



STATE OF COMPETITION ENFORCEMENT IN THE CSME (2019-2021)



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Foreword

This first edition of the State of Competition Enforcement in the CSME Report (Report) presents insights into the competition enforcement trends and policy developments in the region. The Report is an initiative of the CARICOM Competition Commission (CCC), which compiled the statistics relating to the established competition authorities in the CSME for the period 2019-2021.

The data is presented as aggregate statistics to highlight regional trends in competition enforcement and to ensure as far as possible anonymisation of the data for confidentiality purposes. It includes cases investigated into abuse of dominance conduct, restricted agreements and merger transactions. The Report also captures data on the competition advocacy initiatives of the competition authorities in the region. This publication contributes to helping policymakers and competition enforcers stay up to date with the different ways in which competition law and policy is applied throughout the CSME.

The data shows that, despite legislative gaps as well as resource constraints, competition authorities in the CSME are vibrant as it pertains to competition enforcement and advocacy. Over the 3-year period the competition authorities in the region conducted 77 investigations and engaged in 112 advocacy initiatives aimed at raising the regional public's awareness of the benefits of competition and competition law.

Consumer protection policy and legislative initiatives are also included as these form the basis for the implementation of a robust competition framework.

The CCC wishes to thank the individual national competition authorities in the region that generously provided the information on which much of this publication is based. We hope that by the second edition of the Report more Member States in the CSME will have enacted national competition and consumer protection laws and established national competition and consumer protection authorities, to foster improvement in the regional competition enforcement framework and policy environment.

Executive Summary

This Report presents information on the state of competition enforcement in the CARICOM Single Market and Economy (CSME) during the period 2019-2021. It stems from the CCC's intent on ensuring the regional public is aware of the efforts of it and the national competition authorities in the region and the challenges faced regarding competition enforcement. The Report also provides some information on consumer protection and welfare.

In preparing this Report, the CCC relied on several sources of information. These sources include:

- (a) a questionnaire the CCC developed and distributed to the national competition authorities in the region which sought to collect data on their competition enforcement and their advocacy activities;
- (b) the competition and consumer protection legislation in the CSME Member States

It is important to highlight that a major challenge from the consumer protection end, is that the CCC is not empowered to collect consumer information under the Revised Treaty of Chaguaramas.

The Report highlights the following key findings:

- (a) Compliance issues remain regarding competition law as most Member States are yet to enact competition laws and establish national competition authorities.
- (b) There is a lack of harmonisation of the national competition laws in those Member States with these legislation. Examples where the national laws diverge include different substantive tests and different levels of cooperation with the CCC. Regarding the latter, the differences in the substantive tests used in national enforcement create concern for the enforcement of regional competition rules.
- (c) Most Member States with legislation exempt particular sectors from the remit of the national competition authorities. This could create concerns for the enforcement of regional competition policy unless sector-specific legislative frameworks cater for enforcement cooperation between these sector regulators and the CCC.
- (d) Competition authorities in the region investigated 37 cases of abuse of dominance conduct and reviewed 38 merger transactions during the period 2019-2021. Only 2 investigations of restrictive agreements or cartels were launched.
- (e) Articles written about competition and competition law appear to be the most preferred method of competition advocacy used in the region as the competition authorities published 68 articles during the 3-year period.

- (f) 9 Member States have enacted dedicated consumer protection legislation, while 3 Member States have not yet done so, but the issue of harmonising Consumer Protection legislation across the Member States continues to be a concern.

Glossary

BFTC	Barbados Fair Trade Commission
BFCA	Fair Competition Act, Barbados
BFTCA	Fair Trading Commission Act, Barbados
BNS	Bank of Nova Scotia
CCAC	Competition and Consumer Affairs Authority, Guyana
CCC	CARICOM Competition Commission
CSME	CARICOM Single Market and Economy
COTED	Council of Trade and Economic Development
GCFTA	Consumer and Fair Trade Act, Guyana
JFCA	Fair Competition Act, Jamaica
JFTC	Jamaica Fair Trade Commission
LDC	Less Developed Country, referred to in Article 4 Revised Treaty of Chaguaramas
MDC	More Developed Country, referred to in Article 4 Revised Treaty of Chaguaramas
NCA	National Competition Authority
OECS	Organisation of Eastern Caribbean States
RFHL	Republic Financial Holdings Limited
RTC	Revised Treaty of Chaguaramas
TTFTA	Fair Trading Act, Trinidad and Tobago
TTFTC	Trinidad and Tobago Fair Trade Commission

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1. Introduction

- 1.1. In addition to the clear benefits to consumer, competition incentivises businesses to offer goods and services at prices that are competitive and the quality high. The competitive process benefits businesses as it encourages them to become more innovative and efficient in how they produce or distribute their products.
- 1.2. Against this backdrop, the CARICOM Competition Commission (**CCC**) has prepared this report to increase the regional public's understanding of the level of, and the trends in, enforcement of fair competition practices across the CARICOM Single Market and Economy (**CSME**) for the period 2019-2021.
- 1.3. It is the intent of the CCC that this report is an accessible and transparent source of public information on the current development of competition enforcement and policy initiatives in the region. The expectation is that the report will also provide both the CCC and the CSME Member States with information to better target their respective resources towards improving competition at the national and regional levels. It is acknowledged that the review period was economically challenging for market participants and competition and sector agencies. It is anticipated that the future outlook would see more initiatives by competition agencies to assist in market stability and economic recovery.

2. Competition Law and Policy in the CSME

(a) Overview of Community Competition Policy

Chapter VIII of the Revised Treaty of Chaguaramas

- 2.1. The Community Competition Policy Regime is enshrined in Chapter VIII of the Revised Treaty of Chaguaramas ("**RTC**") as an integral part of the economic integration process to ensure free and fair trade within CARICOM. Considering the trade liberalisation and industrial policy regimes in the other chapters of the RTC (Chapters III-VII), Competition Policy and Law Enforcement are a necessity for the orderly and sustainable development of an inclusive single market and economy. This is reflected in the following policy objectives stipulated in Article 169 of Chapter VIII:
 - (a) ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct.
 - (b) promote and maintain competition and enhance economic efficiency in production, trade and commerce.
 - (c) prohibit anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market.
 - (d) promote consumer welfare and protect consumer interest.

- 2.2. To ensure the region achieves the goals which are set out in the Community Competition Policy, the RTC established the CCC pursuant to Article 171. The CCC is empowered, *inter alia*, under Article 174 to monitor, investigate, detect, make determinations, and take action against conduct which prejudices trade or prevents or restricts competition within the single market. These powers are, however, confined to either cross-border conduct or conduct which produces cross-border effects.
- 2.3. While the RTC does not define the “cross-border” concept, application of the established legal rules of treaty interpretation implies that ‘cross-border conduct’ may involve any economic activity that originates in the territory of a Member State and concludes in the territory of another Member State.¹ Moreover, ‘conduct which produces cross-border effects’ may be wider in scope and capture economic activity which while originating and concluding in the territory of one Member State is likely to have consequences for economic activities in another Member State or the wider CSME.² Although the cross-border concept may seem clear there is, however, a policy gap in its implementation. The CCC shall issue rules or guidelines on cross-border jurisdiction to apply this concept when determining jurisdictional issues that may arise in enforcement action under treaty procedures.
- 2.4. Whereas the CCC is the institution created by the RTC to implement the Community Competition Policy, the RTC also requires Member States to legislate for the implementation of the rules of competition within their jurisdiction and to ensure cooperation with the CCC in the implementation of the rules across the single market. One critical obligation is the establishment of institutional arrangements and administrative procedures to enforce competition rules.³ Only **4 of 13** Member States of the CSME have enacted competition legislation and established national competition authorities (**Member State NCAs**): Barbados, Guyana, Jamaica and Trinidad and Tobago⁴.
- 2.5. Member State NCAs have two important roles under Chapter VIII of the RTC. The first is to apply the Chapter VIII rules of competition pursuant to national legislation to address business conduct in national markets. The second is to cooperate with the CCC to ensure that enterprises which engage in cross-border business conduct comply with those rules. This may include cooperation in the functional areas of investigation, agency determination and enforcement.⁵

¹ See the Commission’s Guidance Note entitled “Clarifying the Cross-Border Jurisdiction of the Competition Commission under the Revised Treaty of Chaguaramas” dated August 2019. For example, a group of competing companies in Member State A enter into an exclusive supply agreement with companies in Member State B,

² *ibid.* For example, an agreement to fix prices among all the companies in a Member State which has effects for a regional good or service.

³ Article 170 (1)(b) and (2) RTC.

⁴ The Trinidad and Tobago Fair Trade Act was fully proclaimed in February 2020.

⁵ Article 170(3) RTC.

Development of a Regional Policy on the Regulation of Mergers & Acquisitions in the CSME

- 2.6. Since the development of Chapter VIII, RTC, which was executed over twenty years ago, there are more recent developments in Community Competition Policy. In 2011, the Thirty Second Meeting of the Council for Trade and Economic Development (COTED) agreed that the Community should develop a regional policy on the regulation of mergers and acquisitions in the CSME. This matter has had an extended gestation over the last decade, and in 2016 a revised draft policy (draft merger policy) that considered comments from Community stakeholders was advanced.
- 2.7. The draft merger policy addresses the definition of mergers and acquisitions for competition law review, merger notification thresholds and procedural requirements, substantive test for merger review, merger remedies, as well as other standard Competition Policy prescriptions in this area.
- 2.8. In 2019, the revised draft policy on mergers and acquisitions was further refined through collaboration between the CSME Unit and the CCC to obtain stakeholder comments., Significant amendments were then agreed by the Reconvened Task Force on Competition Policy in the CSME, *inter alia*: (a) clarification of key definitions for the sound operation of the policy; (b) revision of the overall policy objective to ensure greater consistency with the proper role of merger review in a regional trading community; and (c) inclusion of standard policy prescriptions regarding standstill obligation⁶ and filing fees as well as modernisation of the substantive test for merger review. This updated draft merger policy is currently before the COTED for consideration.
- 2.9. Once the revised policy on mergers and acquisitions is approved and relevant amendments to the RTC are made, it is recommended that effect is given via national competition legislation in Member States. Failure to enact key provisions of the revised policy into domestic law will open an enforcement gap in the intended regime for the regulation of mergers and acquisitions in the CSME.

Proposals for the CCC to undertake a Dual Regional and National Role

- 2.10. Other recent Community Competition Policy developments include work to strengthen the institutional arrangements for competition enforcement. Under Article 170(2) of the RTC, “*every Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition*”; however, there is no specific form or structure mandated for a national competition authority. The obligation placed on the Member States is only that they establish and maintain a national competition authority.⁷ While the CCC can address cross-border conduct and effects, only

⁶ These are obligations in competition merger regulation that provides for preserving the status quo of a transaction while it is being reviewed by the competition authority. It is usually triggered upon filing the notification form.

⁷ There is no recommended structure, therefore it can be a minimum of a one-desk establishment to anything larger.

4 Member States have enacted competition legislation and established institutions. The Article 170(2) RTC obligation has been lagging and there is a significant gap within the region that leaves the other Member States unprotected and the implementation and enforcement of Community Competition Policy impaired.

- 2.11. Recognising this implementation gap, the Eighteenth Special Meeting of the Conference of Heads of Government agreed in December 2018, *inter alia*, to amend constitutional documents to enable certain institutions such as the CCC to act as both a national and regional body.⁸
- 2.12. Against that background, the Reconvened Task Force on Competition Law and Policy in the CSME was tasked to examine the requirements from both a legal and a financial perspective that would allow the CCC to execute both its existing regional role and a proposed national role for those Member States who agree to such an arrangement.
- 2.13. The Reconvened Task Force organised its work into separate legal and finance sub-committees, which were chaired by the CCC from 2019 to 2020. The output of these sub-committees included: (a) a draft legal report that was submitted to the Forty-Ninth Meeting of COTED in November 2019; and (b) a submission in December 2020 on proposed financial and institutional arrangements. The latter submission remains the subject of consultations with the Member States, as the outstanding issues concern Member State contributions to the budget that would be necessary to operationalise a dual role.

Development of Cooperation Frameworks to Enforce the Rules of Competition in the CSME

- 2.14. The Community Competition Policy envisions close coordination between the CCC and the Member State NCAs. This is evident in Chapter VIII of the RTC, which requires cooperation between the two types of authorities. In particular, Articles 170(3), 175 and 176 of Chapter VIII specifically mandate cooperation between the CCC and NCAs “...in achieving compliance with the rules of competition.”
- 2.15. 3 out of the 4 national competition legislations mirror this treaty requirement by providing statutory terms of enforcement cooperation between the national CCC established thereunder and the CCC. The exception is the Fair Competition Act 1993 of Jamaica which pre-dates the RTC and so does not formally provide for enforcement cooperation between the CCC and the Jamaica Fair Trading Commission.
- 2.16. It is generally accepted that the formalisation of cooperation frameworks among competition authorities, particularly members of a regional integration community, represents international best practice.⁹ In recognition that the

⁸ See HCG(Spec)2018/18/18/CSC/7

⁹ See OECD/ICN Joint Report on International Enforcement Cooperation, DAF/COMP/WP3(2020)7

objectives of the Community Competition Policy can be enhanced through effective cooperation not only between the CCC and the Member State NCAs but also between those competition authorities and other competent authorities in the Member States (such as sector regulators); a Consultancy to Develop Cooperation Agreements and Memoranda of Understanding to Enforce the Rules of Competition in the CSME commenced in November 2021. The Consultancy also includes work to revise the Rules of Procedure of the CCC with a view to repeal and replacement of the 2011 Rules; as well as work to revise the CARICOM Model Competition Bill provisions on merger review in the national context.

- 2.17. A Project Steering Committee (PSC), of which the CCC is a member, has been established to review consultancy outputs. The consultancy is a work-in-progress, and importantly, the CCC's review indicates that the consultancy outputs - in particular proposed revisions by the consultant to its Rules of Procedure - will require further work to be consistent with the legal and institutional framework under the RTC and Member State legislation.

(b) Legislative Scan

- 2.18. Notwithstanding the model competition law provisions both at Articles 177 – 179 of the RTC as well as in the CARICOM Draft Model Law on Competition, the 4 statutes referenced in para. 2.5 above exhibit marked differences, which can minimise the legislative harmonisation contemplated by the RTC. In this regard, only 2 of the statutes (in Barbados and Trinidad & Tobago) contain provisions for merger review. More details of the differences among the 4 statutes are provided in the rest of this chapter. There is, consequently, work needed to promote greater legislative harmonisation and policy coordination among the Member States.
- 2.19. Apart from enacted legislation, it is worth noting that all other Members States of the CSME are at varying stages in the development of competition legislation. There are draft bills on competition in the Member States of the Organisation of Eastern Caribbean States (OECS), Belize, and Suriname.
- 2.20. Jamaica and Guyana are also amending their legislative frameworks for competition law enforcement. Jamaica has developed a draft amendment competition bill and Guyana has developed a draft merger control and review bill for consultation.

The legislative state of play

- 2.21. While many of the Member States of the CSME have not yet enacted competition legislation and established competition authorities, this does not mean that competition concerns do not exist in those market economies. Indeed, some of those Member States have enacted sector-specific legislation that may contain provisions that could address competition concerns from an *ex ante* regulatory perspective in specific sectors or industries, such as telecommunications legislation. Even in those Member States with competition

legislation, sector-specific legislation with competition provisions implicates the risk of jurisdictional tensions between competition and sectoral regulation.¹⁰ **Appendix 1** illustrates the general state of play regarding competition and some relevant sector-specific legislation in the Member States.

- 2.22. Notwithstanding such provisions that could address specific competition concerns, it is usually the case that sector regulators may not possess sufficient capacity to either recognise competition concerns or apply the available regulatory tools consistent with competition policy precepts. The result may be that the public policy goals of market efficiency and economic inclusion may not be given sufficient weight in the development of Member State economies, to the detriment of consumers and the wider society. Accordingly, there is a cogent need for greater institutional cooperation between sector-specific regulators and competition authorities in the CSME to foster efficient and economically inclusive market outcomes.

Review of legislative compliance with treaty substance

- 2.23. In mandating the enactment of national competition legislation, Chapter VIII of the RTC prescribes the substantive competition law provisions that should be included in such legislation. It does this using model provisions at Articles 177 – 179, which provides for 2 out of the 3 Pillars of Competition Law (i.e. Restrictive Agreements and Abuse of Dominance). As noted above, Chapter VIII does not currently provide for Merger Review; although Article 177(1)(a) indicates that the Treaty chapter is not meant to be exhaustive as Member States are mandated to also prohibit “*any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME.*”
- 2.24. Accordingly, elsewhere in Chapter VIII there are other indications of necessary provisions that should be included in competition legislation. For example, as Articles 170(3), 175 and 176 mandate institutional cooperation between the CCC and Member State NCAs it is expected that all competition legislation in the region should include effective terms of cooperation.
- 2.25. Moreover, the competition policy reflected in the provisions of CARICOM Model Competition Bill not only captures the substance of Chapter VIII but goes further to model other substantive provisions on Resale Price Maintenance, Price Fixing, Bid Rigging and other anti-competitive conduct. As the CCC’s jurisdiction is to enforce Chapter VIII as it has been implemented by legislation, the focus of this section is on legislative compliance with the substantive provisions in the treaty chapter. In this regard, **Table 1** below illustrates a

¹⁰ Appendix 1 sets out the competition and sector-specific provisions in CSME Member States. These specific sectors are for the most part government controlled, operating under statutory licenses, and are necessarily monopolistic, and are subject to their own statutory and regulatory stringencies not contemplated in an open market. However, some competition provisions are necessary to prevent sub-optimal outcomes or encourage the entry of new market participants. For example, the telecommunications Acts usually contain change of control provisions which apply to mergers and acquisitions, while public utilities acts may contain provisions on price discrimination to ensure that utility monopolies charge fair and reasonable rates.

comparative review of substantive competition provisions in Member State legislation.

Table 1: Comparative Review of Substantive Competition Provisions in the CSME Member States

Member States	Legislation	Restrictive Agreements	Abuse of Dominance	Merger Review	Cooperation with the Commission
Jamaica	Fair Competition Act	✓	✓	✗	✗
Barbados	Fair Competition Act	✓	✓	✓	✓
Trinidad & Tobago	Fair Trading Act	✓	✓	✓	✓
Guyana	Competition & Fair Trading Act	✓	✓	✗	✓

2.26. **Table 1** indicates that there are gaps in the substantive provisions of some Member State legislation. **Appendix 2** considers each statute in greater detail.

(e) General conclusions

2.27. Most Member States with legislation have exempted particular sectors from the general remit of the national competition commissions. Due care is necessary to ensure that these exempted sectors have sector specific legislative frameworks which cater to the implementation of the RTC rules of competition and allow for policy and enforcement cooperation by these sector regulators with the CCC. The difference in the substantive tests to be used in national enforcement will also pose some concern for harmonised regional market review and enforcement of competition rules.

2.28. A severe constraint on the overall efficient and effective functioning of the Community Competition Policy and by extension the regional marketplace remains the lack of enacted competition legislation for national markets and regional cooperation in the Member States of the OECS, and in Belize and Suriname.

3. Enforcement Agenda

3.1. The competition authorities in the CSME remained mindful of the issues discussed by the international competition law enforcement community during the 2019-2021 period and their relevance to the region. Some of these issues

have, therefore, formed part of the enforcement agenda of competition authorities in the region. CCC initiatives for the period include:

Competition enforcement in digital markets. The growth of the digital market has raised several competition issues discussed at the international level. Among these issues include defining relevant markets and assessing market power in platform markets; the effects of big data on competition; and the relevance of regulation.

Given the discussions at the international level, in 2019 the CCC convened a meeting amongst the competition authorities in the region to discuss their views on defining relevant markets in two-sided markets. The meeting aimed at harmonising the enforcement practices in the region concerning digital markets.

Competition Enforcement in the financial and insurance sectors. The past period saw an increased activity in the financial and insurance sector. Due to the lack of competition legislation generally or sector-specific competition provisions, there was a notable challenge for the CCC to access critical data and information to conduct its investigations effectively. Therefore, the need for legislation in the CSME's less developed economies and stronger collaboration between the regional competition commission and the sector regulators are critical requirements for efficient competition enforcement.

Competition compliance. Competition agencies across the globe have continued and intensified their efforts to promote competition compliance programmes and competition compliance for businesses. While competition compliance programmes can be used as enforcement tools, especially in the fight against cartels, they can also be used for advocacy to deter firms from infringing competition laws. In 2021, the CCC met with the competition authorities in the CSME to discuss their initiatives to promote competition compliance. CCC further commenced an advocacy programme (virtual) with legal and business communities which addresses, *inter alia*, knowledge gaps on what is needed for compliance and the need for a sound internal compliance regime.

Competition and sustainability. There is a growing consensus that competition law must play a role in preventing the existential threat of climate change. While competition law aims to prevent agreements or mergers between firms that are likely to have anticompetitive effects on markets, competition authorities must consider those business transactions that promote environmental sustainability, agricultural and food safety and climate change. CCC has commenced the discussions with relevant regional institutions and international development partners.

4. COVID-19 and Competition Law and Policy

- 4.1. The novel coronavirus (COVID-19) has had a negative effect on consumers and businesses in the CSME. Through its collaboration with counterpart agencies across the region, the CCC) received reports during the pandemic of (a) excessive retail prices of essential goods and services, leaving the impoverished vulnerable; (b) the spread of misinformation to consumers regarding cures or treatments for COVID-19; and (c) small businesses being impeded from entering national markets for the supply of essential goods by larger businesses.
- 4.2. Reports received from the Member States triggered a regional response spearheaded by the CCC to use the competition and consumer protection tools in the region to help mitigate the effects of COVID-19 on national markets. A [Regional Action Plan \(Plan\)](#) was developed with strategies for national competition and consumer authorities in the CSME to follow during the pandemic. The strategies revolve around 3 pillars: monitoring markets; competition and consumer advocacy; and competition and consumer law enforcement.
- 4.3. For the period April 2020 to December 2021, the Commission convened a regional meeting of competition, consumer and trade officials. That meeting established a [Steering Committee](#), chaired by the CCC, to monitor initiatives taken by the Member States and advise on key policy decisions required at the national level to implement the Plan. The Steering Committee benefited from the membership of the Barbados and Jamaica Fair Trading Commissions, the Guyana Competition and Consumer Affairs Commission, the Consumer Affairs Commission of Jamaica, the Belize Bureau of Standards, and the national consumer protection agencies of Trinidad and Tobago and Saint Lucia. The Steering Committee bore the responsibility of liaising with all Member States to execute the Plan referred to in para. 4.2. above.
- 4.4. **Table 2** highlights the actions taken by the Commission and the Steering Committee, to mobilise the agencies responsible for competition law enforcement in the CSME during the pandemic.

Table 2: Actions taken during the COVID-19 pandemic

Actions
(a) <u>Created</u> a portal on the Commission website to share information about the work of competition law and consumer protection authorities during the pandemic.
(b) <u>Issued</u> press releases on the Commission website warning businesses not to engage in anti-competitive business conduct or deceptive practices that could harm consumer health.
(c) <u>Prepared</u> a document listing the national competition and consumer protection legislations in the region.
(d) <u>Developed</u> and disseminated a work sheet to collect information on COVID-19 related policies and actions being implemented by the national competition and consumer protection authorities and Ministries of Trade to protect commercial and consumer welfare in the CSME.
(e) <u>Developed</u> a basket of essential goods for monitoring prices during the pandemic. The data will allow agencies to track changes and compare prices in the region.
(f) <u>Launched</u> an airline study to understand the: regulatory environment for competition and consumer protection in the industry; experiences of consumers with flight cancellations during the pandemic; and competition in airline markets.

5. Trends and Developments in Competition Law Enforcement in the CSME

(a) Statistical Profile of Enforcement

5.1. This section provides a statistical summary of the cases investigated under the 3 pillars of competition law by the CCC and national competition authorities in the CSME over the period 2019-2021. The data presented in the section was obtained from a questionnaire distributed by the CCC to the national competition authorities

Abuse of Dominance Investigations

5.2. **Table 3** shows that over the review period, competition authorities in the region launched 37 investigations into businesses within the CSME for abuse of dominance conduct. Of the total number of investigations conducted, 30 (83.8%) were initiated by complaints made to the competition authorities, while the rest were self-initiated. The table also shows a decline each year in the total number of abuse of dominance cases launched within the region. In 2021, the number of abuse of dominance cases investigated decreased sharply to only 2 compared to 18 in 2019, a reduction in cases by 89.5%.

Table 3: Summary of Abuse of Dominance Investigations in the CSME (2019-2021)

	2019	2020	2021	Total
No. abuse of dominance investigations launched	19	16	2	37
No. abuse of dominance investigations launched by complaint	18	12	1	31
No. abuse of dominance investigations self-initiated	1	4	1	6
No. abuse of dominance cases settled without Court proceedings	18	16	2	36
No. abuse dominance cases settled via Court proceedings	1	0	0	1
No. companies fined for abuse of dominance	0	0	0	0
Total fines imposed for abuse of dominance by year (US\$)	0	0	0	0

- 5.3. **Table 3** also shows that 97.3% of the abuse of dominance cases recorded were settled without the competition authorities having to go to the Courts to have their decisions enforced. No companies were fined for their abuse of dominance conduct.
- 5.4. **Table 4** presents a breakdown of the total number of abuse of dominance investigations launched by sector. It shows that for the 2019-2021 period, many of the abuse of dominance investigations were conducted on the information and communications sector (13 cases), followed by the financial and insurance sector (6 cases). The two investigations conducted in 2021 were on the education and energy and petroleum sectors.

Table 4: Breakdown of Abuse of Dominance Investigations by Sector (2019-2021)

Industry category	Abuse of Dominance Investigations			
	2019	2020	2021	Total
<i>Arts, entertainment and recreation</i>	0	1	0	1
<i>Construction</i>	1	1	0	2
<i>Education</i>	0	1	1	2
<i>Energy and petroleum</i>	0	2	1	3
<i>Financial and insurance</i>	3	3	0	6
<i>Food, beverages, and hospitality</i>	0	1	0	1
<i>Information and communication</i>	8	5	0	13
<i>Manufacturing</i>	1	0	0	1
<i>Medical services and supplies</i>	1	0	0	1
<i>Other service activities</i>	2	1	0	3
<i>Wholesale and retail trade</i>	3	1	0	4
Total	19	16	2	37

Restrictive Agreements/Cartel Investigations

- 5.5. **Table 5** shows that over the review period only 2 investigations were launched in the region into businesses for restrictive agreements or cartel activity. One of these cases was appealed to the national Court in 2020 while the other, which was launched in 2021, is still being assessed.

Table 5: Summary of Restrictive Agreements/Cartel Enforcement in the CSME (2019-2021)

	2019	2020	2021	Total
No. restrictive agreement/cartel investigations launched	1	0	1	2
No. restrictive agreements/cartel cases settled	0	0	0	0
No. restrictive agreements/cartel cases appealed to the Courts	0	1	0	1
No. companies fined for restrictive agreements/cartels	5	0	0	5
Total fines imposed for restrictive agreements/cartels by year (US\$)	10,000	0	0	10,000

- 5.6. It is noted that **Table 5** shows that in 2019, 5 businesses in the region were fined a total amount of only US\$10,000 for engaging in cartel activity.

Notwithstanding reputational effects, a review of national fines for this conduct is warranted.

Merger Control

- 5.7. Merger control constitutes one of the main areas of work for the competition authorities in the CSME. This remains the case whether the competition law or policy expressly includes merger provisions, or the competition authority assesses mergers under the anticompetitive agreements provisions of their national competition laws.
- 5.8. **Table 6** shows that the competition authorities in the region conducted 38 merger reviews over the 2019-2021 period. These merger reviews were both national and regional or cross-border in scope. Good examples of the latter include those assessed by the Commission, which included: the **Republic/Scotiabank** merger, where Republic Financial Holdings Limited purchased the assets of the Bank of Nova Scotia in several CSME Member States; and Royal Bank of Canada’s sale of its assets to several indigenous banks in the Eastern Caribbean.

Table 6: Summary of Merger Control Reviews in the CSME (2019-2021)

	2019	2020	2021	Total
No. merger notifications received	3	6	15	24
No. phase one (ONLY) merger reviews completed	5	8	15	28
No. phase two clearances without remedies	4	3	3	10
No. withdrawn merger notifications	0	0	0	0
No. merger decisions appealed to the Courts	1	0	0	1

- 5.9. Of the 38 merger reviews conducted, 73.7% were considered phased one or preliminary assessments. Only 1 of these transactions was cleared with the imposition of remedies required. The other 10 merger transactions reviewed, 1 of which was blocked, were considered phased two assessments, where more in-depth analyses of the competitive issues associated with the mergers were conducted. Only 1 merger decision was appealed to a national Court during the period.
- 5.10. In contrast to abuse of dominance investigations, where the total number of cases decreased each year, the total number of mergers reviewed in the region increased annually. **Table 6** shows that the number of mergers assessed increased to 14 in 2021 when compared to 6 in 2019. Two reasons could explain the increase in merger reviews: (1) the full proclamation of the Trinidad and Tobago Fair Competition Act in 2021, which has given the Trinidad and Tobago Fair Trading Commission the required powers to enforce the national competition law in general and review mergers in particular; and (2) an increase in merger activity since the COVID-19 pandemic.
- 5.11. **Table 7** provides a breakdown of the total number of mergers reviewed in the region by sector. It shows that for the 2019-2021 period, many of the mergers

reviewed were conducted under the category of the other services (9 cases), followed by those conducted in the energy and petroleum (6 cases), and financial and insurance (4 cases) sectors.

Table 7: Breakdown of Merger Reviews in the CSME by Sector (2019-2021)

Industry category	Merger Reviews			
	2019	2020	2021	Total
Construction	0	0	1	1
Education	0	0	1	1
Energy and petroleum	1	2	3	6
Financial and insurance	4	2	1	4
Food, beverages, and hospitality	2	1	0	2
Information and communication	0	1	0	1
Medical services and supplies	0	0	1	1
Manufacturing	0	0	2	2
Transportation	0	0	2	2
Other service activities	2	4	6	9
Wholesale and retail trade	0	1	1	2
Total	9	11	18	38

(b) Significant cases

Acquisition by RFHL of the assets of BNS in several CSME Member States

- 5.12. Prior to the review period of this Report, Republic Bank and Scotiabank announced they had entered an agreement where Republic Bank would acquire the banking operations of Scotiabank in 9 markets across the Caribbean. These markets include: Guyana, St. Maarten, Anguilla, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.¹¹ The transaction also contemplated Republic Bank acquiring the life insurance operations of Sagicor Financial Corporation in Jamaica and Trinidad & Tobago.
- 5.13. The CCC completed its internal assessment which relied on public data to assess market shares and concentration levels of banking industries across the region. On 27 March 2019, the CCC further announced that its internal assessment suggested that the transaction could have anti-competitive effects in at least 3 CSME Member States. These were Guyana, Grenada and Saint Lucia.¹²
- 5.14. The outcome of the internal assessment provided the basis for the CCC to invoke its jurisdiction under Article 176 of the Revised Treaty to self-initiate a deeper review of potentially anti-competitive cross-border business conduct in coordination with relevant Member State NCAs.

¹¹ CCC Press Release dated 05 December 2018.

¹² CCC Press Release dated 27 December 2019.

- 5.15. The absence of national competition legislation in Saint Lucia and Grenada significantly hampered the CCC's ability to implement the procedure. There are no NCAs in Saint Lucia and Grenada for the CCC to coordinate with as required by Article 176.
- 5.16. There is, however, a national competition law and an NCA, the Competition and Consumer Affairs Commission, in Guyana to facilitate the successful execution of the Article 176 procedure. The CCAC, therefore, satisfied its Article 176 remit by submitting its preliminary assessment report on the potential impact of the transaction on relevant financial services markets in Guyana.
- 5.17. While the competition reviews of the CCC and CCAC were in progress, the relevant financial sector regulator in the Eastern Caribbean approved the transaction. At the conclusion of the competition reviews, the relevant financial sector regulator in Guyana did not approve the transaction.¹³
- 5.18. Based on the decisions of the relevant financial sector regulators, the transaction was implemented in Saint Lucia and Grenada; but not in Guyana. The CCC concluded that while the transaction was within its jurisdiction and competition concerns were evident in the affected Member States, upon review of its powers to monitor and investigate potential anticompetitive conduct, it could not investigate the matter due to inadequate legislative and institutional frameworks in the affected Member States.¹⁴
- 5.19. This was a significant case for regional competition law enforcement for several reasons. It represents the first case where the CCC formally invoked the Article 176 procedure under the Revised Treaty with partial success. The coordination between the CCC and Guyana's CCAC demonstrated the utility of the procedure to facilitate reviews of potentially anti-competitive business conduct in the CSME; thereby advancing the objectives of the Community Competition Policy under Article 169.
- 5.20. The case also illustrates the benefits of cooperation between competition authorities in the CSME and the insufficient staffing of the competition authorities of the region. This case illuminates the possibilities for light touch, timely competition reviews across the CSME centred on the CCC supported by national laws and institutions, as contemplated by Chapter VIII.
- 5.21. At the same time the case also highlights continuing challenges to the system contemplated by Chapter VIII through non-compliance or tardy compliance by some Member States with their treaty obligations to enact national competition laws and to establish national competition authorities. The result was that a significant cross-border transaction in the CSME avoided competition review in some of the affected Member States without legislation. The necessity for full implementation of the Community Competition Policy through national laws and institutions is, therefore, clear and urgent. The transaction came on the heels of a regulatory policy supporting consolidation of financial institutions within the

¹³ CCC Press Release dated 02 December 2019.

¹⁴ *ibid.*

ECCU.¹⁵ A post-merger competition assessment is required to examine the possible effects of the transaction.

6. Competition Advocacy

- 6.1. Competition advocacy comprises activities outside of enforcement that competition authorities pursue to promote a culture of competition in their markets. Competition advocacy raises public awareness of how their policies may affect competition. Market studies, competition assessments and policy papers are some forms of competition advocacy. Capacity building initiatives such as webinars and educational workshops are also important competition advocacy tools employed by competition authorities.
- 6.2. This section examines some of the competition advocacy initiatives by CCC and the national competition authorities, which took place during the period 2019-2021.

(a) Market Studies, Competition Assessments and Publications

- 6.3. Competition authorities may use different competition advocacy tools with different objectives in mind. For example, market studies and competition assessments are often used to identify potential competition concerns in a specific market or sector. By comparison, articles and issues papers may sensitise the public to particular competition issues already identified and recommended actions that should be taken.
- 6.4. **Table 8** presents the different competition advocacy tools used in the region during the review period. Articles written about competition and competition law appear to be the most preferred method of competition advocacy used in the region as the competition authorities published 74 articles during the 3-year period. Within the region, the agencies also conducted 11 competition assessments and published 11 policy briefs on their websites.

Table 8: Summary of Market Studies, Competition Assessments and Articles written on Competition in the CSME (2019-2021)

	2019	2020	2021	Total
No. market studies conducted.	3	3	4	10
No. competition assessments conducted (e.g. using OECD toolkit).	3	2	5	10
No. articles written about competition and competition law.	21	25	28	74
No. issues papers/policy briefs published on agency website	2	6	3	11
No. guidance documents published to facilitate compliance.	1	1	5	7

- 6.5. **Table 9** presents a closer look at the market studies and competition assessments conducted in the CSME. It shows the competition authorities in

¹⁵ ECCU Policy....

the region conducted 10 market studies and 10 competition assessments. The table also shows that over the period of review the competition authorities in the region had a wide focus for their competition advocacy work as they assessed or studied most economic sectors or industries. Energy and petroleum, however, held the primary interest of the authorities as they conducted 4 competition assessments and 1 market study on that sector from national perspectives.

Table 9: Breakdown of Market Studies and Competition Assessments Conducted by Sector (2019-2021)

Industry category	No. Market Studies and Competition Assessments Conducted			
	2019	2020	2021	Total
Construction	1	0	0	1
Education	0	0	1	1
Energy and petroleum	1	2	3	6
Financial and insurance	1	0	0	1
Information and communication	1	1	1	3
Professional services	0	0	1	1
Transportation	2	0	2	4
Other service activities	0	2	1	3
TOTAL	6	5	9	20

- 6.6. Another sector focused on by the competition authorities was the transportation sector, where market studies and competition assessments were conducted at the national and regional levels. For example, the CCC assessed the 2018 CARICOM Multilateral Air Services Agreement to determine if its provisions could impede effective competition in the regional airline market and make recommendations on amendments to the agreement where possible to ensure its regulatory quality. However, at the national levels, both JFTC and CCAC examined aspects of their respective countries' airline industries.

(b) Workshops and Sensitisation Sessions

- 6.7. As mentioned above, workshops and sensitisation sessions are an effective way of raising awareness of competition issues and building capacity in competition law and policy. Good examples of both types of workshops include: (a) a 1-day session held by the CCC in Grenada in 2019 to sensitise public officers of the OECS Member States on competition law and policy; and (b) a training workshop in the same year in collaboration with the US Federal Trade Commission in Trinidad and Tobago for case handlers of competition authorities in the region on practical tools for merger analysis.
- 6.8. Over the 3-year period reviewed, 37 training or sensitisation sessions were conducted in the region on competition law (see **Table 10**). Due to the pandemic, most of the sessions (75.7%) were held virtually because of national and agency COVID-19 safety protocols. This is observed in **Table 10**, which

shows a sharp increase in virtual sessions since 2020 from 8 sessions held in that year to 20 held in 2021. By comparison, no in-person training or sensitisation sessions were held by the competition authorities in the region in 2021.

Table 10: Sensitisation Sessions held in the CSME on Competition Law (2019-2021)

	2019	2020	2021	Total
Total number of training/sensitisation sessions conducted virtually	0	8	20	28
Total number of training/sensitisation sessions conducted in-person.	8	1	0	9

7. Working Papers

- 7.1. Competition authorities often share their ideas or elicit feedback from the public on competition issues through working papers. These working papers can be viewed as technical reports and also constitute living documents that are updated when more information becomes available to the competition authority.
- 7.2. This section provides summaries of two examples of working papers developed in the region on competition law and policy. The first is a country study on the impact of bank mergers on the efficiency of merged banks in Jamaica, which was produced by the CCC. The second is a paper produced by the JFTC, which looks at the potential harm to consumer welfare from machine learning.

The Impact of Bank Mergers in Jamaica (1998-2019)

- 7.3. Over the recent years bank mergers and acquisitions have been prevalent in the CSME, all of which claimed during the regulatory approval process that the transaction would be efficiency-enhancing. However, the extent to which these mergers have created highly efficient merged banks remains unknown.
- 7.4. The working paper sought to empirically analyse the impact of bank mergers on the efficiency of the merged banks, using Jamaica as a case study. It first employed data envelopment analysis (DEA) to estimate the relative efficiencies of the commercial banks operating in Jamaica over the period 1998 to 2019, before using an augmented case analysis approach to test the hypothesis that bank mergers are efficiency-enhancing. The augmented case analysis approach considers changes in the pre- and post-merger efficiency scores of the merged bank and compares these changes to the scores of non-merging banks, which serve as a control group. The research then uses the difference-in-differences method, where the changes in efficiency scores for the control group are subtracted from the changes in the efficiency scores of the merged banks to compute a merger effect. A negative statistic implies that the merger facilitated efficiency regress, while a positive statistic suggests the merger was efficiency enhancing.
- 7.5. To supplement the augmented case analysis approach, the study also used propensity score matching to estimate the average efficiency effect of mergers in Jamaica over the review period. This technique aims to match merged banks

with non-merged banks that are “similar” to produce valid matches for estimating the average efficiency effects of mergers, before comparing the differences between the two groups using an independent t-test.

- 7.6. The results of the analysis conducted suggest that during the review period, bank mergers in Jamaica had an insignificant effect on the efficiencies of the merged banks. Based on the augmented case analysis approach, 3 of the 4 commercial bank mergers that occurred in the country during the period of review recorded efficiency regress after 2 to 3 years post-merger. The propensity score matching approach suggests that the average efficiency effect of mergers on merged banks was also found to be statistically insignificant.
- 7.7. Going forward, the working paper suggests that further research should be conducted on the effects of mergers on bank efficiency. This would entail the use of other methodologies such as regression analysis, analyses of more merger cases not only in Jamaica but across the region to improve the statistical power and robustness of the results, and a look at bank mergers that create or strengthen the potential dominance of the merged bank.

“Machine Learning will be the Consumer’s Undoing”

- 7.8. The purpose of the article is to demonstrate that in the foreseeable future, biases against monopoly markets will be untenable based on claims of inefficiency. It argues that, while prevailing economic theory views competitive markets as efficient and monopoly markets as inefficient, there are exceptions to the rule. The paper posits that it is theoretically possible for a monopoly structure to create the same level of efficiencies as competitive markets when a monopolist engages in perfect (or first degree) price discrimination, where monopolists can charge each customer the maximum they are willing to pay for a product or service.
- 7.9. On the basis that monopolists can engage in first degree price discrimination, the paper suggests that the Internet can facilitate such conduct. Google and Facebook, among others, are investing significant resources into the research and development of 'machine learning' software designed to help machines learn more about consumers based on their online footprint. Google has incorporated this Artificial Intelligence (AI) software in many of its products and services and has opened up its research on an open-source platform allowing the public to access the software.
- 7.10. The paper then examines opposing arguments for the impact of AI or machine learning on consumer welfare. On one hand, AI would facilitate more highly relevant search results and advertisements being served to consumers while browsing the Internet. However, merchants could use the same machine learning platform to extract the entire consumer surplus from these consumers. In particular, merchants could also use the machine learning to charge higher prices to online shoppers with stronger consumption preferences for a particular product.

- 7.11. The paper concludes that, in the foreseeable future, the Internet will be an essential platform facilitating most social, private and commercial activities. With continued advances in machine learning research, AI price discrimination becomes feasible. In this instance, consumers will be mere spectators in markets and only distributional considerations and not efficiency could separate competitive markets from monopoly markets.

8. Consumer Welfare and Advocacy in the CSME

(a) Review of the Consumer Protection Legislative Framework

The Legislative State of Play

- 8.1. The CSME requires the economic integration of markets in the several Member States into a regional single market via the liberalisation of trade in goods, services, capital and labour. From the perspective of Consumer Policy, market liberalisation and integration raise distinct opportunities and challenges.¹⁶
- 8.2. Regional approaches, such as the harmonisation of consumer laws as required by Article 185 of the RTC bridge the regulatory gap and engender consumer trust and confidence in regional markets for goods and services. Except for the initiative to develop a regional model consumer bill, the state of play across the Member States of the CSME exhibits a significant degree of regulatory fragmentation. **Table 11** below summarises the current situation in the Member States regarding consumer legislation.

¹⁶ Thierry Bourgiognie, “*The Policy Framework for Promotion and Protection of the Interest and Welfare of Consumers in CARICOM*” (Final Report, January 28, 2011).

Table 11: Summary of Consumer Legislation in the CSME Member States

CSME Member State	Dedicated Consumer Protection Legislation	Sample of other laws relevant to consumer protection
Antigua & Barbuda	<ul style="list-style-type: none"> ▪ Consumer Protection & Safety Act 	<ul style="list-style-type: none"> ▪ Sale of Goods Act ▪ Supply of Goods & Services (Implied Terms) Act ▪ Unfair Control Terms Act
Barbados	<ul style="list-style-type: none"> ▪ Consumer Protection Act ▪ Consumer Guarantees Act 	<ul style="list-style-type: none"> ▪ Bills of Sale Act ▪ Control of Standards Act ▪ Weights & Measures Act
Belize	N/A	<ul style="list-style-type: none"> ▪ Sale of Goods Act ▪ Hire Purchase Act ▪ Public Utilities Act
Dominica	N/A	<ul style="list-style-type: none"> ▪ Supply Control Act ▪ Standards Act ▪ Noxious & Dangerous Substances Act
Grenada	<ul style="list-style-type: none"> ▪ Consumer Protection Act 	<ul style="list-style-type: none"> ▪ Food Safety Act ▪ Price Control Act ▪ Hire Purchase Act
Guyana	<ul style="list-style-type: none"> ▪ Consumer Affairs Act 	<ul style="list-style-type: none"> ▪ Guyana National Bureau of Standards Act ▪ Food & Drug Act ▪ Weights & Measures Act
Jamaica	<ul style="list-style-type: none"> ▪ Consumer Protection Act 	<ul style="list-style-type: none"> ▪ Security Interest in Personal Property Act ▪ Electronic Transactions Act ▪ Hire Purchase Act
Saint Kitts & Nevis	<ul style="list-style-type: none"> ▪ Consumer Affairs Act 	<ul style="list-style-type: none"> ▪ Consumer Credit Act ▪ Telecommunications Act ▪ Sale of Goods Act
Saint Lucia	<ul style="list-style-type: none"> ▪ Consumer Protection Act 	<ul style="list-style-type: none"> ▪ Distribution & Prices of Goods Act ▪ Telecommunications Act ▪ Metrology Act
Saint Vincent & the Grenadines	<ul style="list-style-type: none"> ▪ Consumer Protection Act 	<ul style="list-style-type: none"> ▪ Supplies Control Act ▪ Electronic Transactions Act ▪ Sale of Goods Act
Suriname	N/A	<ul style="list-style-type: none"> ▪ Economic Offences Law ▪ Technical Regulations on Labelling, Food Hygiene and Safety ▪ Law on Electronic Legal Transactions
Trinidad & Tobago	<ul style="list-style-type: none"> ▪ Consumer Protection & Safety Act 	<ul style="list-style-type: none"> ▪ Unfair Contract Terms Act ▪ Electronic Transactions Act ▪ Sale of Goods Act

Notes:

- “Dedicated Consumer Protection Legislation” means a single legislative enactment of general applicability across markets or economic sectors that provides legal and institutional arrangements for the benefit of consumers.
- “Other Laws Relevant to Consumers” includes legal instruments (for example, regulations, etc) that contain provisions that may be interpreted for the benefit of consumers in specific sectors or transactional contexts.

8.3. **Table 11** shows that 9 Member States have enacted dedicated consumer protection legislation, while 3 Member States have not yet done so. There is lack of uniformity in the legislative interventions by the Member States. The result from a regional perspective is a patchwork of sector-specific legislation, such as telecommunications acts, or transaction-specific legislation, such as hire purchase acts, to promote consumer interests in specific markets.

A closer look at the consumer protection legislation in the CSME

- 8.4. **Table 11** shows a positive approach by Member States in complying with their treaty obligation to enact Consumer Protection legislation. This compares to the slow compliance regarding the treaty obligation to enact Competition legislation.
- 8.5. However, as with Competition legislation, the issue of harmonising Consumer Protection legislation across the Member States continues to be a concern. By Article 185 of the RTC, the Member States agreed to enact harmonised Consumer Protection legislation. On this basis the Community developed the CARICOM Model Consumer Protection Bill under the 9th European Development Fund (EDF).
- 8.6. While there are similarities among the Consumer Protection legislation in the Member States; there are also significant differences that cut against the treaty requirement for legislative harmonisation.
- 8.7. It is observed that while some Member State economies may still exhibit significant price and quantity regulation and state control; nonetheless they have enacted modern approaches to Consumer Protection, for example the model consumer bill and the CARICOM Framework on Consumer Protection Policy and Five-Year Strategic Plan of Action.

Table 12: Substantive Protections and Redress in the Consumer Protection Legislation in the CSME

Member States	Legislation	Prohibitions against unconscionable agreements/unfair trade practices	Specific E-Commerce Protections	Prohibitions against the supply of harmful/defective goods	Individual right of access to institutional redress mechanisms	Quality Standards for the supply of Goods or Services
Antigua & Barbuda	Consumer Protection & Safety Act, 1987	x	x	x	x	x
Barbados	Consumer Protection Act, 2002	✓	✓	✓	✓	✓
Grenada	Consumer Protection Act, 2020	✓	✓	✓	✓	✓
Guyana	Consumer Affairs Act, 2011	✓	✓	✓	✓	✓
Jamaica	Consumer Protection Act, 2005	✓	x	✓	✓	✓
Saint Christopher & Nevis	Consumer Affairs Act, 2021	✓	✓	✓	✓	✓
Saint Lucia	Consumer Protection Act, 2016	✓	✓	✓	✓	✓
Saint Vincent and the Grenadines	Consumer Protection Act, 2020	✓	✓	✓	✓	✓
Trinidad & Tobago	Consumer Protection & Safety Act, 1985	x	x	x	x	x

Table 12 highlights the substantive differences in the consumer legislation in the CSME. Those CSME Member States with earlier consumer legislations should close the gap through enactment or amendment to bring their laws in line with the more modern consumer legislation. For either exercise, the CARICOM Model Consumer Protection Bill becomes a useful tool.

(b) Consumer Welfare Implementation in the CSME

Projects for a comprehensive consumer welfare

- 8.8. There is currently underway a 2-year “Consultancy for formulation of common financial consumer protection regime in CARICOM” (**FCP Policy**) and the related Model Financial Consumer Protection Bill (Model FCP Bill). The focus of FCP frameworks is on ensuring fair treatment of consumers in their relationship with a financial service provider (FSP) where there is an unequal power dynamic. This project is a CARICOM Secretariat led project but the CCC continues to contribute where possible.

Commission initiatives since 2019

- 8.9. The CCC, with the launch of its first Strategic Plan 2020-2022, sought to strengthen its consumer advocacy and support Member States with implementing their consumer protection frameworks. The CCC is also committed to working with and providing outreach to consumer non-government organisations (NGOs) in the region as they remain an underserved stakeholder group.
- 8.10. The CCC held its first regional Secondary School Essay Competition in 2019-2020, inviting students to write essays on either a competition policy or consumer policy topic. UNICEF, CXC, and BFTC co-sponsored the contest, with the latter two each contributing a prize for winning students. Videos were produced for both competition and consumer policy and a webpage created with resources for students participating in the competition. The CCC also posted the winning essays on its website and social media platforms.¹⁷
- 8.11. The 2020-2022 Strategic Plan envisaged an in-person engagement that was derailed by the advent of the COVID-19 pandemic in 2020. The CCC subsequently reoriented its approach to advocacy and communications to a virtual modality.

Online and Social Media Initiatives

- 8.12. The CCC utilised its website to share information and, where this was not possible due to its age, established a Facebook and LinkedIn account for further outreach. New pages were also created for sharing and distribution of information during the COVID-19 pandemic on consumer protection initiatives implemented by Member States.

¹⁷ <https://news.caricomcompetitioncommission.com/>;
<http://www.caricomcompetitioncommission.com/en/essay-competition-2/winning-essays>

Steering Committee on COVID-19

- 8.13. The Steering Committee referenced at Section 4.3 also promoted consumer protection measures as tools to mitigate the negative impacts of COVID-19 on the social systems of Member States. The work products completed can be accessed on the CCC website.

Work with International Development Partners

- 8.14. The CCC increased its engagement with international Development Partners such as UNCTAD. In the review period most of this work focused on the linkage between health and consumer protection, with the CCC assisting in the hosting of 1 Caribbean and 1 Latin America and Caribbean webinar on the proposals of UNCTAD for consumer protection and health safety.

Collaborations with Regional Institutions

- 8.15. The CCC assisted the OECS Commission in its procurement for a consultant to conduct training in the field of consumer protection policy and law in the OECS. The CCC also continues to engage the OECS membership to support their implementation of consumer protection frameworks.

Regional Regulators

- 8.16. During the period 2019-2021, the CCC initiated discussions with the Organisation of Caribbean Utility Regulators (OOCUR). The CCC also completed a draft Memorandum of Understanding (MoU) to guide cooperation between the parties. The MoU would facilitate improved monitoring and data collection on consumer issues related to utilities, and in policy review and formulation.

9. Competition and Consumer Law and Policy Outlook for the CSME

- 9.1. The CCC established its first Strategic Plan 2020-2022 to better position it to address the requirements of the RTC. However, fiscal challenges remain which are compounded by the lack of necessary legislative framework some Member States to assist market protection and stability.
- 9.2. Given the importance of consumer protection and fair competition enforcement, the necessity for uniform development of national legislation by Member States remains.

(a) Competition Outlook

In 2020, the CCC distributed a questionnaire to the national competition authorities in the CSME aimed at identifying the main operational challenges they face that affected their ability to enforce their national competition laws effectively. The challenges identified by the institutions included limited

finances and technical resources. The following outlook will address some of the challenges identified.

Memorandum of Understanding and Cooperation Agreements

- 9.3. Effective enforcement cooperation by competition authorities in the region can reduce the challenge of a lack of technical resources. It can facilitate the identification of anticompetitive business conduct, and the sharing of ideas between the agencies on market definition, theories of harm for business conduct, and enforcement remedies. Given the benefits of enforcement cooperation, the competition authorities in the CSME have signed 11 MoUs or Cooperation Agreements with other competition authorities within and/or outside the region and sector regulators to facilitate enforcement cooperation.
- 9.4. The development of MoUs and Cooperations Agreements under the 11th EDF programme also seeks to address the shortcomings exposed in the Community law framework when only 25% of Member States have a national competition law and established competition authority to enforce the law. Whereas the CCC acknowledges that this mechanism cannot replace the requirement for legislation in Member States, it recognises that a softer cooperative approach to data and information sharing may assist less developed markets to become more acquainted with the necessity and advantages of a formal competition regime.

Policy support and market studies

- 9.5. In the review period, the CCC completed studies on Air Transportation and Food Prices arising from the COVID-19 pandemic. However, although the CCC collaborated with the CARICOM Secretariat and regional institutions within the review period¹⁸, it is recognized that this must be continued and deepened with significant role clarification, improved coordination and improved governance relationships required for effective implementation of Chapter VIII of the RTC. The CCC will continue to contribute to policy development and formulation.¹⁹
- 9.6. The CCC, in collaboration with other bodies, will continue to identify critical sectors (based on market and Member State need) for the execution of market studies which can play a pivotal role in national and regional policy and enforcement agendas. However, studies are most effective when supported by strong working relationships with national institutions in Member States, buttressed by the reciprocal relationships with other Regional Institutions and the CARICOM Secretariat. The implementation of cooperation agreements and MoUs for information and data sharing are critical components for strengthening implementation of competition and consumer policy.

¹⁸ Collaboration with CARPHA for access to chief medical officers during the pandemic for UNCTAD webinar attendance; collaboration with the CSME Unit, CARICOM Secretariat on review of proposed Merger Policy and proposed dual role of CCC.

¹⁹ Article 173(2)(b), RTC

Amendments to the RTC and Member States' laws

- 9.7. The draft CSME Merger Policy has highlighted the need to incorporate merger provisions into Chapter VIII. It has also provided a timely reminder that there is the need to strengthen some other provisions of Chapter VIII to bring them up to date with economic regulation best practices, to consider new economic sectors (i.e. digital markets and platforms) and how to address potential instances of anti-competitive business conduct. The CCC will seek a comprehensive approach to amending the Treaty to strengthen its structure and cure defects in establishment.
- 9.8. Member States with established laws are amending or adding to their legislative framework in the areas of mergers and acquisitions. The CCC will continue to support the NCAs in their efforts to facilitate the passage of the legislative instruments through their parliaments in a timely manner.
- 9.9. The competition laws of Belize, the OECS and Suriname remain in draft. The CCC intends to deliver more targeted technical assistance and negotiations to assist these Member States in progressing the draft legislation towards Parliamentary approval and enactment within the second strategic plan period 2023-2025. This work will target the decision makers at the Parliament and ministerial level through appropriate interventions by the CCC.

(b) Consumer Welfare

Enactment of national consumer protection legislation

- 9.10. In the last 3 years, Grenada and St. Lucia have progressed the enactment of the Model Consumer Protection Bill into domestic law. That is a significant achievement and brings the number of Member States in the OECS with consumer rights laws to 5 which is a 75% increase over the 3 Member States that previously existed.
- 9.11. The CCC will continue direct engagement with the OECS Commission and national consumer officials to support the momentum in the OECS.

Expansion of the Consumer Protection laws to specialised sectors

- 9.12. The move towards creating a community FCP policy and Draft FCP bill augurs well for increasing the reach of consumer protection laws into a sector that has a significant impact on the current and future lives of community citizens. The current regulatory environment depends on the moral suasion of consumer departments and consumer NGOs, customers' rights governed by Bank charters created and enforced by banking associations in over 80% of Member States, financial regulators whose priority is prudential aspects of the banking sector and is not consumer-centric in approach. A completed Community FCP policy and the FCP Bill to enforce the policy would be an important step towards protecting consumers in an environment where electronic commerce is rapidly becoming the norm rather than an exception.

- 9.13. The CCC will continue its advocacy to new regulators when they become established and in the exchange of information on trends that are impacting consumers in the financial sector. The CCC will build on existing interventions to support this process.

New and emerging areas: Data Protection, Privacy and E-Commerce

- 9.14. Data protection including storage, security, access, and use of data are now critical issues in digital media and e-commerce platforms. Several Member States are now moving towards creating the enabling environment to address these issues and have established new regulatory agencies such as Data Commissioners.
- 9.15. Within the period 2022-2024, the CCC intends to conduct studies on the competition readiness of the region in the emerging areas of data protection, privacy and e-commerce, with the intention that these work products would enhance Member States policy and legislative frameworks.

(c) Advocacy Outlook

- 9.16. The CCC's advocacy initiatives transitioned to virtual modalities during the pandemic. The CCC expects there will be a need to interact face to face in some Member States with stakeholders in the future but will retain a predominantly virtual modality due to cost constraints.

In-country intervention

- 9.17. The CCC will target this means of intervention for critical impact, while considering its budgetary constraints. The CCC will rely upon external assistance from IDPs and other sponsors to defray expenses where necessary. Focus will be placed on: (i) Members with no legislation; (ii) targeted technical training for Members with active competition commissions; and (iii) targeted technical or knowledge training for Members on consumer protection initiatives.

Virtual Activities

- 9.18. The CCC will continue to emphasise the use of virtual meetings and social media platforms to communicate with stakeholders and promote the benefits of competition and consumer protection.
- 9.19. During the current strategic plan 2020-2022, the CCC launched initiatives to deliver competition and consumer protection training modules online as a sustainable alternative to one-off in-country events. The Commission is likely to expand its use of these types of interventions to address ongoing and emerging issues in the future as a cost-effective way of engaging with stakeholders.

Appendix 1 – Competition Legislation and Sector-specific competition provisions in CSME Member States

MEMBER STATES	Dedicated Competition Legislation	Sector-Specific Competition Provisions
Antigua & Barbuda	N/A	Telecommunications Act
Barbados	Fair Competition Act	Telecommunications Act
	Fair Trading Commission Act	Utilities Regulation Act
Belize	N/A	Telecommunications Act
		Public Utilities Commission Act
Dominica	N/A	Telecommunications Act
		Electricity Supply Act
Grenada	N/A	Telecommunications Act
		Public Utilities Regulatory Commission Act
Guyana	Competition & Fair Trading Act	Telecommunications Act
		Public Utilities Commission Act
Jamaica	Fair Competition Act	Office of Utilities Regulation Act
Montserrat	N/A	Telecommunications Act
		Info-Communications Development Act
Saint Christopher & Nevis	N/A	Telecommunications Act
		Electricity Supply Act
		Public Utilities Act
Saint Lucia	N/A	Telecommunications Act
		National Utilities Regulatory Commission Act
Saint Vincent and the Grenadines	N/A	Telecommunications Act
		Electricity Supply Act
Suriname	N/A	Telecommunications Act
		Telecommunications Act
Trinidad & Tobago	Fair Trading Act	Financial Institutions Act
		Regulated Industries Commission Act

Notes:

"Dedicated Competition Legislation" - means a single enactment that contains the pillars of competition law together with institutional arrangements for enforcement.

"Sector-Specific Competition Provisions" - includes statutory instruments (whether as regulations, orders, codes, etc) that contain provisions which may be interpreted or applied to address specific competition concerns in a sector or industry.

Appendix 2 – Comparison of National Competition Legislations in the CSME

Comparison of substantive statutory tests for anti-competitive conduct

- 9.20. There are marked differences among the various statutes. For example, the presence or absence of merger review jurisdiction²⁰. There are also subtle but relevant differences in the substantive statutory tests for each of the Pillars of Competition both within a statute and as compared to its counterpart in another Member State. There are also differences in terms of jurisdictional scope, which are considered in the next section.
- 9.21. The differences not only challenge the legislative harmonisation contemplated by the RTC; but may also pose serious implications for cross-border enforcement, as under the inter-governmental system of CARICOM which lacks a doctrine of Direct Effect, the CCC must rely on national competition legislation to reach private business conduct within Member State territory. Indeed, for an investigation or determination by the CCC involving two or more Member States the question of which statutory test to apply would arise. The table below presents a summary of the various substantive statutory tests stipulated in Member State legislation.

Summary of Substantive Legal Tests in Member State Competition Legislation

Business Conduct	Jamaica Fair Competition Act	Trinidad & Tobago Fair Trading Act	Barbados Fair Competition Act	Guyana Competition & Fair Trading Act
Restrictive Agreements	s.17(1): "...provisions that have as their purpose the substantial lessening of competition or have or are likely to have the effect of substantially lessening competition in a market. "	s.17(2): "...Any decision or concerted practice of an association of enterprises, the object of which is the prevention, restriction or distortion of competition... "	s.13(1): "All acts or trading practices prescribed or adopted by... that result or are likely to result in the disruption or distortion of competition... "	s.20(1): "(a) all agreements...and (b) concerted practices or decisions... which have or are likely to have the effect of preventing, restricting or distorting competition... "
Abuse of Dominance	s.20(1): "...abuses a dominant position if it impedes the maintenance or development of effective competition in a market. "	s.21(1): "...abuses that power if it impedes the maintenance or development of effective competition in a particular market. "	s.16(3): "...abuses a dominant position if it impedes the maintenance or development of effective competition in a market... "	s.24(1): "...abuses a dominant position if it impedes the maintenance or development of effective competition in a market. "
Merger Review	N/A	s.13(2): "...an anti-competitive merger is a merger which restricts or distorts competition in a market. "	s.20(6): "...the proposed merger would not affect competition adversely or be detrimental to consumers or the economy. "	N/A

²⁰ This may be because of the initial non – inclusion of a merger rule in the Revised Treaty of Chaguaramas.

- 9.22. The table shows that among the Member States there is considerable divergence in the substantive statutory tests for Restrictive Agreements and Merger Review.
- 9.23. In light of these subtle but significant differences in the substantive statutory tests for anti-competitive conduct; the CCC may find it necessary to issue rules or guidelines that seek to clarify for internal review and assessment purposes the minimum requirements common to all of the various tests for anti-competitive conduct outlined above.

Overview of Member State Legislation

- 9.24. This section offers an overview of Member State competition legislation along 4 dimensions: (i) policy goal or legislative object; (ii) legislative scheme; (iii) basic institutional arrangements; and (iv) jurisdictional scope.

(a) Jamaica – The Fair Competition Act, 1993

(i) Policy goal:

- 9.25. The policy goals of Jamaica’s Fair Competition Act (**JFCA**) are to:²¹
- [1] provide for competition, rivalry in markets and to secure economic efficiency in trade and commerce;
 - [2] open markets and guard against undue concentration of economic power; and
 - [3] to promote consumer welfare and to protect consumer interest.

(ii) Legislative scheme:

- 9.26. Those policy goals inform the legislative scheme of the JFCA. In this regard, Part III of the Act which addresses “*Control of Uncompetitive Practices*” contains prohibitions against Anti-competitive Agreements and Abuse of a Dominant Position. Together with Parts IV and VI which address Resale Price Maintenance and other exclusionary commercial practices, these provisions of the Act are meant to achieve the policy goals of competition, economic freedom and efficiency.

(iii) Basic institutional arrangements:

- 9.27. The Act establishes the Jamaica Fair Trading Commission (**JFTC**) with a board of commissioners and a staff headed by an executive director as an *ex officio* commissioner. There is, to an extent, segregation of functions as the staff conducts investigations, but the commissioners review staff findings and issue a report on the matter. This report is not a legally binding determination as it does not empower the JFTC to make final determinations of competition law liability. The Act provides for enforcement only where the JFTC satisfies a court of law that there has been a breach of the legislation.

²¹ See Government of Jamaica Green Paper No. 1 of 1991 entitled “Proposal for a Competition Act”.

(iv) Jurisdictional scope:

- 9.28. In terms of the jurisdictional reach of the statute, the JFCA applies generally to all sectors and/or industries of the economy, subject to specific exemptions under Section 3, i.e., intellectual property rights and business activities exempted by ministerial order.
- 9.29. Formal provisions on merger review are missing from the legislative scheme. However, this has been partially ameliorated by a 2017 decision of Jamaica's final appellate court in **Fair Trading Commission v Digicel Jamaica Ltd & Anor**,²² which 'read into' the provision on anti-competitive agreements a jurisdiction to review mergers (and potentially some acquisitions) on the basis that they can be categorised as 'agreements likely to substantially lessen competition'. While the draft bill to amend the Act does not contain provisions on merger review, in 2021 the JFTC developed Merger Assessment Guidelines on the basis of the aforementioned court decision.
- 9.30. Also missing from the legislative scheme are provisions on cooperation between the JFTC and the Commission. This opens an enforcement gap in the Community Competition Policy as the CCC may not have the requisite jurisdiction to address cross-border, anti-competitive conduct that either emanates from or affects markets in Jamaica. The draft bill to amend the Act aims to close this gap with formal provisions that recognise the jurisdiction of the CCC in Jamaica and mandates institutional cooperation between the authorities.

(b) Barbados – Fair Competition Act, 2002

(i) Legislative object:

- 9.31. The objects of Barbados' Fair Competition Act (**BFCA**) are to:
- [1] promote and maintain and encourage competition;
 - [2] prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in Barbados and within the CSME;
 - [3] ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the marketplace; and
 - [4] for connected matters.

(ii) Legislative scheme:

- 9.32. Those objects inform the legislative scheme of the BFCA. In this regard, Part III of the Act which addresses "*Anti-Competitive Agreements, Abuse of Dominant Position, Mergers and Interlocking Directorships*" contains prohibitions that address the 3 Pillars of Competition Law. Furthermore, Parts IV and VI address Resale Price Maintenance as well as other exclusionary commercial practices such as Price Fixing and Bid Rigging.

²² [2017] UKPC 28

(iii) Basic institutional arrangements:

- 9.33. Another related legislation, entitled the Fair Trading Commission Act (**BFTCA**), establishes the Barbados Fair Trading Commission (**BFTC**) with a board of commissioners and a staff headed by a chief executive officer as an *ex officio* commissioner. Like the JFTC, there is to an extent segregation of functions as the staff conducts investigations, but the commissioners review staff findings and issue a report on the matter. The report is also not a legally binding determination of the BFTC and the agency must satisfy a court of law that there has been a breach of the legislation.

(iv) Jurisdictional scope:

- 9.34. The jurisdictional reach of the statute applies generally to all sectors and/or industries of the economy except for specified exemptions under section 3, i.e., employee collective bargaining arrangements and business activity exempted by ministerial order.
- 9.35. The BFTCA contains formal provisions on merger review. The nature of the review is *ex ante*, with a market share (40%) threshold for triggering compulsory notification of transactions to the BFTC for prior approval. In terms of scope, the provisions are sufficiently broad to capture a wide variety of transactions regardless of legal form or structure to include amalgamations, acquisitions of majority shareholdings, joint ventures and interlocking directorates. Subsidiary statutory instruments, which address procedural matters, supplement the merger review provisions in the Act. These are: (a) the Fair Competition (Merger) Rules, 2009; and (b) the Fair Trading Commission (Fair Competition Merger Fees) Regulations, 2009.

(c) Trinidad & Tobago – Fair Trading Act, 2006

(i) Legislative object:

- 9.36. The object of Trinidad & Tobago's Fair Trading Act (**TTFTA**) is to “...*provide for the establishment of a Fair Trading Commission, to promote and maintain fair competition in the economy, and for related matters*”

(ii) Legislative scheme:

- 9.37. Those objects inform the legislative scheme of the TTFTA. In this regard, Part III of the Act which addresses “Mergers, Anti-Competitive Agreements or Practices and Monopolies” contains prohibitions that address the 3 Pillars of Competition Law. However, unlike its counterparts in Jamaica, Barbados and Guyana; the Fair Trading Act of Trinidad & Tobago does not contain separate provisions to expressly address Resale Price Maintenance as well as other exclusionary commercial practices such as Bid Rigging. We note that the potential for judicial interpretation of the anti-competitive agreements provision of the statute to extend same to reach those conducts should not be ruled out.

(iii) Basic institutional arrangements:

9.38. The Act establishes the Trinidad & Tobago Fair Trading Commission (**TTFTC**) with a board of commissioners and a staff headed by an executive director as an *ex officio* commissioner. There is to an extent segregation of functions in as much as the staff conducts investigations, but the commissioners review staff findings. With the exception of abuse of monopoly power cases; the TTFTC is not required to issue reports; but must instead apply to the courts for decisions on their investigations under the legislation.²³

(iv) Jurisdictional scope:

9.39. In terms of the jurisdictional reach of the statute, the TTFTA is more limited than its counterparts in Jamaica, Barbados and Guyana. In addition to the usual subject matter exemptions found in the other statutes (such as intellectual property rights or employee collective bargaining arrangements), the Act also exempts telecommunications companies, banks and non-bank financial institutions from its purview. The result is to effectively carve out those sectors of the economy in Trinidad & Tobago from competition law review. Lastly, although the Act applies to regulated industries (such as public utility companies), the legislation grants enforcement jurisdiction not to the TTFTC, but instead, to the Regulated Industries Commission (**RIC**).

9.40. The TTFTA contains formal provisions on merger review. The nature of the review is *ex ante*, with an asset threshold (50 Million TTD) for triggering compulsory notification of transactions to the TTFTC for prior approval. In terms of scope, the provisions are sufficiently broad to capture a wide variety of transactions regardless of legal form or structure to include amalgamations, acquisitions of majority (and potentially, minority) shareholdings, joint ventures and interlocking directorates.²⁴ As at the date of this Report, the TTFTC has not yet published any agency guidelines on merger review.

(d) Guyana – Competition & Fair Trading Act, 2006

(i) Legislative object:

9.41. The object of Guyana’s Competition & Fair Trading Act (**GCFTA**) is to “...promote, maintain and encourage competition and to prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade; to promote the welfare and interest of consumers, to establish a Competition Commission and for connected matters.”

(ii) Legislative scheme:

9.42. Those objects inform the legislative scheme of the GCFTA. In this regard, Part III of the Act which addresses “*Anti-Competitive Agreements and Abuse of*

²³ Stewart, Taimoon and Jones, Marc. “Merger Control in the Caribbean Community.” *Merger Control in Latin America: A Jurisdictional Guide*, edited by Paulo Burnier da Silveira et al, 1st Edn., Concurrences Antitrust Publications & Events, 2020, pages 253 – 277.

²⁴ *ibid.*

Dominant Position” contains prohibitions that address only 2 Pillars of Competition Law. Furthermore, Parts IV and VI address Resale Price Maintenance as well as other exclusionary commercial practices such as Price Fixing and Bid Rigging.

(iii) Basic institutional arrangements:

- 9.43. The Act establishes the Guyana Competition and Consumer Affairs Commission (**CCAC**) with a board of commissioners and a staff headed by a director as an *ex officio* commissioner. There is to an extent segregation of functions in as much as the staff conducts investigations, but the commissioners review staff findings and issue a report on the matter. This report is not a legally binding determination as the CCAC is not empowered to make final determinations of competition law liability.²⁵ In this regard, the Act provides for enforcement where the CCAC satisfies a court of law that there has been a breach of the legislation.

(iv) Jurisdictional scope:

- 9.44. In terms of the jurisdictional reach of the statute, save and except for specific subject matter exemptions under section 3, for example intellectual property rights or business activity exempted by ministerial order, GCFTA is of general application across all sectors and/or industries of the economy. While the Act applies to public utilities, it is noted that the CCAC is required to consult with the utilities’ regulator.
- 9.45. Like in Jamaica, formal provisions on merger review are missing from the legislative scheme. This represents a legislative gap, which should be closed. In this regard, Guyana has developed a draft merger control and review bill for consultation.

²⁵ Stewart, Taimoon and Jones, Marc. “Merger Control in the Caribbean Community.” *Merger Control in Latin America: A Jurisdictional Guide*, edited by Paulo Burnier da Silveira et al, 1st Edn., Concurrences Antitrust Publications & Events, 2020, pages 253 – 277.



Hendrikstraat # 69
Paramaribo
Suriname

www.caricomcompetitioncommission.com

Tel: (597) 491 439 - (597) 491 455

Email: admin@ccc.sr

Fax: (597) 530 639



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