



PRESENTATION TO COUNSELS OF STATE OWNED ENTERPRISES AND GOVERNMENT MINISTRIES



**Presented by Mr. Bevan Narinesingh, Executive Director
Trinidad and Tobago Fair Trading Commission
June 10th 2021**

Agenda

- ☐ About the Commission
- ☐ Role, powers and functions of the Commission
- ☐ Importance of Competition
- ☐ The key provisions in the Fair Trading Act
- ☐ The future work of the Commission

- Independent Statutory Body established pursuant to the Fair Trading Act 2006.

- Our objectives are to promote, protect and maintain competition in the Trinidad and Tobago market. We do this by:

- Preventing anti- competitive conduct;
- Taking action against abuse of dominance, restraint of trade and unfair or deceptive trade practices;
- Diffusing and publishing information about competition policy;
- Advising the Government on other laws affecting competition.

- The Commission is one of more than 130 competition/anti-trust agencies that are presently functioning globally.

ABOUT US

Powers of the Commission

The Commission's powers are set out in several provisions in the Fair Trading Act. They include the power to:-

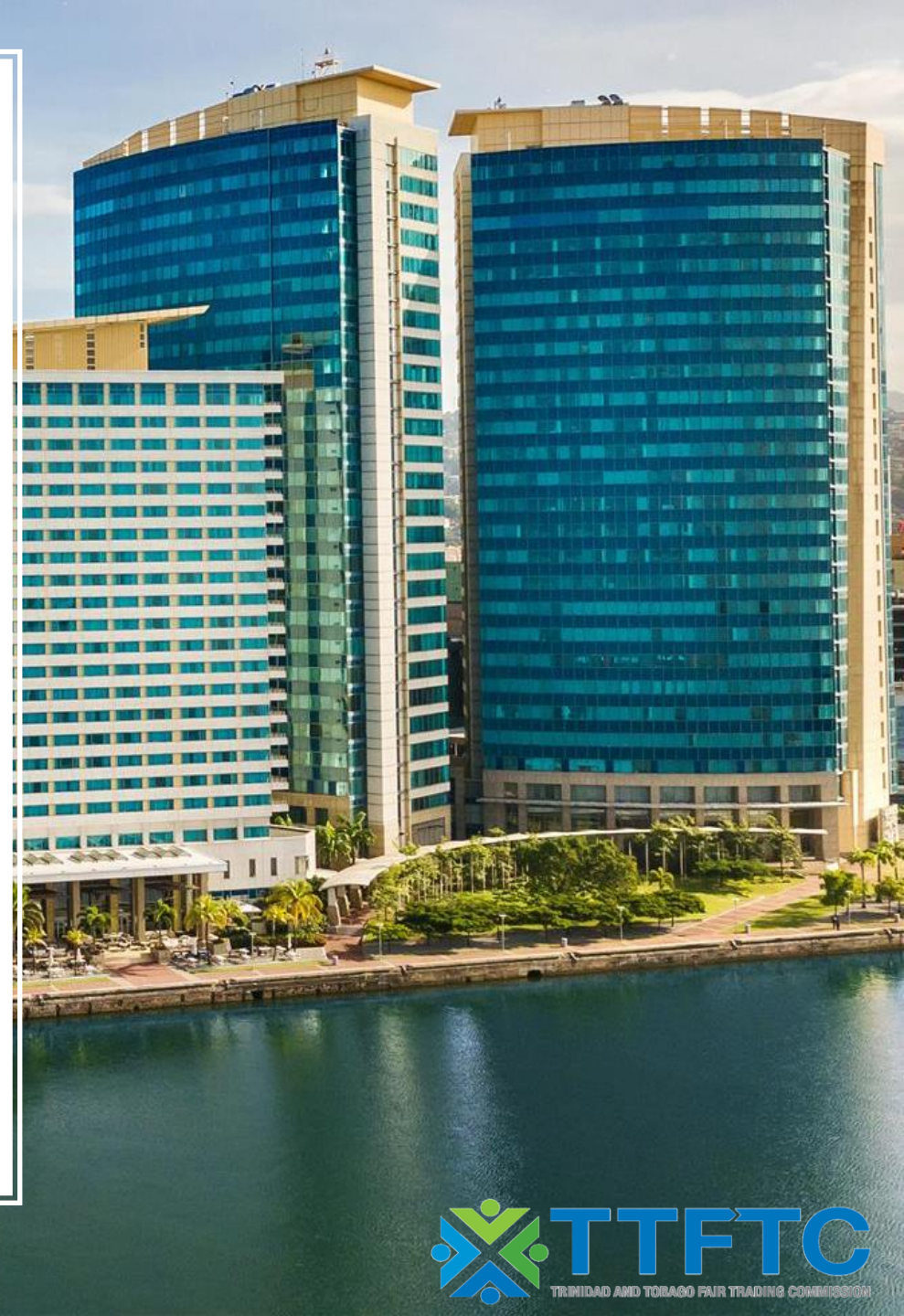
- Carry out investigations,
- Summon and examine witnesses,
- To call for, require the production of and examine documents in connection with an investigation, and
- To direct an enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse of dominance in a relevant market.



What is competition and what do we mean by a competitive market?


Competition:


- A situation in a market in which firms or sellers independently strive for buyers' patronage in order to attain a particular business objective, in most cases profit, market shares, and/or sales (OECD 1993:22).
- A competitive market is characterized by there being many sellers with every seller trying to increase its profits by offering to the buyers a better combination of price, quality, and service than the combinations offered by its competitors.
- Having an effective competition law framework in place is expected to enhance the investment climate, safeguard the liberalization process and promote an enabling environment for sustainable growth and development.
- An effective competition regime is even more important during a period of economic slowdown.




Why is Competition Good?

❑ Protects consumers 

❑ Most effective way to ensure high quality and a wider choice of goods are available to consumers at the “lowest possible price” as it stimulates companies to increase their productivity and efficiency. 

❑ Encourages investment, innovation and technological development as it provides an incentive for firms to perform at their best. 

❑ Promotes economic growth as an effective competition framework safeguards the market liberalization process and promotes an enabling environment for sustainable growth and development which is even more important during a period of economic slowdown. 

COMPETITION'S ROLE IN OVERALL GOVERNMENT POLICY



VISION
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Government's 2030 Vision with
respect to Trade Performance,
Business Facilitation and
Overall Competitiveness

Theme IV of Vision 2030-
Building Globally Competitive
Businesses and more
specifically, in the areas of

- Business Facilitation
- Export Promotion
- Business Development



THE FAIR TRADING ACT

- The Fair Trading Act creates an institutional framework for the enforcement of competition policy and deals with many major issues including:
 - Anti-competitive agreements;
 - The abuse of monopoly power (dominant position is defined as controlling more than 40% of the market);
 - Anti-competitive mergers; and
 - The enforcement of the relevant clauses or enforcement measures.
- The Act is designed to protect the economy, consumers, and businesses from anticompetitive behaviour and to promote healthy competition, innovation, and greater choices for consumers.
- The legislation was passed in Parliament in 2006 and fully proclaimed in 2020.
- The provisions are reflective of EU, UK, Canadian, New Zealand and Australian experiences.
- The interpretation and application of the Act will be based on sound legal principles and economic thinking.



Relevant Parts of the Fair Trading Act

- Part 1- Preliminary
- **Part II- The Fair Trading Commission: Establishment, Powers and Functions**
- **Part III- Mergers, Anti-Competitive Agreements and Monopolies**
- Part IV- Constitution of the Commission
- Part V- Staff of the Commission and Related Matters
- Part VI- Finance, Report and Audit
- **Part VII- Powers of the Court**
- Part VIII- Community Competition Commission
- Part IX- Miscellaneous



A graphic featuring a large white exclamation mark inside a blue circle, followed by a blue horizontal bar with the word "EXEMPTIONS" in white capital letters.

EXEMPTIONS

- The Act is of general application. There are however certain sectors where the Act does not apply including:
 - (i) Securities Industry
 - (ii) Telecoms
 - (iii) Banking Industry
 - (iv) Intellectual Property
 - (v) Professional Associations/Collective Bargaining Situations
 - (vi) Activities expressly authorized or required under any treaty or agreement to which Trinidad and Tobago is a party
- **State-owned entities that are involved in commercial activity are not exempt!**
- On cross-sectorial competition matters, the Commission will work with the relevant sectorial regulator to determine which entity is best placed to handle the case in accordance with the legal powers given to each.



Why are State Owned Enterprises (SOEs) regulated by the Commission?

- In recent years, SOEs have extended the reach of their activities and have become increasingly important players in the economy with their activities having a significant impact on consumers, competition, trade and investment.
- SOEs operate in key sectors of the Trinidad and Tobago economy and a number of SOEs engaging in commercial economic activities and compete and/or collaborate with private entities.
- There is thus the need for SOEs to better understand the provisions of the Fair Trading Act especially because anti-competitive behaviour by SOEs can be as harmful as restrictions of competition by private sector competitors.

Anti-competitive Agreements



Anti-competitive agreements

An anticompetitive agreement is one which has an adverse effect on the competitive process with the effect of Substantially Lessening Competition (coordinated conduct).

Provisions against restrictive agreements cover both formal or explicit and informal or implicit agreements.

The Fair Trading Act prohibits:

(A) Horizontal agreements between competitors that lessen competition

(B) Vertical agreements that lessen competition (vertical restraints) - distribution arrangements that reduce inter-brand (e.g. exclusive purchasing) and intra-brand competition

Examples of Anti-Competitive Behaviour

- Anti-competitive Agreements prohibited under the Fair Trading Act include:

- Price Fixing
- Bid Rigging
- Group Boycotts
- Market Sharing
- Output Limitations

- **These are strict/liability per se violations** are condemned outright, with no need for the Commission to prove that they have been actually put into practice or that they have actually produced harmful effects on prices or other adverse market conditions.



Vertical Agreements

- Vertical Agreements are defined as agreements or contracts between firms at different stages of the production process for example by processing firms on their raw material suppliers, or by manufacturers on their wholesale or retail distributors and entails some limitation on the activities of one or more parties.
- Different types of vertical agreements exist. Including:-
 - Selective distribution e.g. selected outlets
 - Exclusive distribution e.g. restraints by a manufacturer on where to who the retailer may sell the product such as an exclusive territory,
 - Resale Price Maintenance i.e. product sold at or above a certain price point
 - Full Line forcing e.g. manufacturer insisting that a retailer takes the manufacturer's complete range of products
 - Quantity forcing- manufacturer specifying the amount of a product that a retailer must agree to sell, exclusive dealing e.g. retailer sells the product of only one manufacturer
 - Inter-brand, exclusionary vertical agreements that affect competitors are more likely to be challenged, but only if the actual or likely competitive harm outweighs any pro-competitive benefits.
- The Commission will apply a rule of reason approach when assessing the impact of these agreements where we will evaluate the positive and negative effects of a certain business practice on a case by case basis.
- The relevant issue would be the net welfare effect of the agreement e.g. does it foreclose competition (even if this was not the intention) or facilitate anti-competitive behaviour.

Abuse of Monopoly Power



General Principles

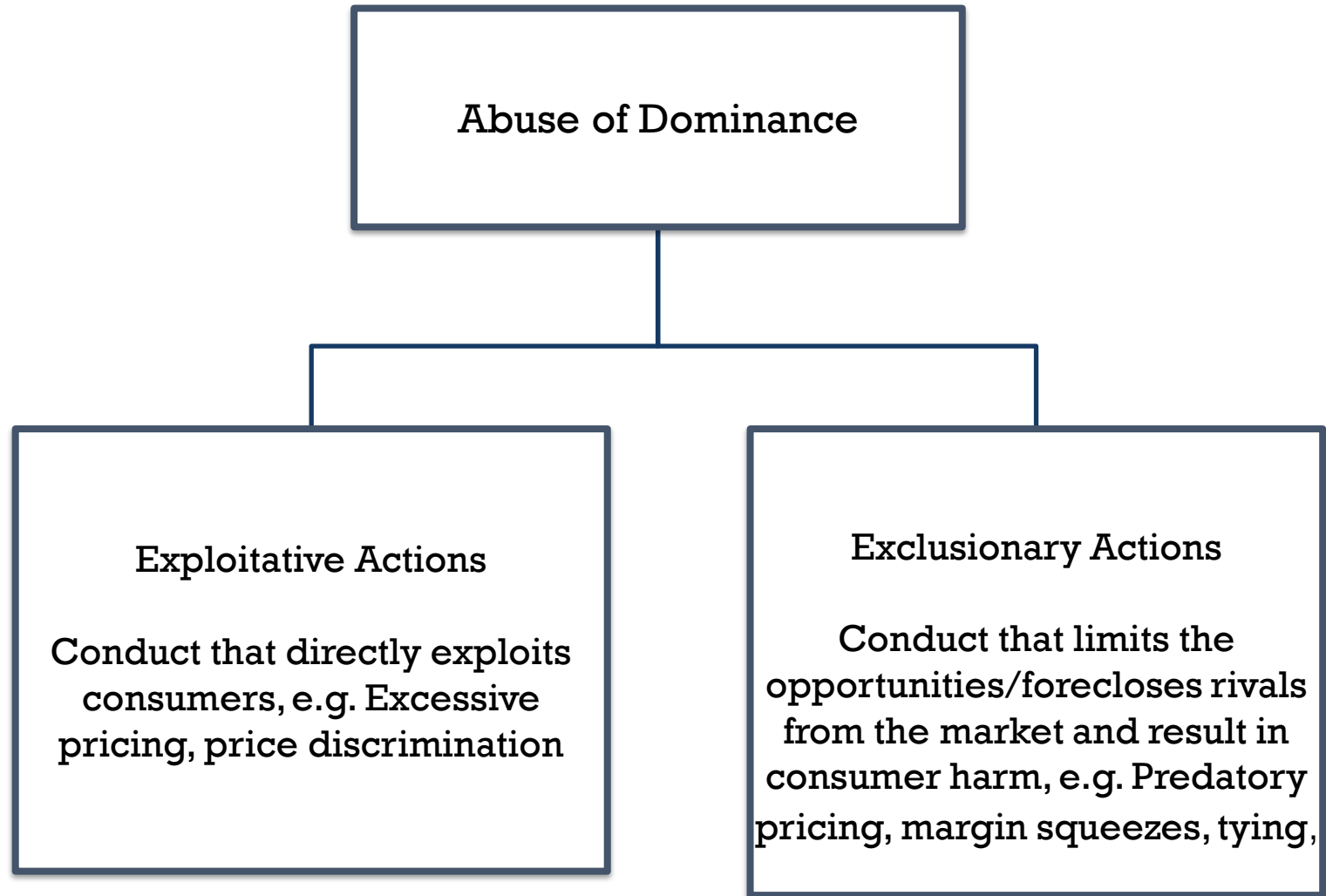
- Monopoly power refers to the ability of a firm (or group of firms) within a **market** to **raise prices profitably** above the **competitive level** for a **sustained period of time**.
- Under the Fair Trading Act an enterprise has market/monopoly power if it controls at least 40% of the market
- The Fair Trading Act does not prohibit the acquisition or possession of market power .
- **Dominance in itself is not bad.** What is considered bad is the abuse of a dominance .
- The abuse refers to practices that the firm may engage in to lessen competition in the market or to exploit customers.
- It is the conduct of the powerful or dominant business enterprise which is subject to scrutiny and not their position of power or dominance.

Why

- Companies that have a large proportion of the business in a particular market have a special responsibility not to engage in behaviour which is considered abusive.
- Abusive behaviour affects the structure of the market and weakens competition and can adversely affect prices, output, innovation and the variety and quality of goods and services.
- Firms in a dominant position should not act in a way that prevents competitors from competing effectively or drives them out of the market.



Types of Abuses of Dominance





MERGER REVIEW

Mergers

- Under the Fair Trading Act, a ‘merger’ is the cessation of two or more enterprises from being distinct whether by purchase or lease of shares or assets, amalgamation, combination, joint venture or any other means through which influence over the policy of another enterprise is acquired.
- Under Part III s. 14 of the Fair Trading Act enterprises shall not enter into a merger unless they obtain permission from the Commission where:
 - their assets exceed fifty million dollars; and
 - at least one of the enterprises carries on or intends to carry on business in Trinidad and Tobago.
- If a merger than exceeds 50 Million Dollars in total value is done without our approval, the Commission has the power to investigate and subsequently get an order to prohibit this merger and get an order for divestment or other appropriate remedy.
- Notification under merger control law is suspensory, meaning that the parties cannot close prior to clearance.

Approach of the Commission

- Merger analysis is a complex, resource intensive exercise that requires the reviewing agency to make an informed prediction about whether the merger will likely generate substantial competitive harm.
- The vast majority of mergers do not raise material competitive concerns as they may be done for legitimate reasons including to-:
 - Reap the benefits from synergies;
 - Increase efficiencies from economies of scale;
 - Gain access to particular types of resources and technology;
 - Execute a market entry strategy; and/or
 - Ensure survival of a firm in distress.
- The Commission is concerned with anti-competitive mergers i.e. mergers which restrict or distort competition.
- The purpose of merger analysis is to **identify** and **prevent** or **remedy** only those mergers that are likely to **harm competition**.

Merger Review

- Merger review is forward-looking: In our analysis we will examine the efficiency justifications for the merger and compare it to any anti-competitive effects that may result.
- Mergers can be remedied or prohibited if they substantially lessen competition e.g. if likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm competition for a sustained period of time.
- Other than outright prohibition, further remedies include the imposition of either structural or behavioural remedies which aim at the elimination of the merger's prospective anticompetitive effects.
- The Commission may revoke its approval of a merger if there are reasonable grounds for suspecting that the information on which the Commission based the decision was incomplete, false or misleading in a material particulars.
- The Commission is presently in the process of finalizing Merger Guidelines. These guidelines are designed to provide a breakdown to various stakeholders of the relevant information required in obtaining requisite permissions from the Commission as it relates to mergers.

The Commission and the Courts



The Fair Trading Act and the Courts

- The Commission can take to Court any business or individual who it believes is guilty of anti-competitive conduct and has failed to take corrective measures, after being instructed by the Commissioners.
- Because the language of the Fair Trading Act is broad, courts are expected to eventually develop a robust doctrine of law in terms of the interpretation and enforcement of the relative legislative provisions.
- The legislation is well suited to deal with evolving, innovative and developing markets.





Possible consequences in cases of violation of the Fair Trading Act

- Fines (up to 10% of global turnover)
- Lengthy investigation and loss of management time
- Dawn Raids
- Reputational damage
- Private Damages claims for damages suffered if a competitor have been found guilty of anti-competitive practices and you have suffered provable loss as a result of same
- Entire Contracts (or parts thereof) may be null and void
- To assess the size of the penalty to be imposed, the court generally considers a number of factors, including:
 - the duration of the abusive conduct,
 - the gravity of the infringement,
 - the loss or damage caused,
 - the size and turnover of the company and the market,
 - the degree of power and whether the conduct was deliberate.

Examples of where SOEs have been investigated and found guilty of anti-competitive activity



The EU Commission brought a case against Gazprom (a Russian owned SOE) in 2012 relating to anti-competitive behaviour in the EU through market segmentation, restrictions on the reselling of gas and excessive pricing.



In 2011 the Administrative Council for Economic Defence (“CADE”) opened administrative proceedings to investigate contracts between Banco do Brazil and several public institutions. These contracts included clauses imposing territorial and negotiation exclusivity arrangements for the provision of payroll loans to civil servants. The case was eventually settled out of court.



The Competition Commission of India (“CCI”) imposed its first major fine on an SOE in 2013, when it charged the domestic SOE Coal India Ltd. for abuse of dominance in the market for production and supply of non-cooking coal.



The Barbados Court of Appeal in 2015 upheld the determination of the Barbados Fair Trading Commission that the Barbados National Oil Company had abused its position as the dominant supplier of oil to the Barbados Light and Power Company.



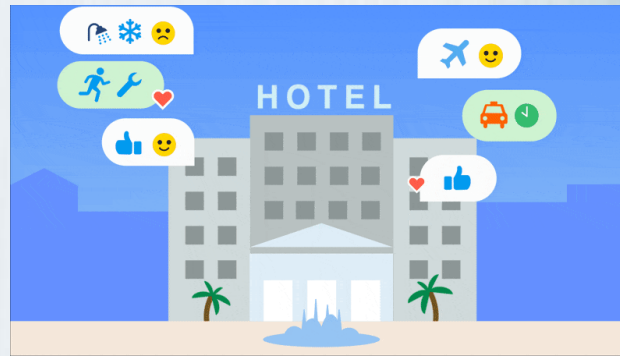
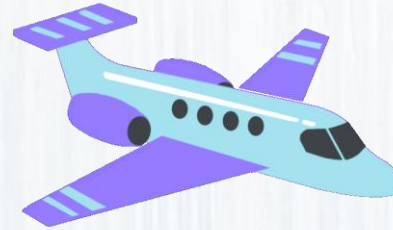
In 2017 Boryspil International Airport was fined by Ukraine’s Antimonopoly Committee (“AMC”) for abuse of dominance on the airport’s specialised services market. It was found to have charged excess fees for use of the airport infrastructure to other providers of aircraft ground handling services. In 2018 the Ukrainian Supreme Court confirmed the AMC’s decision.



The work of the Commission going forward

Sectors where State Owned Enterprises may be involved in commercial activity

- Construction
- Medical/pharmaceutical industry
- Energy sector
- Motor vehicle sector
- Food production, supply/distribution
- Airline Industry
- Hotel industry
- Transport





The Commission's approach to regulating SOEs

- The Commission in its regulating of SOEs will be guided by the principle of **Competitive Neutrality** which is based on the objective that all Enterprises (whether publicly or privately owned) compete on a level playing field.
- Based on the decisions and recommendations of the 2017 OECD Ministerial Council Meeting which identified the need to address government policies that may distort competition a **Council on Competitive Neutrality** was established.
- The Council subsequently developed a **Recommendation on Competitive Neutrality**.
- **The Recommendation** establishes a set of principles that seeks to ensure that governments' actions are competitively neutral and that all enterprises benefit from a level playing field, irrespective of factors such as their ownership or nationality.
- The Recommendation is based on the principle that Government actions may distort competition in the market even though these undue restrictions on competition may occur unintentionally and that public policies may need to be reformed in a way that promotes competition while achieving their objectives.

The Commission's Guiding Principles

- The Commission will adhere to the following principles:
 - Accountability
 - Transparency
 - Consistency
 - Fairness
 - Commitment
- Guided by the law, the Commission will objectively gather as much information as possible relevant to the particular circumstances and utilize a sound analytical framework firmly grounded in economic principles.

COVID-19

- The Commission would like to reiterate the need for there to be fair and competitive pricing of essential goods and services including food, medical supplies and all related services.
- It is recognized that businesses have to coordinate to alleviate shortages of essential goods or services necessary to limit the spread of COVID-19.
- We as a Commission will however not hesitate to hold accountable individuals and businesses who may use the pandemic as an opportunity to subvert competition, including increased prices, decreased output, or reduced quality as well as efforts by dominant players to use their market power to engage in exclusionary conduct.
- The Commission is part of efforts coordinated by the Ministry of Trade and Industry and the CARICOM Competition Commission aimed at ensuring that consumer rights, trade, food security are protected and business integrity is maintained during this period.

Focus Areas for the Future

- The Commission is committed to play its part in the economic revitalisation of Trinidad and Tobago through a twin approach of enforcement and advocacy to protect, promote and maintain competition.
- Among some of our major efforts going forward will be to:
 - Raise awareness of competition through a sustained sensitization programme with there being a focus on stakeholder-focussed presentations and training;
 - Finalize Merger Guidelines and through the help of the IDB preparing Merger Regulations in the near future;
 - Undertake market studies on certain key sectors; and
 - Offer guidance to stakeholders in the preparation of compliance documents.

CONCLUSION

- Through legislation, monitoring, enforcement, and public education, the Commission is committed to promoting and ensuring a fair marketplace.
- We are committed to having a stronger, more resilient and fairer economy.
- Once properly implemented and applied, the Fair Trading Act can with other pieces of important legislation and effective government policy result in long term sustainable growth and development.
- This is based on our firm belief that Competition has an important role to play in improving the productivity, and therefore the growth prospects of an economy.



Thank you for your attention!

- Visit our website at:

<http://www.tandtftc.org/>

- Email:

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