission has on several occasions accepted the defendant's rebuttal of the evidence and revisited its initial presumption of a breach of the Act.

4. CONCLUSIONS

The Commission's ultimate goal in conjunction with the stated objectives of the Act are to promote and maintain competition in Barbados, by eliminating anti-competitive conduct and by ensuring that all businesses have the opportunity to participate equitably. While no protection of consumer welfare is listed here, the Commission nevertheless places high priority on ensuring that there are direct benefits accruing to the consumer from the transaction in question.

These represent quite significant goals. To assist in achieving these objectives by the means of enforcement of the law, involves a formal investigative and adjudicative exercise, leading ultimately to a decision of, in-breach or not-in-breach of the Act. This decision making process involves the use of presumption based on strong reliable evidence and a fairly irrefutable assumption of guilt. It therefore places considerable emphasis on the timeliness, accuracy and overall quality of information compiled.

Juxtaposition to this is the limited resources and modalities for the compilation of the quality information necessary. In the small state this information is often almost impossible to attain. This creates a problem for reaching a conclusive finding of a breach, and is an even greater challenge when an investigation involves businesses which have their base in a foreign jurisdiction. Such scenarios compound the problem by now requiring significant financial resources to pursue on top of the lack of necessary channels to achieve it. In addition the various tests that need to be undertaken to corroborate an assumption of dominant position, market boundaries or substantial lessening of on competition also have heavy information requirements.

These challenges often result in the failure to complete important findings, and speak to an area where there may be a need to identify opportunities for greater information sharing, domestically as well as regionally and internationally. This would assist with the access to critical information, in investigations involving foreign based corporations.

There is also a significant need as a result of this challenge for more technical assistance, by way of technical analysis of market circumstances where certain key types of information are unavailable for greater efficiency in the investigation and prosecution of anticompetitive conduct.

There may also be an opportunity for the access for more assistance by way of regional stake holder organisations to be trained further in the area of competition law enforcement. These include organisations which will have to be relied upon to facilitate the operation of the regional competition authority.

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