



Cutting the Regulatory Edge?

Services Regulation Disciplines in the Cariforum EPA

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Table of Contents

List of Abbreviations	3
1 Introduction	5
2 Domestic Regulation in Services and the WTO – A Mini-Primer	6
2.1 What is Domestic Regulation in Services?	6
2.2 WTO Law on Domestic Regulation in a Nutshell	6
3 The CEPA “Regulatory Framework”	8
3.1 The General Provisions.....	8
3.1.1 Overview	8
3.1.2 Mutual Recognition (Article 85)	8
3.1.3 Transparency (Article 86).....	10
3.1.4 Procedures (Article 87)	11
3.1.5 Conclusions.....	11
3.2 Computer Services.....	12
3.3 Courier (and Postal?) Services	12
3.3.1 Overview	12
3.3.2 Scope and Definitions (Article 89).....	12
3.3.3 Prevention of Anti-Competitive Practices in the Courier Sector (Article 90).....	13
3.3.4 Universal Service (Article 91).....	15
3.3.5 Individual Licenses (Article 92)	15
3.3.6 Independence of the Regulatory Bodies (Article 93).....	16
3.3.7 Conclusions.....	16
3.4 Telecommunications Services	17
3.4.1 Overview	17
3.4.2 Definitions and Scope (Article 94).....	18
3.4.3 Regulatory Authority (Article 95)	18
3.4.4 Authorization to Provide Telecommunications Services (Article 96).....	19

3.4.5	Competitive Safeguards on Major Suppliers (Article 36)	20
3.4.6	Interconnection (Article 98)	20
3.4.7	Scarce Resources (Article 99)	21
3.4.8	Universal Service (Article 100)	21
3.4.9	Confidentiality of Information (Article 101)	21
3.4.10	Disputes between Suppliers (Article 102)	22
3.4.11	Conclusions	22
3.5	Financial Services	23
3.5.1	Overview	23
3.5.2	Scope and Definitions (Article 103)	23
3.5.3	Prudential Carve-Out (Article 104)	24
3.5.4	Effective and Transparent Regulation (Article 105)	24
3.5.5	New Financial Services (Article 106)	25
3.5.6	Data Processing (Article 107)	26
3.5.7	Specific Exceptions (Article 108)	26
3.5.8	Conclusions	27
3.6	International Maritime Transport Services	28
3.7	Tourism Services	28
3.7.1	Overview	28
3.7.2	Prevention of Anticompetitive Practices (Article 111)	29
3.7.3	Access to Technology (Article 112), Small and Medium-Sized Enterprises (Article 113), Increasing the Impact of Tourism on Sustainable Development (Article 115)	29
3.7.4	Mutual Recognition (Article 114)	30
3.7.5	Environmental and Quality Standards (Article 116)	30
3.7.6	Development Cooperation and Technical Assistance (Article 117)	30
3.7.7	Exchange of Information and Consultation (Article 118)	30
3.7.8	Conclusions	30
4	Concluding Remarks	31

List of Abbreviations

ACP	African, Caribbean and Pacific Countries
AoS	WTO Agreement on Safeguards
ARO	Agreement on Rules of Origin (GATT 1994)
CARICOM	Caribbean Community
CBD	Convention on Biological Diversity
CEPA	CARIFORUM-EC Economic Partnership Agreement
BTA	Bilateral Trade Agreements
DDA	Doha Development Agenda
EPA	Economic Partnership Agreement
EC	European Community
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication(s)
IPRs	Intellectual Property Rights
LDC	Least-Developed Country
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
ORC	Other Regulations of Commerce
PTA	Preferential Trade Agreements
RP	Reference Paper (also: WTO Reference Paper on Basic Telecommunications)
RTA	Regional Trade Agreement
SMEs	Small and Medium-Sized Enterprises
SPS	(Agreement on) Sanitary and Phytosanitary Measures

SSM	Special Safeguard Mechanism
SVEs	Small, Vulnerable Economies
TA & CB	Technical Assistance and Capacity Building
TBT	(Agreement on) Technical Barriers to Trade
TDCA	South Africa Trade, Development and Cooperation Agreement
TRIPS	(Agreement on) Trade-Related Intellectual Property Rights
UPOV	International Union for the Protection of New Varieties of Plants (Union internationale pour la protection des obtentions végétales)
WCT	WIPO Copyright Treaty
WPDR	Working Party on Domestic Regulation (WTO)
WPPT	WIPO Performances and Phonograms Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

The far-reaching coverage of trade in services, investment and e-commerce in the Economic Partnership Agreement between the European Community and the CARIFORUM¹ states (“the CARIFORUM EPA”, or “CEPA”) is one of the distinctive features of that agreement. The interim, or “stepping-stone” EPAs between the EC and other ACP regions do not contain comparable provisions – they essentially remain “goods-only” while negotiations on other issues, including services and investment, continue.

The inclusion of services and investment in the CEPA is not only remarkable for the mutual market access² provided by the Parties, but – perhaps equally so – for the treatment of certain regulatory aspects. Title II on “Investment, Trade in Services and E-Commerce” contains an entire Chapter 5 on the “Regulatory Framework.” This chapter features both general disciplines on the regulation of services and several blocks of specific provisions on various regulatory issues, namely for postal/courier, telecommunications, financial, maritime and tourism services. The depth and breadth of these disciplines – that means: legal obligations on the Parties to regulate, or not regulate, services in certain ways – is still comparatively unusual for international agreements, but is arguably part of a global trend. The CEPA is certainly the avant-garde of a trend the European Commission aims to set for the EC’s bilateral trade agreements – the first agreement concluded that reflects the Commission’s new “template”³ for services and investment agreements.

Should this trend be welcomed? This paper takes a somewhat detailed look at the “Regulatory Framework” chapter with a focus on two aspects that may shed some light on this issue. First, how do the regulatory provisions relate to corresponding WTO rules, in particular the GATS – to what extent are they “WTO plus” commitments? Second, are they desirable or undesirable from a development policy perspective? In particular: Do they raise administrative issues that may pose significant challenges to the CARIFORUM states’ (and possibly other ACP states’) capacities to implement?

After a brief reminder of the nature of domestic regulation in services and the basic WTO parameters in play (Section 2), the following analysis considers the provisions of Chapter 5, the “Regulatory Framework” chapter one by one (Section 3), in search of answers to these questions which may provide a piece of the puzzle when approaching the (much) bigger question: Is this agreement good for development?

Our limited focus on the “Regulatory Framework” chapter, of course, leaves aside other aspects of the CEPA’s Title II that may have a (much) more significant impact on

¹ CARIFORUM consists of the members of CARICOM plus the Dominican Republic.

² The right of service suppliers and investors from one party to sell and provide services, or make investments, in (or into) the respective other party’s market.

³ This new template has been introduced by the European Commission over the past few years in all of its recent negotiations on agreements on trade in services, such as in the EuroMed („Barcelona Process“) negotiations on services and investments with its Mediterranean partner countries, as well as bilaterals with Asian and Latin American Countries, and, of course, EPAs. Its features include, among other things, an alignment of “mode 3” commercial presence in services and investment in other areas (such as manufacturing), a merger of GATS “modes 1” and “2” under the heading of cross-border supply, separate treatment of audio-visual services and, as reflected upon in this paper, significant regulatory disciplines in particular in courier/postal, telecoms and financial services. .

development, most notably the various market access commitments made by the EC and CARIFORUM sides. Out of these, the EC's "mode 4" commitments, including for cultural professionals and entertainers, fashion models and others, stand out as an arguably unique⁴ pro-development achievement of the CARIFORUM negotiators. We only mention in passing the Protocol on Cultural Cooperation, which will hopefully assist CARIFORUM cultural industries and professionals in no small measure in reaping the benefits of enhanced cooperation.

2 Domestic Regulation in Services and the WTO – A Mini-Primer

2.1 What is Domestic Regulation in Services?

The term domestic regulation in the context of trade in services (and similarly in trade in goods) refers to all administrative and regulatory measures that happen on the domestic market level, i.e., "behind the border," as opposed to measures that directly affect the very access to the market, for instance the right of foreigners to provide a certain service. Domestic regulation measures typically apply to both foreign and domestic services and providers alike.⁵ Typical elements of domestic regulation are qualification requirements and procedures, licensing requirements and procedures, and technical standards.

A special subset of domestic regulation could be seen in so-called "pro-competitive" regulatory activities. This captures the functions of regulators, in particular in network industries such as telecoms, energy or postal/courier services, where rules are enforced to secure fair competition among market players.

Trade agreements address – and attempt to discipline – domestic regulation measures because they may, in fact, have a significant effect on the possibility of foreign services and providers to succeed in that market.

2.2 WTO Law on Domestic Regulation in a Nutshell

WTO law currently maintains relatively few, and mostly quite general, standards for the domestic regulation of services. Article VI of the GATS, the main provision on domestic regulation, provides for instance that where Members have undertaken specific market access commitments in services their regulations affecting trade in those services must be administered in a reasonable, objective and impartial manner. It demands, again generally, that some review of relevant administrative decisions through independent tribunals or procedures must be guaranteed. And it gives applicants for licenses the right to be informed about progress in their application. Against this thin set of rules, however, Article VI:4 of the GATS establishes a mandate for negotiations on further – more detailed and powerful – disciplines. This forms an important background for our evaluation of the CEPA, because the corresponding negotiations in the WTO's Working Party on Domestic Regulation (WPDR)

⁴ Several commitments made by the EC in "mode 4" for cultural professionals in particular are a "first" in the Community's negotiating history. See Caribbean Negotiating Machinery, *Getting to Know the EPA: Provisions on Services and Investment*, 8 February 2008, page 7 (available online at www.crnw.org, last visited on 7 September 2008)

⁵ Under the GATS domestic regulation measures that discriminate against or among foreign services or service suppliers are addressed as National Treatment or Most-Favoured Nation principle violations under Articles XVII or II, respectively, not under the disciplines on domestic regulation.

are in fact at an advanced stage. As text-based negotiations are well under way, it seems fair to expect that general disciplines will emerge sooner rather than later. Meanwhile, the guiding principles of the negotiating mandate apply on a provisional basis where Members have made specific commitments.⁶ These guiding principles⁷ provide that qualification requirements and procedures, technical standards and licensing requirements should be

- based on objective and transparent criteria, such as competence to supply the service;
- not more burdensome than necessary to ensure the quality of the service; and
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

However, this obligation to apply these guiding principles on a provisional basis is rather weak and largely irrelevant in practice. This is because regulatory measures by WTO Members are only caught if they go beyond what could be expected at the time the GATS was concluded. This leaves all then existing regulation, and new regulation replacing it with similar effect, out. On top of that a claimant would have to prove that the violation of the principles “nullifies and impairs”⁸ the specific commitments made by the Member – usually a tough task. The provisional application rule acts thus as a mere, and rather weak, standstill obligation.

Apart from Article VI, a few other elements of WTO law provide further disciplines on domestic regulation. Article VII of the GATS provides a general framework for mutual recognition agreements (MRAs) on professional qualifications, allowing countries to conclude them (which may otherwise raise issues under the most-favoured nation (MFN) principle) but requiring them to give other Members the “adequate opportunity” to participate in such agreements or negotiate similar ones – provided they meet the standards. The same applies to unilateral recognition, where other Members must be given the chance to prove that their professional qualifications, too, should be recognized.

A few sector-specific instruments complete the picture. Around half of all WTO Members (including many, but not all CARIFORUM states⁹) have subscribed to the so-called “Reference Paper on Basic Telecommunications” (the “Reference Paper”), which lays down a set of rules aiming to foster pro-competitive regulation in that sector. The GATS’ Annex on Financial Services, which applies to all Members, provides for some rules for the regulation of financial services – its most important element, the so-called “prudential carve-out”,¹⁰ however, is in fact an enhanced right for financial regulators to act on prudential grounds, hence not primarily an additional discipline. Further elements of regulatory disciplines can be found in the “Understanding on Commitments in Financial Services,” and optional set of rules to which some WTO Members (none of them a CARIFORUM State) have subscribed. Finally, Members have developed a set of quite detailed disciplines on domestic regulation

⁶ Contained in Article VI:5 of the GATS.

⁷ See GATS Article VI:4.

⁸ GATS Article V(5).

⁹ See Section 3.4.1 and footnote 21.

¹⁰ Section 2 (a) of the Annex on Financial Services.

for accountancy services under the above-mentioned mandate in Article VI:4 of the GATS. These “Accountancy Disciplines”, however, are not yet legally applicable.

Initiatives have been mounted as part of the Market Access negotiations in the Doha Development Agenda (DDA) negotiations to develop further disciplines in the form of additional reference papers similar to the Telecoms Reference Paper, for instance in postal, courier and express delivery services. These attempts, however, have not found the echo their proponents had hoped for and appear unlikely to find their way into the DDA’s results.

Apart from the – optional – sector-specific rules in telecoms and financial services, thus, WTO disciplines on the regulation of services are rather limited. However, developments are under way to expand and deepen them.

3 The CEPA “Regulatory Framework”

3.1 The General Provisions

3.1.1 Overview

The “provisions of general application” – Section 1 of CEPA’s Chapter 5 – address three issues, namely the mutual recognition of qualifications, transparency and some aspects of procedures. They correspond, with some variation, to their respective GATS counterparts.

The section, however, does not address some of the more pertinent principles contained in Article VI:4 of the GATS, the mandate to negotiate new disciplines. These principles, although only on a weak footing, do apply provisionally to all GATS Parties. In that sense the CEPA appears to be even “GATS minus.”

3.1.2 Mutual Recognition (Article 85)

The recognition of professional qualifications is key to a meaningful market access. A professional will hardly benefit from the general right to exercise her profession in another country if that country does not recognize her qualifications. One way of addressing this issue is to conclude mutual recognition agreements, or MRAs.

Article 85 foresees a process of several stages towards the establishment of MRAs between EPA Parties on “requirements, qualifications, licenses and other regulations,” in particular (but not limited to) professional services, some of the stages even of “soft” obligatory character. The process, despite the apparent “softness” of its mechanisms, is designed to generate significant legal pressure towards the conclusion of MRAs. The GATS does not foresee any obligation to conclude such MRAs; its Article VII merely provides for the possibility of MRAs, subject to certain conditions. This provision goes thus beyond WTO obligations.

This is true because although the obligations contained in Article 85 are primarily “soft,” they may lead to a dynamic which results in “hard” obligations. The EPA Parties generally undertake to “encourage” their respective professional bodies – meaning: professional self-organizing bodies, such as bar associations and engineers’ guilds – to work together towards developing *recommendations* for mutual recognition (Para. 2). This general rule is without a

timeline. However, for four priority sub-sectors, namely accounting, architecture, engineering and tourism, a timeframe of three years is set to start negotiations. While this sends a signal to hasten the efforts, the obligation on EPA Party *governments* remains one to “encourage” (Para. 3). The treaty obligation in a strict sense thus remains soft.

If and to the extent that recommendations are developed by the two sides’ professional bodies, they will be reviewed by the CARIFORUM-EC Trade and Development Committee for consistency with the EPA. Provided the Committee finds them to be in conformity with the EPA, however, the Parties are then under an obligation (“shall”) to negotiate an MRA. While the Parties’ governments thus retain *some* control over the process through the Committee, its limited mandate (only review for consistency with the EPA) restricts that control. In other words: Once recommendations have been developed by the professional bodies, a semi-automatic process begins that may lead to the obligation to conclude – and implement – an MRA.

The administrative burden of this obligation on the EPA governments is arguably limited. Recognition is unlikely to increase the effort needed in the regulation of the respective sector – if at all recognition, once agreed, should lead to a reduction of such efforts for the authorities, as the regulation of foreign service providers becomes easier (because their admission to practice is then a mere formality). That said, it appears that accreditation bodies are not necessarily fully operational in all CARIFORUM states,¹¹ so some work there remains. Further, the governments will be called upon to provide for legislative frameworks, where not yet in place – a task facilitated by various Draft Model Professional Services Bills prepared by the CARICOM Secretariat in cooperation with the CARICOM Legislative Drafting Facility. Finally, the governments will, of course, have the task of participating in the Trade and Development Committee’s meetings – which, for purposes of vetting MRAs, will require the use of experts.

The actual work, in fact, will however be shouldered by the respective professional bodies, which are the ones to actually engage and negotiate with each other. To the extent that their administrative capabilities are limited, they arguably have the option not to act on the “encouragement” – and thereby avoid the burden altogether. This applies even in the four priority sub-sectors, despite the timeline, which therefore remains hortative in nature. The bodies thus retain, in theory at least, the ability to control the administrative burden falling upon them.

That said, a simple refusal to engage appears rather unrealistic, and the pressure of the bodies’ respective governments’ “encouragement” (as well as their own desire to negotiate an MRA) may be significant. In practice, therefore, the challenge for the CARIFORUM professional bodies in particular may be rather significant.¹²

Transitional timeframes would in any case only be relevant for those privileged sub-sectors, as the obligation to “encourage” regarding other sectors (Para. 2) does not carry any timeline. Given the “soft” nature of the obligation, however, phase-in periods would appear to add little.

¹¹ Allyson Francis and Heidi Ullrich, *EPA Negotiations on Trade in Services: Analysis of the CARIFORUM-EU EPA*, Working Paper in the series *CARIFORUM EPA and beyond: Recommendations on Services and Trade-Related Issues*, GTZ (2008), p. 12.

¹² See Francis and Ullrich, Note 11, at p. 12-13.

Another question is whether and to what extent the effects of MRAs, especially in the privileged sub-sectors, are desirable, since they may lead to more effective market access in these sub-sectors. This, however, is a question that would be more appropriately addressed in the context of market access negotiations and commitments. Once a commitment is made, the (non-)recognition of professional qualifications, licenses etc. should ideally not act as a second, hidden “line of defense” in any case. MRAs thus remain, as a matter of conceptual principle, desirable, as they (eventually) alleviate burdens from service providers, national regulators and/or their professional bodies (win-win).

An investment in MRAs will thus usually be a worthwhile exercise – for CARIFORUM professionals who wish to use new market access opportunity in the EU they will operate as a significant facilitator.

3.1.3 Transparency (Article 86)

This provision requires the provision of information to other CEPA Parties and the establishment and operation of enquiry points. It mirrors virtually *verbatim* GATS Article III:4, with the logical variation that the transparency obligation concerns laws and agreements that pertain to or affect this EPA rather than the GATS. Rather curiously, however, the provision does not single out services and investment issues, and hence appears to cover measures relating to *all* parts of the EPA (“this Agreement”). This may be a drafting error – the provision’s context and position in the middle of the Services and Investment Title and the parallelism to GATS would suggest that it was indeed meant to relate to measures pertaining to aspects relating to services, investment and e-commerce only.

Even if read with that limitation, two relevant differences exist with regard to the GATS counterpart, however, namely with regard to the beneficiaries of the enquiry points (private Parties instead of governments only) and the added coverage of measures related to investors and investments in non-services sectors.

GATS Article III:4 requires enquiry points to provide information “*to other Members,*” whereas Para. 1 of this provision provides that they respond “*to investors and service suppliers of the other Party.*” This corresponds to TRIPS Article 10.1, which foresees the same function (to respond to “*interested parties in other Members,*” *i.e.*, private parties) for TBT enquiry points, in contrast to SPS enquiry points, which like GATS enquiry points only have to respond to other Members (*i.e.*, their governments).

It is obvious that from a market perspective an enquiry point is significantly more useful if it is open to those directly concerned, namely the investors and service providers, rather than only their governments. However, from the perspective of the administering government being directly exposed to requests from private parties may add some burden in terms of quantity and costs. To the extent that the EPA Parties already operate GATS enquiry points (which should be the case in all WTO Members), however, the impact would appear overall negligible, as far as services are concerned.

The same is not true, however, with respect to investors and investments in sectors other than services. These are obviously not yet covered by GATS Article III. The enquiry points would thus have to cover all investment-related measures, too. This is significant in principle, but most likely less so in practice, as most countries already maintain investment-related

public relations mechanisms. However, to the extent that an EPA Party does not yet maintain such a mechanism, the obligation may indeed lead to a non-negligible burden.

It would thus arguably have been sensible to provide for a transitional period of, e.g., two years, in parallel to that given to initially to WTO Members in GATS Article III:4. That said, however, a functional information mechanisms for potential and current foreign investors would appear to be in the immediate interest of any country, developing and developed. The early investment in the establishment and operation of an enquiry point would thus, in principle, seem to be a very good one indeed.

3.1.4 Procedures (Article 87)

This provision follows *verbatim* GATS Article IV:3 and 2. The only difference, again, is that the obligations would now cover also investment in non-services sectors.

The obligations themselves, as in GATS, arguably represent a common-sense minimum of good governance and are thus unlikely to represent a significant “burden” for CARIFORUM states.

3.1.5 Conclusions

The “provisions of general application” are arguably unremarkable, because they essentially follow in the footsteps of the corresponding GATS provisions, namely Articles VI and VII.

In fact, taken as a whole they do not even fill those footsteps, because they leave out some of the main principles found in Article VI of the GATS. The principles (provisionally applicable under GATS, even if with shackles) that measures should be based on objective and transparent criteria, should be not more burdensome than necessary to ensure quality and should not in themselves operate as restrictions on the supply of a service are not reflected. Similarly, the section does not mention the basic principle, reflected in GATS Article VI:1 and many other services agreements, that measures should be administered in a reasonable, objective and impartial manner. Given the otherwise far-reaching ambition reflected in this Chapter, this Title and the CEPA in general, this may appear a bit surprising. Commentators have even called it a missed opportunity to advance the cause of regulatory disciplines in services agreements generally.¹³

That said, the chapter still does contain some limited “GATS plus” obligations. In particular, it establishes a certain automaticism regarding the development of mutual recognition agreements on services regulation that may lead to an obligation to actually conclude such agreements. The GATS allows and encourages, but does not “nudge” WTO Members to conclude such agreements. That said, however, MRAs will be an important vehicle for interested CARIFORUM professionals to make use of market access opportunities in the EU.

The EPA’s transparency obligations go beyond existing GATS obligations in that EPA enquiry points, unlike GATS enquiry points, will have to cater also to private parties, not only

¹³ P. Sauvé and N. Ward, "Services and investment in the EU-CARIFORUM EPA: Innovation in rule-design and implications for Africa", in Faber, G. and Orbie, J. (eds) 'Beyond Market Access for Economic Development: EU-Africa Relations in Transition', Routledge, 2009 (forthcoming), Section II.4.2.b.

to governments. Transparency as well as general good governance principles for procedures will apply not only to services but also non-service sector investments and investors.

The resulting administrative burdens on ACP governments and administrations appear overall rather limited, except for the CARIFORUM professional bodies that are called upon to negotiate mutual recognition parameters – and, where applicable, the CARIFORUM legislators that need to provide a framework for such recognition.

3.2 Computer Services

Section 2 of Chapter 5 consists of only one Article (Article 88). Despite its position in this Chapter entitled “Regulatory Framework,” however, the provision in fact does not contain any regulatory disciplines; it merely addresses the interpretation of specific commitments in computer and related services.

3.3 Courier (and Postal?) Services

3.3.1 Overview

Section 3 of Chapter 5 provides for a series of disciplines for pro-competitive regulation in the courier (and postal) services sector. This is remarkable because no specific regulatory disciplines in this sub-sector currently exist in the WTO context. The entire Section, thus, is “WTO plus”.

The approach mirrors that of the Telecoms Reference Paper, but is less comprehensive. The chapter’s provisions on the prevention of anti-competitive practices, universal service, licenses and the independence of regulatory bodies, however, reflect significant obligations for the Parties’ regulators.

3.3.2 Scope and Definitions (Article 89)

Article 89 determines, first, the scope of the section on courier services and, second, defines two key concepts for this services sub-sector, namely the concepts of “universal service” and “individual license”. It is worth pausing to consider these “technicalities,” as they provide important insights into the operation of this Section.

Article 89 (1) provides that the regulatory principles set out in Section 3 explicitly apply to “courier” services. Postal services, by contrast, are not mentioned. This is noteworthy because under the WTO Services Sectoral Classification List, courier and postal services form a common single sub-sector of the sector “communication services”. The WTO list refers to the UN’s CPC¹⁴ classification, which defines both courier and postal services essentially as “pick-up, transport and delivery services” relating to letters, parcels and packages.¹⁵ However, courier services are further defined as being supplied by service suppliers “other than ... the national postal administration”. Thus, the difference between

¹⁴ The UN’s Provisional “Central Product Classification”, to which the WTO list and many Members’ schedules of specific commitments refer.

¹⁵ CPC numbers 7511 (postal) and 7512 (courier).

courier and postal services, as defined by the CPC, is not in the nature of the service but in the nature of the service *suppliers* as postal services may only be supplied by the “national postal administration”. Given this context – much discussed in negotiations at the WTO and elsewhere – it would seem at first sight that postal services were not meant to be covered by this Section at all, given that only courier services are mentioned here. However, it would seem that the drafters of the CARIFORUM EPA have decided to deviate from traditional practice here. This follows from Article 89 (2), which defines universal service as the permanent provision of a *postal* service. It may be inferred that the section, in fact, aims to cover both courier and postal services.

The first of the legal definitions set forth by Article 89 (2), as just mentioned, relates to the concept of “universal service”. In debates at the WTO and elsewhere that concept is discussed primarily in relation to the liberalization of *postal* services, as erstwhile monopolies of many national postal administrations are eroding. Because courier services – if one follows the CPC distinction – are supplied by service suppliers *other* than the national postal administration, the universal service concept is usually not discussed with respect to courier services. It is thus not surprising that Article 89 (2) defines universal service in relation to “postal service” but not in relation to courier services – except that Section 3, as discussed, explicitly (only) relates to courier services.

The definition of universal service here is similar to that in the Convention of the Universal Postal Union (UPU). There, universal service is defined as the “permanent provision of a postal service of specified quality at all points in the territory of a Party at affordable prices for all users”. The UPU definition (which does not formally apply here, but offers useful orientation) lists the elements that make a postal service “universal” (within the territory of the Party in question), namely: (a) the postal service concerned must be supplied on a *permanent* basis; (b) the *geographical* reach of the postal service concerned is unlimited; (c) the *number* of the service consumers that may benefit from the postal service concerned is unlimited; (d) the postal service concerned must meet certain criteria regarding its *quality*; and (e) the *prices* charged for the postal service in question have to be “affordable”. These elements are general in nature and need further concretization by the CEPA Parties. This is addressed by CEPA Article 91 on “universal service” (see below).

The second definition under Article 89 (2) concerns individual licenses. Pursuant to this provision, an individual license is “an authorization, granted to an individual supplier by a regulatory authority, which is required before supplying a given service”. This definition highlights that the Parties may require an authorization for the supply of certain services, namely those linked to the universal service concept. Remarkably, Article 92 – see below – provides that such licenses may only be required for services within the scope of the universal service (meaning: services that are, or compete directly with, universal services).

3.3.3 Prevention of Anti-Competitive Practices in the Courier Sector (Article 90)

Article 90 addresses the regulation of the market behaviour of certain service suppliers, namely those suppliers who “have the ability to affect materially the terms of participation (having regard to price and supply) in the relevant market for courier services as a result of use of their position in the market”. The service suppliers targeted by this provision are those who have a “dominant position” in the relevant market for the courier (possibly including postal) service in question. As the provision refers to suppliers “who, alone or together” have

a dominant position in the relevant market, the provision covers both monopolistic and oligopolistic suppliers.

Yet the fact that some suppliers may enjoy a monopoly or an oligopoly is not at issue, in and of itself. Rather, Article 90 (only) seeks to ensure that such suppliers are prevented by national regulators “from engaging in or continuing anti-competitive practices”. However, the provision does not spell out which market behaviour may constitute anti-competitive practices. This is less remarkable than it may seem, due to the immediate context, namely Article 97 of the CEPA (Section 4 on telecommunication services, see below) and its model, the WTO *Telecoms* Reference Paper. Both list the following practices in the *telecoms* sector as being anti-competitive: (a) cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.¹⁶ While practice (c) may be less relevant in the market for courier/postal services, practices (a) and (b) are clearly relevant. While, of course, the CEPA rules on telecoms and the WTO *Telecoms* Reference Paper do not apply directly or by automatic analogy here, it seems safe to assume that at least these two practices (or behaviour akin to them) fall under Article 90.

National regulators must prevent these anti-competitive practices by service suppliers through “appropriate measures.” They are to be taken in accordance with the provisions of the CEPA’s chapter on competition.”¹⁷ This reference is potentially confusing. The competition chapter does not set out any (specific) measures against anti-competitive practices. It only requires the Parties to “have laws in force addressing restrictions on competition within their jurisdiction, and the bodies referred to in Article 1.1”, within five years of the coming into force of the EPA.¹⁸ The competition bodies of the CARIFORUM States, referred to in Article 1 (1) of the competition chapter, are the CARICOM Competition Commission and the Dominican Competition Authority. Thus, it would appear that Article 90, in fact, contemplates that measures against anti-competitive practices by service suppliers in the market for courier (and possibly postal) services should be taken by the aforementioned competition bodies, in line with the relevant competition laws (once they have entered into force). Yet it must be noted that Article 93 also refers to regulatory bodies (see below). It would thus seem that the CARIFORUM Parties are free to choose their preferred institutional setup, and that the regulatory bodies referred to in Article 93 are those bodies that are responsible for take measures against anti-competitive practices of courier (and possibly postal) service suppliers, whether or not they are the aforementioned (general) competition bodies. In the same vein, it would seem natural that such measures do not have to be based on general competition laws but could equally be based on specific rules regarding the regulation of the market for courier (and possibly postal) services.

¹⁶ Note that the EC proposal for a Reference Paper for postal and courier services (TN/S/W/26 of 17 January 2005) stated that the examples of anti-competitive practices listed by the *Telecoms* Reference Paper were not included in the EC proposal “as further analysis of the anti-competitive practices specific to the postal and courier sector appears necessary” (*ibid.*, page 4).

¹⁷ Chapter 1 of Title IV of the CEPA.

¹⁸ Article 3 (1) of the competition chapter.

3.3.4 Universal Service (Article 91)

Article 91 relates to the universal service concept. The ability of governments to effectively secure universal service in essential services is, obviously, a very important principle of modern administration. This is true in particular in developing country markets where unsupervised market players may be even more tempted than in richer markets to leave parts of the population aside and concentrate on profitable areas and customers. This provision thus recognizes the need for universal service, and hence the obligations for service suppliers that may go with it. But it also operates to discipline regulators when they impose such obligations.

It is recalled that the concept in this Section only applies to *postal* services (but not to courier services), according to the legal definition of “universal service” in Article 89. Article 91 complements this legal definition, which is based on a number of somewhat general criteria. The first sentence of Article 91 grants any Party “the right to define the kind of universal service obligation it wishes to maintain”. This means two things: First, any CEPA Party is entitled to decide which specific *postal* service is to be supplied as a “universal” service. Put differently, a Party may decide that no postal service is supplied as “universal” service or, conversely, that all, or only some, postal services are to be supplied as “universal” services.

Second, once a CEPA Party decides that a, some, or all postal services are to be supplied as “universal” service, Article 91, second sentence, imposes certain conditions on that Party as regards the administration of the specific universal service obligations imposed on providers, such as the permanent provision of a postal service of specified quality at all points within the territory [of the Party] at affordable rates.¹⁹

Article 91 provides that these obligations have to be “administered in a transparent, non-discriminatory and competitively neutral manner” and must “not [be] more burdensome than necessary for the kind of universal service defined by the Party” (the “necessity-test”). In a nutshell, this discipline on regulators seeks to ensure that the imposition of a universal service obligation on the suppliers of such a service is not used as a pretext for favouring certain (domestic) service supplier(s) over others, i.e. is not applied in manner that accords to the *incumbent* a competitive advantage. The conditions imposed on the supplier must be limited to what is strictly necessary to achieve the elements that make up the universal service.

It is worth noting that as the said conditions concern the “administration” of the obligations pertaining to universal services, they also apply to the actual granting of licenses required for the supply of such services (see immediately below on Article 92).

3.3.5 Individual Licenses (Article 92)

Article 92 on individual licenses also relates to the universal service concept, as an individual license “may only be required for services which are within the scope of the universal service.” In other words, *no* individual licenses may be required for postal/courier services that do not fall within the realm of the “universal” services. This is significant – normal

¹⁹ See CEPA Article 89, discussed above.

courier/postal services that are not operating within that realm must thus be allowed without requiring a special license.

To the extent that an individual license is required for the supply of a “universal” service, certain criteria regarding such a license must “be made publicly available,” namely: (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license; and (b) the terms and conditions of individual licenses. The criteria set forth in Article 92 (2) thus underpin the conditions stipulated by Article 91 regarding the administration of the universal service obligations.

The third paragraph of Article 92 addresses the rights of service suppliers whose applications for individual licenses were rejected: transparency and appeal. When a license application is rejected “the reasons for the denial of an individual license shall be made known to the applicant upon request.”²⁰ Moreover, each Party is under an obligation to establish “an appeal procedure through an independent body.” Thus, an unsuccessful applicant has to have the opportunity to request a review of the decision to deny its application for an individual license. The procedure governing the review by the independent body must be “transparent, non-discriminatory, and based on objective criteria.”

3.3.6 Independence of the Regulatory Bodies (Article 93)

While Articles 91 and 92 are concerned with the rules governing the administration of the obligations pertaining to universal service, Article 93 relates to the regulatory bodies competent for administering these obligations as well as the courier and postal services sub-sector in general. The provision may seem to suggest that such (specialized, sectoral) “regulatory bodies” ought to be set up, although the provision stops short of expressly requiring the setting up of such bodies. (As discussed, Article 90 in fact appears to suggest that the general competition bodies, as contemplated in the competition chapter, may operate as the postal/courier regulators.)

In any case, however, the body regulating this sector is to be “legally separate from, and not accountable to, any supplier of courier services”. Hence, the regulatory body must be independent, both in legal and factual terms, from any given supplier, in particular the (domestic) incumbent – the national postal provider. Moreover, and in line with this wide notion of independence, the “decisions and procedures used by the regulatory body” are to be “impartial with respect to all market participants”. Thus, the regulatory body must not discriminate against any supplier of courier and postal services in favour of any other courier or postal service supplier, in particular the (domestic) incumbent.

3.3.7 Conclusions

This section provides for Reference Paper-type disciplines in the courier – and the postal – services sub-sector. No specific regulatory disciplines in this sub-sector currently exist in the WTO context. Proposals for establishing a Reference Paper for postal and courier services were made in the DDA negotiations, notably by the EC, but so far received a rather cool response by other WTO Members. At this point in time, it appears very unlikely that a

²⁰ This underpins the objective, sought by Article 91, of a *transparent* administration

Reference Paper for the postal and courier services sub-sector will be agreed by a critical number of WTO members.

Against this backdrop, agreeing on such regulatory disciplines in an EPA means a clear and effective “GATS plus” commitment for all EPA Parties. The disciplines set out in Section 3 are identical to those contained in the proposal for a Reference Paper regarding postal and courier services, made in 2005 by the EC and its Member States in the DDA negotiations. The scope of these disciplines is somewhat unclear, however, because Section 3 is supposed to cover only courier services. However, the disciplines on universal service and individual licenses, which are key elements of this section, relate to postal service. Arguably, thus, the section plainly covers both courier *and* postal services.

Of particular relevance are the requirement for EPA Parties to take appropriate measures against anti-competitive practices, the need to have an *independent* regulatory body in place as well as a review procedure through an independent body in case applications for individual licenses are denied. These measures entail a significant administrative and institutional responsibility, including potentially non-trivial costs. (That said, of course, more transparent procedures, better competition and hence better services may well justify the efforts.)

3.4 Telecommunications Services

3.4.1 Overview

Section 4 of the “Regulatory Framework” Chapter 5 addresses the regulation of telecommunication services.

The section obviously builds on, and emulates, the elements of the WTO Telecoms Reference Paper (hereinafter “RP”), but at times goes beyond RP obligations. In most cases, however, these “RP Plus” provisions are more or less mere elaborations of RP principles.

Like its model, the section covers a broad range of aspects relevant for a functioning system of pro-competitive regulation in this important sector. It addresses the independence of the regulator, the licensing of telecoms operators, the pro-active prevention of anti-competitive practices by monopolists and oligopolists, the interconnection between grids and operators, the fair allocation of frequencies, telephone numbers and other scarce resources, the regulation of universal service, the confidentiality of telecommunication data and the settlement of disputes between telecoms suppliers - a rather comprehensive web of obligations.

The majority of CARIFORUM members have accepted the RP as part of the specific commitments under the GATS, and hence are likely to be reasonably well prepared for any challenges this chapter poses. But some CARIFORUM members²¹ have not subscribed to the RP, and may thus find it more challenging to comply with this chapter. That said, all

²¹ This applies to Guyana, Haiti, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, as well as the non-WTO Members Bahamas and Montserrat (the latter is not a party to the EPA).

(except possibly one, namely Guyana²²) have largely functional telecommunications laws and regulators in place,²³ and should thus be generally prepared as well.

3.4.2 Definitions and Scope (Article 94)

The definitions in Para. 1 of Article 94 correspond to normal GATS / Telecoms Reference Paper definitions, with the exception of that of a “Regulatory Authority”, which is an autonomous definition. No relevant regulatory challenges appear to arise from this provision.

The same is true for Para. 2 on the scope, which (like the RP) provides for the coverage of basic (non-value-added) telecommunications services.

3.4.3 Regulatory Authority (Article 95)

This provision with its four paragraphs goes beyond, but arguably primarily elaborates on, Section 5 of the Telecoms RP, which is much shorter and reads in its entirety as follows:

“The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.”

Para. 1 of Article 95 appears to reinforce the RP requirement of “*separate from, and not accountable to*” through the alternative phrase “*legally separate and functionally independent,*” which is arguably more specific and imposes stricter obligations, because it does not leave Parties the choice to achieve effective separation without separating the functions legally. In essence, however, this option would appear to be of minor relevance, as it is hard to imagine effective separation and non-accountability without legal separation and functional independence of the regulator from any operator in the market. For practical purposes, thus, Para. 1 seems to function as a clarification rather than an additional “RP Plus” obligation.

Para. 2 of this provision contains two additional specific obligations which the RP does not spell out, namely the need to sufficiently empower the regulatory authority and to make its function and powers transparent for the market. However, while these are technically “RP Plus,” the demands appear to reflect simple common sense regarding the status and operation of a regulatory authority, once one is established. The resulting *additional* obligations thus appear rather negligible.

The same applies to Para. 3, which spells out the obvious, namely that the regulatory authority should be and act impartial(ly).

More remarkable is Para. 4. It reinforces the general right to appeal contained in GATS Article VI:2 in three ways: (1.) the independence of the appeals body from the Parties, including the regulatory authority; (2.) the requirement for that body (unless it is judicial in

²² See Samuel Braithwaite, *Privatization, Regulation and Investment: A Case Study of the Telecom Regulatory Environment (TRE) and Investment in Guyana*, Discussion Paper, World Dialogue on Regulation in Network Economies, 2006, available online at <http://www.regulateonline.org/content/view/667/69/> (last visited 11 September 2008).

²³ St. Kitts & Nevis, St. Lucia and St. Vincent & the Grenadines are members of ECTEL, the Eastern Caribbean Telecommunications Regulatory Authority (www.ectel.int).

nature) to provide written reasons for its decision; and (3.) the requirement to provide for independent and impartial *judicial* review of the appellate decision itself. Depending on the actual regulatory *status quo* in individual CARIFORUM members to date, these obligations may for some of them entail non-negligible institutional and administrative burdens, especially for small Parties with limited administrative capacities.

3.4.4 Authorization to Provide Telecommunications Services (Article 96)

This provision appears to impose rather significant disciplines on licensing requirements and activities. It goes well beyond its counterpart in the RP (Section 4), which only provides for the public availability of licensing criteria, but otherwise leaves licensing (in particular the requirement as such) largely to the discretion of the Members.

Para. 1 provides that the provision of telecoms services “*shall, as much as possible be authorized following mere notification,*” i.e., automatically. It thus puts the burden of proof on the Party (or its regulatory authority) to demonstrate that non-automatic licensing for a particular telecoms activist is necessary, as it is otherwise obliged to authorize following mere notification. Para. 2 enumerates two aspects with respect to which licensing is expressly authorized, namely frequencies and numbers. It would appear that beyond these only major concerns such as security and data safety may effectively justify non-automatic licensing under Para. 1. While this in principle constitutes a non-trivial restriction (discipline) on EPA Parties, it does not as such impose administrative burdens, and hence does not raise issues of feasibility.

Para. 3 (a) reiterates RP requirements regarding the administration of licensing. Interestingly, however, it leaves out the requirement to make the terms and conditions of individual licenses publicly available (RP Section 4.b).

Para. 3 (b) clarifies that the reasons for a denial decision must be given in writing, while the RP only demands that they are given in the first place. The difference in administrative practice appears to be negligible, as subjecting regulators concerned with major issues such as the licensing of telecoms to the need to provide written reasons for their decisions appears to be an imperative of basic good governance, and as such is likely to be part of administrative practice (if not law) of most CARIFORUM states in any case. However, some of the smaller states may prove the exception to the rule. As written reasons do increase the vulnerability of a decision upon appeal, the effect may be non-negligible on some smaller administrations.

Para. 3 (c), oddly, merely mirrors Article 95 (4) in requiring the availability of an appeal against the denial of licenses, and hence appears redundant.

Para. 3 (d), remarkable, limits the license fees to the administrative costs. This would appear to operate as a significant limitation on EPA Parties to generate revenue through telecoms licensing. Since no exception for the auctioning (or other sale) of licenses is provided for (unlike in the draft Disciplines on Domestic Regulation currently under discussion in the WTO), this appears as a rather excessive limitation on EPA Parties, especially those with yet-to-be liberalized market segments (or unused/unallocated licenses), e.g. in 3G (or even 2G) mobile telephony. It would have been sensible to either leave out the paragraph in its entirety (this would allow for revenue generating licensing generally) or at least add an

exception for the non-discriminatory, competitive sale (especially auctioning) of scarce frequencies (or rather: related licenses). It should be noted that several EU Member states (not least Germany) have generated enormous revenues through telecoms licensing in 3G mobile telephony. It would seem unfair to deny others the same opportunity (even if the economic wisdom of excessive licensing fees generated by auctions may be questionable).

3.4.5 Competitive Safeguards on Major Suppliers (Article 36)

This provision, which requires the pro-active prevention of major anti-competitive practices by dominant providers (especially incumbent ex-monopolists, but also oligopolies), mirrors largely literally Section 1 of the RP, with minimal editorial rearrangements. No additional obligations arise thus for EPA Parties that have subscribed to the RP. For others the obligation – which entails the need to supervise major suppliers, i.e. powerful companies, rather narrowly – could prove to be rather significant.

3.4.6 Interconnection (Article 98)

Perhaps the single most important element of a functioning telecoms market is the secure possibility (right) of telecoms provider to interconnect with, i.e., link their networks to, other providers' networks. Without this guarantee especially smaller providers will not be able to satisfy their customers (as they cannot guarantee that they can reach other subscribers), and hence will not be able to compete. It is thus in principle welcome that this provision clarifies and improves the RP provisions on interconnection – possibly, not least, in view of lessons drawn from the *Mexico-Telecoms (Telmex)* case decided by a WTO Panel in 2004.²⁴

While paragraphs 3-6 of Article 98 provision mirror largely literally Section 2.2-2.5 of the RP, the remainder of the provision goes beyond its model.

Para. 1 establishes the additional *right* of every telecoms provider to negotiate interconnection with every other provider, effectively excluding gatekeeper rights for designated providers (usually the universal service providers). This requirement, however, logically does not add any administrative burden on the government/regulatory authority.

Para. 2 requires Parties to secure the confidentiality, and restrictive use, of business information exchanged between telecoms operators as part of interconnection negotiations. The obligation already exists under the RP for major suppliers (Section 1.2 (b) of the RP). The extension to others appears as a necessary reflex of Para. 1. Notwithstanding that conclusion, it does add another specific obligation for regulatory authorities, which, however, would appear rather manageable for those EPA Parties that have subscribed to the RP, given that they already maintain that control for major suppliers.

For EPA Parties that have not subscribed to the RP so far and have not implemented its principles in practice this provision may pose significant challenges, in particular in the short run.

²⁴ Sauv  and Ward, *supra* note 13, at II.4.3 (b) see this connection. See *Mexico – Measures Affecting Telecommunication Services*, Report of the Panel, dated 2 April 2004, WT/DS204/R.

3.4.7 Scarce Resources (Article 99)

The provision, requiring fair procedures for the allocation of scarce resources such as numbers and frequencies among providers, reproduces *verbatim* Section 6 of the RP. Even for EPA Parties that have not subscribed to the RP the burden would appear to be rather minor.

3.4.8 Universal Service (Article 100)

As in postal and courier services, the possibility to provide for universal service obligations for telecoms providers is an important tool to secure access to these essential services for all citizens. Article 100 allows for, but also disciplines, the imposition of such obligations.

Paragraphs 1 and 2 of the provision reproduce literally Section 3 of the RP. Para. 3, however, adds the *right* of all providers to be eligible for universal service. This reflects the fact that the obligation also potentially entails significant economic advantages, even in the absence of monopoly rents, namely economies of scale short of (prohibited) cross-subsidization. This right of operators thus entails an obligation on the regulator to entertain the options and make impartial choices. While the decision is likely to be economically important and hence potentially contentious, the actual administrative and institutional burden on the regulator to administer this decision would appear to be acceptable.

Para. 3 further requires Parties to consider suitable compensation mechanisms for universal service obligations, limiting them to what is necessary to offset actual burdens incurred by the operator. Importantly, the choice of mechanism (direct compensation or sharing mechanisms involving the other operators) is left to the individual Party. However, the need to administer such compensation mechanisms may represent a non-trivial challenge, not least for small administrations. Given that it is a necessary reflex of the operation of universal service obligations, as exclusivity of certain services is not an option to the extent that market access is committed, the burden appears unavoidable.

While the issue does not appear to have raised concerns regarding administrative burdens in the CARIFORUM context, this may be different in other EPA arenas. It may be worth considering a transitional period postponing the right for non-incumbents to be eligible for universal service provision, and hence allowing Parties to maintain the *status quo* (likely involving a previously or currently state-owned operator providing universal service) for a while, to provide relief in case of need.

3.4.9 Confidentiality of Information (Article 101)

Article 101 imposes the obligation on Parties to ensure (through regulation) the confidentiality of telecommunications and traffic data as processed by operators, excluding non-public telecoms operations such as intra-corporate communications (see GATS Annex on Telecommunications for guidance).

Neither the GATS (incl. Annexes) nor the RP contain such an obligation. The GATS Annex on Telecommunications, however, in Section 5 d) provides for a *right* for Members to ensure such confidentiality, provided the measures do not operate as a disguised restriction on trade. The *obligation* to do so in this provision may, again, pose challenges for some regulators in EPA Parties, notwithstanding the desirability of the result. Interestingly, this

provision, while requiring Parties to secure confidentiality, limits this to cases that do not restrict trade in services (not only telecommunication services). Since many data protection measures may do exactly that, the scope of the obligation may be effectively limited.

An interesting interpretative question arises if and when an EPA Party chooses to exercise its rights under the GATS Annex, raising *undisguised* (open, visible and purposeful) barriers to trade in the process. Would Article 101 of the CEPA prohibit such measures? The answer, however, would appear to be no, as the phrase “*without restricting trade in services*” seems to only operate only as a limitation on the *obligation* to secure confidentiality in Article 101 itself, not as a separate limitation on a Party’s *right* to provide for further-reaching data protection if it so chooses. However, it may be worth ensuring that all EPA Parties are fully aware of this issue to avoid misunderstandings; a clarification of the issue in future EPAs may be desirable to avoid misunderstandings.

3.4.10 Disputes between Suppliers (Article 102)

Article 102, which does not find a correspondence in the RP, requires the telecoms regulator to intervene, when requested, as an arbitrator in disputes between telecoms suppliers if rights and obligations rooted in this Chapter of the CEAP are concerned. Oddly, it duplicates the right of providers engaged in a dispute on interconnection to have the matter resolved by the regulatory authority (Article 98 (4)).

The provision adds a function to the regulator’s portfolio and as such represents an administrative burden. However, given the general need to “sufficiently empower” the regulator to effectively regulate the sector (Article 95 (2), see above), establishing it as a judge of first resort for disputes among operators appears as a rather obvious consequence. The *additional* burden can thus be seen as rather negligible.

Para. 2, finally, provides for the cooperation of concerned Parties’ regulators in case of disputes concerning cross-border supply of services. This rather general and unspecific obligation holds the potential for some degree of outside interference, but does not add significant administrative burdens as such.

3.4.11 Conclusions

Section 4 on telecommunication services emulates its model, the WTO Telecoms Reference Paper, but at times goes beyond RP obligations. In most cases, however, these “RP Plus” provisions are more or less mere elaborations of RP principles.

For the majority of CARIFORUM Parties that have subscribed to the RP, the additional burden appears moderate. For those that haven’t the requirements, individually and as a bundle, may pose challenges. That said, as indicated, all of these (with the possible exception of Guyana²⁵) appear to have generally functional telecommunications laws and regulators in place, and should thus be generally prepared as well.

Significant departures from the standards established by the RP include a far-reaching right of (ultimately judicial) appeal against regulatory decisions (Article 95), limitations on licensing

²⁵ See note 22.

including the capping of licensing fees at the level of costs, which would preclude the profitable auctioning of licenses (Article 57), the obligation to establish compensation mechanisms for universal service provision (Article 100), the obligation to ensure the confidentiality of telecommunications and traffic data (Article 101) and the obligation to settle disputes between providers (Article 102). The resulting administrative burdens (for RP subscribers), however, appear generally acceptable, with the possible exception of very small administrations.

3.5 Financial Services

3.5.1 Overview

Section 5 of the CEPA's regulatory chapter addresses the regulation of financial services. Its significance derives not least from the considerable number of specific commitments that CARIFORUM states have undertaken in this sector – 83 in total, compared to 44 existing GATS commitments and offers made in the DDA negotiations.²⁶

The Section's provisions derive their inspiration almost entirely from the GATS' "Annex on Financial Services" (the "Annex") and the "Understanding on Commitments in Financial Services" (the "Understanding"). The difference matters, as the Annex is a part of the GATS and hence mandatory WTO law, while the Understanding only applies to (mostly developed) WTO Members who have chosen to undertake their specific commitments on financial services in line with the approach adopted by the Understanding. Importantly, no CARIFORUM state has done so, therefore all obligatory elements derived from the Understanding represent "WTO plus" commitments.

Apart from detailed definitions, in particular of financial services (a crucial element of any agreement on financial services), the provisions of this Section include in particular a "prudential carve-out" (a far-reaching authorization for regulators to take exceptional measures for prudential reasons), principles of transparency, the principle of automatic inclusion of new financial services, an obligation to permit the processing and transfer of financial data and specific exceptions for public entities.

3.5.2 Scope and Definitions (Article 103)

According to Article 103 (1), Section 5 sets out the principles of the regulatory framework for "all financial services liberalized pursuant to Chapters II, III and IV of this Title", i.e. only for those financial services where the EPA Parties have undertaken commitments on market access and national treatment.

Article 103 (2) lit. a) – c) contain legal definitions of: (a) financial service, (b) financial service supplier, and (c) public entity. These definitions are identical to the corresponding definitions the Annex, which, as indicated, is an "integral part" of the GATS, according to Article XXIX of the Agreement.

²⁶ See Francis & Ulrich, *supra* note 11, at p. 14-15.

Article 103 (2) lit. d) further contains a legal definition of “new financial service” which does not figure in the Annex. By contrast, it corresponds literally to the legal definition of a “new financial service” in the Understanding, which, as discussed, does not constitute an integral part of the GATS, however.

3.5.3 Prudential Carve-Out (Article 104)

The prudential carve-out in Article 104 (1), which allows financial regulators to take prudential measures to protect customers such as investors, depositors or policy holders as well as measures to ensure the integrity and stability of a country’s financial system, corresponds literally to its counterpart in the Annex.²⁷ The non-disclosure rule in Article 104 (2), which ensures that authorities are not required to disclose confidential information or information relating to the affairs and accounts of individual customers, is identical to the non-disclosure rule in paragraph 2. b) of the Annex.

The provision thus simply mirrors existing GATS obligations, or rather: rights. Its role here is simply to ensure that these rights also apply in the CEPA context. No additional obligations arise.

3.5.4 Effective and Transparent Regulation (Article 105)

By contrast, the regulatory principles laid down in Article 105 do constitute in large part a “WTO plus” approach, mitigated, however, by the soft “best endeavour” nature of the obligations.

Article 105 (1) seeks to increase the transparency of the (legislative) process by which a Party adopts new measures of “general application.” In this respect, there is a clear link to Article III:1 of the GATS which requires WTO Members to publish promptly “all relevant measures of general application which pertain to or affect the operation” of the GATS. However, Article 105 (1) differs from Article III:1 of the GATS in that it covers measures “that the Party *proposes* to adopt”, as opposed to measures already adopted (emphasis added). Such measures should be provided “in advance to all interested persons” in order to allow an opportunity for such persons “to comment on the measures” being proposed – a so-called “prior comment” commitment. While undoubtedly a useful tool for maintaining a reasonable and transparent regulatory practice, this type of commitment is feared by small and/or weak administrations because it may open the door somewhat prematurely to powerful foreign providers that may steamroll the regulator more easily during the drafting stage than later when a regulatory measure has already been adopted. Like other developing country groupings in the WTO the group of Small, Vulnerable Economies (SVEs), which includes virtually all CARIFORUM states, has therefore consistently resisted a general “prior comment” obligation in the deliberations of the WTO Working Party on Domestic Regulation (WPDR).

Possibly as a result of the CARIFORUM states maintaining this position also in the EPA negotiations, Article 105 (1) does not legally oblige the Parties to follow this approach.

²⁷ Paragraph 2. a) of the Annex on Financial Services. The CEAP leaves out the second sentence of this provision, without apparent consequences.

Rather, it states that each Party “shall endeavour”, i.e. use its best efforts, to do so. (A similar compromise, in fact, appears to emerge in the WPDR.²⁸)

Article 105 (2), third sub-paragraph, relates to “internationally agreed standards for regulation and supervision in the financial services sector”. Parties are asked to use their best endeavours to facilitate their implementation and application. The exact meaning of “internationally agreed standards,” however, is less than clear. A previous draft of the CEPA provided that these were standards “under agreements to which they are parties.” This phrase would have excluded, for example, OECD standards, which are viewed with suspicion by Caribbean countries that feel targeted by OECD measures on tax policy, money laundering etc. While it is not a necessary conclusion that the disappearance of that phrase means that such plurilateral standards have now found their way back into the EPA, the vagueness does not seem to work in favour of the CARIFORUM states. That said, the mere “best endeavour” nature of the obligation should provide sufficient insulation against such unwanted standards.

The first and second sub-paragraphs of Article 105 (2) deal with “applications relating to the supply of financial services”. These two provisions are mandatory. According to the first sub-paragraph, each Party has to make available to interested persons “its requirements for completing applications relating to the supply of financial services”. Financial service suppliers are thus entitled to be informed of all of the requirements applying to the supply of financial services within the territory of a given Party. This is to enhance the transparency of the financial services sector. The second sub-paragraph requires the Parties to inform an applicant of the status of its application (this obligation corresponds to Article VI:3, second sentence, of the GATS). Moreover, the Parties have to “notify the applicant without undue delay” if they require additional information on its application. This obligation serves the goal of making the application process as fast as possible.

3.5.5 New Financial Services (Article 106)

Article 106 addresses the treatment of new financial services, i.e. services not yet captured by existing definitions and schedules – a rather important issue given the fast pace of innovation in financial product design. The issue is not dealt with in the Annex, but appears in the Understanding.

Article 106 foresees that new financial services provided by suppliers from the other Party should be permitted if the same or similar services are permitted when supplied by domestic providers “in like circumstances.” The first sentence of Article 106 is somewhat similar to paragraph 7 of the Understanding. The two provisions mainly differ in that paragraph 7 of the Understanding only applies to new financial services that are offered by financial service suppliers which have a commercial presence (mode 3) in the territory of the WTO Member where the services are to be supplied. By contrast, Article 106, first sentence, is not restricted to new financial services supplied in mode 3. Rather, the latter provision applies to new financial services supplied in any mode of supply, provided the service in question is “similar to those services that the Party permits its own financial service suppliers to provide under its domestic law in like circumstances”.

²⁸ See Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, WTO Room Document, 23 January 2008, section 15.

This general right of foreign suppliers to provide the new service, however, can still be subjected to regulatory conditions. Article 106, second sentence, entitles the Parties to determine “the juridical form through which the service may be provided.” Thus, a Party may effectively require foreign financial service suppliers to establish a commercial presence in its territory in order to be able to supply the new financial service.

Further, Article 106, third sentence, entitles the Parties to “require authorization” for the provision of a new financial service. In such a case, a decision by the competent authority (regulatory body) on an application for authorization is to be made “within a reasonable time” (this requirement corresponds to Article VI:3, first sentence, of the GATS). An authorization may only be refused “for prudential reasons.” The discretion enjoyed by the regulatory body is thus somewhat limited, but the notion “prudential reasons” still leaves a wide margin of discretion to the regulatory body.

The CEPA’s approach to new financial services is thus distinctly liberal, but not novel. It corresponds not only to that reflected in the Understanding, but also mirrors corresponding concepts in NAFTA.²⁹

3.5.6 Data Processing (Article 107)

The provision on data processing has its counterpart in paragraph 8 of the Understanding, and hence is – for CARIFORUM States – “GATS plus.” It contains two corresponding elements. First, Parties must allow for the cross-border transfer of financial data if that is required in the ordinary course of business of a financial service provider. Second, however, the Parties on the other hand undertake the obligation to take sufficiently effective measures (“adequate safeguards”) to ensure the protection of data, in particular personal data. While the first element will cater to those CARIFORUM States that excel in financial services, the second may pose some legislative and regulatory challenges. Given the values at stake, however, this would appear as a normal cost to be borne to obtain the benefit.

In its logic the right of financial service suppliers to transfer information into and out of a Party’s territory for data processing is somewhat reminiscent of the general obligation of WTO Members that have made specific market access commitments in mode 1 to permit the cross-border movement of capital, provided that is an essential part of the service itself.³⁰

3.5.7 Specific Exceptions (Article 108)

The “specific exceptions” listed in Article 108, relating to certain specific financial services of a *public* nature, are identical to the “exceptions” listed in paragraph 1. b) of the Annex. The difference between Article 47 and paragraph 1. b) of the Annex is a purely *formal* one: paragraph 1. b) of the Annex provides that the financial services concerned are deemed to be “supplied in the exercise of governmental authority” in the sense of Article I:3(b) of the GATS. According to this provision, such services do not come under the scope of the GATS (and hence the Annex).

²⁹ See Article 1407 (1) of the North American Free Trade Agreement (NAFTA).

³⁰ See footnote 8 to Article XVI:1 of the GATS

There is one *material* difference, though, between Article 108 and the Annex as regards the financial services concerned. According to paragraph 1. c) of the Annex, the financial services comprised by paragraph 1. b) (ii) [services relating to a statutory system of social security or public retirement plans] and (ii) [activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government] are not considered to be supplied in the exercise of governmental authority if a WTO Member allows such services to be conducted by its financial service suppliers “in competition with a public entity or a financial service supplier”. By contrast, this exception from the exception is more limited under Article 108: Only its first paragraph, relating to services forming part of a public retirement plan or a statutory system of social security, mentions the possibility that such services may be supplied in competition with public entities or private institutions. In such a case, the services in question are not exempted from the regulatory principles set out in Section 5.

3.5.8 Conclusions

Most of the regulatory principles in this section are identical, or correspond, to the principles in the “Annex on Financial Services” (*Annex*) or the “Understanding on Commitments in Financial Services” (*Understanding*). Furthermore, some of the principles are similar to those set out in Article VI:3 of the GATS. As the Annex is an integral part of the GATS, the regulatory principles of this section that are identical, or correspond, to those in the Annex do not constitute a “WTO plus” approach.

The same cannot be said, however, with respect to the regulatory principles that are identical, or correspond, to those in the Understanding. This is because the Understanding is not an integral part of the GATS. It is only applicable to those WTO Members that subscribed their specific commitments on financial services in line with the Understanding. None of the CARIFORUM States chose to do so. Therefore, the regulatory principles mirroring those of the Understanding represent a “WTO plus” approach for the CARIFORUM States. This applies in particular to the provisions on new financial services (Article 106) and financial data processing (Article 107).

Equally “WTO plus,” of course, are those principles that are entirely new, i.e. that do not appear in either the Annex or the Understanding. This is the case for most of the principles relating to an “effective and transparent regulation”. It must be noted, though, that the latter principles are couched in the form of “best endeavour” commitments and hence are not strictly mandatory for the Parties.

All in all it would not appear that the regulatory principles which constitute a “WTO plus” approach are overly burdensome. In particular, they do not require the establishment of new (regulatory) bodies. The implementation of such principles may, however, require more resources in terms of additional personnel for the regulatory bodies charged with the implementation of such principles as well as appropriate training of the (new) staff. To this end, technical assistance and capacity building may be required so as to enable the regulatory bodies of the Parties concerned to effectively fulfill their functions to the benefit of a stable financial service sector.

In fact, for CARICOM members (i.e., CARIFORUM Members minus the Dominican Republic) it appears that it will generally be sufficient to implement already existing commitments under

the CARICOM Financial Services Agreement. However, doing so will in fact require further work and resources.³¹

3.6 International Maritime Transport Services

Section 6 on international maritime transport services consists of just one, but rather long, Article broadly entitled Scope, definitions and principles. The provision aims primarily at clarifying the extent of market access commitments in maritime services by providing (partly extensive) definitions.

Importantly, it further establishes in principle unrestricted market access *“in view of the existing levels of liberalization between the Parties”* (Article 109 (3) lit. a).

It further provides for National Treatment and MFN, in particular regarding access to port and other facilities and services (Article 109 (3) lit b) and (6)). Beyond non-discrimination, Article 109 (6) further specifies that access to a number of enumerated services must be on *“reasonable (...) terms and conditions,”* excluding thereby in particular excessive fees and grossly sub-standard services. Cargo-sharing arrangements are henceforth prohibited, existing ones are to be phased out (Article 109 (4) (a)).

A general clause (Article 109.4 (b)) imposes on the Parties the requirement to abstain from (if need be: abolish existing) measures that discriminate or act as a disguised restriction on trade in international maritime services.

The administrative regulatory burdens resulting from this Section, if any, appear rather limited, given not least the quoted existing level of liberalization. It appears to act largely as a reconfirmation/elaboration of existing policies rather than a new, additional set of obligations. Specific difficulties for CARIFORUM Parties are not apparent.

3.7 Tourism Services

3.7.1 Overview

Section 7 contains significant regulatory disciplines with respect to tourism services (Article 110 speaks of *“principles of the regulatory framework for all tourism services”*). The GATS does not contain any sector-specific disciplines in tourism. The section as a whole thus constitutes “GATS plus.”

The treatment of tourism, not surprisingly, has attracted considerable attention. This is not only because of the importance of the sector for Caribbean economies, but also due to some innovative elements in the CEPA’s approach to the matter. Perhaps most prominent is the obligation (de facto primarily on the EC) to prevent anti-competitive practices by their tourism service suppliers abroad (i.e., in the Caribbean). This is of high importance for the CARIFORUM States where powerful, often vertically integrated European providers exert significant anti-competitive pressures.

³¹ See Francis and Ullrich, *supra* note 11, at p. 11. They refer to a paper prepared for CARICOM Heads of Government in January 2008 which puts the cost of implementation of the financial services obligations for CARIFORUM states at EUR 2 million.

Other provisions address access to technology, SMEs, mutual recognition, sustainable development, environmental and quality standards, cooperation/technical assistance and the exchange of information.

It is worth noting that while the other sectoral mechanisms – in financial, telecoms, postal/courier and maritime transport services – are originally based on standard EC proposals, the agreement on a regulatory framework for tourism came about at the targeted insistence of the CARIFORUM side, reflecting the region’s significant interests in the sector.³² These interests include the defensive interest to control the negative impact of anti-competitive structures maintained in particular by foreign (EU) tourism networks as well as offensive interests for Caribbean tourism companies and professionals to effectively access the European market.

3.7.2 Prevention of Anticompetitive Practices (Article 111)

This provision, perhaps the most innovative in the Chapter, requires the Parties to maintain or introduce a pro-active competition policy in the area of tourism services. It specifically demands controls on “tourism distribution networks,” such as agencies, tour operators, tourism wholesalers and reservation systems (see definition in footnote 24). Anti-competitive practices, in particular the abuse of a dominant position, are to be prevented.

These requirements in their entirety are “GATS plus.” The GATS does not contain any such requirements, general or sector-specific for tourism, beyond the general disciplines on monopolies and exclusive service providers in GATS Article VIII.

The requirements are significant. They demand significant administrative (and implicitly institutional) arrangements. While most CARIFORUM states already maintain an active tourism policy, which may or may not include some supervision of strong players and anti-competitive practices, and some maintain general competition policies, the challenges should not be underestimated.

That said, the main focus of this provision is in fact on the EC and its tourism operators. It is in view of their (often vertically integrated) structures, market power and behaviour in the Caribbean markets that the CARIFORUM States have actively pushed for these disciplines. It may indeed be hoped that by enlisting the European Commission’s formidable powers in competition policy for this challenge the Caribbean markets could gain respite from sometimes suffocating structures – something the local governments could not easily do on their own.

3.7.3 Access to Technology (Article 112), Small and Medium-Sized Enterprises (Article 113), Increasing the Impact of Tourism on Sustainable Development (Article 115)

Article 112, a hortative “best endeavour” provision, asks the Parties to facilitate the commercial transfer of technology to CARIFORUM States. This rather harmless provision aims to serve exclusively CARIFORUM interests and does not entail relevant regulatory

³² Caribbean Regional Negotiating Machinery, EPA Brief: The Cariforum-EC Economic Partnership Agreement (EPA) – Treatment of Tourism in the EPA, at page 2 (2008) (available online at www.crnrm.org, last visited on 10 September 2008).

obligations for them. The same applies to Article 113, which asks the Parties to use their best endeavours to facilitate the participation of SMEs in tourism, and Article 115, which commits them to encourage (read: finance) the participation of CARIFORUM providers in programmes supporting the sustainable development of tourism.

The value of these provisions may appear rather questionable, given their weakness and vagueness, but should probably not be underestimated. They may provide the basis for policies and budgetary outlays, and hence prove eventually valuable.

3.7.4 Mutual Recognition (Article 114)

This provision reconfirms the obligations under Article 85 (see above), with specific emphasis on tourism requirements, qualifications and licenses, but without additional “hard” obligations. However, this provision will lend some political weight to future specific demands towards mutual recognition, for example of qualifications of tourism professionals. It corresponds to CARIFORUM demands made in the course of the negotiations.

3.7.5 Environmental and Quality Standards (Article 116)

This provision contains a relatively “hard” (“*shall*”) but, as far as results are concerned, effectively “soft” (“*shall encourage compliance*”) obligation on the Parties to work towards the observation of unspecified environmental and quality standards in tourism. The second sentence, asking for support of CARIFORUM states’ participation in international standard setting activities, suggests that these include standards developed by – again unspecified – international organizations.

An earlier CARIFORUM proposal would have put the compliance obligation only on the EU Member States, not on the CARIFORUM Parties. It can thus be assumed that the latter considered this obligation to be non-negligible, presumably more so for CARIFORUM’s tourism service providers than its administrations. Since the effective obligations on those providers remains rather vague (they are to be “encouraged”) as long as their governments act with restraint, the EPA obligation as such appears manageable from the perspective of the CARIFORUM Parties.

3.7.6 Development Cooperation and Technical Assistance (Article 117)

This provision envisages cooperation (read: technical assistance) programmes for a number of specified purposes. It does not contain regulatory disciplines.

3.7.7 Exchange of Information and Consultation (Article 118)

Article 118, finally, contains “soft” obligations to exchange information among the Parties and invite stakeholders to these dialogues, if agreed. No such obligation exists under GATS. The administrative burden, if any, appears very limited.

3.7.8 Conclusions

While many of its provisions are “best endeavour” commitments to advance worthwhile causes such as technology transfer and the participation of SMEs in the sector, Section 7

does contain a few significant regulatory disciplines with respect to tourism services. The GATS does not contain any sector-specific disciplines in tourism. The section as a whole thus constitutes “GATS plus.”

The provisions appear to be geared primarily towards CARIFORUM interests. A key obligation is the requirement for Parties to maintain an active sectoral competition policy in the area of tourism, focused on the prevention of anti-competitive practices and abuse of dominance in particular by “tourism networks,” including – that is the point – in the respective other Party’s market. This obligation is significant and could entail important new administrative and institutional burdens for countries that do not yet maintain such a policy. The primary target of this provision, however, are the EC and its powerful, often vertically integrated tourism operators and networks. They are the ones that this provision, by enlisting the European Commission, aims to control. It is for this reason that the CARIFORUM states actively demanded the inclusion of such disciplines in this Chapter.

A further “soft” obligation to uphold (*“encourage compliance with”*) environmental and quality standards in tourism may entail the need for new administrative and institutional measures. The impact of this obligation, however, appears to be of moderate significance. A provision on MRAs reiterates the soft obligations contained in Article 24.

The remainder of this section, as indicated, concerns “best endeavour” obligations targeted towards support for developing country interests (access to technology, SMEs) as well as technical assistance and cooperation.

4 Concluding Remarks

Chapter 5 does not contain strong general disciplines on the regulation of services, except for mutual recognition agreements (MRAs). While even there the obligations in a strict legal sense remain soft, the procedure involving professional bodies from both sides entails a certain automatism, once the ball gets rolling, towards the adoption of MRAs.

More significant are the sector-specific disciplines. These contain partly non-trivial “GATS plus” regulatory obligations on EPA Parties, which will demand additional administrative, regulatory and legislative efforts. The extent of the additional challenge depends in part on individual Parties’ existing specific commitments under GATS, including in particular the Telecoms Reference Paper, and the status of implementation. The same applies to regional frameworks such as the CARICOM Financial Services Agreement. For those countries that have already implemented it the CEPA provisions on financial services do not require much additional effort.

Far-reaching new regulatory commitments not underpinned by any existing GATS commitments arise in particular in the courier/postal and tourism services, where the CEPA Parties undertake to pursue significant sectoral competition policies and corresponding regulatory activities, resulting in the need for institutional arrangements.

In financial services, most of the regulatory principles conform to those set out in the Annex on Financial services and the Understanding on Commitments in Financial Services. As none of the CARIFORUM States made commitments in line with the said Understanding, the principles corresponding to the Understanding go beyond the current commitments of these States under the GATS.

With respect to telecoms, the Chapter in part goes beyond the Reference Paper. In most instances (with some notable exceptions), however, the requirements appear to be elaborations of Reference Paper disciplines rather than entirely new obligations.

Is the CARIFORUM EPA good for development? This paper obviously cannot answer this question. However, what can be stated is that the “Regulatory Framework” established by the provisions of Chapter 5 will, on the one hand, pose a number of regulatory and legislative challenges, impose some administrative burdens and trigger corresponding costs. These costs – for CARIFORUM members – have been estimated to amount to EUR 15.6 million in total.³³ If correct, this number would appear rather trivial compared to the possible positive economic impact of functioning regulatory systems, in particular the pro-competitive mechanisms foreseen in telecoms, postal/courier and, most of all, tourism services.

On the other hand, some of the agreed regulatory mechanisms should cater directly to important CARIFORUM interests, most prominently in the area of tourism. In addition to the specific rules in Section 7 on tourism services, the built-in agenda to work towards mutual recognition agreements, as stated, should work to benefit those Caribbean professionals whose interests in exporting their services to Europe have driven their negotiators’ rather remarkable efforts in securing some market access in “mode 4.” Remarkably, the four priority sectors where negotiations on mutual recognition are to be initiated within three years include tourism – an unusual choice given that tourism professionals usually do not get the same recognition as the classical liberal professions. It reflects CARIFORUM negotiators’ successful insistence on priority treatment for this crucial sector.

The insistence on access for Caribbean professionals to EC markets may – apart from tourism – be most relevant in the area of cultural and entertainment services, a sector not separately represented in the Chapter analysed here, because it has found a more prominent place in the CEPA’s rather unique “Protocol III on Cultural Relations.” There, the specific access gained for CARIFORUM cultural professionals to the EC market is further buttressed by additional facilitation measures, including “soft” market access (explicit support in going through normal channels) for those cultural professionals not directly benefiting from agreed market access – a unique construction that aims at underpinning the far-reaching cultural cooperation envisaged.

Quite apart from the concrete effects discussed, one may further speculate that the most significant benefits of Chapter 5 may actually lie in the overall efficiency gains inherent in the good governance embodied in the regulatory disciplines. This, however, remains obviously speculative at this point.

Overall, thus, the developmental balance with respect to the regulatory framework appears to be positive. The burdens appear manageable, and the benefits could be significant. It remains to be seen, of course, whether the assumptions made here – and by the CARIFORUM negotiators – survive their meeting with reality.

³³ Francis and Ullrich, *supra* note 11, at page 13.

References

- Braithwaite, S.** (2006): Privatization, Regulation and Investment: A Case Study of the Telecom Regulatory Environment (TRE) and Investment in Guyana, Discussion Paper, World Dialogue on Regulation in Network Economies, available online at <http://www.regulateonline.org/content/view/667/69/> (last visited on 11 September 2008)
- Caribbean Regional Negotiating Machinery**, EPA Brief: The Cariforum-EC Economic Partnership Agreement (EPA) – Treatment of Tourism in the EPA (2008) (available online at www.crnmm.org, last visited on 10 September 2008).
- Caribbean Regional Negotiating Machinery**, *Getting to Know the EPA: Provisions on Services and Investment* (8 February 2008) (available online at www.crnmm.org, last visited on 7 September 2008)
- Francis, A. / H. Ullrich** (2008): EPA Negotiations on Trade in Services: Analysis of the CARIFORUM-EU EPA, GTZ Working Paper in the series CARIFORUM EPA and beyond: Recommendations on Services and Trade-Related Issues, Eschborn
- Panel Report** on *Mexico – Measures Affecting Telecommunication Services*, dated 2 April 2004, WT/DS204/R
- Sauvé, P. / N. Ward** (2009): Services and Investment in the EU-CARIFORUM EPA: Innovation in rule-design and implications for Africa", in Faber, G. and Orbie, J. (eds) Beyond Market Access for Economic Development: EU-Africa Relations in Transition, Routledge (forthcoming)
- Working Party on Domestic Regulation**, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, WTO Room Document, 23 January 2008

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