

The Fair Trading Act and Competition Law: Context, Updates and Considerations for State Counsel in Government Ministries and State Enterprises

Presented by
Ms. Krystle S. Maharaj, Senior Legal Counsel

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AGENDA



- Introduction to the FTC, Competition Law and Policy
- Update on the work of the FTC for the past year
- Compliance of State Counsel with FTA
- Future Relationship with State Counsel
- Questions and Comments



INTRODUCTION

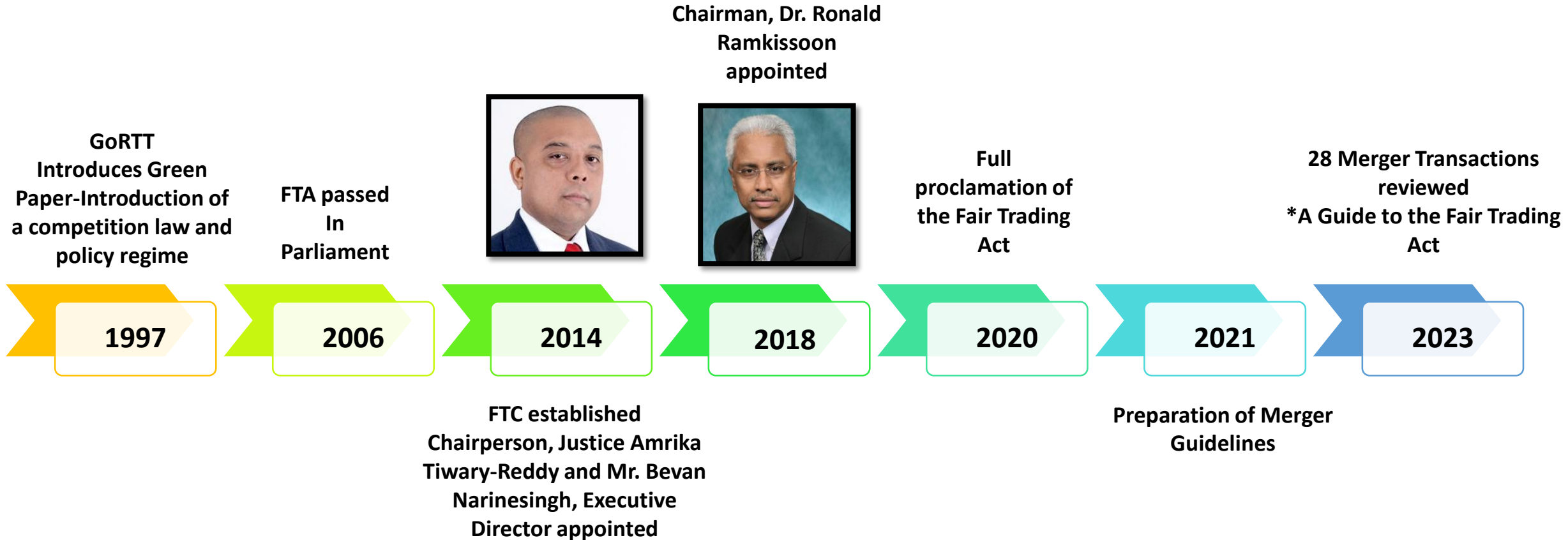


***At present, the FTC can only investigate anti-competitive activities occurring in Trinidad and Tobago**

- 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.



Timeline of the FTC





THE FAIR TRADING ACT

Relevant Parts of the Fair Trading Act

Part 1- Preliminary

Part II- The Fair Trading Commission: Establishment, Powers and Functions *Carry out investigations, Summon witnesses, Search powers

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 blue circular icon containing a white exclamation mark is positioned to the left of a dark blue horizontal bar with rounded ends. The word "EXEMPTIONS" is written in white, bold, uppercase letters on the bar.

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

- On cross-sectorial competition matters, the FTC 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.

Section 2 of the Fair Trading Act, “enterprise”, means an individual, partnership or body (corporate or incorporate) engaged in business.



The Fair Trading Act applies to public bodies/authorities who are involved in commercial activity

A public authority is defined in Section 4 of the Freedom of Information Act, to include:

- All government Ministries and Departments;
- Parliament, Cabinet, the Judiciary, the Tobago House of Assembly, Regional Health Authorities, Statutory Bodies, Service Commissions;
- A company incorporated under the laws of Trinidad and Tobago which is owned or controlled by the State;
- A body incorporate or unincorporated that performs and exercises any function on behalf of the State; or
- which is supported directly or indirectly by Government funds and over which the Government is in a position to exercise control.

*Also Section 4 of the Public Procurement and Disposal of Public Property Act 2015, as amended, Definition of “public body”.

Homework

Examine the Departments under your Ministry's purview and for State Enterprises your business models that may be involved in commercial activities for potential anti-competitive breaches of the Fair Trading Act

- A public body should ask itself the following questions for each of its activities separately
 - Am I offering or supplying a good or service, as opposed to, for example, exercising a public power?
 - If so, is that offer or supply of a 'commercial' rather than an exclusively 'social' nature?
 - If the answer to both these questions is yes, then for the purposes of that activity (and any related upstream purchasing) the public body is likely to be regarded as an enterprise subject to the provisions of the Fair Trading Act.
- The pursuit of 'profit' is not by itself a determining factor when deciding whether a course of action or conduct amounts to being a commercial activity.
- Profit making activities in competition with private sector companies may be interpreted as commercial activity.

Competition Issues that may contravene the Fair Trading Act

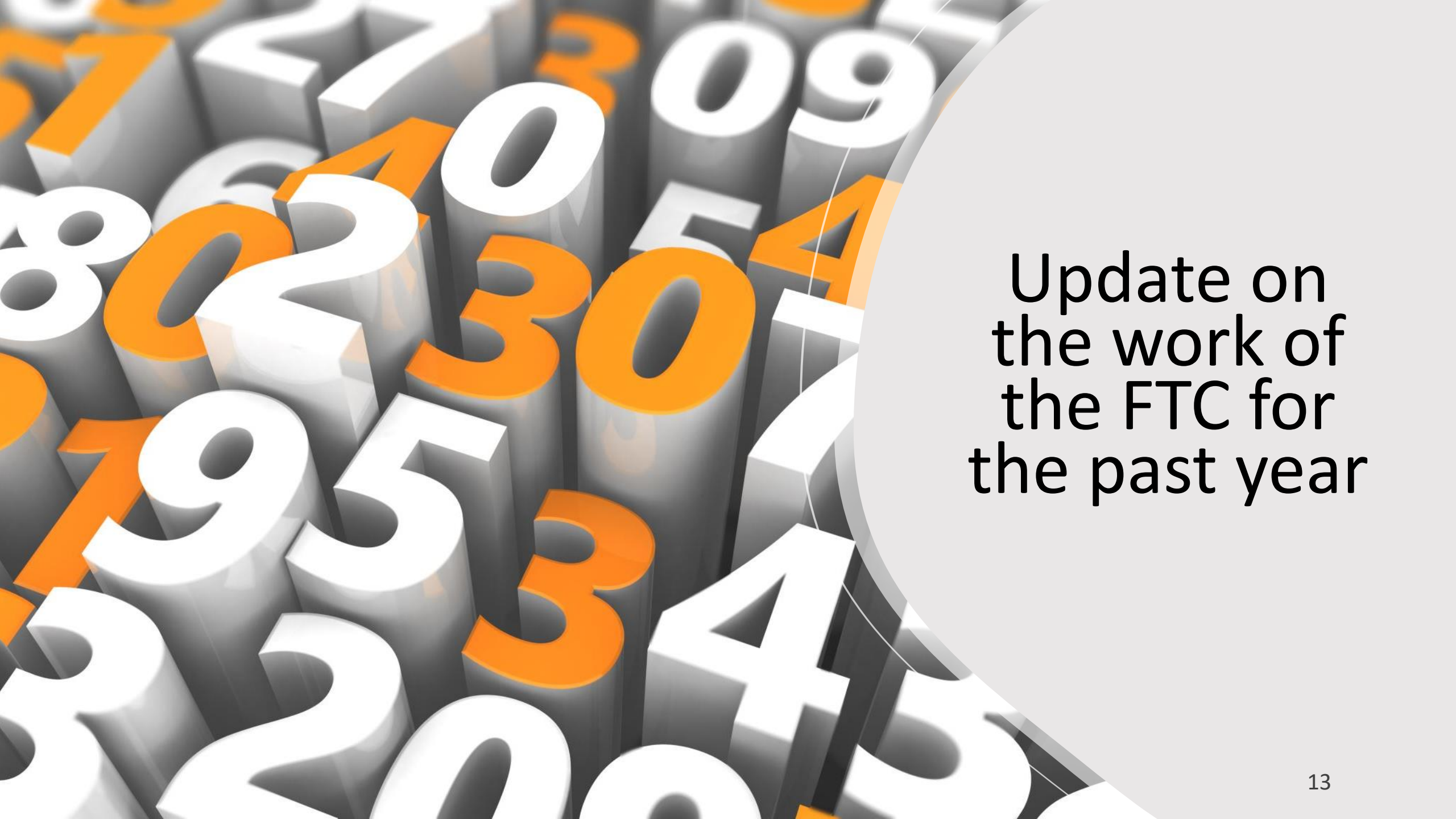


- **Price fixing** – this involves competitors agreeing not only to the price to charge third parties for their products, but also agreeing to the components a price will include, the levels of price increases, discounts or rebates, the timing of price changes and any other price-related matter(s).
- **Agreements to limit or withhold supply or production** – these involve firms agreeing to restrict the availability of a product or service in order to push prices up.
- **Market allocation or customer sharing** – this involves competitors agreeing to focus on different product or geographic markets, or different customer groups.
- **Bid rigging and Collusion**-this involves competitors agreeing in advance which of them will win a particular contract.

Competition Issues continued



- **Disclosures and exchanges** –whether direct or indirect of competitively sensitive information to facilitate cartel conduct and are therefore also treated as very serious infringements of competition law for e.g. coordination with other trade associations on terms of membership.
- **Cartels**—agreements where competitors in the same market agree to fix prices, share markets, rig bids or limit production or supply and to also keep existing and potential competitors from entering a market or from reaching their full potential.
- **Collective boycotts or other coordinated measures** intended to eliminate competitors.
- **Anti-competitive mergers**

The background of the slide is a dense field of 3D-rendered numbers. The numbers are in two colors: white and orange. They are scattered across the frame, with some appearing in the foreground and others receding into the background, creating a sense of depth. The numbers are of various sizes and orientations, some standing upright and others tilted. The lighting is soft, casting gentle shadows and highlights on the numbers, giving them a realistic, three-dimensional appearance. The overall composition is abstract and modern.

Update on
the work of
the FTC for
the past year

A Year in Merger Review (January 16th 2022-Present)



Merger Number	Sector(s) Involved	Status of Merger
Merger 1	Energy	Approved
Merger 2	Food and Beverage: Manufacturing and Distribution	Approved
Merger 3	Business/Commercial Properties	Approved
Merger 4	Energy	Approved
Merger 5	Power Generation	Referred to a Regulatory Agency
Merger 6	Insurance Sector	Referred to a Regulatory Agency
Merger 7	Food and Beverage: Manufacturing and Distribution	Approved
Merger 8	Aviation	Approved
Merger 9	Pharmaceuticals/Health Care	Approved
Merger 10	Industrial Engineering and Construction (Internal Re-structuring)	Approved
Merger 11	Manufacturing and Distribution (Internal Re-structuring)	Approved
Merger 12	Chemicals (Internal Re-structuring)	Approved
Merger 13	Industrial Gases	Approved



- ❑ A Guide to the Fair Trading Act to be published.

Virtual Stakeholder Sensitization Sessions/Meetings



- THA
- SMEs
- Supply Chain, Shipping, Maritime and Related Industries
- Tobacco
- Corporate Counsel, Private Organizations
- Private Bailiffs
- Pharmaceutical and Health Care Industry
- Energy and Energy Services Industry

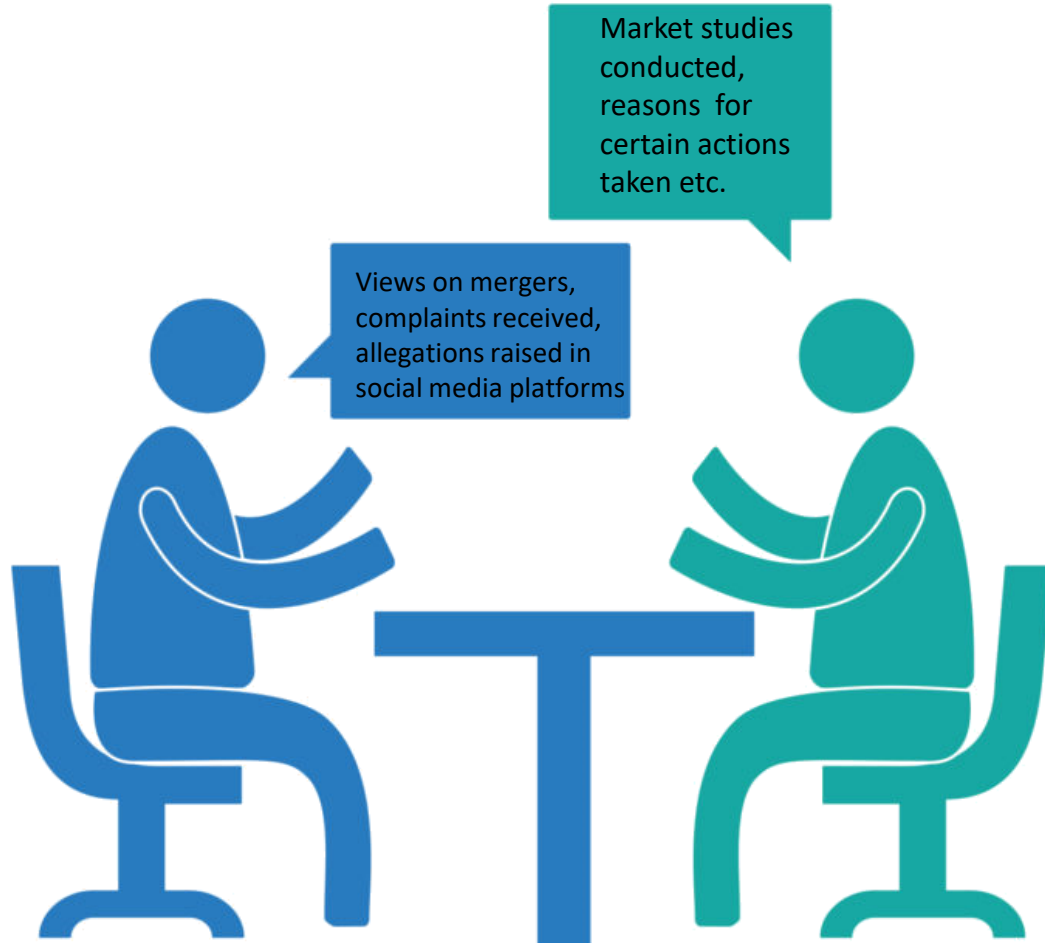
Complaints & Investigations



- To date there has been no formal complaint nor any FTC initiated one.
- Presently no investigations are taking place.

Cooperation with Government Ministries/State Enterprises

- The Office of the Attorney General
- Ministry of Health
- Ministry of Energy and Energy Industries
- Ministry of Agriculture, Land and Fisheries
- Ministry of Works and Transport
- Tobago House of Assembly
- Tobacco Control Unit
- Airports Authority of Trinidad and Tobago
- Port Authority of Trinidad and Tobago





Compliance of State Counsel with FTA

KNOW YOUR ROLE

- Provision of advice
- Development of Internal Policies/Procedures
- Public Procurement Processes
- Legislative Drafting/Amendments and Regulations
- Review of agreements with suppliers/vendors
- Review of Treaties/Conventions/Framework Agreements

Is it Cheating or Competing? It's your business to know the difference

Action Item 1: Review your Agreements



- **Agreements with Competitors**- some types of agreements entered into between competitors such as information exchange agreements or joint purchasing or selling may have the effect of preventing, restricting or distorting competition in breach of the Act.
- **Agreements with Non-competitors**—agreements with suppliers or distributors could also be anti-competitive in nature if they contain certain types of provisions such as resale price maintenance or exclusivity provisions.
- **Look out for key/buzz words/phrases:**
 - Grants exclusive rights for a supplier to provide goods or services.
 - Establishes a license, permit or authorization process as a requirement of operation.
 - Limits the ability of some suppliers to provide a good or service.
 - Significantly raises cost of entry or exit by a supplier.
 - Creates a geographical barrier for companies to supply goods, services or labour or even invest capital.
 - Exempts the activity of a particular industry or group of suppliers
 - Limits the ability of consumers to decide from whom they decide to purchase from

This list is not exhaustive



Is it Cheating or Competing? It's your business to know the difference

Action Item 2: Mind Your Language

- Communication does not have to be effective; the intent to distort competition is sufficient.
- Communication can take the form of writing (letter, email, social media post), verbal or a gentleman's agreement.
- Don't speculate whether an activity is legal.
- Don't imply you have "inside" or "confidential" on a competitor.
- Don't use ambiguous or inappropriate language for example, market dominance.
- Don't communicate with your competitor without a legitimate business reason.
- Don't communicate with your competitor indirectly e.g. via a common supplier.



Is it Cheating or Competing? It's your business to know the difference

Action Item 2: Mind Your Language continued



- **Forms of Competitor Contact include:**

- Direct contacts with competitors (phone and one-to-one)
- Market Research
- Personal Life
- Connections through previous employments
- Trade/Industry associations

- **Information that should not be shared**

X Information on prices, price formulae, costs, business strategy, rebates, discounts, volumes, productivity levels

X Information on customers, suppliers, marketing strategy, sales volumes and targets

X Future strategy and plans

- **Information that can be shared**

- ✓ Published industry statistics
- ✓ Annual reports and information that is already in the public domain
- ✓ Legislative developments
- ✓ Historic cost and sales data



Is it Cheating or Competing? It's your business to know the difference

Action Item 3: Pay attention to your internal procurement practices and processes



- **Bid Rigging and Collusive Tendering-Warning Signs in Documents Submitted**
 - Similar anomalies in documentation
 - Same type of paper
 - Same misspellings and grammatical errors
 - Handwriting
 - Wording
 - Calculations and miscalculations
 - Alterations
 - Bids come from the same place (from the same fax number or email address)
- **Similar prices are quoted from different suppliers**
 - The same price for a long period of time
 - Previously different from one another
 - Increased price and it is not justified by increased cost
 - Eliminated discounts especially in a market where discounts were previously given
 - A large difference between the price of a winning bid and other bids



- **Observed after the call for bids**

- Same supplier is often the successful bidder
- Winning bidder does not accept the contract
- Winning bidder subcontracts work to unsuccessful bidders
- Significant difference between price of winning bid and other bids
- A bidder seems to have knowledge of its competitor's confidential bid
- Pattern suggesting rotation of successful bids among several suppliers

- **Awarding Contracts**

- Avoid splitting contracts between suppliers with identical bids.
- Establish a complaint mechanism for suppliers to voice competition concerns.
- Ask questions if prices or bids don't seem to make sense

Staff involved in procurement activities, investigators and auditors should all understand the different forms of bid rigging, and should know what signs to look out for in order to detect this behaviour.



Is it Cheating or Competing? It's your business to know the difference

Action Item 4: Watch out for signs of abuse of dominant position



- Examples of behaviour that could amount to an abuse by a business of its dominant position include:
 - Imposing unfair trading terms, such as exclusivity;
 - Excessive, predatory or discriminatory pricing;
 - Refusal to supply or provide access to essential facilities; and
 - Tying – i.e. stipulating that a buyer wishing to purchase one product must also purchase all or some of their requirements for a second product from the dominant supplier;
 - Removing competing products from retail outlets;
 - Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

These are no more than examples, and are not exhaustive

- **The FTC 's Considerations:** The dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets.
- The abusive conduct must cause the anticompetitive effect. Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur.



Is it Cheating or Competing? It's your business to know the difference

Action Item 5: Watch out for signs of cartel behaviour



- There are a number of signs that may indicate that a cartel is operating.

Look out when the supplier:-

- Raises prices by the same amount and at around the same time
- Offers the same discounts or have identical discount structures
- Quotes or charges identical or very similar prices
- Refuses to supply a customer because of their location,
- Uses give-away terms or phrases, such as:
 - 'the industry has decided that margins should be increased'
 - 'we have agreed not to supply in that area', and
 - 'our competitors will not quote you a different price.'

- The presence of these signs does not necessarily mean that a cartel is operating.



Is it Cheating or Competing? It's your business to know the difference

Action Item 6: Review your enterprise's operations



- Do your employees have **contact with your competitors** at industry events or otherwise?
- In your market, do **employees move frequently between competing businesses** and do you have people who have recently joined from competing businesses?
- Do your employees seem to **have information about your competitors'** prices or business plans?
- Are your **customers also your competitors**?
- Do you ever **work in partnership with your competitors**?
- Are you **entering into exclusive contracts for long periods** (five years or more)?
- Do your agreements contain **joint selling and purchasing provisions** with your competitors?
- Do your agreements contain requirements **to share commercially sensitive confidential information**, or to **collaborate with your competitors**?
- Does your enterprise **impose resale restrictions on retailers** that sell your products?
- Does your enterprise have **a large share of any of the markets** in which it operates in?



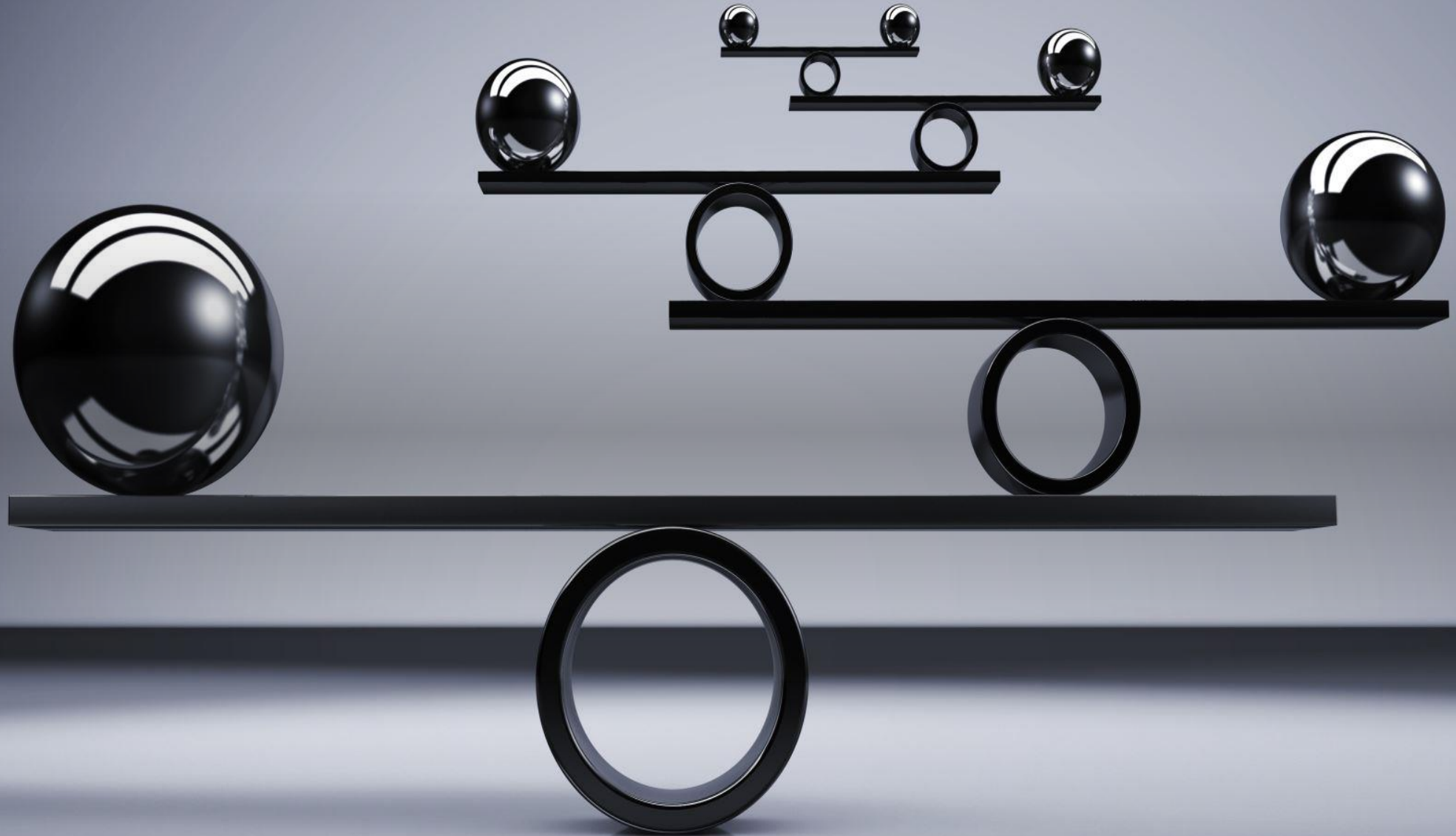
The Cost of Getting it Wrong

For participating in Anti-competitive agreements:



- 1997-La Lactaria Española S.A., a public enterprise attached to the Ministry of Agriculture, was sanctioned with a fine of € 1.01 million for leading a cartel of industrial dairy firms that agreed on the basic prices, quality bonuses and discounts for raw milk.
- 2010- Singapore: a State-linked ticketing services agency (owned indirectly the by the Ministries of Information/Communication/Arts, and Community/Youth/Sports) was fined for entering into exclusive dealing arrangements with event venues and event promoters.
- 2014-China-the NDRC imposed a fine of US\$18.6 million on three state-owned cement companies for forming a cartel to restrict output with the goal of preventing excessive competition.

Future Relationship with State Counsel



How can Ministries/State Enterprises work more strategically and efficiently with the FTC and in a constantly evolving environment



CO-OPERATION-INVESTIGATIONS



SHARING OF THE RELEVANT TECHNICAL EXPERTISE AND CAPACITY BUILDING SKILLS



SEEKING TO RESOLVE IDENTIFIED CONTRADICTIONS BETWEEN COMPETITION LAW AND OTHER LOCAL LAWS (INCLUDING AMENDMENTS) OR REGULATIONS



ASSISTANCE IN REQUEST FOR INFORMATION, MARKET STUDIES, SURVEYS OR DATA COLLECTION



FORWARDING INFORMATION OR COMPLAINTS RECEIVED THAT FALL WITHIN THE JURISDICTION OF THE FTC



623-2931 ext. 2202/2209/2212



tandtftc@gmail.com



www.tandtftc.org



Trinidad and Tobago Fair Trading Commission



**Questions or
comments?**



CONTACT US



THANK YOU