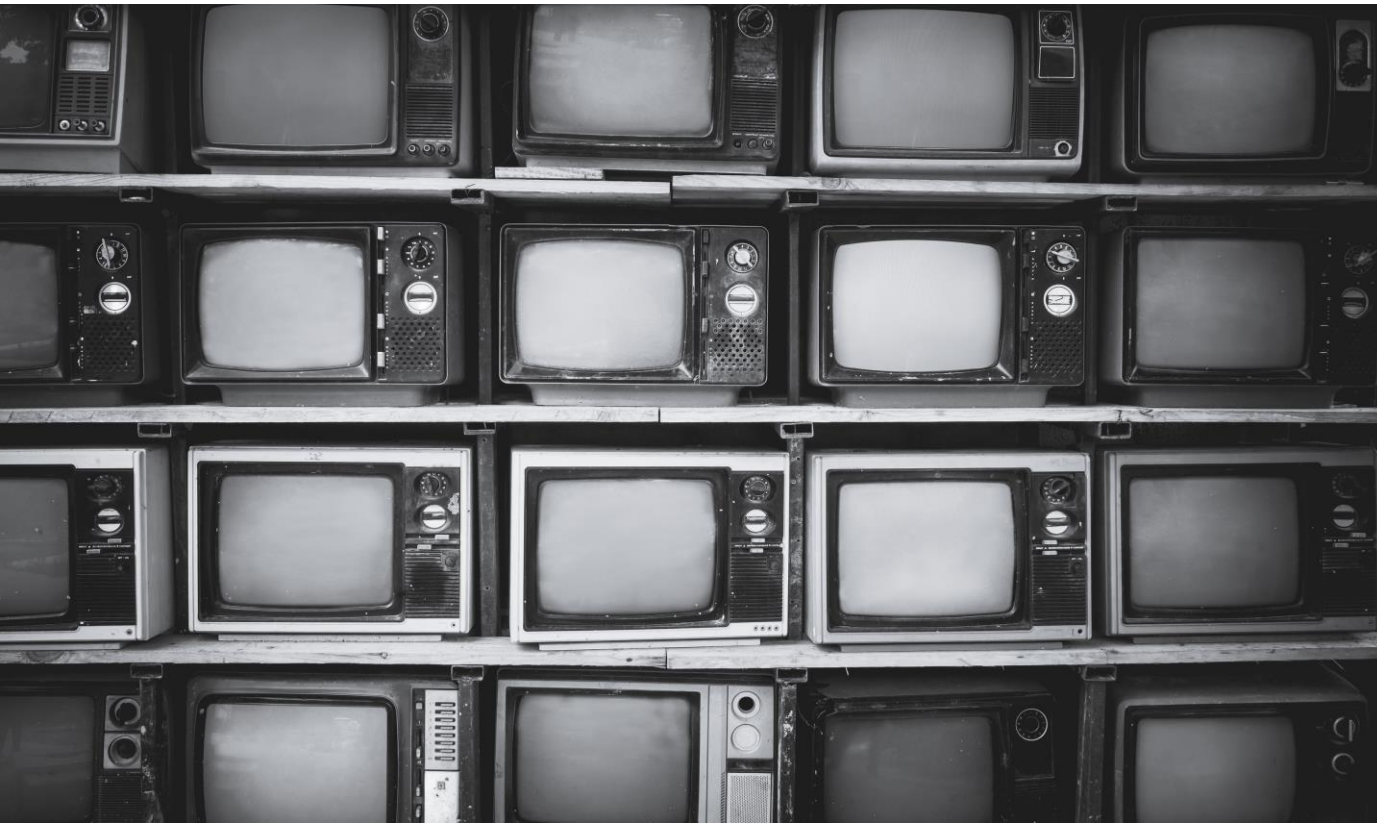


E-READINESS in the Caribbean: competition and sectoral cooperation and collaboration

Nievia Ramsundar
Executive Director, CARICOM
Competition Commission
To the ITU-D SG6/1 Workshop
“Trends in consumer protection
regulatory instruments to enable
Digital Transformation”
17th May 2023

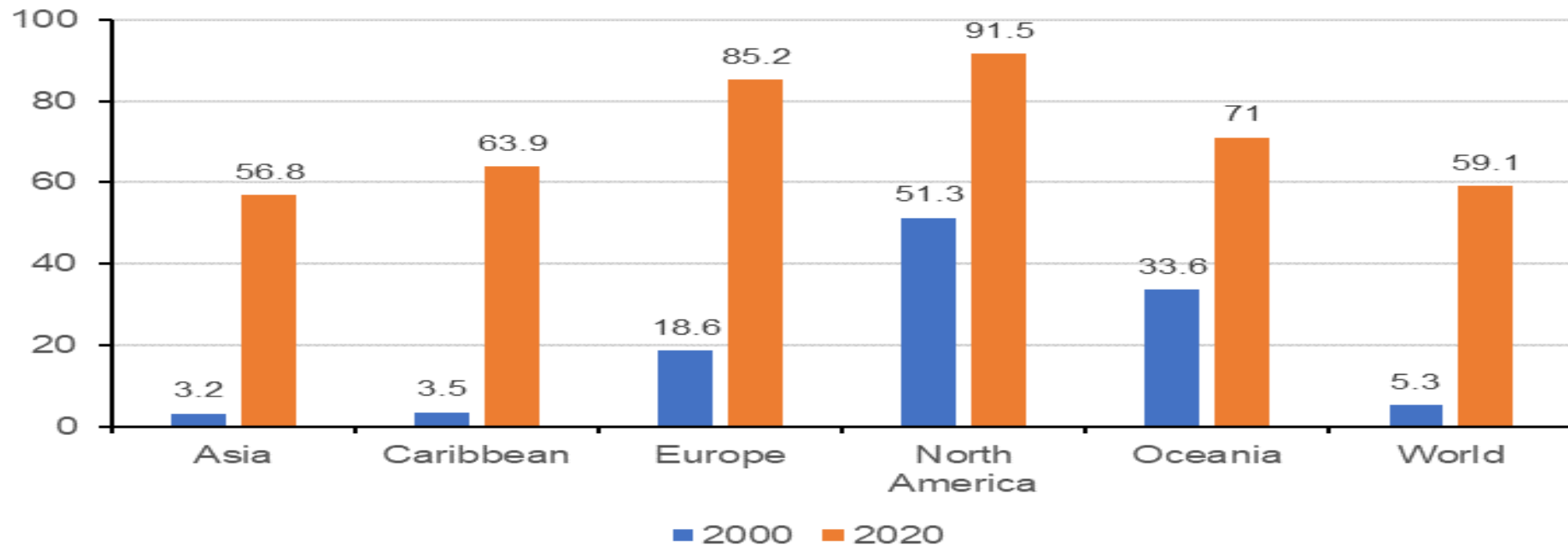


THE VIEWS EXPRESSED IN THIS PRESENTATION ARE
NOT REPRESENTATIVE OF THOSE OF THE CARICOM
COMPETITION COMMISSION AND DO NOT
CONSTITUTE LEGAL OR POLICY ADVICE

In the Caribbean, we are increasing our **USAGE** of the Internet:

- The percentage of individuals in the Caribbean using the Internet increased from 3.5% in 2000 to 63.9% in 2020.
- This compares favourably to the global average of persons using the Internet which stood at 5.3% in 2000 and increased to 59.1% in 2020.

Figure 1: Percentage of individuals using the Internet by region (2000 and 2020)

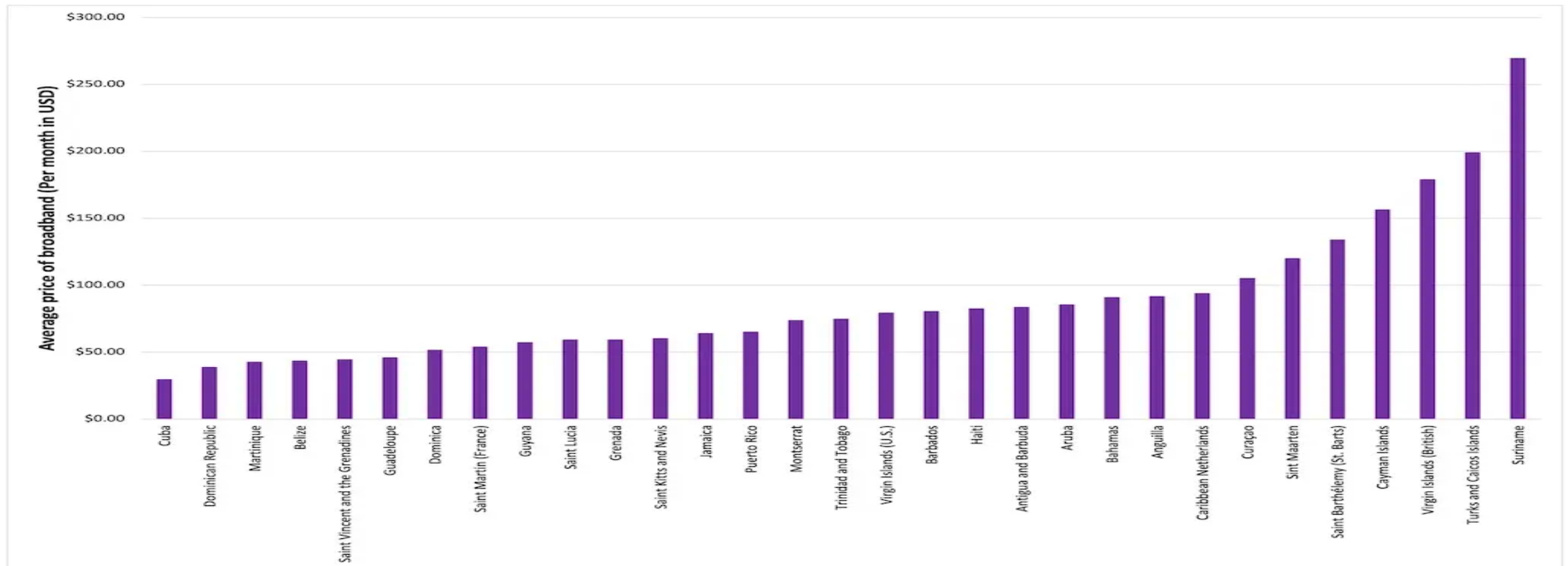


Data source: International Telecommunications Union (ITU)

We are **WILLING TO PAY** for it:

- The Cable, a UK company, published recent data for the period 2 January 2023 and 1 March 2023 on fixed broadband costs per month in USD.
- The lowest average price was recorded in Cuba, at USD 29.51, whilst the highest was recorded in Suriname, at USD 269.44. Across the region, the median price was USD 74.69.

(Graph Source below: The Cable)



And spend our **time** on it:

Highest time share spent on the internet came from Antigua and lowest came from Trinidad and Tobago.

Antigua and Barbuda	95.7%
Anguilla	81.6%
Bahamas	94.3%
Barbados	87.8%
Dominica	80.9%
Jamaica	82.4%
St. Kitts and Nevis	80.7%
St. Vincent and the Grenadines	84.9%
Trinidad and Tobago	79%

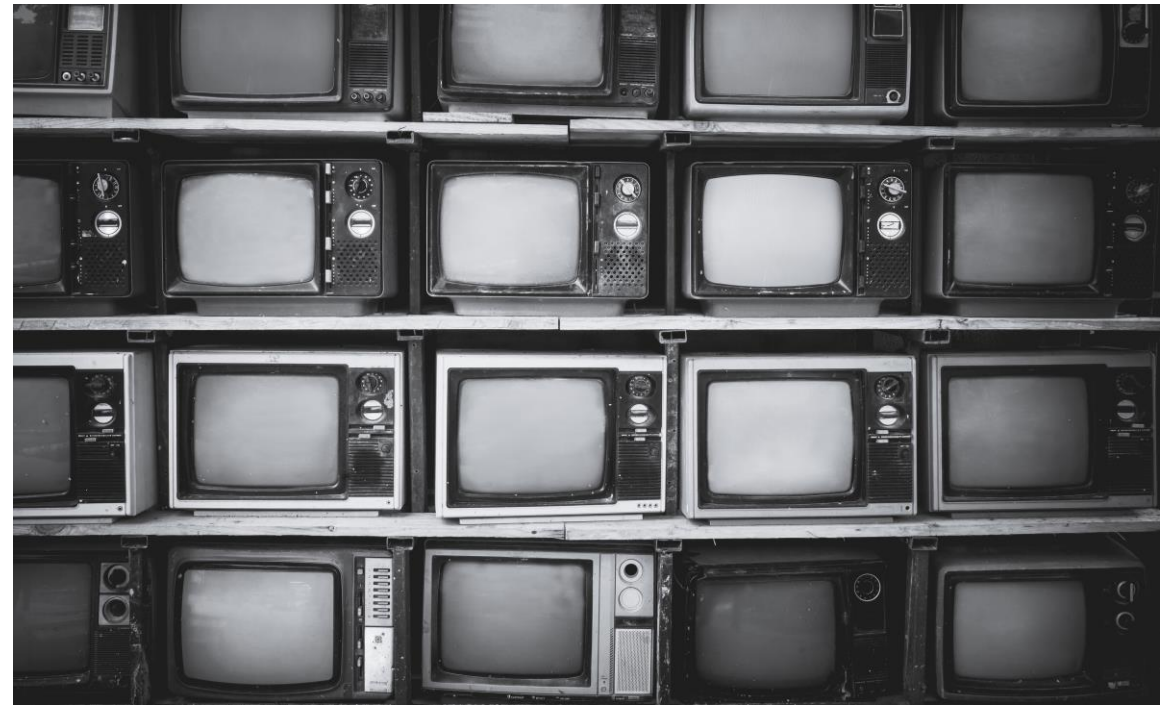


But are we **READY** for it?

- An early initiative taken by the Caribbean regarding e-commerce, could be said to be its General Undertaking in the penultimate article of the RTC 2001, Art. 239, to “**elaborate a Protocol**” on e-commerce.
- 22 years later, there is no protocol. **What else have we been doing?**
- This presentation scans existing legal provisions for e-transactions and postulates cooperation between diverse authorities to reduce unfairness to the consumer and increase market resilience.

Overview

- ✓ **Market regulation**
 1. Consumer Protection
 2. Competition Control
- ✓ **Sector Regulation**
 1. Sector specific
 2. Electronic Transactions
 3. Privacy and Data Protection
- ✓ **Sector and Competition Co-operation**
- ✓ **Challenges**
- ✓ **Getting to the next level**
- ✓ **Concluding Remarks**





Market regulation

in the Caribbean



Our **REGIONAL** governance

CARICOM is established by Revised Treaty of Chaguaramas (2001) (**RTC**), which is a **Common market and Customs Union** with a focus on enhanced coordination for economic policies and functional cooperation. In addition to the existing obligations agreed to in the Treaty, its members agree to policy statements to be subscribed to by Members via national legislation. Draft Model legislative texts are also submitted for guidance of Members in the preparation of national legislation. There is no community law but community policy. There is no supra – national telecommunications regulator but there is the Community Competition Commission (CCC) established in 2008 with enforcement mandate for competition matters and advocacy mandate for consumer protection.

The RTC is “directly applicable” to Member States as it binds the State as a matter of international law and is directly enforceable under the system established by the RTC and the CCJ. There is no “direct effect”; the RTC requires the transformation of regional law into national law. There is also no principle of ‘pre-emption’ or ‘supremacy’ clause.

OECS is established by the Revised Treaty of Basseterre 2011 (**RTB**). It is an Economic Union with unified financial and judicial governance. Customs matters still fall to the CARICOM. The RTB provides for fullest harmonisation and common positions. There is regional telecommunications authority but no regional competition commission.

Legal transformation is required as under the RTC, but there is a greater level of harmonisation is adoption and promulgation of policies and legislation amongst the OECS.

CARIFORUM Caribbean Forum of African, Caribbean and Pacific States; created in 1993 for position coordination between Caribbean, African, Pacific States and EU – Economic Partnership Agreement (EPA) executed 2008

ACS Association of Caribbean States Created in 1994 by States of broader Caribbean Basin and Latin America; functions to promote regional economic integration, coordination, cooperation, environmental preservation and friendly relations

1.a. Protection of the **CONSUMER**

Art. 186 RTC CCC

advocates for the enactment and enforcement of consumer protection laws.



Art. 184 + 185 RTC

Member States are required to encourage fair and effective competition in order to provide consumers with greater choice among goods and services at the lowest cost; promote the provision of adequate information to consumers to enable the making of informed choices; ensure the availability of adequate information and education programmes for consumers and suppliers; and provide adequate and effective redress for consumers.



The **Community Secretariat** implemented a CARICOM Rapid Alert System for the Exchange of Information on Dangerous (non-food) Consumer Good (CARREX). It is an information exchange mechanism, on preventive and restrictive measures taken by the Member States on consumer products found on the market that pose a serious risk to the health and safety of consumers. It was deployed for use by Member States in 2017.



The **CONSUMER PROTECTION BILL** was approved by the Community for the guidance of Member States in 2018.

1.b. Substantive **Protections and Redress** in Consumer Protection - Specific Legislation in the CSME

•‘**First generation**’ were enacted in the 1980’s in heavy regulated market environments, with price control, subsidies and tariffs, state involvement in commercial enterprise. Passive legislation as they may lack substantive rights and safeguards with absence of individual redress mechanisms and exclusive enforcement of the legislation with central government.

•“**Second generation**” found in markets with liberalization and privatization, stronger firm rivalry, little price and quantity regulation. More interventionist approach to ensure consumer welfare not sacrificed for perceived greater economic efficiency. Consumer redress arrangements in the form of individual complaints procedure together with an independent authority that is established to receive, investigate those complaints, and take relevant enforcement action to ensure compliance are key features. More updated features as distance selling may also be found.

•CARICOM Consumer Model Bill falls within this category. The 2 MS with first generation legislation do not have necessary protection in built, but are provided for in other legislation, (next slide).

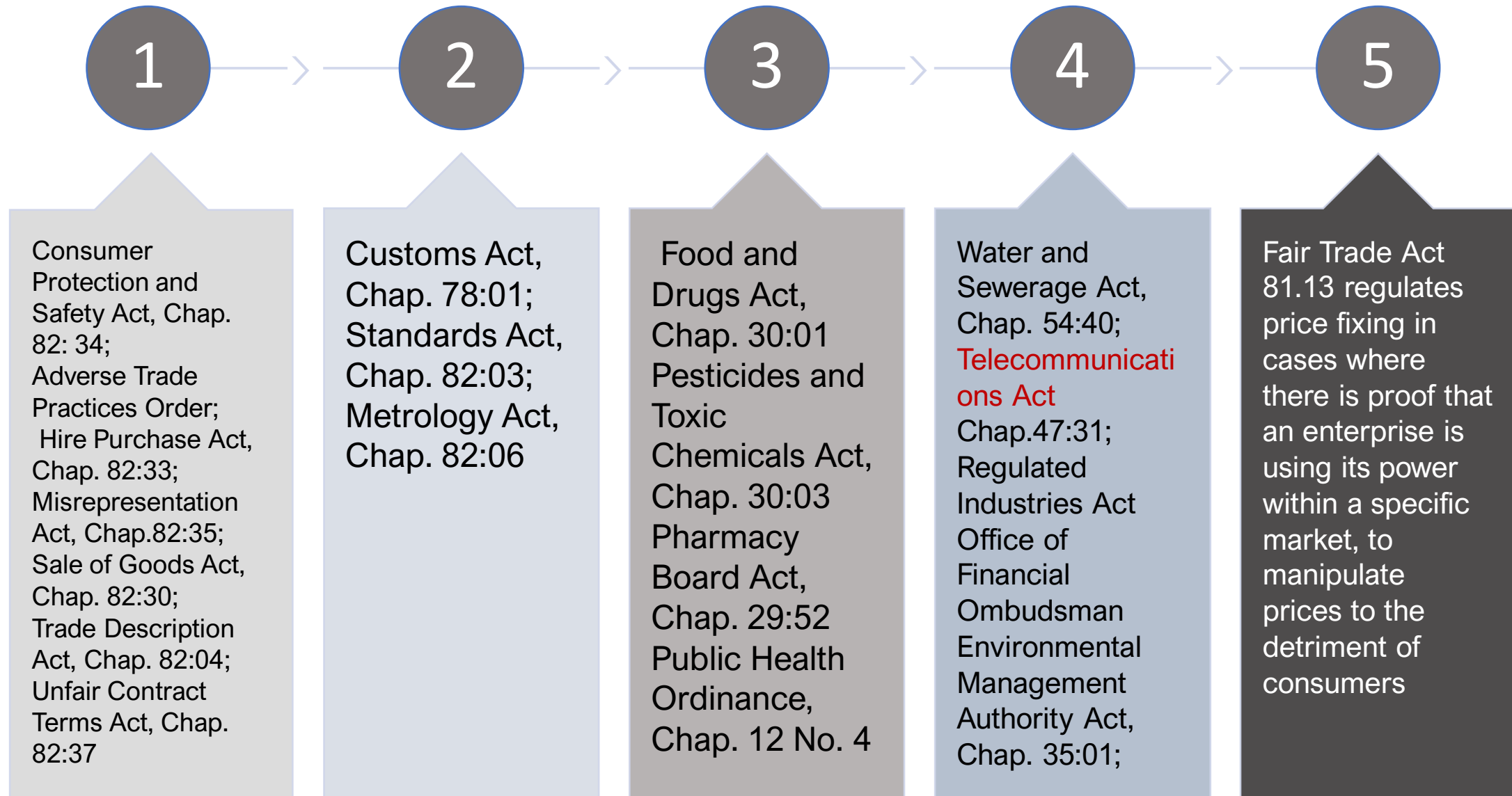
Member States	Legislation	Type	Prohibitions against unconscionable agreements/unfair trade practices	Distance Selling* Protections	Prohibitions against the supply of harmful/defective goods	Individual right of access to institutional redress mechanisms	Quality Standards for the supply of Goods or Services
Antigua & Barbuda	Consumer Protection & Safety Act, 1987	First generation	x	x	x	x	x
Barbados	Consumer Protection Act, 2002	Second generation	✓	✓	✓	✓	✓
Grenada	Consumer Protection Act, 2020	Second generation	✓	✓	✓	✓	✓
Guyana	Consumer Affairs Act, 2011	Second generation	✓	✓	✓	✓	✓
Jamaica	Consumer Protection Act, 2005	Second generation	✓	x	✓	✓	✓
Saint Christopher & Nevis	Consumer Affairs Act, 2021	Second generation	✓	✓	✓	✓	✓
Saint Lucia	Consumer Protection Act, 2016	Second generation	✓	✓	✓	✓	✓
Saint Vincent and the Grenadines	Consumer Protection Act, 2020	Second generation	✓	✓	✓	✓	✓
Trinidad & Tobago*	Consumer Protection & Safety Act, 1985 and others	First generation	✓	x	x	✓	x
CARICOM Draft Model Consumer Protection Bill	CARICOM Draft Model Consumer Protection Bill	Second Generation	✓	✓	✓	✓	✓

1.c. Sample of Legislation with Consumer protection purposes in the CSME

In addition to general consumer protection, provisions also exist in consumer specific additional legislation or sector/transaction specific legislation.

CSME Member State	Dedicated Consumer Protection Legislation	Sample of other laws relevant to consumer protection
Antigua & Barbuda	Consumer Protection & Safety Act	Sale of Goods Act Supply of Goods & Services (Implied Terms) Act Unfair Control Terms Act
Barbados	Consumer Protection Act Consumer Guarantees Act	Bills of Sale Act Control of Standards Act Weights & Measures Act
Belize	N/A	Sale of Goods Act Hire Purchase Act Public Utilities Act
Dominica	N/A	Supply Control Act Standards Act Noxious & Dangerous Substances Act
Grenada	Consumer Protection Act	Food Safety Act Price Control Act Hire Purchase Act
Guyana	Consumer Affairs Act	Guyana National Bureau of Standards Act Food & Drug Act Weights & Measures Act
Jamaica	Consumer Protection Act	Security Interest in Personal Property Act Electronic Transactions Act Hire Purchase Act
Saint Kitts & Nevis	Consumer Affairs Act	Consumer Credit Act Telecommunications Act Sale of Goods Act
Saint Lucia	Consumer Protection Act	Distribution & Prices of Goods Act Telecommunications Act Metrology Act
Saint Vincent & the Grenadines	Consumer Protection Act	Supplies Control Act Electronic Transactions Act Sale of Goods Act
Suriname	N/A	Economic Offences Law Technical Regulations on Labelling, Food Hygiene and Safety Law on Electronic Legal Transactions
Trinidad & Tobago	Consumer Protection & Safety Act	Unfair Contract Terms Act Electronic Transactions Act Sale of Goods Act

1.d.Trinidad and Tobago – legislative **fragmentation** sample



2.a. COMPETITION regulation

Consumer choice is optimized by a healthy level of contestability in the market. CL is important to regulate supply side conduct that could also affect demand.

The **Part VIII, RTC** establishes a 3-tier implementation approach – Community established policy, regional enforcement by CCC and national enforcement by Member States.

The OECS competition policy is implied to be that of the wider CSME, but a formal resolution is still required.

Art. 169, RTC states that the benefits expected from the establishment of the CSME should not be frustrated by anti-competitive business conduct and requires the Community to: Pursue the objectives of promoting and maintaining competition; Prohibit anti-competitive business conduct and **Promote consumer welfare and protection of consumer interests**

The RTC does not establish a body of “Community competition law” but rather **Community competition policy based upon “rules of competition” in Part VIII, RTC.**

The RTB does not establish either CL or CP. It provides that its Members (original treaty) pursue joint policies particularly in the field of – regulatory and competition authorities, and recognise that to achieve the objectives of the Union, the activities of Member States shall include – a common competition policy

Member States	Legislation	Restrictive Agreements	Abuse of Dominance	Merger Review	Cooperation with the Commission
Jamaica	Fair Competition Act	✓	✓	x	x
Barbados	Fair Competition Act	✓	✓	✓	✓
Trinidad & Tobago	Fair Trading Act	✓	✓	✓	✓
Guyana	Competition & Fair Trading Act	✓	✓	x	✓
CARICOM Draft Model Law on Competition	CARICOM Draft Model Law on Competition	✓	✓	✓	✓

2.b. Comparative Review of **PILLARS OF COMPETITION** Provisions in the CSME – 4 out of 13

In 2003, CARICOM agreed to a template Fair Trade Bill to guide its Members for the establishment of a Fair Trade Commission in their jurisdiction to facilitate:

- (1) national enforcement of competition policy
- (2) regional enforcement by the CCC of cross border transactions or transactions with cross border effect, or conduct, which can prejudice trade or prevent, restrict or distort competition in the CSME
- (3) Cooperation by the national FTC with the CCC

Jamaica already had 1993 legislation. Barbados (2002), Guyana (2006) and Trinidad (2006, wef 2021) in that order effected legislation and commission.

Business Conduct	Jamaica Fair Competition Act	Trinidad & Tobago Fair Trading Act	Barbados Fair Competition Act	Guyana Competition & Fair Trading Act	CARICOM Draft Model Law on Competition
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..."	s.17(1): "all agreements...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."	s.21(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	s.25(4): "...that the proposed merger would not affect competition or be detrimental to consumers or the economy."

2.c. Comparative Review of PILLARS OF COMPETITION Provisions in the CSME – 4 out of 13

- CL provides for:
 - (i) anti-competitive assessment of restrictive agreements of “object” or “effect” of conduct under investigation, which results in “substantial lessening of competition”;
 - (ii) impediment of effective competition for dominance cases; and
 - (iii) mergers – restriction of competition (TT) and detriment to consumer in BB and Model Bill.
- The Model Bill is undergoing amendment to include merger provisions for cross border transactions.



Sector regulation

in the Caribbean



3.a. **SECTOR SPECIFIC** Regional policy - jurisdiction

RTC, Art. 54, COTED shall promote:

- increased investment in services,
- competitiveness in the modes of delivering services;
- enhanced enterprise and infrastructural development, including that of micro and small service enterprises;
- **the efficient provision of infrastructural services including telecommunications;**
- the development of services which enhance cross-sector competitiveness;
- **the facilitation of cross-border provision of services which enhance the competitiveness of the services sector;**
- the development of informatics and other knowledge-based services

RTB, Art. 25.1 –Telecommunications and Information Technologies
...shall implement policies to facilitate the **promotion of competition in the telecommunications and information technologies sectors** through an open, transparent and harmonized regional approach.

MEMBER STATES	Dedicated Competition Legislation	Sector-Specific Competition Provisions
Antigua & Barbuda	N/A	Telecommunications Act
Barbados	Fair Competition Act Fair Trading Commission Act	Telecommunications 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 Telecommunications Act
Montserrat	N/A	Info-Communications Development Act
Saint Christopher & Nevis	N/A	Telecommunications Act Electricity Supply Act Public Utilities Act
Saint Lucia	N/A	Telecommunications Act Electricity Supply 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

3.b. Sector-Specific Regulation in CSME

- There is a strong preference for sectoral legislation in the Members. This may be due to a philosophy that regulation allows more governmental control – “independent” bodies, but Boards government selected, Ministers provide general policy direction; where there is discretion of the regulator or supervisor in decision making, such discretion is exercised by the Board on Ministerial or Cabinet instruction.

- This table excludes financial supervisory legislation or securities legislation. ECTEL has finalised draft model bill for electronic communications and electronic regulations. Thus far, SKN and SVG have passed the Electronic Communications Act 2022 but these are not yet in force.

- Most sectoral legislation contains consumer remit to sector regulator. For MS who also do not have competition legislation, the lack of legislated cooperation mechanisms between internal sectoral enforcement and regional competition enforcement (CCC) means a high exposure to and lack of redress for anti-competitive conduct.

- The overall picture is **fragmented** when it comes to competitive control – concerns of relevance of competition to national interests as opposed to regional market control have been raised, as well as the more significant issue of institutional costs to support national competition commissions.

4.a. CARICOM MEMBER STATES **ELECTRONIC TRANSACTIONS AND CYBERSECURITY** LEGISLATION

CARICOM MEMBER STATE	ELECTRONIC TRANSACTIONS LEGISLATION	CYBERCRIME/ COMPUTER MISUSE LEGISLATION	ELECTRONIC RECORDS LEGISLATION
Bahamas	Electronic Communications and Transactions Act	Computer Misuse Act	NO LAW
Grenada	Electronic Transactions Act, No. 21 of 2013	Electronic Crimes Act No. 23 of 2013	Electronic Filing Act No. 12 of 2013 Electronic Evidence Act No.13 of 2013
Belize	Electronic Transactions Act Chapter 229:03	Cybercrime Act Chapter 106:01	Electronic Evidence Act Chapter 95:01
St. Vincent & Grenadines	Electronic Transactions Act of 2015	Cybercrime Act of 2016	NO LAW
Saint Christopher and Nevis	Electronic Transactions Act Electronic Communications Act	Electronic Crimes Act	NO LAW
Commonwealth of Dominica	Electronic Transactions Act, 2013 Electronic Funds Transfer Act, 2013	NO LAW	Electronic Filing Act, 2013 Electronic Evidence Act, 2010
Antigua and Barbuda	Electronic Transactions Act, 2013 Electronic Transactions (Amendment) Act, 2016	Electronic Crimes Act, 2013 Electronic Crimes (Amendment) Act, 2018 Electronic Crimes (Amendment) Act, 2019 Electronic Crimes (Amendment) Act, 2020	NO LAW
Saint Lucia	Electronic Transactions Act	Computer Misuse Act Criminal Code Act 9 of 2004	NO LAW
Montserrat	Electronic Transactions Act 2009, No. 7 of 2009	Penal Code Amendment Act No. 12 of 2022	NO LAW
Haiti	Décret portant sur la signature électronique (Decree on Electronic Transactions)	NO LAW	NO LAW
Barbados	Electronic Transactions Act	Computer Misuse Act	NO LAW
Guyana	NO LAW	Cybercrime Act 2018	Access to Information Act
Jamaica	Electronic Transactions Act	Cybercrimes Act	NO LAW
Suriname	Wet Elektronisch Rechtsverkeer [LAW of September 24, 2017	NO LAW	NO LAW
Trinidad and Tobago	Electronic Transactions Act Chap. 22:05 Electronic Payments into and out of court No. 14 of 2018 amended by No. 5 of 2021 E-money Issuer Order 2020, pursuant to Financial Institutions Act 2008	Computer Misuse Act Chap 11.17 Electronic Transfer of Funds Crime Act Chap. 79.51	NO LAW

4.b. PRIVACY AND DATA PROTECTION in CARICOM Members

•All Member States in the Caribbean have a **constitutional right to privacy**; but 6 out of 15 MS have no data protection law.

•Data protection legislation enacted has varying degrees of principles-based protection. For those MS who have data protection laws, the model chosen is one which promotes free flow of data but with necessary safeguards. Not all legislation fully proclaimed, nor Information Commissioners appointed.

•There are no safeguards or protections for data in the 6 MS with no legislation. Note that Member State Guyana published its draft Data Protection Bill for public consultation in April 2023. 4 OECS MS will benefit from new harmonized laws under the CARDTP project.

•The RTC and RTB have no specific obligations regarding data flows or personal information; there is no regional policy of **cross border data flows**.

•Some Members have Interception of Communications legislation or similar which will also impact the overall implementation of any data protection and privacy regime. Some territories are also considering or have considered Children’s legislation establishing specific institutions to address children’s issues which may include some cross over responsibility for digital issues of abuse.

CARICOM MEMBER STATE	CONSTITUTIONAL RIGHT TO PRIVACY/RESPECT FOR PRIVATE LIFE	PRIVACY/ DATA PROTECTION LEGISLATION
Bahamas	YES	Data Protection (Privacy of Personal Information) Act, CH.324A
Grenada	YES	NO LAW
Belize	YES	Data Protection Act, No. 45 of 2021
Saint Vincent and the Grenadines	YES	Privacy Act of 2003
Saint Christopher and Nevis	YES	Data Protection Act, No. 5 of 2018
Commonwealth of Dominica	YES	NO LAW
Antigua and Barbuda	YES	Data Protection Act, 2013
Saint Lucia	YES	Data Protection Act, No 11 of 2011 [partially proclaimed by Statutory Instrument No. 4 of 2023]
Montserrat	YES	NO LAW
Haiti	Privacy of communications	NO LAW
Barbados	YES	Data Protection Act, 2019
Guyana	YES	NO LAW
Jamaica	YES	Data Protection Act (No. 7 of 2020)
Suriname	YES	NO LAW
Trinidad and Tobago	YES	Data Protection Act, 2011 [partially proclaimed by Legal Notice No. 2 of 2012 and Legal Notice No. 220 of 2021]



Sector and Competition Co-operation



5.a. Sectoral and competition cooperation

- The previous discussion illustrates that for of digital transformation, there is fragmented landscape of separate regulators and supervisors for competition, consumer matters, data protection and privacy, electronic transactions (and finance).
- It is recognised that competition authorities protect the competitive process and are not firm, transaction or sector specific. Certain conducts under the three established pillars are prohibited, and intervention is based on a case – by – case basis with regard to the level of infringement. Competition control is a horizontal action across all economic activities.
- Sector regulation is transaction specific and is often in the CSME subject to Ministerial “policy” directions. There is a risk of becoming captured by specific firms or issues.
- However, actions by both competition and sector regulators can be complementary or else the results would be uncoordinated. Collaboration therefore avoids “double jeopardy” (*ne bis in idem*).
- In **Bpost**, the CJEU held that cooperation between competition and sector authorities is required where cases of the same facts under scrutiny but by different authorities. (**Bpost** provided exceptions where the double proceedings were (i) under different legislations and distinct legitimate interests, (ii) proportionate duplication and penalties and (iii) duplication is strictly necessary and predictable in that firms are aware that they will be required to comply with varied obligations.
- Recently in **Meta**, Advocate General Santos stated that even in the absence of clear rules, the competition authority has the duty to consult with the sector regulator and possibly await the outcome of that consideration prior to its own action.

TRINIDAD

Fair Trade legislation exempts telecommunications, financial institutions and utilities. It requires the RIC to enforce competition issues under the FTA for its regulated industries. All companies under the Telecommunications are exempted from the FTA. The FTC has legislated collaboration mechanisms with the CCC.



BARBADOS

The situation is different in that it has a fused regulator for competition, consumer and utilities (including telecommunications) It also has an effective merger control regime and collaboration mechanisms with the CCC.



GUYANA

There is a new Bill for its Merger Control Regime in consultation to complement its CFTA. Telecommunications, utilities and financial sectors are exempted under the proposed MCR and the CFTA. The PUC is the legal monitor for the first two sectors. Its Telecommunications Act 2016 was finally promulgated in 2020. It prescribes the PUC with competition control for the telecommunications sector within the TA 2016, and public utilities and regulated sectors under the PUC legislation. Further, the onus of information provision for competition matters (on all 3 pillars and consumer welfare) in these CFTA excluded areas is CCAC to PUC. Interestingly, *regarding matters in these areas, the PUC shall be and shall perform the responsibilities, functions and powers of the national competition authority of Guyana with respect to Chap. VIII. RTC.*

5.b. The relationship of Sector-Specific Communications and competition Regulation in CSME Membership

5.c. Sectoral and competition cooperation: Jamaica– case study on **jurisdiction**

- Conflict of regulatory powers arose in **Jamaica Stock Exchange Case, 2001** – Listing rules of the JSE as allowed by the Securities Act were challenged under the Fair Competition Act. Through an examination of applicable exemptions in the legislation that would reveal the legislative intent as to which should apply, the Jamaica Court of Appeal held it would be **a conflict to apply both pieces of legislation to the JSE**. Therefore, this could be said to have been a traditional application of *ne bis in idem*, where there is either a prior decision on the merit of the case and subsequent proceedings must concern the same material facts of the first, see *Portland and ors v. Commission* (2004)
- In the **Digicel/Claro Case, 2017** – **s. 5 of the Telecommunications Act** provided that after consultation with the FTC, and the OUR DETERMINES that a matter or any aspect thereof is of (a) substantial competitive significance to the provision of the specified service and (b) falls within the functions of the FTC under the FCA, the OUR SHALL refer the matter to the FTC. **s. 5 of the FCA** provides the FTC to conduct investigations on its own initiative or on the request of another. **S. 17 FCA** provides for prohibited anti-competitive conduct. The OUR approved a merger between Digicel and Claro under s. 17 TA, which finding was then challenged under the FCA. The matter went to the Privy Council UK as the appellate court.
- The PC upheld the Court of First Instance on all 3 grounds: (1) that the FTC had the jurisdiction to intervene into the telecommunications market; (2) that s. 17 of the FCA, referred to mergers although not specifically, but by the establishment of a regime of control over a class of transactions which includes mergers; and (3) s. 17 of the FCA applied to transactions approved by the Minister with responsibility for telecommunications, since his approval does not refer to provider's obligations to refrain from conduct prohibited by Part III of the FCA. Therefore, on a review of the extent of the mandate under the relevant legislation and sufficiency of the regulatory tools provided, the PC held that **there would be no conflict in applying both pieces of legislation to the merger**.
- This case, although of great import to the FTC, should be viewed carefully as the other MS with competition legislation have specific provisions on competition jurisdiction or lack thereof to their sectoral matters. For those without such clarity, it may be necessary to review the exemptions and powers.

5.d. OECS move towards sectoral cooperation – **electronic communications**

- The ECTEL Treaty was amended by Protocol in 2019 to facilitate the recommendation of the proposed Electronic Communications Bill to ECTEL Member States. Thus far, SKN (2021) and SVG (2022) have passed the legislation but not yet in force.
- Key changes to the previous Telecommunications legislation allows for an update to NTRCs powers and ECTEL for **sectoral competition** matters, electronic consumer issues and ensure compliance by licensed operators of protection of personal data.
- It however preserves mandatory compliance with directions of Minister to the relevant NTRC on policy in relation to electronic communications.**
- Since the RTC and RTB are silent on regional or national sector to competition collaboration, the Bill refers to the right of ECTEL to consult with “a competition body”**

5.e. Sectoral collaboration and cooperation – way forward

- It has been recognised that regional [trade or economic] agreements that have components relating to competition enforcement and which create supra-national bodies with the power to advise, investigate and/or make binding decisions are often regarded as the ‘gold standard’ of regional co-operation, [one of which is CARICOM]. When they function effectively, they have the potential to facilitate effective and efficient enforcement co-operation, foster economic integration and increase intra-regional trade.

OECD/ICN Joint Report on Cooperation, 2021

- Even with FTA exemptions and sector-specific legislation, the regional and national FTCs addressed 19 abuse of dominance matters out of 37, and 5 mergers out of 38, in the fields of Finance and Insurance, and ICT during the period of 2019-2021.
- Given the sectoral approach for the most part to competition issues in the electronic communications sector and indeed most sector regulatory systems, **amendment of the RTC** is required to include powers of **collaboration and cooperation** between CCC and national, sub-regional and regional sector regulators for information sharing or enforcement assistance of cross border conduct. In instances of specific mandate, similar legislative provisions as Guyana’s new TA would assist cross border competition control.



Challenges



1. e-Trade (dis)enablers - Customs and Post

Customs

- Time to clear (Hrs) - AB 109, BB 127, JA 136 and TT 122

Mugica et al (2018)

- Cost to clear (USD) – AB 646, BB 1926, JA 996 and TT885 (GRN1306)

World Bank Doing Business (2020)

Postal

- All ranked over 100 with exception of JA(72) and BB (93), based on UPU 2IPD index, following reach, reliability, relevance, resilience

UPU Postal Development Report 2020



2. Imbalances

- The **UN 2020 E-Government Survey** cites the main barriers to SIDS progress as resource constraints, concerns on data quality, security and privacy – (all of which have a high consumer welfare factor).
- The **2022 Digital Economy for SIDS** report, evaluated 3 groups, including the Caribbean, on 3 indices – human capital, online services and telecommunications infrastructure. Although lower than rest of world, the Caribbean ranked higher than the other 2 SIDS groups in all indices.
- PwC Digital Nation Survey 2022** reviewed use of government online services. 66% advocated use, 46% accessed government via online channels, but 51% were neutral on government use of data responsibly.
- Despite this, and the fragmented legislative and policy landscape, Caribbean countries scored high to middle in the E-government development index (EGDI) with BB at 62 and TT at 81, with the lowest ranking Belize at 136 and Haiti at 180.

3. (dis) - Integration

- Earlier discussion showed 4 integration movements – purpose or negotiation driven, not “unity” driven, except for the OECS. The harmonious decision making does not directly flow to the larger integration.
- There remain political tensions of LDCs economies versus MDCs.
- Delay in Member State consultations and approvals of policies or legislative guidance.
- Lack of political will for regional (cross border) competition market oversight in preference to laissez faire approvals.




Getting to the next level




Regional - policy (1)

activity towards electronic transactions Finance and security

The foregoing legislative scans were the combined result of consultancies and working groups which crystallised sound recommendations for Member States to consider when constructing their national legislation. With new developments in the digital era, further work has commenced to strengthen frameworks and increase trust and confidence in the integrity of doing business digitally:



CONSULTANCY TO DEVELOP A COMMON FINANCIAL CONSUMER PROTECTION REGIME FOR CARICOM MEMBER STATES – commenced in **2022**, will establish recommend draft policy and legislative texts for financial consumer protection, including “vulnerable consumers”



CONSULTANCY FOR CAPACITY DEVELOPMENT OF CARIFORUM MEMBER STATES ON FINANCIAL COMPLIANCE, ASSET RECOVERY AND CYBERCRIME – focuses on asset recovery, sound prosecution, judicial training and strengthening regional coordination. The first 2 projects completed in 2020 with others in train

Regional - activity towards electronic transactions – structural policy (2)

- CARIBBEAN DIGITAL TRANSFORMATION PROGRAMME (CARDTP) is a massive digital transformation project targeted to the OECS, Commonwealth of Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines.
- Multi-tiered approach to infrastructural projects (on heels on CARCIP infrastructural programme) and legislative:
 - Component 1: **Digital Enabling Environment**: This component will support the development of a positive enabling environment for the region's digital economy that drives competition, investment and innovation while promoting trust and security of online transactions. (Focus on legislation and policy)
 - Component 2: **Digital Government Infrastructure, Platforms and Services**: This component will support public sector modernization, resilience and delivery of digital public services to individuals and businesses. (key enablers through standards and government productivity platforms)
 - Component 3: **Digital Skills and Technology Adoption**: This component aims to better equip individuals and businesses across the region for the jobs and economy of the future and to spur innovation and productivity growth. (work-force ready). There is a fourth component for implementation support at the national and regional level.
- Projects in Comp 1 of immediate relevance are (1) The development of methodology and update of Quality of Service and Quality of Customer Experience Standards for electronic communications customers and (2) preparation of a regional cybersecurity strategy inclusive of customised national Member State policies and (3) harmonized data protection legislation

Regional - policy (3)

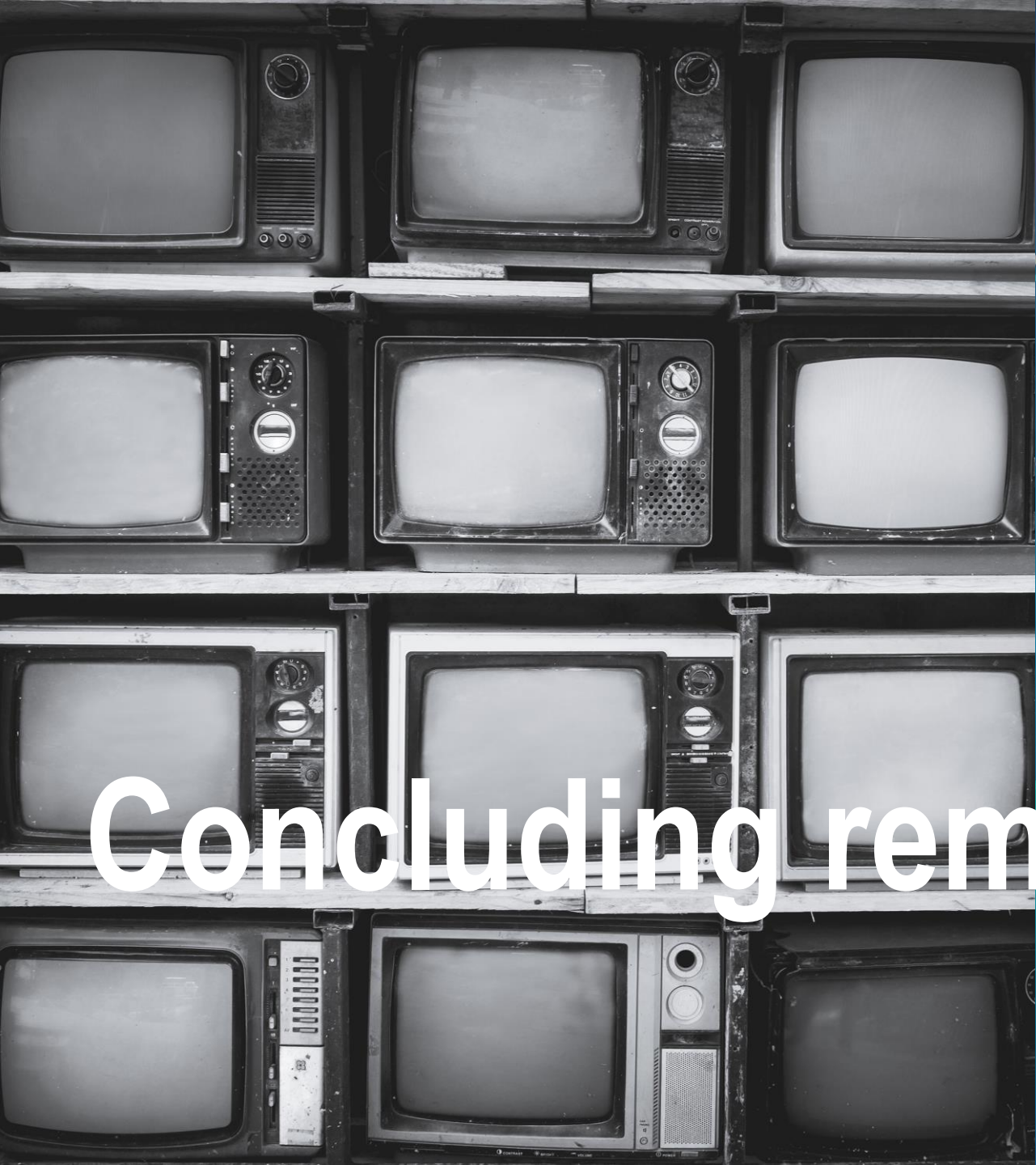
Roadmap for a CARICOM Single ICT Space

- Recognising the importance of a group effort towards compliance, the region embarked on strategies to guide Members via the Regional Digital Development Strategy (RDds) in 2009. This was established prior to the establishment of the CCC and key competition and consumer elements as well as competition collaboration are lacking
- In 2017 the CARICOM agreed to a Roadmap for a single ICT space envisaged as: *An ICT enabled borderless space that fosters economic, social and cultural integration for the betterment of citizens; characterized by*
 - regional harmonized ICT policy, legal and regulatory regimes*
 - robust national and BB infrastructure*
 - Common framework for government, ICT service providers and consumers*
 - effective secure technological and management system.*
- Some of the objectives: Remove barriers in conducting online activities and harmonizing, inter alia, contract laws, tax regimes, **consumer protection** and copyright laws among member states ii. Establish mechanisms to accelerate the necessary policy, legislative and regulatory reforms. On operationalization of the roadmap, CARICOM has established working groups in accordance with new priorities.
- As the projects are built out, a key consideration must address digital inclusion of ‘vulnerable’ consumers and those less able to access the digital economy, particularly for essential services and government services.

Regional - policy (4)

Competition projects

- Data protection and privacy:
 - In light of the importance of the digital economy and its competition and consumer concerns, the CCC has begun the process of assessing whether there are enforcement gaps or barriers to effective functioning of the regional market, created by lack of legislative coverage or insufficient coverage.
 - The Commonwealth Secretariat is currently funding the first phase of this project via consultancy on a *“Study on the Impact of Data Protection and Privacy in Regulating Competition and Consumer Protection for Digital Markets in the CSME”*.
- Cooperations:
 - CCC has entered into cooperations with COFECCE and COMESA to strengthen south – south learning. Internally, it has entered into cooperation with CXC and is finalizing cooperation documentation with OOCUR – the regional body for utility commissions.
- Consultancy for Merger control policy, cooperation templates for use by nationals, 11th EDF was recently concluded with templates for agreements, proposals for legislative text based on the consulted merger control regime, and proposed amendments to the CCC Rules of Procedure.



Concluding remarks



Competition solutions in emerging trends

- Large digital platforms are regularly used in CARICOM. For example, monthly market shares of Google Chrome in the browser markets in CARICOM from January 2009 to March 2019 showed an increase in the shares of Chrome in the browser markets across the region from an average of 1.9% in January 2009 to 67.1% in March 2019. Additional data showed that as at March 2019, Safari held the second highest individual market shares in the browser markets in all the countries, except for Barbados. Together, Chrome and Safari accounted for almost 80% of the browser markets in each CARICOM Member State.
- While Google owns the Chrome browser and Apple owns the Safari browser, Google Search is the default **search engine** on both internet browsers, which increases the tendency of users in the region to use Google search, securing its position as a dominant supplier of general online search. It is plausible that these large “gatekeepers” could leverage their position in other digital markets based on the indirect network effects.
- The EU has passed the Digital Services Act and the Digital Markets Act. Whereas there is some short time before the full implementation, the CSME can use the opportunity to relook its framework, particularly in light of its objectives to implement a **Single ICT Space**. Areas of collective and individual responsibility for the respective market regulators would be required, and clear precise frameworks for collaboration on policies and cooperation on enforcement.

Concluding remarks

- In 2017, BUEC issued a report on challenges of the EU online consumer in the global market, finding that the systems external to the EU were a ***complex, inconsistent and fragmented system of national legislation, which is often contradictory and difficult to access – providing no tangible means for individual consumers to seek redress.***
- The CARICOM region is not an economic union and neither it nor the OECS have legislative competence for its Member States. However, competition and sectoral regional policy and national legislation provide **for a landscape of unequal terrain**; but work is progressing to fill gaps and harmonise protections available, particularly with international obligations in mind.
- From a competition perspective, the differences in, or lack of, legislative provisions make it difficult for external consumers to navigate which could lead to their unfair treatment through lack of clarity on which authority to approach for which right. On the other hand, this environment makes it easy for external or internal market players to exploit.
- **This absence of clarity or of legislative provision in and of itself may form the largest barrier to both intra-regional and extra-regional trade. Gaps not plugged can lead to regulatory arbitrage, with Caribbean multinationals and external transnational corporations taking advantage of weak regulatory frameworks to consolidate power and market share. This inevitably reduces consumer choice and overall efficiency of both the common market in the region and the national markets of its Member States.**
- To allow implementation of digitally enhanced trade, prioritisation of payments, data and security to engender consumer trust, **national and regional collaboration amongst governments, competition and consumer commissions and sectoral authorities is critical in order to ensure that policies are accurate, relevant and can produce the expected outcomes for consumer welfare.**

References

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For more information about the CARICOM Competition Commission visit:

www.caricomcompetitioncommission.com



Email: competition@ccc.sr